

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

<u>Sheila Rothe,</u>)	Human Rights Act Case No. 9901008615
Charging Party,)	
vs.)	
<u>Motel 6,</u>)	<i>Final Agency Decision</i>
<u>Respondent.</u>)	

I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on August 17, 1998. She alleged the respondent, Motel 6, discriminated against her on the basis of her disabilities (coronary heart disease and diabetes) when it refused to grant a requested accommodation beginning on or about March 10, 1998, and then terminated her employment on or about April 22, 1998. On April 4, 1999, the department gave notice of contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing convened on July 26, 1999, in Billings, Montana. Rothe was not present until the second day of hearing. Her attorney, Kathryn S. Syth, attended and represented her. Ronald Kautzman, manager of the Motel 6 South, Billings, Montana, attended as designated representative for respondent. Respondent's attorneys, Eric A. Welter and Marija T. Marino, Hunton & Williams, and Michael K. Rapkoch, Felt, Martin, Frazier, Jacobs & Rapkoch, P.C., attended and represented respondent.

The hearing examiner excluded witnesses on Rothe's motion. Dr. Richard Anderson, Ronald Kautzman, Dean Hoyt, Margaret Girton, Steven Bohl, Sheila Rothe, Kara Bergum and Lee Gowers testified under oath.

The parties stipulated to the admission of Exhibits 1 through 6, 8 through 13, 103 through 107, 119, 124 through 126, 129, 132 through 135, 137, 141, 144, 149 and 150, 160 and 161 and 168 through 171. Without objection from the parties, the hearing examiner made exhibit 137A part of the record after the parties referred Dr. Anderson to the exhibit for an extended portion of his testimony and admitted exhibits 7G and 7H. Over respondent's objections, the hearing examiner admitted exhibits 7E, 7F and 7 (volumes I through IV) (relevance objections) and exhibit 10A (foundation objection). Rothe offered and then withdrew Exhibit 7 in its entirety. Hearing concluded with oral closing arguments on July 27, 1999.

II. Issues

The legal issues in this case are (a) whether Rothe suffered from a disability, (b) whether respondent illegally discriminated against her in employment by failing to offer her reasonable accommodations after she requested a schedule change and (c) whether respondent illegally discriminated against Rothe when it fired her. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Since early childhood, Sheila Rothe has suffered from Type I diabetes, necessitating daily insulin injections and the maintenance of a consistent schedule of activities, including meals, sleep time and work activities. At all times pertinent to this case, Rothe monitored her own blood sugar level and kept a diary of the levels, for the use of with her physician, Dr. Richard Anderson. Dr. Anderson regularly ordered laboratory testing to monitor the control of Rothe's diabetes. Dr. Anderson monitored the disease to adjust the frequency and amount of her insulin injections. At the time of hearing, Rothe was 54 years old. Testimony of Anderson and Rothe.

2. Dr. Anderson is a physician licensed to practice in Montana. He graduated from the University of Minnesota Medical School. He was Board Certified in Internal Medicine. He has practiced medicine since 1978. He has practiced in Billings, Montana, for approximately 11 years. His subspecialty for the past 10 years has been the treatment of diabetes. Approximately half his current patients are diabetics. Dr. Anderson has been Rothe's treating physician since May 1996. He knew Rothe worked when he first began treating her. Testimony of Anderson.

3. Dr. Anderson considered Rothe, during all times pertinent to this case, substantially limited in her activities by her diabetes. All of the limitations related to her diabetes resulted from the need to avoid swings up or down in her blood sugar levels. Either abnormally high or low blood sugar levels could result in coma, organ damage and death. Dr. Anderson recommends that his diabetic patients maintain consistent daily schedules of activities (including work), meals and sleep. His standard recommendation for work schedules for his diabetic patients is that they work day shifts. In part, this recommendation results from the usual metabolic shifts in blood sugar levels, that Dr. Anderson believes typically follow diurnal patterns regardless of work schedule. Sleeping at night, together with consistent daily schedules,

offers the diabetic the best chance of maintaining control of the disease.
Testimony of Anderson.

4. One reliable indicator of the degree to which a diabetic's disease is under control is a laboratory blood sugar test called the "Hemoglobin A1C" test. Test scores are in percentages. According to the standard laboratory scale, a result at or above 9% is poor diabetic control. Fair control results in 8 to 9 % scores. Good control results in 7 to 8% scores. Excellent control results in 7% scores. Dr. Anderson considers a range of 7 to 7.1% was indicative of excellent or optimal control, while higher percentages between 7.1 and 7.9 % only show good to fair control. Although Dr. Anderson agrees that optimal control is sometimes not possible, he still aims for optimal control with his patients. Testimony of Anderson; Exhibit 137A.

5. Dr. Anderson's records included A1C test results for Rothe as follows:

<i>Date</i>	<i>Result</i>	<i>Control level</i>
10/21/96	7.4	Fair/Good
4/7/97	7.6	Fair/Good
12/15/97	8.1	Fair
3/23/98	7.7	Fair/Good
2/26/99	7.6	Fair/Good

Testimony of Anderson; Exhibit 137A.

6. Although A1C test results were one reliable indicator of Rothe's disease control, her reports of self-monitored blood sugar levels and her reports of insulin reactions were also important indicators. Dr. Anderson does not rely solely upon the test results. Testimony of Anderson.

7. Motel 6 employed Rothe beginning in February 1991. Rothe successfully completed a 6-week training program that included studying Motel 6 policies and procedure and passing a written test as well as on-site training. She worked as an assistant manager at a Motel 6 in Greeley, Colorado. Rothe worked as a desk clerk at the Billings location (0178, also known as "Billings South") beginning in February 1996. Final Prehearing Order, "Facts and Other Matters Admitted," Par. 1; testimony of Rothe.

8. In March 1997, Ron Kautzman became the assistant manager of the Billings South Motel 6. He met Rothe when he took the job. Testimony of Kautzman.

9. Rothe had heart surgery in July 1997. Motel 6 granted her leave during the immediate recovery period. Motel 6 provided a part-time work schedule for Rothe when her physicians released her to light duty. On

September 24, 1997, after obtaining a full release from her physicians, she returned to work full time. She worked two day shifts and three evening shifts per week until January 1998. Final Prehearing Order, "Facts and Other Matters Admitted," Par. 2; testimony of Anderson, Kautzman and Rothe.

10. Both before and after the interruption in her employment due to her heart surgery, Rothe followed the directions of her physicians, monitored her blood sugar levels and took her insulin. She was able to perform the job duties of desk clerk. Testimony of Rothe.

11. Kautzman became the manager of the Billings South Motel 6 in January 1998.

12. Kautzman and Rothe did not work well together. Dean Hoyt, another employee, found the conflict between Kautzman and Rothe so troublesome that he asked Kautzman not to assign him as manager on duty when Rothe was working. Hoyt was not comfortable with Rothe's negative comments about Kautzman, and her assertions that she knew the right way to run the motel. Hoyt felt "in the middle" of the conflict between Kautzman and Rothe over proper procedures, and finally requested a transfer to Area Maintenance. Testimony of Hoyt and Kautzman.

13. In January 1998, Shawna Puluch, another Motel 6 employee, developed medical problems related to her pregnancy. Kautzman, to accommodate Puluch, assigned her to two day shifts as desk clerk, and reassigned Rothe to five evening shifts. Rothe understood the reason for the reassignment and did not object to it. Kautzman discussed this accommodation, and all others, with Lee Gowers, Human Resources Director for the Mountain States Region of Motel 6, and when necessary, with Motel 6 legal counsel. Testimony of Kautzman, Rothe and Gowers.

