

**BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA**

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**Wanda Buck,**

) **HRC Case No. 9201005277**

Charging Party,

versus

) *Hearing Examiner's*  
) *Decision*

**Cascade County,**

Respondent.

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**I. Procedure and Preliminary Matters**

Wanda Buck filed a verified complaint with the Montana Human Rights Commission on April 2, 1992. She filed a perfected complaint on May 11, 1992. She alleged that Cascade County discriminated against her in employment by not hiring her as an LPN on October 29, 1991, because of her physical or mental disability (back/shoulder injury). On October 16, 1997, the Commission certified her complaint for a contested case hearing, and appointed Terry Spear as hearing examiner.

The hearing examiner granted, in part, the County's motion for summary judgment, by order dated February 23, 1998. The hearing examiner ruled that the Commission has no jurisdiction to decide a dispute arising under §39-71-317 MCA, regarding alleged failure to follow the statutory rehiring preference for an injured worker.

This contested case hearing was held March 6, 1998, in Room 104, Cascade County Annex, 325 2nd Ave. No., Great Falls, Cascade County, Montana. Buck was present, with her attorney, Cameron Ferguson, Hartelius, Ferguson, Baker & Kazda. Respondent Cascade County was present, without designated representative, through its attorney, Carey Ann Shannon, Deputy County Attorney. Witnesses were excluded on the County's motion.

Wanda Buck, Christina Wilson, Jennifer Martel (Fowler) and Donna Cady testified for Buck. The hearing examiner overruled the County's objections to Donna Cady's testimony, on timely identification and timing bases. Nancy Mann testified for the County.

The hearing examiner admitted Exhibits A through X into evidence, in accord with the parties' stipulation, with the parties reserving their arguments on relevance and weight (with

1 the original deposition of Nancy Mann substituted for the copy submitted as Exhibit X). The  
2 hearing examiner admitted Exhibit Y over relevance and timely disclosure objections. The  
3 hearing examiner admitted Exhibit BB over timely identification objections.<sup>1</sup> The hearing  
4 examiner refused Exhibit Z, sustaining relevance and timely disclosure objections. The  
5 proponent of Exhibit AA withdrew the exhibit.

6 The County filed its closing argument March 23, 1998. Buck filed her closing  
7 argument March 24, 1998. Both parties filed their reply arguments March 30, 1998.

## 8 II. Issues

9 This case turns on whether Buck proved a prima facie case of disability discrimination.  
10 A full statement of issues is in the final prehearing order, of which the only issues necessary to  
11 the decision here are:

- 12 1. Was Buck disabled (and if so, when)?
- 13 2. Between Buck and the County, who is responsible for the failure of Colleen  
14 Lordeman's notice to reach Buck?
- 15 3. Did Buck apply for post-release work at the County--why not or how and when?
- 16 4. What business reasons did the County have for not hiring Buck?

## 17 III. Findings of Fact

18 1. Buck worked for the Cascade County Convalescent Nursing Home as a Licensed  
19 Practical Nurse (LPN). On August 8, 1990, she suffered a compensable industrial injury to  
20 her back and shoulder. Uncontested Fact No. 1, Final Prehearing Order.

21 2. Buck's injury disabled her from her employment with the County's nursing home.  
22 In accord with County policies applicable to the nursing home, the County replaced Buck after  
23 90 days, notifying her in writing on October 11, 1990, that her job was filled and that she had

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25 <sup>1</sup> Exhibit BB is also hearsay. Dr. Tacke did not testify. His attestation to the accuracy of the exhibit  
26 (by notarized attestation on the exhibit) does not necessary cure the hearsay problem. Buck did not object to the  
27 exhibit on a hearsay basis, and cannot now assert the fundamental right to confront the witness, in accord with  
28 *Bean v. Mt. Bd. Of Labor Appeals*, \_\_\_ Mont. \_\_\_, \_\_\_ P.2d \_\_\_, No. 97-482 (9-3-98). *Bean* has not been  
released for publication as of this date. The point for which it is cited, however, is the extant law of Montana  
before *Bean*. Here, the parties stipulated the exhibits timely prepared and identified into evidence. Although  
Buck did object to the timeliness of identification of this exhibit, she did not challenge the accuracy of the content  
of Dr. Tacke's notes. The hearing examiner is well aware that physicians rely heavily upon their office notes to  
refresh their recollection and testify to what they did and said, and what their patients did and said, on particular  
visits. Thus, though hearsay, the document has sufficient guarantees of trustworthiness to be admitted.

1 a two year rehire preference after her injury, should she be able to return to work. Exhibit J.

2 3. While Buck was off work, and receiving disability benefits from the County's  
3 workers' compensation insurer, she decided to move to Missoula with her family, to attend  
4 school and to work. Her husband either found or was seeking work in Missoula. Testimony  
5 of Buck (see also Exhibit E). Her attorney for her work injury notified the compensation  
6 insurer's rehabilitation provider of Buck's plans in May of 1991. Exhibit A. Buck's move to  
7 Missoula was not permanent. She was still resettling (eventually returning to Great Falls to  
8 live) during July and August of 1991. Testimony of Buck.

9 4. Despite the apparent termination of her employment the previous October, the  
10 County recorded a raise in pay for Buck, effective July 1, 1991. Exhibit K. The collective  
11 bargaining agreement between the County nursing home and the Montana Public Employees  
12 Association makes no reference that explains this pay raise. Exhibit B.

13 5. On July 23, 1991, Buck visited her physician, Dr. Tacke. Dr. Tacke gave Buck a  
14 work release to return to her employment, placing some limitations upon her job activities.  
15 Dr. Tacke also gave Buck a copy of the modified duty position the compensation insurer and  
16 rehabilitation provider (Colleen Lordeman) had arranged with the County at the nursing home.  
17 Dr. Tacke approved the job for Buck (Exhibit M). He encouraged her to take the position, and  
18 work back to full-duty as an LPN. Exhibit BB.

19 6. The insurance adjuster on the work related injury forwarded the approved job  
20 description to the insurer's rehabilitation provider. Exhibit I. On August 6, 1991, the  
21 insurer's rehabilitation provider wrote to Buck, at her Great Falls address (Buck's phone was  
22 still connected in Great Falls, according to the letter). The letter advised Buck that a modified  
23 position was available at the County's nursing in home in Great Falls. Exhibit C.

24 7. Buck did not receive the letter, because she was not then residing at the Great Falls  
25 address. Unaware of the job opportunity, she did not respond to it, but she had decided not to  
26 return to the nursing home because of the move to Missoula. Testimony of Buck. More  
27 specific knowledge of the available modified position would not have changed her plans.

28 8. On September 13, 1991, the insurance adjuster on the work related injury wrote to

1 Buck's attorney, to advise him that her workers' compensation disability benefits would  
2 terminate in two weeks. The reason the letter gave for terminating benefits was that Buck had  
3 not taken the modified job in August, and the six weeks Dr. Tacke expected Buck to require  
4 before she could return to full duty as an LPN had elapsed. Exhibit L. Buck's attorney and  
5 the adjuster then negotiated about a settlement of her claim, and a prior claim with the same  
6 insurer. Exhibit O. In those negotiations, the adjuster stated again that Buck had failed to  
7 contact the nursing home either to accept the modified duty position or to seek any other  
8 position until "earlier this week." Exhibit O (dated November 4, 1991).

9 9. Buck did contact the nursing home at the end of October 1991. She had returned to  
10 reside in Great Falls in October 1991. Buck testified that she then was seeking work, but her  
11 file does not contain any application for employment more recent than 1989, when the County  
12 previously hired her. Exhibit Q. Buck did sign, in October of 1991, an "employee  
13 termination" form showing she had been terminated effective November 8, 1990. On that  
14 form, Buck said that she wished to receive all unused and eligible vacation and sick leave and  
15 withdraw her retirement fund. Exhibit D.

16 10. Buck's attorney then wrote to the nursing home on November 7, 1991, advising in  
17 writing that Buck was seeking employment either in a modified duty position or as a full-time  
18 and full duty LPN. Exhibit E. The County responded, through Nancy Mann, the  
19 administrative secretary, that "At this time, there is not a position available for an LPN at this  
20 facility." Exhibit F (Nov. 29, 1991).

21 11. According to a computer generated list of County hires at the nursing home, no  
22 LPNs were hired after Oct. 7, 1991 (when Jan Irvine was hired) until Dec. 23, 1991 (when  
23 Linda Bjornson was hired). Exhibit H. Both Irvine and Bjornson were hired as part-time  
24 employees. Exhibit N. The statements in Exhibit F were true when written.

25 12. Exhibit H identifies seven more LPN's the County hired in January through March  
26 of 1992. Exhibit N identifies 17 more LPN's (including the seven in Exhibit H) the County  
27 hired in January through July of 1992. All new-hire LPN's were part-time ("on-call")  
28 employees. Exhibit N. New openings for part-time LPN positions were common. Nancy

1 Mann regularly told callers to come in and fill out an application, when inquiries were made  
2 about employment. Testimony of Mann, Christina Wilson and Jennifer Martel (Fowler).

3 13. On July 14, 1992, Dr. Tacke signed a full release for Wanda Buck, to return to  
4 work with no specific restrictions except to use “her appropriate pacing skills.” Exhibit X.

5 14. Buck called the County frequently, in 1992, to seek employment. Testimony of  
6 Buck. She usually spoke with Nancy Mann, who told Buck that there were no full-time  
7 openings, but to come in and fill out an application. Mann also told Buck that any full-time  
8 positions that might come open (which rarely happened) would probably be filled by LPNs  
9 already working part-time positions. Testimony of Mann. Buck never filled out a new  
10 application for employment. Testimony of Buck and Mann.

11 15. During the time at issue, no new hire LPNs filled vacant full-time LPN positions.  
12 If such a position had opened, a current part-time employee would have filled it. With no  
13 application on file, the County would not have considered Buck for any position. Testimony  
14 of Mann.

15 16. Mann understood Buck, through her attorney and in her contacts with the County,  
16 to be seeking full-time employment. Testimony of Mann, Exhibit E. Mann’s understanding  
17 was reasonable under the circumstances. Nonetheless, Mann repeatedly told Buck to fill out an  
18 application to be considered for employment. Testimony of Mann.

19 17. In 1989, Buck filled out a new application for employment with the County (Exhibit  
20 Q), after signing a termination form in 1988 when she left previous employment with the  
21 County (Exhibit T). She signed another of the same termination forms in October 1991.  
22 Exhibit R. She signed a “claimant’s voluntary quit statement” in December 1991. Exhibit P.  
23 Buck’s belief that she did not need to fill out a new application in 1992 was not reasonable.

#### 24 **IV. Opinion**

25 Montana law, adopting and following federal cases, analyzes discrimination claims with  
26 a four-element test whether the complaining party’s membership in a protected class motivated  
27 adverse employment action. The leading case, expressly adopted by the Montana Supreme  
28 Court, is *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Crockett v. City of*

1 *Billings*, 234 Mont. 87, 761 P.2d 813 (1988).<sup>2</sup>

2 Everyone belongs to particular "classes" of people, by race, creed, religion, color,  
3 national origin, age, marital status and sex. Discriminating against a person in employment  
4 because of that person's membership in any of these protected classes is illegal, with a few  
5 limited statutory exceptions. §49-2-303(1)(a) MCA.

6 The provisions that assure protected groups freedom from discrimination under Title 49  
7 of the Montana Human Rights Act closely mirror Title VII of the Civil Rights Act of 1964,  
8 §42 U.S.C. Section 2000(e), *et seq.* This is why our Court examined and adopted the three  
9 tier standard of proof from *McDonnell Douglas*, *supra*, for employment cases involving  
10 disparate treatment of a protected class member.

11 To establish a *McDonnell Douglas* prima facie case, Buck must prove four elements:

12 (i) that [s]he belongs to a [protected class] . . .; (ii) that [s]he applied and was  
13 qualified for a job for which the employer was seeking applicants; (iii) that, despite  
14 [her] qualifications, [s]he was rejected; and (iv) that, after [her] rejection, the position  
remained open and the employer continued to seek applicants from persons of  
complainant's qualifications.

15 *McDonnell Douglas*, 411 U.S. at 802. This is the "first tier" of proof, necessary to  
16 establish a prima facie case.

17 Was Buck disabled (and if so, when)?

18 Disability by pertinent statutory definition is a physical impairment that substantially  
19 limits one or more of a person's major life activities, or a record of such an impairment; or a  
20 condition regarded as such an impairment. §49-2-101(15)(a) MCA. From the time of her  
21 injury until six weeks after the offer of a modified job opening, the County considered Buck  
22 disabled. There is no credible evidence that, after that date, the County considered Buck  
23 disabled. Buck offered no evidence of actual disability (as opposed to perceived disability)  
24 after that date. Her proof of the first element of the *McDonnell Douglas* prima facie case  
25 extends no further.

26 Who is responsible for the failure of Colleen Lordeman's notice to reach Buck?

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28 <sup>2</sup> See also, *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987);  
*European Health Spa v. Human Rights Commission*, 212 Mont. 319, 687 P.2d 1029 (1984);  
*Martinez v. Yellowstone County Welfare Dept.*, 192 Mont. 42, 626 P.2d 242 (1981).

1 Buck argued that she was unaware of the modified job offer and limited time within  
2 which she had to respond and accept that job. This argument related to her contention that she  
3 did not need to fill out a new application for employment. Colleen Lordeman, the vocational  
4 rehabilitation provider for the County's compensation insurer, sent the notification of the job  
5 offer to Buck's Great Falls home address. Lordeman was an agent neither of Buck nor of the  
6 County. Her good faith basis for sending the notification to the Great Falls address appears in  
7 the letter she sent. Under the circumstances, as between the County and Buck, Buck as the  
8 job-seeker was responsible for being sure the rehabilitation provider had current address  
9 information to reach her. Since the County had no obligation to notify Buck of the available  
10 position (Buck cited no legal basis for such obligation), the County was not responsible.

11 Did Buck apply for post-release work with the County--why not or how and when?

12 Buck never did fill out an application for employment. The reason is the crux of this  
13 case. Neither Buck nor Mann is entirely credible in this regard.

14 Mann's far more definite testimony at hearing, as opposed to her more equivocal  
15 deposition testimony, renders her certainty suspect. Still no credible evidence of record  
16 supports the assertion that Mann deliberately concealed employment opportunities, or even told  
17 Buck not to fill out an application. Lacking that evidence, the record does not give rise to any  
18 inference that Mann somehow considered Buck disabled. Thus, Mann is credible in testifying  
19 that Buck always said she was interested in full-time work.

20 Buck may be telling the truth in asserting that she did not think she needed to fill out a  
21 job application. However, under the facts of this case, such a belief is not reasonable. Buck  
22 did know, as she testified at trial, that the County did post openings for some LPN positions  
23 (part-time or "on call" jobs). Her knowledge should have triggered inquiry about filling out an  
24 application, particularly since she knew or had reason to know that any full-time positions  
25 would probably be filled from the part-time roster.

26 Buck herself, by never placing an application on file, left herself out of the running for  
27 any openings. Had Buck obtained and filled out an application, and still not been hired, she  
28 would have a much more substantial claim. Buck failed entirely to prove the second element

1 of her prima facie case--that she applied for a job with the County during the alleged  
2 discrimination.

3 The anomalous "raise" Buck received on paper in 1991 when she was no longer  
4 employed (Exhibit K) cannot, standing alone, bridge the gap created by Buck's failure to apply  
5 for a job. The County did not explain this document, but Buck did not establish that this  
6 internal document relieved her of the obligation to apply for work, in writing.

7 What business reasons did the County have for not hiring Buck?

8 The County did not hire Buck because she never applied for a job. The communication  
9 between Mann and Buck was obviously flawed. Although the hearing officer could speculate  
10 that Mann manipulated the process, the evidence does not support such a speculation. The  
11 evidence shows that Buck, focused upon a full-time job, never filled out an application for any  
12 part-time or on-call position. Buck failed to prove the third element of her prima facie case--  
13 that the County rejected her.

14 The Workers' Compensation Two Year Rehire Preference

15 Buck cites the Workers' Compensation Act rehire preference. Violation of the statute  
16 leads to a right to proceed in district court. Nonetheless, evidence that the County violated the  
17 statute could buttress a prima facie case, as evidence from which the presumption of a  
18 discriminatory motive could be drawn.

19 §39-71-317(2) MCA states, in pertinent part, with emphasis added:

20 When an injured worker is capable of returning to work within 2 years from the date of  
21 injury and has received a medical release to return to work, the worker must be given a  
22 preference *over other applicants for a comparable position that becomes vacant . . . .*

23 Because there is no evidence of any full-time hire during the time in question, a  
24 comparable job to Buck's job of injury never became vacant. Buck, as already noted, never  
25 applied for the positions that did open. The statute has no effect here.

26 Buck's Failure to Establish a Prima Facie Case

27 Buck did fail to establish three of the four elements of her prima facie case. Except  
28 during the six weeks following the abortive offer of a modified position, she did not prove the  
County considered her disabled. The presumption that the County considered her disabled



1 (and that this was the reason the County did not hire her) is unsupported by any evidence.  
2 Instead, the evidence shows that Buck never applied for a job and, as a result, was never  
3 rejected for a job.

#### 4 **V. Conclusions of Law**

- 5 1. The Commission has jurisdiction over this case. §49-2-509(7) MCA.
- 6 2. Wanda Buck failed to establish a prima facie case that Cascade County  
7 discriminated against her in employment by reason of disability.

#### 8 **VI. Proposed Order**

- 9 1. Judgment is found in favor of Cascade County and against Wanda Buck on her  
10 complaint that the County discriminated against her in employment by not hiring her as an  
11 LPN on or after October 29, 1991, because of her physical or mental disability (back/shoulder  
12 injury).
- 13 2. The complaint is dismissed with prejudice as without merit.

14 Dated: October 13, 1998.

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