

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

Glenn M. Schippers,)	Human Rights Act Case No. 9801008381
)	
Charging Party,)	<i>Final Agency Decision</i>
)	
versus)	
)	
Imperial Holly Sugar, Inc.,)	
)	
Respondent.)	
)	

I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on November 10, 1997. He alleged the respondent, Imperial Holly Sugar, Inc. ("company") discriminated against him on the basis of his disability, lung disease, when it discharged him on or about May 16, 1997. On April 27, 1998, the department gave notice Schippers' complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on September 3, 1998, in Sidney, Richland County, Montana. Schippers attended with his attorney, Steven A. Kelly. The company's designated representative, Richard Parrill, District Manager, attended with the company's attorney, Roberta Anner-Hughes. The hearing examiner excluded witnesses on Schippers' motion. Dr. Donald Cooper, Mark Denning, Aubrey Jay Miller, Peggy Schippen, Richard Parrill, Sharon Ginther, Douglas Bergerson, Eldon Moos, Carlan Schmidt, John Rogers, Barb Craig, Glenn Schippers and Elizabeth Sharon (Heidi) Kranker testified under oath. The hearing examiner admitted the following exhibits: Schippers' exhibits 1-4, 6-9, 11-13, 15-19, 21-22, 25, 34-35 and 38-42; the company's exhibits A (page 4 only), G, Y and FF. The hearing examiner refused Schippers' exhibits 33 and 36. Exhibits mentioned but not offered were Schippers' exhibit 32 and the company's exhibits R and U. The parties requested and received time to submit post-hearing briefs, which they subsequently filed.

II. Issues

The legal issue here is whether Imperial Holly Sugar, Inc., unlawfully discriminated against Glenn M. Schippers based on his disability by denying him reasonable accommodation and by firing him. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. The company hired Schippers as an Oiler Temp. (a seasonal position) in September 1981. Uncontested Facts, No. 1; testimony of Schippers.
2. Schippers worked for most of his life as a mechanic or a laborer. In 1982, he bid and obtained a year-round house mechanic position with the company. As a house mechanic, Schippers worked in the scale house in the company's plant in Sidney, Montana. He bought a home in Sidney in 1989. He still lives in Sidney. Testimony of Schippers.
3. In March 1995 Schippers sought medical attention. He had been feeling sick for some months, and he thought he was getting sicker. He saw Dr. Donald Cooper, a Sidney physician specializing in internal medicine. He understood from Dr. Cooper that he had pneumonia. He continued to work for a short period. Then he took approximately 8 to 11 days off from work on Dr. Cooper's orders. He returned to work on May 3, 1995, with a full medical release from Dr. Cooper. Dr. Cooper noted in 1995 that Schippers showed signs of early lung disease, and suggested that Schippers should pursue further evaluation of his pulmonary function. Testimony of Schippers and Dr. Cooper; Exhibit 41.
4. Despite his doctor's advice, Schippers believed his problems were temporary. He continued to suffer intermittently from congestion and burning in his chest and throat, and gagging and coughing. He felt feverish, with night sweats, and was light-headed, dizzy and short of breath, but still continued working. When he felt his symptoms were worsening again, he consulted another physician, Dr. David Anderson, in Great Falls in July of 1996. Schippers wondered if his pneumonia had returned. Dr. Anderson performed tests for which the results took 4-6 weeks. During this time, based upon what Dr. Anderson said, Schippers began to fear he might have lung cancer. Testimony of Schippers.

5. In his work environment, Schippers encountered pulp dust, lime dust, sulfur discharges, ambient sulfuric acid, ambient hydrochloric acid and asbestos, among other potential irritants. Schippers understood Dr. Anderson to have suggested that a respite from the dust exposures at work might be beneficial, so he took a vacation. He returned to work without a medical release. When he returned to work, Schippers used inhalers prescribed by Dr. Cooper, even though he had not seen Dr. Cooper since June 1995. Testimony of Schippers and Dr. Cooper, Exhibits 4 and 41.

6. On August 26, 1996, the company suspended Schippers for 3 working days for leaving an assigned job or company premises without a supervisor's permission. Schippers refused to sign the suspension slip because he disputed the company's account of the circumstances involved. Testimony of Schippers; exhibit A (page 4 only).

7. In August 1996, Dr. Anderson sent Dr. Cooper, Schippers' local physician, his diagnosis that Schippers suffered from interstitial lung disease. Interstitial lung disease is an inflammatory condition in the connective tissue that holds the lungs together. On August 27, 1996, Schippers requested and received a letter from Dr. Anderson, which he then gave to the company at the end of his 3-day suspension. The letter was the company's first notice that Schippers suffered from a physical condition resulting from the work environment, or that his condition might worsen with continued exposure to organic dusts present at the company's Sidney plant. The letter was also the company's first notice that Schippers could not safely work in the physical environment at the plant. Testimony of Schippers and Parrill; exhibit 3.

8. The company operated under a master agreement with the union. Under the master agreement, pages 50 and 51, excused absences included time off due to illness or injury for which the company received a doctor's report, or certificate. The company had a particular form, labeled "Confidential Physician's Report" that it used as the doctor's report. The form requested the date of first consultation, the primary diagnosis and secondary diagnosis, the length of the disability (from onset to conclusion, or to the present), the date of return to work, the restrictions (if any) on work, whether the condition was work-related or not, and if the employee could return to work with restrictions, a date upon which the employee could return to regular duties. Exhibit 40, see exhibit 4 for an example of the form.

9. Schippers took sick leave commencing August 30, 1996, because his lungs burned more, and burned more often. He experienced more night sweats, sleeping problems, chest pain, dizziness and shortness of breath. He believed his symptoms were recurring more frequently and were more intense.

He believed, with a sugar beet campaign starting at the plant, that he was encountering more irritants in the air. Testimony of Schippers.

10. Elizabeth Sharon (Heidi) Kranker, the company's refinery safety manager for the Sidney plant, requested that Schippers provide a confidential physician's report before the company would return Schippers to work. Schippers took the company's form for the confidential physician's report and requested that Dr. Anderson's office complete and return it to the company. Testimony of Schippers and Kranker.

11. Schippers completed a claim for occupational disease (a "first report") on September 6, 1996, and sent it to the Department of Labor and Industry. He believed that because of his medical condition he should not be working. By signing the claim, Schippers expressly authorized release of medical information to the workers' compensation insurer. In 1996, the company was self-insured, using an adjusting agency to handle industrial injury and occupational disease claims. The company had access to Schippers' medical information. However, the company's policy was to request that the employee obtain and provide medical information regarding return to work. Testimony of Schippers, Kranker and Parrill; exhibit FF.

12. Dr. Anderson provided the confidential physician's report on September 13, 1996. Dr. Anderson described Schippers' condition as "interstitial pulmonary fibrosis related to exposure to dust and welding fumes," with a secondary diagnosis of asthmatic bronchitis. The diagnosis was consistent with that of Dr. Cooper. The company received Dr. Anderson's report on or about September 25, 1996. In his report, Dr. Anderson released Schippers to work on restricted duty, avoiding exposure to organic dust and chemical and welding fumes. Within those restrictions, Dr. Anderson released Schippers to return to work at anytime. Testimony of Dr. Cooper, Exhibits 2 and 4.

13. Kranker showed Dr. Anderson's September 13, 1996 report to Schippers. She asked him what he could do at work, given the restricted duty release. Schippers did not believe that Dr. Anderson had released him to return to work. He suspected the company had falsified the report. He thought Kranker was trying to treat Dr. Anderson's report as a full release. He told Kranker that he would straighten out the confusion. He also told Kranker that he was not presently able to return to work at all. Schippers then called Dr. Anderson. Testimony of Schippers and Kranker.

14. Dr. Anderson followed up his August 27, 1996 letter and his September 13, 1996 release with another letter to the company, dated September 30, 1996, that Kranker received by fax. In the letter, Dr. Anderson

stated that Schippers had “occupational related lung disease.” He stated that Schippers risked developing progressive lung disease with further exposure to organic dusts and welding fumes. Dr. Anderson finally stated that he recommended Schippers change occupations to avoid further exposures to airway irritants. Exhibit 6.

15. The company treated industrial injury or illness differently from injury or illness unrelated to the employee’s work. For a work-related condition, the company aggressively sought to find a work assignment compatible with the employee’s medical restrictions. This effort began after receipt of the confidential physician’s report, from which the company could identify the applicable limitations. For a condition unrelated to work, the company usually required a full release by the treating doctor before returning the employee to work. Testimony of Parrill, Kranker, Moos.

16. Kranker had initially approached Schippers consistent with the company’s treatment of work-related conditions. Because Schippers insisted he could not yet return to work at all, Kranker asked that he obtain another doctor’s report. She also requested that he provide monthly doctor’s reports. Schippers did not provide monthly doctor’s reports. He did report to Kranker every month that his doctor still “has me off work.” He made these verbal reports in October, November and December of 1996. Schippers did not ask to return to work, and responded to Kranker’s questions by telling her that he did not know when he could return to work because his doctors had not fully released him. Testimony of Schippers and Kranker.

17. On December 6, 1996, Kranker made a written request for a confidential physician’s report, providing Schippers with another copy of the company’s form. In the request, she recounted the prior requests for the confidential physician’s report as well as the prior reports received. Exhibit G.

18. Schippers asked Dr. Cooper for an appointment, and saw him on January 22, 1997. He obtained a note from Dr. Cooper that stated Schippers was unable to return to work. Schippers gave this handwritten note to the company. He did not provide a confidential physician’s report. When Schippers submitted the handwritten note, Kranker again asked him to obtain a confidential physician’s report. During January, February and March 1997, Schippers continued to pick up his checks every two weeks at the company’s plant in Sidney. Kranker continued to request the confidential physician’s report. She continued to ask when Schippers might return to work. Testimony of Schippers.

19. On April 2, 1997, the company sent Schippers a certified letter to advise him that it was placing him on a special attendance program. The letter

included another copy of the confidential physician's report. The letter notified Schippers he had to submit the completed confidential physician's report to the company by April 18, 1997. The letter notified Schippers he had to submit an updated confidential physician's report every month, in person, starting May 7, 1997, on the first Wednesday of each month until he could return to work. Exhibit 8.

20. Under its master agreement with the union, the company reserved the right to establish separate rules and regulations for the attendance of an employee whose absenteeism was a problem. The company, on April 2, 1997, established such a special attendance program for Schippers. The regular attendance program, set forth in both the employee handbook and the master agreement, provided that the first and second unexcused absences resulted in warnings. The third unexcused absence within 12 calendar months resulted in a 3-day suspension. The fourth unexcused absence resulted in termination of employment. Testimony of Parrill; Exhibits 39, p. 14, and 40, pp. 51-52.

21. Schippers consulted Patrick Sheehy, the attorney representing him on his Occupational Disease Act claim, about the letter of April 2, 1997. Sheehy wrote a response to the company on April 7, 1997. He requested that the company send further correspondence about the special attendance program to him rather than Schippers. He also requested 12 confidential physician's report forms, for Schippers' use during the next 12 months. Testimony of Schippers; Exhibit 9.

22. On April 17, 1997 Schippers saw Dr. Fairfax, a pulmonary specialist in Billings, Montana. Dr. Fairfax provided a hand-written note that Schippers should be off work until seen by Dr. Anderson. Schippers delivered the note to Kranker the next day. Kranker asked for a confidential physician's report. Schippers asked if the note would suffice. Kranker said it would not. Testimony of Schippers; Exhibit 12.

23. On April 25, 1997, Schippers consulted Dr. Cooper, his local physician, to obtain a confidential physician's report. He did not get one. Instead, he got another hand-written note, this time from Dr. Cooper, stating that he was not presently able to return to work, and would be unable to return for a "prolonged and indefinite" period. Dr. Cooper wrote this note, at least in part, because Schippers told him Dr. Anderson had never released Schippers to return to work. Schippers delivered this note to Parrill at the plant, within a day of receiving it. Testimony of Schippers and Dr. Cooper; Exhibit 13.

24. Kranker again told Schippers that the company wanted a confidential physician's report. Schippers had this conversation with Kranker

on or before May 7, 1997, because May 7 was the second Wednesday after he delivered Dr. Cooper's note to Parrill. Schippers still went to the plant every other Wednesday to pick up a check. During this conversation, Schippers told Kranker he had given Dr. Cooper's note to Parrill. Schippers acknowledged to Kranker that he was aware of the company form for a confidential physician's report. He told her he would try to get the confidential physician's report. Between May 7 and May 12, he did not attempt to obtain a completed confidential physician's report from Dr. Cooper. Testimony of Schippers.

25. On May 12, 1997, Kranker asked Schippers to come to a meeting at the plant. The company's in-house counsel faxed a letter to Sheehy, also on May 12, 1997, telling him that the company had not received a confidential physician's report by April 18. The letter also stated that the company had not received the monthly confidential physician's report due by May 7. The letter went on to state that beginning May 8, 1997, Schippers' absence from work was unexcused because he had not provided the doctor's reports. The letter noted that Schippers, as of May 12, had "earned" 3 disciplinary points for unexcused absences. The letter advised that the company was suspending Schippers without pay for 3 days, and that if Schippers failed to provide a completed doctor's report by the end of the suspension (May 15, 1997), the company would terminate his employment for attendance violations. The company did not give Schippers a copy of the faxed letter on May 12. Testimony of Schippers; Exhibit 15.

26. At 4:30 p.m. on May 12, 1997, Schippers arrived at the meeting. Kranker and Parrill were present, but Schippers asked for union representation. The company then postponed the meeting until the next day. Testimony of Schippers.

27. On May 13, 1997, Schippers met with the company representatives, Kranker and Parrill, with a union representative, John Rogers, in attendance. Schippers brought a tape-recorder to the meeting, and taped the meeting (over the objections of the company). Testimony of Schippers; Exhibit 1 and transcription of exhibit 1.

28. During the meeting, the company gave Schippers a copy of the letter faxed to Sheehy the previous day. During the meeting, Schippers again stated that he did not believe his doctor had ever released him to return to work, and asserted that he was still off work on medical advice. Testimony of Schippers; