BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

Michael Laudert,	)	Case No. 9301005424
	)	
Charging Party,	)	
	)	
versus	)	
	)	*Hearing Examiner's Decision*
Richland County Sheriff's Department,	)	
	)	
Respondent.	)	

I. Procedure and Preliminary Matters

Michael Laudert ("Laudert") filed a verified complaint with the Montana Human Rights Commission on August 12, 1992, after filing a complaint intake form on June 22, 1992. He alleged that the Richland County Sheriff's Department ("RCSD") denied him employment opportunities because of age and disability, violating his rights under the Human Rights Act and the Governmental Code of Fair Practices. On July 15, 1994, the Commission certified his complaint for a contested case hearing. The undersigned was appointed as hearing examiner.

This contested case hearing began on July 24, 1996, in the Richland County Justice of the Peace Courtroom, Sidney, Montana, Richland County. Laudert was present with his attorneys, Barbara E. Bell, Bell & Marra, and E. June Lord. RCSD's designated representative, Mike Weber, Richland County Attorney[1], was present with RCSD's attorney, Virginia A. Bryan, Wright, Tolliver & Guthals, P.C. RCSD moved for an opportunity to obtain the testimony of former sheriff Don Tiffany after hearing. The motion was granted over Laudert's objection. Witnesses were excluded on Laudert's motion. Witnesses and exhibits are listed on the attached dockets.

[1] Mike Weber appeared as co-counsel for RCSD, but also served as RCSD's designated representative, without objection.

Hearing proceeded on July 24, 25 and 26, 1996. By stipulation of the parties, hearing reconvened and concluded on August 19, 1996, in Billings, Yellowstone County, Montana, in Room 1, Job Services Office at 2121 Rosebud Lane. Laudert filed his written closing argument on September 24, 1996. RCSD filed its post-hearing memorandum on September 24, 1996. Laudert filed his reply argument on October 3, 1996. RCSD filed its response to Laudert's closing argument on October 4, 1996.

II. Issues

From the issues set forth in the final prehearing order, this case turns upon whether J. C. Rankin was a *better* candidate than Laudert for the deputy sheriff job in 1992. Laudert proved that RCSD considered his disability during the hiring process, *before* deciding. Still, RCSD, though subject to affirmative relief, is not liable to Laudert if Rankin was a better candidate.

III. Findings of Fact

1. Laudert was born on July 21, 1941. In February of 1992 he was 51 years old.

2. RCSD hired Laudert as a deputy sheriff in September of 1985. Laudert had previously worked for the Sidney Police Department, from May of 1984 until mid-April of 1985. Laudert reported, on his application to RCSD, that he had also worked in law enforcement in Sanborn, Minnesota (July 1980 to September 1981), Milaca, Minnesota (November 1979 to July 1980), Crosslake, Minnesota (May 1979 to November 1980), Breezy Point, Minnesota (August 1977 to May 1979), Emily, Minnesota (December 1975 to November 1979) and Crow Wing County, Minnesota (October 1978 to November 1979).

3. Laudert served as a deputy for five years and two months. Within the first fourteen months, he began to have health problems (at first primarily gastric bleeding) which required medical attention, hospitalization and time off work. The etiology of the problems was unclear. These problems compromised Laudert’s ability to do his duties, particularly later in his

employment with RCSD. Laudert had multiple hospitalizations and surgeries over the years, with equivocal results. His physical condition deteriorated.

4. In 1989, Richland County changed its employees' medical insurance coverage. The county commissioners made this change to get a better price for the health coverage. They did not consider Laudert's medical problems in this process. Richland County did not make the change to save future expenses anticipated for Laudert's particular problems. The county commissioners were not aware at the time that Laudert's particular problems stemmed from liver disease.[2] The commissioners were aware at the time that the new insurance would not cover whole organ transplants,[3] but neither Laudert nor the commissioners knew in 1989 that Laudert would later need a liver transplant.

5. Laudert continued to work, taking sick leave as required, but eventually became unable to do more than minimal duties. When he ceased working altogether, Laudert was so debilitated he could do no more than assist in prisoner transports. At the time he ceased working, Laudert did not expect to return to work in law enforcement. RCSD did not expect Laudert to return to work in law enforcement, either. Laudert did not know whether his liver disease, not even diagnosed to his satisfaction until later, would kill him.[4] He did expect his disabled condition to be permanent.

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[2] Exhibits R E1 and E2. The cause of the health problems is not identified as liver disease.

[3] Later, Laudert pursued the lack of coverage for liver transplants, and members of the Commission were reminded of this specific change in coverage, after the fact. No evidence was presented to support Laudert's subjective belief that the coverage change was specifically aimed at his problems. No claim was made in this case of discrimination in coverage in 1989.

[4] Laudert, in post-hearing argument, contended the pattern of discrimination began shortly after he became ill. He admits ("Closing Argument," p. 7) that he could not longer work in November of 1990. Both the evidence and his admission indicate that he could not perform the essential job functions of any job for RCSD when he ceased employment. He clearly wanted to stay at work, but he himself acknowledged that he could not. He did not prove that he could have stayed in even a modified position. He did not prove that he could have been reasonably accommodated.

6. Laudert made some inquiries regarding disability entitlements, at the time (September and October of 1990) he was no longer able to work. He did not pursue the question diligently. Richland County likewise did not respond thoroughly to his inquiries. Laudert never applied to Richland County or the Public Employee's Retirement System (PERS) for any type of disability entitlement. He formed the impression, from the limited contacts he made with Richland County and PERS, that he did not qualify for disability retirement. He thought he should have qualified, and made some further contacts to learn what problems existed in his service record that prevented him from qualifying. He did not pursue the question beyond conversations.[5]

7. Laudert's finances suffered from his lack of employment and huge medical bills. He needed to obtain his PERS entitlement. To get it, he had to terminate employment. He resigned. When he resigned, Laudert had no plans or expectations of returning to employment with RCSD. His last pay check was for September of 1990, when he was out of sick leave and unable to work any longer. He resigned in October of 1990. Exhibit R B. Laudert, to obtain his PERS entitlement, certified that he was ending his employment.

8. On September 1, 1991, Laudert underwent a whole liver transplant. It was successful. Rather than facing a potentially terminal disease, Laudert recovered. His doctor gave him a "clean slate"--clearing him for physical activities up to and including those involved in law enforcement duties as a deputy sheriff. He contacted RCSD regarding any available positions, but RCSD did not offer him any employment. Laudert did not prove that any employment was available at the time he made this initial contact, or anytime before January of 1992. Laudert did

[5] Laudert's service records incorrectly reflected less than five years of service. This error was not part of a course of conduct by RCSD or the county generally to force Laudert from employment because of his disability. Five years' service would have qualified Laudert for disability retirement. Had Laudert applied for disability retirement, he would have received it, once the mistakes in record-keeping were confirmed. Even though he testified to his belief that he was entitled, he elected in 1990 not to pursue his entitlement. RCSD's prolonged bungling of Laudert's records is not evidence of discriminatory motive or a discriminatory course of conduct. The level of administrative competence demonstrated is strikingly low, but that is not germane to this case.

not actually apply for employment with RCSD before applying for the deputy position involved here.

9. In January of 1992, the person hired to replace Laudert in 1990 resigned. After learning of the available deputy position with RCSD, Laudert again contacted RCSD and informed RCSD that he could return to work. RCSD requested that Laudert provide a medical release. Laudert gave RCSD statements from two doctors saying that he could return to work as a deputy sheriff, without restrictions.

10. RCSD informed Laudert he would have to apply for the position. He did. Laudert interviewed with RCSD on February 17, 1992. Seven other applicants also interviewed that same day, all with a four-member panel. Sheriff Don Tiffany, Undersheriff Marvin Johnson, Deputy Russell Glaeske, and Deputy Glenn Hanson conducted the interviews. All four members of RCSD had worked with Laudert during his service as a deputy.

11. Before interviewing, Laudert disputed RCSD's decision that he must apply for the job.[6] He claimed that he was entitled to the job as a deputy who had left active service for health reasons. RCSD rejected his claim, after the county commissioners met with the county attorney and Sheriff Tiffany in closed session. Laudert was excluded from the closed session. Laudert discussed the decision with Tiffany, and with the county commissioners. Nevertheless, he did not commence any legal challenge either to the closed session or to RCSD's requirement that he apply for the job.

12. Before his interview, Laudert also talked with Deputy Glaeske, during a chance meeting in a grocery store, about his application. Glaeske does not remember the substance of the discussion, but denies (without recalling) making the statements to which Laudert testified.

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[6] At this hearing, he contended that Tiffany had promised him the job, telling him that if he provided a letter from his doctor he could "start right away." That was not the thrust of his claim in 1992, before and during his interview.

Laudert's account is credible.[7] Glaeske expressed doubt that Laudert could do the deputy's job. Laudert, as a result, came to his interview worried that his past medical problems would prevent fair consideration of his application.

13. During Laudert's interview, he felt he "breezed through" discussion of the job--the hours, shifts, his knowledge and ability to do the job. He recounted his experience and background, and what he felt to be his excellent prior performance. He then brought up the doubt Glaeske had expressed. A discussion of his physical condition, medical history and medication needs followed. The interviewers asked if he could do the job. The interviewers asked if he could take a blow to the stomach. He asked if his medical releases were in the file (they were not--he provided them again after the interview). Laudert estimated that ten minutes of the twenty to thirty-minute interview were spent discussing his condition. Finally, Sheriff Tiffany cut off the discussion of Laudert's disability, belatedly noting it was inappropriate, but only after considerable discussion occurred.

14. Laudert again asserted during the interview that he should be given "his" job back.[8] Marvin Johnson also asked Laudert about the circumstances under which Laudert left the Sidney Police Department, almost a year before RCSD hired him in 1985. Laudert retorted that "he [Johnson] knew," and that they should not open that "can of worms."

15. RCSD's four interviewers independently rated the candidates who interviewed. The scores included appearance, manner, speech, adaptability, bearing, expression, job knowledge, motivation, personality and general impression. Exhibits R G and R H.

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[7] Annabelle Heiser also testified to some strikingly similar comments by Deputy Glaeske about Laudert's physical condition. Glaeske made these unsolicited comments to Heiser while at her home in response to a call for assistance. With the corroborating testimony of Heiser, Glaeske's denials are not credible.

[8] Laudert claimed that a state statute entitled him to the job. RCSD asked him to cite or produce a copy of the statute, which he declined to do. No such statute has been cited in this case.

16. Johnson compiled the scores from the interviews as follows (Exhibit R I):

Scores given by:		Tiffany	Johnson	Glaeske	Hanson
Applicants:	Lewis	52	60	56	69
	Brookman	53	70	62	63
	Hofer	60	59	67	70
	Keller	61	58	*	78
	Swift	56	66	*	74
	Hilde	53	65	*	75
	Laudert	*48*	*48*	*59*	*53*
	Rankin	*70*	*68*	*78*	*79*

* Glaeske was absent during some interviews, so he did not score some candidates. Both before and after addition of points for military service (veterans' preference), Laudert, a veteran, had the lowest average score of any candidate. Rankin, also a veteran, had the highest average score, before and after adding veteran's preference points.

17. Glaeske was the only interviewer who did not give Laudert the lowest point total of any applicant. Glaeske scored applicant Lewis lower than Laudert. Before addition of veterans' preference points, Lewis, a veteran, was next to last in average scores, ahead only of Laudert.

18. Rankin received the highest scores from all interviewers except Marvin Johnson. Johnson scored applicant Brookman above Rankin. Before addition of veterans' preference points Brookman, not a veteran, had the third lowest average score, above Lewis and Rankin.

19. On or about February 21, 1992, RCSD notified Laudert that it would not offer him the job. RCSD had selected and hired John C. Rankin as the new deputy. Rankin was born on February 6, 1950, and was 42 years old in February of 1992. Rankin had no history of medical problems. RCSD did not regard Rankin as disabled. After receiving RCSD's notification of the hiring decision, Laudert complained to the Montana Human Rights Commission.

20. Laudert had more than ten years of law enforcement experience, with RCSD, with the Sidney Police Department and with even smaller units in rural Minnesota.[9] Rankin had five

[9] The total years involved, part-time and full-time, exceed ten years. Exhibit CP 7.

and a half years of law enforcement experience, all with the Rosebud County Sheriff's Department. Rankin also served as a reserve deputy in Rosebud County for a few months before commencing work as a regular deputy.

21. Laudert had recommendations from two former law enforcement employers. Rankin had recommendations from three superior officers in the Rosebud County Sheriff's Department and a recommendation from the Rosebud County Attorney.

22. Laudert had two commendation letters for specific actions taken in former law enforcement jobs. Rankin had two letters of appreciation, from an accident victim and a sheriff to whose staff he taught self-defense classes.

23. Both Laudert and Rankin had many certifications for various kinds of law enforcement specialty training. Both more than satisfied the minimum qualifications for serving as a deputy. The materials submitted by Laudert and Rankin presented them both as qualified candidates for the RCSD deputy job.

RCSD's Business Reasons for Not Hiring Laudert

24. RCSD had some questions about Michael Laudert's past performance and about his application. In 1989, Laudert was involved in a motor vehicle accident while off-duty. The other driver, Kim Thiel, observed Laudert on the scene, concluded Laudert was drunk, and complained to the investigating officer. Laudert did not take any sobriety tests, and did not receive any citations. The investigating officer, a fellow deputy, gave Laudert a ride home. Thiel complained to the Sheriff's Department, and RCSD disciplined Laudert. Thiel testified at hearing about Laudert's apparent intoxication, and the complaint made to RCSD about the failure to pursue the investigation. Thiel was a credible witness regarding the incident.

25. Laudert was one subject of sexual harassment complaints by two dispatchers in the RCSD office. Laudert testified that the incidents involved intemperate language and that he

apologized when he learned of the complaints. RCSD provided the written complaints, which are not fairly characterized as "intemperate language." Exhibits R N and R O. Laudert believes he "fixed" this matter by his apologies. Still, it did occur. RCSD properly considered this incident in evaluating Laudert as a candidate.

26. Laudert had also been the subject of citizen complaints. Laudert denied knowledge of these complaints. Marvin Johnson testified to the complaints. RCSD did not call the citizens themselves as witnesses. RCSD did not prove the truth of the content of the complaints. RCSD did prove the existence of the complaints--that the complaints were made.[10] Citizen complaints against a job applicant during his prior law enforcement service are relevant to the hiring decision.

27. Marvin Johnson also testified that telephone contacts with Laudert's references did not confirm the written endorsements of Laudert as an excellent law enforcement officer. RCSD did not prove the truth of what was said to Johnson (that Laudert failed to perform his duties or was a problem employee in one particular or another). The testimony of Johnson did prove that some interviewers had a nondiscriminatory reason to question at least part of the application package Laudert presented. As between equally qualified candidates, some questionable references for one are properly considered in making the hiring decision.

28. Laudert quit his job with the Sidney Police Department before the end of his first year of employment, after he discovered he would not be retained. On his two applications to RCSD, in 1985 and in 1992, he gave the reason he left the Sidney P.D. as: "Limited Duties - Little chance to use skills and training." Exhibits CP 7 and R E1. Laudert testified that RCSD

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[10] Laudert offered evidence that Marvin Johnson was biased against him. In fact, Johnson is "biased" against Laudert. Johnson does not believe Laudert was or would be a good officer. But Laudert did not prove that Johnson's opinion is based on Laudert's membership in protected classes. Nor did Laudert prove that Johnson's opinion was so strongly and irrationally held that Johnson would lie under oath about either citizen complaints or reference checks.

knew all the details of his resignation from the Sidney P.D. when he was first hired in 1985. He said that he had simply resubmitted the same application materials to an employer who already knew the underlying facts. RCSD contended Laudert was not honest in his application. Don Tiffany was not the sheriff in 1985. Tiffany did not necessarily know the underlying facts. As between equally qualified candidates, apparent concealment of pertinent facts regarding prior employment is relevant to the hiring decision.

The Scores versus the "Business Reasons"

29. RCSD chose not to hire Laudert because of his low scores from his interview. The litany of business reasons proved at hearing did not cause the low scores. At least two of the interviewers scored Laudert on the content of his interview, rather than on his background and reference checks. At most two of the interviewers knew of most of the business reasons at the time they held the interviews.

30. Undersheriff Johnson denied being present during the discussion of Laudert's medical condition. Johnson also failed to explain precisely when he did the reference and background checks. He did not testify that he shared the information from those checks with either Hanson or Glaeske. It is not even clear whether all of those checks were done before the interviews. Johnson's testimony is not entirely credible about his professed ignorance of any discussion or concerns about Laudert's physical condition.[11] Nevertheless, Johnson does prove that some interviewers could not have relied upon RCSD's business reasons for rating Laudert below other candidates. Johnson testified that he rated Laudert on "all" the information he had. What exact information he had then, and whether he had shared it with the two deputies also interviewing Laudert, remains unclear at best.

[11] Johnson, on redirect, testified to the relevance of Glaeske's questions about the physical condition of Laudert. It is difficult to fathom how Johnson could have formed this opinion if he was not present during the questioning.

31. Deputy Glaeske did not know the results of the background checks, which he thought the sheriff had done. Glaeske could not recall whether he knew at the time of the interviews that there were questions about Laudert's account of why he left the Sidney Police Department. Glaeske did know (he considered it common knowledge) that Laudert had experienced problems with the Sidney Police Department. Glaeske did know about the suspension following the 1987 accident. But Glaeske's concerns were Laudert's ability to do the job and Laudert's attitude (as Glaeske perceived it during the interview and remembered it from Laudert's prior work).

32. Deputy Hanson did not testify. As the investigating officer on Laudert's 1987 accident, he was aware of the disciplinary action taken then. He was also another subject of one of the two harassment complaints involving Laudert. Hanson might or might not have known of Laudert's involvement. Otherwise, there is no evidence that Hanson had any information about the business reasons proved by RCSD. He could not have relied upon those reasons in rating Laudert.

33. Don Tiffany did know at the time of the interviews that Laudert left the Sidney Police Department after finding out he would not be retained. He did know of the disciplinary action in 1987 and the harassment complaints. He apparently was aware, through Johnson, of at least some background check questions. Tiffany testified to his concerns about Laudert's prior performance, which were not mentioned during the interview. Tiffany also testified that the members of his small department seemed to him to oppose working with Laudert again.

34. Laudert, in his testimony, displayed little of the abrasive and aggressive personality that the interviewers said they observed. Laudert did confirm that he challenged RCSD's decision to open the job to applications in 1992, rather than simply hiring him. He confirmed that he asserted a statute entitled him to the job. He confirmed several of his comments to the interviewers (to Marvin Johnson and Russell Glaeske in particular), comments that were at least

confrontational in content, whatever the tone. RCSD had a reasonable basis for concern that Laudert, because of his personality, might be the source of problems if rehired.

35. All three interviewers who testified cited Laudert's attitude and confrontational conduct during the interview as something they considered in rating him. However, all three also showed in their testimony concerns that stemmed from Laudert's perceived disability. Both Glaeske and Tiffany admitted they considered liver disease a likely consequence of alcohol abuse. Both considered this supposed connection in evaluating Laudert.

36. From the evidence adduced, RCSD decided not to hire Laudert in part because of the questions about his condition. RCSD's business reasons played a less significant role in the actual decision than Laudert's medical history and perceived physical impairments. RCSD evaluated Laudert and made its hiring decision at least partially because of his perceived disability.

IV. Opinion

RCSD had two possible motives for selecting someone other than Laudert for the deputy position in 1992. RCSD could have rejected Laudert because of his service record, references and the misleading statements on his application, without regard to his health problems. RCSD also could have rejected Laudert because of his health problems.

Either way, Rankin was a better prospect than Laudert. Rankin's service record and recommendations were "clean." No questions about Rankin's reasons for leaving prior employment arose. No questions of misleading or false statements arose. A fair and impartial evaluation of Laudert versus Rankin favored Rankin *without* the specter of medical disability. Also, Rankin did not have any prior health problems that had interfered with his job performance in law enforcement. The question remains--did RCSD choose Rankin without being influenced by Laudert's disability?

On the purely circumstantial evidence of discrimination, RCSD prevails. RCSD has produced credible evidence of a legitimate business reason for rejecting Laudert. This ends the inquiry regarding age discrimination. Because Laudert presented direct evidence of an illegal discriminatory motive concerning disability discrimination, RCSD must go further.

Laudert proved a prima facie case (*McDonnell Douglas*--first tier).

Montana applies the three-tier test from *McDonnell Douglas* to cases involving proof of discrimination by circumstantial evidence.[12] Under the first tier of the *McDonnell Douglas* test, the charging party's prima facie case creates, through indirect or circumstantial evidence, "an inference that an employment decision was based on a discriminatory criterion illegal under the act." *Teamsters v. United States*, 431 U.S. 324, 358 (1977). The elements of a prima facie case will vary according to the charge made, *McDonnell Douglas*, 411 U.S. at 804, n. 13, but in each case it serves a critical function, "it eliminates the most common nondiscriminatory reasons" for the adverse action by the employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

To satisfy the *McDonnell Douglas* first tier, Laudert must establish a prima facie case of discrimination by proving the following four elements:

> "(i) that he belongs to a [protected class] . . .;
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."
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> *McDonnell Douglas*, 411 U.S. at 802.

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[12] *McDonnell Douglas Corp.v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Hafer v. Conoco, Inc.*, 268 Mont. 396, 886 P.2d 947 (1993); *Montana Rail Link v. Byard*, 260 Mont. 331, 860 P.2d 121 (1993); *H.A.I. v. Rasmussen*, 258 Mont. 367,852 P.2d 628 (1993); *Kenyon v. Stillwater Cty.*, 254 Mont. 142, 835 P.2d 742 (1992); *Johnson v. Bozeman Sch. Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Cty. Wlf. Dept.*, 192 Mont. 410, 626 P.2d 242 (1981).

This standard of proof is flexible. The four elements may not necessarily apply to every disparate treatment claim. For example:

> "In *Martinez*, we thus recognized that the fourth element in *McDonnell Douglas* could be satisfied simply by showing that a job vacancy is filled by an applicant who is not a member of the particular protected group. ***See***, *Martinez*, 626 P.2d at 246 (***citing*** *Crawford v. Western Elec. Co., Inc.* (5th Cir. 1980), 614 F.2d 1300)."
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> *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 817 (1988).

RCSD demonstrably considered Laudert suspect, because of his prior medical history. RCSD required medical releases as part of Laudert's application process. RCSD treated Laudert as someone who did have a disability, a physical impairment that might substantially limit his capacity to work. 49-3-101(3)(a) MCA. Disability under the Americans with Disabilities Act likewise includes "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," or "a record of having such an impairment," or "*being regarded as having such an impairment*." 42 U.S.C. §12102(2) (emphasis added). Resort to ADA precedent and regulation is appropriate for the parallel prohibitions against disability discrimination under the Montana Human Rights Act.[13] Under both state and federal interpretations, Laudert belonged to a protected class as "disabled." ***See***, *Hafer*, ***supra***.

Laudert also belonged to a protected class by age. RCSD hired an applicant who was nine years younger. The difference in age, *if it were a motivating factor in RCSD's decision*, was an impermissible factor. §49-2-303(1)(a) MCA. The age difference is large enough to satisfy the protected class membership requirement for Laudert.

Laudert qualified for the deputy job. He had the experience and formal training necessary. He had done the job in the past. He had recommendations. He met the qualifications for the position of deputy sheriff in RCSD.

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[13] ***E.g.***, *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200, 204 (1990); *Snell v. M.D.U. Co.*, 198 Mont. 56, 643 P.2d 841 (1982).

RCSD's argument that only the candidate selected by the interviewers was "qualified" fails. One of the statutory requirements for a deputy sheriff is successful completion of an oral examination. RSCD could properly treat the interview as the statutory "test" which a candidate for deputy must successfully complete to qualify:

> "(2) No sheriff of a county . . . or other person authorized by law to appoint peace officers in this state shall appoint any person as a peace officer who does not meet the following qualifications plus any additional qualifying standards for employment promulgated by the board of crime control . . . . (h) successfully complete an oral examination conducted by the appointing authority or its designated representative to demonstrate the possession of communication skills, temperament, motivation, and other characteristics necessary to the accomplishment of the duties and functions of a peace officer . . . ."
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> §7-32-303(2)(h) MCA.

RCSD cannot extend the definition to consider only the applicant it hires as "successfully completing" the oral examination. RCSD has offered no authority for this extension of the definition of "successfully completing." This kind of circular reasoning would insulate the interviewing process from any meaningful review.

An applicant dropped from further consideration after the interview, *because of his or her interview score*, might be "unqualified." Here, RCSD did not find any of the eight applicants unqualified after the interviews. RCSD scored all eight against each other, in the subjective views of the interviewers. No applicant was singled out as inappropriate to hire. Laudert was not "unqualified" because he received a lower interview score.

RCSD hired J. C. Rankin. Rankin had no prior medical history and was younger. As to Laudert's prima facie case, there were no other differences of note between them. Laudert had more experience, but Rankin had more longevity in his prior position than Laudert before RCSD. Both had written recommendations and verified successes in law enforcement work. With no significant differences between the two except interview scores[14], the inference does arise that

[14] The "tainted" nature of the interview scores is discussed *infra*.

Laudert's disability and age motivated RCSD. Laudert has presented a prima facie case of illegal discrimination.

RCSD had a business reason to reject Laudert (*McDonnell Douglas*--second tier)

Laudert's prima facie case (the "first tier" under *McDonnell Douglas*) raises an inference of discrimination at law. The burden then shifts to RCSD to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. RCSD only bears the burden of production of a legitimate nondiscriminatory reason. Laudert still bears the burden of persuading the fact-finder that discrimination occurred.

RCSD's burden of production of a legitimate explanatory reason for rejecting Laudert comprises the second tier of proof under *McDonnell Douglas.* It is imposed on RCSD 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."

Burdine, 450 U.S. at 255-56.

RCSD need only raise a genuine issue of fact by clearly and specifically articulating a legitimate reason for the rejection of an applicant. *Johnson*, 734 P.2d at 212. RCSD need not prove that its decision was actually based upon the proffered reasons.[15]

Past conduct of the employee is one factor that can be relevant to an employer's assessment of present fitness for a job.[16] RCSD cited several instances of past conduct to justify its decision not to hire. Although Laudert had plausible explanations for some instances, the past conduct questions provided ample justification for selecting another candidate. Some of RCSD's

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[15] *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *Burdine*, 450 U.S. at 254.

[16] *McDonnell Douglas*, 411 U.S. at 806-07, n. 21, ***citing*** *Garner v. Bd. of Public Works of Los Angeles*, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1981).

four interviewers had more limited nondiscriminatory reasons for scoring Laudert lower, but RCSD established a list of legitimate, nondiscriminatory reasons for hiring Rankin rather than Laudert.

RCSD's business reason is not pretextual (*McDonnell Douglas*--third tier).

Laudert did not persuade the fact-finder that RCSD's business reason for choosing Rankin was pretextual.

> "Once the defendant has produced a legitimate reason in support of its decision not to rehire, the plaintiff then must show that the defendant's reasons are in fact a pretext. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Martinez*, 626 P.2d at 246. This is the third and last tier of proof required in *McDonnell Douglas*. As stated in *Burdine*, proof of the pretextual nature of the defendant's proffered reasons may be either direct or indirect:
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> > 'She 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*, 450 U.S. at 256, 101 S.Ct. at 1095. Ultimately, the plaintiff must persuade the court by a preponderance of the evidence that the employer intentionally discriminated against her. *Johnson*, 734 P.2d at 213."

Crockett v. City of Billings, 234 Mont. 87; 761 P.2d 813, 817-18 (1988).

The string of "red flags" regarding Laudert was not fabricated. RCSD did not manufacture false evidence of these problems. The red flags were legitimate points of concern for the prospective employer, involving Laudert's character and past performance. Laudert does not believe that any of RCSD's concerns matter or are genuine. Laudert has not proved his belief is true. Given the legitimate concerns of RCSD, explaining the choice of another candidate by pointing out the better ("cleaner") history, was not pretextual.

Laudert proved RCSD did not act purely out of legitimate business reasons.

Although RCSD did pick the better candidate, the inquiry is not ended. If Michael Laudert had presented a purely circumstantial case, RCSD would simply win. RCSD does "simply win" on the claim of age discrimination for this very reason. The evidence of age discrimination is purely circumstantial, and RCSD has rebutted the inference of illegal motive.

Laudert also presented direct evidence of disability discrimination by RCSD. This increased RCSD's burden of proof from production of exculpatory evidence to persuasion of legitimate motive. To rebut this direct evidence, *RCSD* must persuade the fact-finder that the unlawful consideration of Laudert's disability played no part in the decision to hire Rankin.[17]

RCSD argued that because federal regulations permit voluntary disclosure of medical histories *in the context of employee health programs*[18], the interviewers were entitled, once Laudert invited the discussion, to pursue questions about Laudert's physical condition, medical history and medication needs. RCSD also cited 29 C.F.R. 1630.2(1), which discusses the rationale for outlawing discrimination based on perceived impairments. RCSD argued that Laudert brought up his condition, and was questioned about it. RCSD claims Laudert was able to dispel any "myths" about his condition, and therefore the discussion of his perceived impairment proved the absence of discriminatory motive.

RCSD cited inappropriate regulations. The appropriate federal authority deals specifically with employer conduct when the applicant voluntarily discloses a disability. "EEOC Guidance on Pre-Employment Inquiries Under ADA," October 10, 1995.[19] The particular situation Laudert created is directly addressed in an example dealing with an applicant who has voluntarily disclosed a hidden disability during the pre-offer interview:

> "*Example:* An applicant with a severe visual impairment applies for a job involving computer work. The employer may ask whether he will need reasonable accommodation to perform the functions of the job. If the applicant answers 'no,' the employer may not ask additional questions about reasonable accommodation (although,

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[17] ***See, among others***, *T.W.A., Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *EEOC v. Alton Packaging Co.*, 901 F.2d 1148, 1150 (11th Cir. 1990); *Fields v. Clark University*, 817 F.2d 931, 935 (1st Cir. 1987); *Blalock v. Metal Trades Inc.*, 775 F.2d 703, 712 (6th Cir. 1985).

[18] ***See*** 29 C.F.R. 1630.14(d).

[19] Our Human Rights Act mirrors the ADA. This federal guideline provides proper guidance. In 1992, RCSD could not have reviewed this guideline, which was issued in 1995. However, the guideline reiterates a prohibition against pre-offer inquiries about physical and/or mental impairment. The prohibition existed under the ADA and the Human Rights Act prior to February of 1992.

of course, the employer could ask the applicant to describe or demonstrate performance)."

"Enforcement Guide, The Pre-Offer Stage."

In footnote 12 to the same section, the "Guidance" states:

> "It should be noted that an employer might lawfully ask questions about the need for reasonable accommodation on the job [when the applicant voluntarily discloses either a disability or a need for reasonable accommodation] and then fail to hire the applicant. The failed applicant may then claim that the refusal to hire was based on the need for accommodation. Under these facts, the EEOC will consider the employer's pre-offer questions as evidence that the employer *knew* about the need for reasonable accommodation, and will carefully scrutinize whether the need to provide accommodation was a reason for rejecting the applicant."

Taken together, these two comments show that an employer's questions to an applicant who voluntarily reveals a disability must start with "Do you need a reasonable accommodation because of your disability?" If the answer is "no," the discussion is over. If the answer is "yes," the employer can ask more questions, although it does so at its own risk.[20]

The questions asked Laudert during the interview are direct evidence that RCSD, violating the law, pursued inquiry into his disability--his perceived impairment. Laudert told the interviewers he was not impaired and could do the job. The interviewers continued questioning him because they believed neither him nor the medical releases he provided.

The oral interview scores Laudert received were tainted by the illegal consideration of his disability--his perceived impairment. RCSD had the right to ask, when Laudert brought up his liver transplant, whether Laudert sought an accommodation. Laudert would have responded with a decisive "no," consistent with his assertion that he could do the job. That should have closed the subject. Instead, the interviewers persisted, breaking the law. RCSD failed to prove its unlawful consideration of Laudert's disability played no part in the decision to hire Rankin.

Laudert has established a "mixed motive" case.

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[20] The "risk" the employer takes is of heightened scrutiny of its motives if the applicant is not hired.

A "mixed motive" case arises when illegal discrimination is proved, but the discriminator proves a sufficient nondiscriminatory reason also existed for the adverse action. As a matter of law, no recovery for the charging party is possible.[21] Even though an illegal discriminatory motive is proved, it is impossible to say that "but for" the discriminatory motive, the action would not have been taken. Take away the discriminatory motive altogether, and a sufficient nondiscriminatory reason for taking the action remains. No harm to the charging party resulted from the discrimination--the same result would have occurred without it--and there is nothing to rectify.

The idea of "mixed motive" cases serves solely the public interest. The complainant receives no recovery. The determination that a discriminatory motive played a part in the decision mandates affirmative relief under the Act, to prevent future discriminatory action by the respondent. For Michael Laudert, seeking employment in law enforcement, the "mixed motive" decision accords him neither relief nor complete vindication. In the interest of the public, RCSD must not discriminate in the future. RCSD must follow specific guidelines regarding disability inquiries in pre-offer situations. Even within those guidelines, inquiry into disability and/or accommodation will be at RCSD's risk. But Laudert is left with no recovery.

V. Conclusions of Law

1. RCSD illegally discriminated against Laudert, considering his disability when it rejected his job application in February of 1992. §49-2-303(1)(a), §49-3-201(1) MCA.

2. RCSD did not illegally discriminate against Laudert because of his age when it rejected his job application in February of 1992. §49-2-303(1)(a), §49-3-201(1) MCA.

3. The circumstances of the illegal discrimination do mandate particularized affirmative relief.

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[21] *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367; 852 P.2d 628 (1993), *Johnson v. Bozeman School Dist.* 226 Mont. 134, 734 P.2d 209 (1987).

4. RCSD must, in future hiring situations, follow these guidelines:

a. Require medical releases of all applicants or of none;

b. Make no pre-offer inquiries regarding real or perceived disabilities, with the sole exceptions of:

i. Asking an applicant who either appears to have a disability or voluntarily reveals a disability, "Do you need a reasonable accommodation because of your disability?"

ii. If the answer is "no," the discussion is over;

iii. If the answer is "yes," RCSD can ask more questions, *limited entirely to questions to define the accommodation needed*;

iv. If RCSD properly does ask more questions, it does so at its own risk.

5. RCSD must not violate any of the rights of its employees as protected under the Montana Human Rights Act.

VI. Order

1. Judgment is awarded in favor of charging party and against respondent in the matter of Michael Laudert's complaint that respondent, Richland County Sheriff's Department illegally discriminated against him, considering his disability in rejecting his job application in February of 1992. §49-2-303(1)(a), §49-3-201(1) MCA. Because respondent proved a legitimate business reason for rejecting charging party's application, no damages are awarded, since the same result would have occurred without the illegal discrimination.

2. Judgment is awarded in favor of respondent and against charging party in the matter of Michael Laudert's complaint that respondent, Richland County Sheriff's Department illegally discriminated against him because of his age in rejecting his job application in February of 1992. §49-2-303(1)(a), §49-3-201(1) MCA.

3. Respondent is ordered, in all future hiring situations, to follow these guidelines:

a. Require medical releases of all applicants or of none;

b. Make no pre-offer inquiries regarding real or perceived disabilities, with the sole exceptions of:

i. Asking an applicant who either appears to have a disability or voluntarily reveals a disability, "Do you need a reasonable accommodation because of your disability?"

ii. If the answer is "no," the discussion is over;

iii. If the answer is "yes," RCSD can ask more questions, *limited entirely to questions to define the accommodation needed*;

iv. If RCSD properly does ask more questions, it does so at its own risk.

4. RCSD is ordered, within sixty (60) days of the final order here, to submit to the staff of the Montana Human Rights Commission, attention Ken Coman, a written policy regarding procedures for job applications, which contains the provisions of paragraph 3 of this order.

5. RCSD is further ordered not to violate any of the rights of its employees as protected under the Montana Human Rights Act.

Dated: March 3, 1997.

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Terry Spear, Hearing Examiner
Montana Human Rights Commission