14. Within a month after she began working two day shifts, Puluch took a medical leave of absence. Rothe mentioned to Kautzman that she wanted her two day shifts back. Kautzman had agreed with another employee, Margaret Girton, that Girton could work day shifts during the school year, to assist her in arranging day care for her child. In March 1998, Kautzman hired another desk clerk, Steven Bohl, and began training Bohl during day shifts. Kautzman did not respond to Rothe's suggestions that she return to a two day shift and three evening shift weekly schedule. He had filled the available day shifts. Testimony of Kautzman, Girton, Bohl and Rothe.

15. On March 23, 1998, Rothe saw Dr. Anderson. His office notes reflect that "Overall she is doing okay." Rothe reported to him that she was having low blood sugar readings "in the middle of the night." Dr. Anderson did not recall discussing Rothe's work shifts or her increasing fatigue during this

visit, but believed he could have discussed these topics with Rothe. Since Dr. Anderson did not and does not believe it likely for a diabetic working nights to achieve excellent control of type I diabetes, he would have suggested a shift change if Rothe did discuss her work schedule with him. Dr. Anderson does not recall Rothe discussing her work schedule with him until April 1998. Testimony of Anderson; Exhibit 137.

16. In the first three months of 1998, Kautzman had several discussions with Lee Gowers about the failure of his desk staff, including Rothe, properly to complete guest folios. During Motel 6 audits, these failures counted against local management, and contributed to poorer overall scores. Poorer overall scores could result in loss of bonuses that otherwise might be available for management and staff. Kautzman decided he should go beyond pointing out to individual staff members some of their failures properly to complete guest folios, together with other areas of performance concern. He decided to hold a staff meeting to express these concerns. Testimony of Kautzman and Gowers.

17. At least two Motel 6 policies addressed guest folio information. The motel guidelines, Chapter 2, Section 6, discussed completion of the folio. The safety and security manual, Chapter 2, Section 3, also touched upon the need for and reasons for identification requirements. Motel 6 received some negative publicity on a national television show some years ago and the organization revised and emphasized the security section accordingly. Manager training, which Kautzman and Rothe had both successfully completed, covered both policies. Testimony of Kautzman, Rothe and Gowers, Exhibits 104 and 106.

18. Motel 6 required the guest signing the register to provide identification to verify name, address and telephone number (or at least name). Motel 6 also required the guest to provide license number and state of the guest's vehicle. With multiple guests, the signature and information had to come from a guest over 18. With multiple rooms for which one guest was responsible, the signature and information for each room had to come from a guest within that room who was over 18, except that reference to another room for the same responsible guest would obviate the need to write in the same vehicle information. Proper coding for Motel 6 employees staying at the motel did not require all of the identification and license information. Motel 6 employees were coded "gratis" when they were guests at the motel. Failure to complete folios properly was a violation of Motel 6 procedure. An employee repeatedly or willfully violating procedure could be subject to discipline, up to and including discharge from employment. Testimony of Kautzman, Hoyt, Margaret Girton, Steven Bohl, Rothe and Gowers; Exhibits 104 and 106.

19. Guest folios identified the staff member doing guest check-in by initials, in the upper right hand corner. The left side of the folio included a small box the staff member could check, under which the folio read "Verify ID." To the immediate right of the box was a space under which the folio read "Car License and State." The staff member checking in a guest would, for guests signing the folio as responsible for the room, ask for and examine acceptable identification and then check the box on the folio. The staff member could properly note "PR" ("personally recognized") for guests they knew. The staff member would also obtain a vehicle license number and state from the guest or from the vehicle. The staff member could properly note "walked up" or "dropped off" for guests who arrived without a vehicle. Folios that did not follow the motel guidelines were mistakes, for which the staff member was responsible. Testimony of Kautzman, Hoyt, Margaret Girton, Steven Bohl, Rothe and Gowers; Exhibits 104 and 106.

20. The number of guest folios with mistakes concerned Kautzman. He was anticipating an audit. His motel was the site of a Motel 6 Area Meeting in April 1998. He wanted to resolve the problem, and eliminate it as a concern before the Area Meeting. Testimony of Kautzman.

21. On March 24, 1998, Kautzman held the meeting with his motel desk staff, including Rothe. Kautzman prepared a handwritten memo detailing some of the details of that meeting, involving various procedures at the desk. He required the staff to sign the memo, to acknowledge their participation in the discussion and their understanding of his requirements. Kautzman did not include anything in that memo regarding completion of guest folios to include (1) written confirmation that the clerk had checked the guest's identification and (2) guest vehicle license numbers. In the meeting, Kautzman did discuss the importance of completing the guest folios properly. Testimony of Kautzman and Rothe; Exhibit 124.

22. Later on March 24, 1998, while Rothe was on-duty, a man entered the motel office, pulled a handgun and demanded the money from the motel's register. Rothe gave him the money and he left. She called 911, and the dispatcher asked her to stay on the line until the police arrived. She complied. While the police were taking her statement, Dean Hoyt called. Hoyt had heard about the robbery on a police band radio. Rothe asked him to call Kautzman, and Hoyt did as she asked. Kautzman then came to the motel. Rothe was "shook up and scared," but she did not request counseling to deal with her reactions. Rothe experienced more anxiety and fatigue at work after this incident. Testimony of Kautzman and Rothe.

23. After the robbery, Rothe sent Kautzman an e-mail message on the motel computer system. She asked for at least two day shifts on a regular

basis, reporting that “with my schedule as it is now I may have to change some of my diabetic medicine and that would take some adjustment.” Testimony of Rothe; Exhibit 2.

24. Kautzman did not want to return Rothe to any day shifts. He preferred Rothe on evening shifts, where he had much less contact with her. He considered her his regular evening shift employee. In addition, his agreement with Girton that she could work days, and his training of Bohl, also during days, left no day shifts available unless Kautzman himself worked other shifts. Kautzman had never worked other shifts as a manager, except in emergencies. Kautzman did not consider changing Girton and Bohl's schedules or working other shifts himself to accommodate Rothe. Instead, on March 27, 1998, he offered her three choices: taking Friday and Saturday off (the busiest evenings) and continuing to work the evening shift; working four evening shifts, with three days off; or moving to the night shift (11:30 p.m. to 7:30 a.m.), which was much less busy. Testimony of Kautzman; Exhibit 2.

25. On March 29, 1998, Rothe responded that “busy” was not the problem. She reiterated her request for at least two day shifts. She also noted, “It seems other people have more important reasons than health for getting days.” Testimony of Rothe; Exhibit 2.

26. On April 8, 1998, Rothe saw Dr. Anderson again. She complained of anxiety at work and of waking up crying. Dr. Anderson prescribed a tranquilizer for Rothe, and recommended that she work days. He gave her a note to take to Motel 6 confirming that recommendation. Testimony of Anderson and Rothe; Exhibits 3, 135 and 137.

27. Rothe several times had obtained and provided letters from her doctors to Motel 6 to confirm her restrictions from or releases to work. She did not ask Dr. Anderson for such a letter this time. Had she asked, he would have provided a letter. Testimony of Anderson and Rothe; Exhibits 132, 133 and 134.

28. On April 21, 1998, Lee Gowers was in Billings for a Motel 6 Area Meeting. She met with Rothe to discuss complaints Rothe had voiced about conflicts with other staff members. She also provided Rothe with information about complaints other staff members made about Rothe. She did not discuss Rothe's job performance on folio completions. Testimony of Rothe and Gowers.

29. Later on April 21, 1998, Gowers met with Kautzman to discuss business at the motel. During that discussion, Kautzman complained that although other staff members were improving their folio completion performances, Rothe continued to leave large numbers of folios incomplete.

Gowers then reviewed folios provided by Kautzman. Based upon the number and type of mistakes she observed on Rothe's folios, taking into consideration Rothe's years of experience and her training, Gowers concluded that Rothe was deliberately failing to do her job. Gowers decided Motel 6 should discharge her from employment. Testimony of Kautzman and Gowers.

30. Motel 6 terminated Rothe's employment on April 22, 1998. Kautzman called Rothe and told her not to come to work, that her employment was terminated. He refused to discuss the reasons for termination during the telephone call. He provided her with a written statement of the reasons the same date. The reasons Motel 6 gave for discharging Rothe were that she failed consistently to complete the guest folios regarding identification of guests and recording of vehicle license numbers. Final Prehearing Order, "Facts and Other Matters Admitted," Par. 3; testimony of Kautzman and Rothe.

31. At about the same time as Rothe's discharge, Kautzman enlisted Bohl's assistance in going through the guest folios completed by all staff members. Under Kautzman's directions, Bohl identified folios with errors. Also under Kautzman's directions, Bohl checked the "Verify ID" boxes or wrote in "PR" (personally recognized) on some folios completed by employees other than Rothe. He also wrote in "walked up" or "dropped off" in the license plate space on some folios completed by other employees. In all, Bohl was involved in altering about 12 folios. Bohl did not know whether he made these changes before or after Gowers reviewed folios with Kautzman and decided to discharge Rothe. He did know that Kautzman then faxed the folios to the Motel 6 legal office in Dallas. Testimony of Bohl.

IV. Opinion

Montana law prohibits discrimination in employment on the basis of physical or mental disability when the reasonable demands of the position do not require a distinction based on such disability. §49-2-303(1)(a) MCA. Rothe must prove that Motel 6 violated this prohibition. To do so she must initially establish that she suffers from a disability as defined in the Montana Human Rights Act. If she sustains her burden of proof on this threshold issue, she must then prove the additional elements of her two discrimination claims. For her first claim, she must prove that Motel 6 failed or refused to offer her reasonable accommodations after she requested a schedule change. For her second claim, she must establish a prima facie case of discriminatory discharge. If she establishes either or both her claims, then Motel 6 must offer evidence of a legitimate non-discriminatory business reason for its adverse actions. If it presents such evidence, Rothe then has the opportunity to present evidence of

pretext. If the department reaches the *McDonnell Douglas* third tier, and the fact-finder is not persuaded that Motel 6 had a discriminatory motive, then Rothe cannot prevail.

1. Rothe Proved She Suffered from a Disability

A physical or mental disability means a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or a condition regarded by the employer as such impairment. §49-2-101(19) MCA. The determination of whether impairment resulting from illness is a disability under the Montana Human Rights Act requires a factual determination, made on a case-by-case basis. *Reeves v. Dairy Queen, Inc.*, 287 Mont. 196, 206, 953 P.2d 703, 709 (1998). In making that factual determination, the department notes that the Montana Supreme Court has held that work is a major life activity. *Walker v. Montana Power Company*, 278 Mont. 344, 924 P.2d 1339 (1999), *Martinell v. Montana Power Company*, 68 Mont. 292, 886 P.2d 421 (1994). For employment contexts, a substantial limit upon the performance of work means the individual is unable to perform a class of jobs or a broad range of jobs as compared to an "average" person with comparable training, skills and abilities. 29 C.F.R. 1630.2(j)(3). Thus, the inquiry is whether Rothe, with her impairment, was unable to perform a class of jobs or a broad range of jobs, compared with her unimpaired "average" twin.

Rothe's impairment resulting from her illness was that to control her blood sugar fluctuations she needed to develop and follow a rigorous regime, doing the same things at the same times every day.¹ For optimal control of her disease, she needed to work days, according to her physician. The Montana Supreme Court has not considered whether diabetes that restricts an employee to day shifts constitutes a disability. The Court has addressed the impact of a restriction in shifts resulting from illness.

In 1993, under a previous version of the Montana Human Rights Act, the Montana Supreme Court affirmed a district court award of \$467,364 in damages to Bonnie Martinell. The alleged discrimination was, in part, the employer's refusal to permit her to work day shifts. *Martinell, op. cit.* at 299, 886 P.2d at 426. In fact, at the time that Martinell entered into direct conflict with her employer (conflict that led to her resignation), working day shifts was the only suggestion her doctors could make.

¹ Rothe did not prove any pertinent disability as a result of her coronary artery disease. Motel 6 accommodated her when she had surgery to address this illness. Coronary artery disease is not relevant to this case, and the department's opinion will not address it further.

The department holds that for Rothe, with her range of potentially available jobs derived from her experience and skills, a medical recommendation that she only work day shifts constitutes a disability.² Rothe's impairment dictated a limited number of work opportunities in any job, not just in motel management. Her impairment, unlike that of Lawrence Walker³, stretched across the lines of various jobs and careers. Rothe, with her impairment, was unable to perform a class of jobs or a broad range of jobs, compared with her unimpaired "average" twin.

2. Rothe Did Not Prove that Motel 6 Failed or Refused to Offer Her a Reasonable Accommodation after She Requested a Schedule Change

Rothe requested a schedule change to at least two day shifts. This schedule change was not within the recommendation of her physician. What she requested was a return to her former schedule. In response, Kautzman offered her three choices: taking the busiest evenings off and continuing to work the evening shift; working four evening shifts, with three days off; or moving to the less busy night shift. Given that Rothe herself did not seek a schedule consistent with her physician's recommendation, Motel 6 did not respond unreasonably.

Kautzman denied receiving Dr. Anderson's note recommending day shifts for Rothe. Whether she provided the note to Kautzman is irrelevant. Since she did not request all day shifts, the employer's proposed accommodations were reasonable. Rothe's request for split shifts actually was contrary to the thrust of her doctor's recommendations. Without an endorsement of split shifts from Dr. Anderson, Rothe's current schedule actually fit her doctor's recommendation better than her request. Based upon the evidence adduced, had Motel 6 received Dr. Anderson's note, it could reasonably have refused any accommodation rather than granting a request that did not match the medical recommendation.

² The United States Supreme Court, in a series of decisions, has narrowed the scope of "disability" under the ADA. *Sutton v. United Air Lines, Inc.*, __ U.S. __, 119 S.Ct. 2139, __ L.Ed.2d __ (1999); *Murphy v. United Parcel Service, Inc.*, __ U.S. __, 119 S.Ct. 2133, __ L.Ed.2d __ (1999); *Albertson's, Inc. v. Kirkinburg*, __ U.S. __, 119 S.Ct. 2162, __ L.Ed.2d __ (1999). The DOT certification cases are akin to *Walker*—on the facts of those cases, corrected monocular vision and medicated high blood pressure did not substantially limit work overall, even though it impacted DOT certification for commercial truck driving jobs. *Murphy and Albertson's, Inc.*, *supra*. The pilot case is likewise akin to *Walker*—corrected vision did not substantially limit work overall, even though it prevented employment as a pilot with one airline. *Sutton*, *supra*.

³ In *Walker* at 349, 924 P.2d at 1342, Walker contended only that his impairment prevented him from working as a power company lineman, not in other jobs both for the power company and for other employers. The Montana Supreme Court affirmed a jury verdict that Walker was not disabled, because Walker's illness was too narrow a constraint to substantially limit the major life activity of work.

3. *Rothe Established a Prima Facie Case of Discriminatory Discharge*

The Montana Supreme Court has adopted the three-tier *McDonnell Douglas* test to ascertain whether a claimant proves a claim of disability discrimination in employment by indirect evidence. *Hafner v. Conoco, Inc.*, 268 Mont. 396, 886 P.2d 947, 950 (1994)⁴; *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Taliaferro v. State*, 235 Mont. 23, 764 P.2d 860, 863 (1988). The parties do disagree about the reason Motel 6 terminated Rothe's employment, and therefore this case involves indirect evidence of alleged illegal discrimination. *Reeves* at 202, 953 P.2d at 706.

⁴ The Montana Supreme Court's more recent analysis modifying the *Hafner* adoption of the *McDonnell Douglas* tiers, in *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1996), applies only to summary judgment. *Reeves* at 201, 953 P.2d at 706. *Reeves* Decision, Page 11

To satisfy the first tier of *McDonnell Douglas*, Rothe had to prove that: (1) she suffered from a physical or mental disability; (2) she was qualified to continue in her employment; and (3) the employer terminated her employment despite her qualifications.⁵ Rothe did prove that she was qualified to continue in her employment. She had satisfactorily performed her job for a number of years. Motel 6 valued her as an employee, and provided accommodation for her when she experienced heart problems. Kautzman considered her his regular evening shift employee. Motel 6 did not document any progressive disciplinary steps taken regarding her.

4. Motel 6 Presented Evidence of a Legitimate Business Reason for the Discharge

Rothe's proof of her prima facie case under *McDonnell Douglas* raises an inference of discrimination at law. Motel 6 then has the burden to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas* at 802, 93 S.Ct. at 1824. This burden comprises the second tier of proof under *McDonnell Douglas*. Motel 6 must meet Rothe's prima facie case by presenting a legitimate reason for the action, framing the factual issue with sufficient clarity so that Rothe has a full and fair opportunity to demonstrate pretext. *Burdine* at 255-56, 101 S.Ct. at 1095, 67 L.Ed.2d at 217. A defendant thus only need raise a genuine issue of fact by clearly and specifically articulating a legitimate reason for the rejection of an applicant. *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209, 212 (1983); *cited and followed*, *Crockett*, 761 P.2d at 216.

Lee Gowers decided to fire Rothe because the number and type of mistakes by Rothe in guest portfolios. Gowers credibly testified that she concluded that an employee with Rothe's experience and training could not make that many mistakes of these types except deliberately. Motel 6 showed that it had a legitimate non-discriminatory business reason to fire Rothe—extremely poor performance.

5. Rothe Did Not Prove Pretext

⁵ The hearing examiner draws this statement of the first tier of *McDonnell Douglas* from *Reeves* at 204, 953 P.2d at 708. The first tier of *McDonnell Douglas* requires the elimination of "the most common nondiscriminatory reasons" for the employer's action. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The formulation of the first tier elements remains flexible; the charging party must present enough evidence to trigger the reasonable inference of discriminatory motive. *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 817 (1988). *Final Agency Decision, Page 12*

Because Bohl and perhaps Kautzman altered some folios, the current state of the folios in Exhibit 7 does not necessarily reflect the state of the folios as of the time Gowers reviewed some of them. However, Rothe's folios remained unaltered. Even if Kautzman had not reported that other employees had improved since the March 24 meeting, Gowers found enough mistakes in Rothe's folios to convince her that Rothe was not misunderstanding or performing poorly.

The department concludes, from the direct evidence of his conduct, that Kautzman wanted Motel 6 to fire Rothe, and that Kautzman manipulated the evidence he presented to Gowers, in order to obtain that result. However, without Kautzman's manipulations, Gowers still had plenty of evidence to support her conclusion that Rothe was not satisfactorily performing her job. Thus, if Kautzman's motive in seeking Rothe's discharge was her disability, the department would have a mixed motive case.

The entirety of the evidence adduced by Rothe contains nothing upon which the department can infer that Kautzman's motive related to Rothe's disability. The best evidence supports the conclusion that Kautzman did not want Rothe on "his" day shifts, because of the conflicts between them.

Kautzman did not have the power to fire Rothe. Gowers made that decision. She made it based upon what she reasonably perceived as the documented poor performance of Rothe. Gowers did not decide to fire Rothe because of any illegally discriminatory motive. Kautzman did not manipulate Gowers because of any illegally discriminatory motive. Rothe failed to prove pretext.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Rothe did not prove that Motel 6 discriminated against her on the basis of her coronary heart disease and diabetes when it refused to grant the particular accommodation she requested and then terminated her employment.

VI. Order

1. Judgment is found in favor of Motel 6 and against Rothe, on the charges that Motel 6, discriminated against Rothe on the basis of her disabilities (coronary heart disease and diabetes) when it refused to grant a

requested accommodation beginning on or about March 10, 1998, and then terminated her employment on or about April 22, 1998.

2. The complaint is dismissed.

Dated: November 1, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry