

1 reply brief on May 27, 1998. The County filed its reply brief on June 1, 1998.

2 **II. Issues**

3 A full statement of issues appears in the final prehearing order (March 10, 1998). The
4 issue determinative of this case is whether Adamson was disabled.

5 **III. Findings of Fact**

6 1. Adamson worked for the county from November 12, 1977 until June 2, 1994.

7 Uncontested Facts.

8 2. On June 2, 1994, Adamson had surgery on his right shoulder to repair a torn rotator
9 cuff. The surgeon, Dr. Michael Luckett, released Adamson to return to work on August 12,
10 1994 with a 20-pound lifting restriction. Uncontested Facts.

11 3. On August 16, 1994, Adamson met with the county's commissioners and gave them
12 Dr. Luckett's work release. The commissioners asked for additional information.

13 Uncontested Facts.

14 4. Until receiving additional information, the county declined to return Adamson to
15 work. Testimony of Adamson.

16 5. On August 22, 1994, Adamson met with the commissioners, and gave them a
17 second work release, with a lifting restriction of no more than 20 pounds, upper right
18 extremity. Uncontested Facts. The commissioners examined the existing job description for
19 Adamson's job, consulted with the road supervisor, Tony Fowler, and concluded that
20 Adamson could not perform a full day's shift, consistent with the job description, without
21 exceeding his medical limitations, and being at risk for reinjury. Testimony of Bill Rappold,
22 Exhibit 10. The county knew at that time the expected return to work would be within six
23 months of the surgery. Testimony of Rappold.

24 6. On September 1, 1994, the county refused Adamson with the lifting restriction.
25 Uncontested Facts.

26 7. On January 18, 1995, Adamson returned to his job, after the county received
27 Dr. Luckett's January 13, 1995, work release with no restrictions. Uncontested Facts.

28 8. On April 3, 1995, Adamson had surgery on his left shoulder to repair a torn rotator

1 cuff. Dr. Luckett released Adamson to return to modified duty on May 12, 1995, and released
2 Adamson again to return to work on July 14, 1995. The July work release specified both a 25-
3 pound lifting restriction, and a 15-pound lifting restriction above shoulder level. Uncontested
4 Facts.

5 9. On September 8, 1995, the county refused to allow Adamson to return to work with
6 the lifting restrictions. Uncontested Facts. The county refused Adamson after the second
7 surgery on the same basis as after the first surgery. Testimony of Rappold.

8 10. On October 26, 1995, Adamson returned to his job, after the county received
9 Dr. Luckett's October 13, 1995, release with no restrictions. Uncontested Facts.

10 11. Adamson retired from his job with the county on May 25, 1996. Uncontested
11 Facts.

12 III. Opinion

13 Montana law prohibits employers from discriminating against employees on the basis of
14 disability. Discrimination on the basis of disability includes the failure to make reasonable
15 accommodation. The determinative issue in this case is whether the county unlawfully
16 discriminated against Adamson by refusing to accommodate the lifting restrictions imposed
17 after each of his two surgeries. The case turns on whether Adamson's conditions after each
18 surgery constituted a disability.

19 Adamson's Temporary Limitations¹ Were Not Substantially Limiting

20 Montana law defines "physical or mental disability" as:

- 21 (i) a physical or mental impairment that substantially limits one or more of a person's
22 major life activities;
23 (ii) a record of such impairment; or
24 (iii) a condition regarded as such an impairment.
§49-2-101(15)(a), MCA.

25 Federal regulations note that temporary, non-chronic limitations "are *usually* not
26 disabilities." 29 C.F.R., Part 1630 App., §1630.2(j) [emphasis added]. However, Montana
27 law follows both federal interpretations and decisions from other jurisdictions, in holding that a

28 ¹ Adamson abandoned his claim of age discrimination, and offered no evidence of discrimination by reason of age.

1 temporary impairment *is* a substantial limitation to a major life activity if it interferes for a
2 sufficient duration with the ability to work, so the worker has trouble securing, retaining or
3 advancing in employment. *Reeves v. Dairy Queen, Inc.*, 1998 MT 13, ¶29, ___ Mont. ___,
4 __ P.2d __ (1998); *Martinell v. Montana Power Company*, 268 P.2d 292, 306, 886 P.2d 421,
5 430 (1994).

6 The question is both one of duration and of severity. Adamson's argument that
7 Montana law compels a determination of disability whenever an employer restricts the
8 employment activities of a person because of medically-prescribed physical reasons is over
9 broad. Temporary limitations that interrupt work are not always disabilities.

10 The Montana Supreme Court in *Martinell* approved the analysis of an Illinois court,
11 including specific comments drawn from "the plain language of the statute, together with the
12 Illinois Human Rights Commission's rules," that "transitory and insubstantial [conditions],
13 such as influenza or a cold" are not disabilities. *Id.* at 305-306, 886 P.2d at 429-30. The
14 distinction, as applied to *Martinell*, resulted in a finding of disability. *Martinell's* conditions
15 lasted for two years and cost her potential promotions and her job. *Id.* at 307, 886 P.2d 430.

16 The county has cited and summarized an impressive string of cases decided by federal
17 courts and courts in other states, involving various kinds of conditions--from complications
18 arising out of pregnancy to carpal tunnel syndrome--determined not to be disabilities.² The
19 point of the cases is that determination of whether and when a temporary condition is a

21 ² *E.g.*, *Heintzelman v. Runyon*, 120 F.3d 143 (8th Cir. 1997); *Robinson v. Neodata Services, Inc.*,
22 94 F.3d 499 (8th Cir. 1996); *Sanders v. Arneson Products*, 91 F.3d 1351 (9th Cir. 1996); *Roush v. Weastec,*
23 *Inc.*, 96 F.3d 840 (6th Cir. 1996); *Rogers v. International Marine Terminal*, 87 F.3d 755 (5th Cir. 1996);
McDonald v. Commonwealth of Pa., 62 F.3d 92 (3rd Cir. 1995); *Hughes v. Bedsole*, 48 F.3d 1376 (4th Cir.)
24 *cert. den.*, 516 U.S. 870 (1995); *Evans v. City of Dallas*, 861 F.2d 846 (5th Cir. 1988); *Grimard v. Carlston*,
567 F.2d 1171 (1st Cir. 1978); *Scott v. Flaghouse, Inc.*, 980 F.Supp. 731 (S.D.N.Y. 1997);
Wallace v. Trumbull Memorial Hospital, 970 F.Supp. 618 (N.D. Ohio 1997); *Harris v. United Airlines, Inc.*,
25 956 F.Supp. 768 (N.D. Ill. 1996); *Gerdes v. Swift-Eckrich, Inc.*, 949 F.Supp. 1386 (N.D. Iowa 1996);
Wilmarth v. City of Santa Rosa, 945 F.Supp. 1271 (N.D. Cal. 1996); *Johnson v. A.P. Products, Ltd.*,
26 934 F.Supp. 628 (S.D. Ny. 1996); *Mowat-Chesney v. Children's Hospital*, 917 F.Supp. 746 (D. Colo. 1996);
McCullough v. Atlanta Beverage Co., 929 F.Supp. 1489 (N.D. Ga. 1996); *Muller v. Auto. Club of So. Cal.*,
27 897 F.Supp. 1289 (S.D. Cal. 1995); *Rakestraw v. Carpenter Co.*, 898 F.Supp. 386 (N.D. Miss. 1995);
Oswalt v. Sara Lee Corp., 889 F.Supp. 253 (N.D. Miss. 1995); *Presutti v. Felton Brush, Inc.*, 927 F.Supp. 545
28 (D.N.H. 1995); *Blanton v. Winston Prtg Co.*, 868 F.Supp. 804 (M.D.N.C. 1994); *Sutton v. N.M.D. of Children*,
922 F.Supp. 516 (D.N.M. 1996); *Visarraga v. Garrett*, 1993 WL 209997 (N.D. Cal. 1992); *Paegle v. Dp. of*
Int., 813 F.Supp. 61 (D.D.C. 1993); *McKay v. Toyota Mfg., USA, Inc.*, 878 F.Supp. 1012 (E.D. Ky. 1995);
Stubler v. Runyon, 892 F.Supp. 228 (W.D. Mo. 1994) *affirmed*, 56 F.3d 69 (9th Cir. 1995).

1 disability is a fact-driven determination, made on a case-by-case basis.

2 The county barred Adamson from returning to work until he obtained a full medical
3 release, after each of his two surgeries. After the first surgery, he was off work for 229 days
4 (from June 2, 1994, until January 18, 1995). Of those 229 days, the last 158 days (starting
5 August 12, 1994) came after a limited work release from Dr. Luckett. Before that work
6 release, Adamson would not, in any event, have been able to work. Thus, the period of lost
7 work after the first surgery involves around 5 months. After the second surgery, he was off
8 work for 205 days, (from April 3, 1995, until October 26, 1995). Of those 205 days, the last
9 166 days (starting May 12, 1995) came after the first of a number of limited work releases
10 from Dr. Luckett--a period of slightly more than 5 months. His job was never in jeopardy.
11 He lost no opportunities for promotion. He lost the opportunity to work and earn while
12 recuperating.

13 Because Adamson retained his job, and lost only the wages he would have earned
14 during the recuperative periods, he has not established a disability. Two periods of forced
15 unemployment, each of approximately five months' duration while healing, do not constitute
16 two periods of disability under the facts of this case. Adamson and his doctor actually knew
17 before the first surgery that two surgeries, one for each shoulder, would be necessary.
18 Because the surgeries were not to repair the same damage to the same shoulder, and because
19 the two surgeries resulted in separate and distinct periods of unemployment, Adamson
20 correctly treated the two as separate claims.

21 The Montana Supreme Court relies on federal law to decide new issues under the
22 Montana Human Rights Act. *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200, 204 (1990);
23 *Snell v. Montana Dakota Util. Co.*, 198 Mont. 56, 643 P.2d 841 (1982). The same regulatory
24 appendix--indeed, the same section--cited in *Martinell* can be quoted more extensively on the
25 precise question of the standards by which a temporary condition is determined to be a
26 disability. 29 C.F.R., Part 1630 App., entitled "Subtitle B--Regulations Relating to Labor,
27 Chapter XIV--Equal Employment Opportunity Commission, Part 1630--Regulations to
28 Implement the Equal Employment Provisions of the Americans with Disabilities Act" (current

1 through October 1, 1998; 63 FR 52946), §1630.2(j).

2 In a subsection addressing the meaning of the language “substantially limits”³, the
3 federal guidelines note that verifying the existence of a physical impairment “is only the first
4 step in determining whether or not an individual is disabled.” The explanatory comments are
5 applicable to Adamson’s claim:

6 Many impairments do not impact an individual's life to the degree that they
7 constitute disabling impairments. An impairment rises to the level of disability if the
8 impairment substantially limits one or more of the individual's major life activities.
9 Multiple impairments that combine to substantially limit one or more of an individual's
10 major life activities also constitute a disability.

11 The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a
12 "laundry list" of impairments that are "disabilities." The determination of whether an
13 individual has a disability is not necessarily based on the name or diagnosis of the
14 impairment the person has, but rather on the effect of that impairment on the life of the
15 individual. Some impairments may be disabling for particular individuals but not for
16 others, depending on the stage of the disease or disorder, the presence of other
17 impairments that combine to make the impairment disabling or any number of other
18 factors.

19 Other impairments, however, such as HIV infection, are inherently substantially
20 limiting.

21 **On the other hand, temporary, non-chronic impairments of short duration,
22 with little or no long term or permanent impact, are usually not disabilities. Such
23 impairments may include, but are not limited to, broken limbs, sprained joints,
24 concussions, appendicitis, and influenza.** Similarly, except in rare circumstances,
25 obesity is not considered a disabling impairment.

26 **Part 1630 notes several factors that should be considered in making the
27 determination of whether an impairment is substantially limiting. These factors
28 are (1) the nature and severity of the impairment, (2) the duration or expected
duration of the impairment, and (3) the permanent or long term impact, or the
expected permanent or long term impact of, or resulting from, the impairment.
The term "duration," as used in this context, refers to the length of time an
impairment persists, while the term "impact" refers to the residual effects of an
impairment. Thus, for example, a broken leg that takes eight weeks to heal is an
impairment of fairly brief duration. However, if the broken leg heals improperly,
the "impact" of the impairment would be the resulting permanent limp. Likewise,
the effect on cognitive functions resulting from traumatic head injury would be the
"impact" of that impairment. [Emphasis added.]**

29 The primary difference between Adamson’s shoulder surgeries, each of which is a
30 separate case involving the same legal question, and the myriad cases the County cited, is that
31 Adamson’s recuperative periods were longer than many off-work periods in those cases. The
32 loss of approximately five months’ wages is a very serious matter for the average worker.
33 Under the facts of this case, that loss does not rise to a disability. Paul Adamson’s physical

³ The federal language parallels exactly the language already quoted in §49-2-101(15)(a), MCA.

1 impairments, from each surgery, fall short, in this case, of constituting disabilities.

2 The County Did Not Perceive Adamson as Substantially Limited

3 A condition regarded as an impairment substantially limiting a major life activity is a
4 disability. §49-2-101(15)(a)(iii) MCA. But not every impairment is regarded as a disability:

5 An employer does not necessarily regard an employee as handicapped simply by
6 finding the employee incapable of satisfying the demands of a particular job.
Forrisi [v. Bowen, (4th Cir. 1986), 794 F.2d 931] at 934-35.

7 The statutory reference to a substantial limitation indicates instead that an
8 employer regards an employee as handicapped in his or her ability to work by finding
9 the employee's impairment to foreclose generally the type of employment involved.
Forrisi, 794 F.2d at 935. In *Forrisi*, the Fourth Circuit ruled that the record
10 demonstrated the employer did not regard an employee's acrophobia (fear of heights) as
11 a "substantial limitation" in employability, but rather as a condition rendering the
12 employee unsuited for one position. *Forrisi, 794 F.2d at 935.*

13 Hafner argues that he was "regarded as" physically disabled because Conoco
14 viewed his physical impairment as a limitation of his overall ability to work in general.
15 The Conoco personnel director testified by deposition that he regarded Hafner as
16 "restricted ... in basic job functions that would limit his performance of work or could
17 limit his performance of work." Under the federal standard, which we adopt, and
18 based on the testimony of the Conoco personnel director, we conclude that Hafner has
19 established that Conoco "regarded" him as physically disabled.

Hafner v. Conoco, Inc., 268 Mont. 396, 402-403, 886 P.2d 947, 951 (1994).

20 The county viewed Adamson as unable safely to perform his specific job until he
21 completed his recuperation from each surgery. The county did not consider Adamson
22 disabled, merely temporarily impaired, within a limited scope that precluded return to his
23 specific job while impaired.

24 **IV. Conclusions of Law**

- 25 1. The Commission has jurisdiction over this case. §49-2-509(7) MCA.
26 2. Adamson failed to prove the County discriminated against him in employment by
27 reason of disability.

28 **V. Proposed Order**

- 1 Judgment is found in favor of Respondent Pondera County and against Charging
2 Party Paul Adamson on his complaint that the county discriminated against him in employment
3 by reason of his disability, in Case No. 9501006838 when it denied him the opportunity to
4 return to his position as equipment operator on August 22, 1994, following surgery on his
5 shoulder, and in Case No. 9601007417 when it refused to reinstate him on or about

1 September 8, 1995 to his position and denied him accommodation for his disability.

2 2. The complaint is dismissed.

3 Dated: November 13, 1998.

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Terry Spear, Hearing Examiner for the
6 Montana Human Rights Commission
7 Hearings Bureau, Montana Department of Labor and Industry
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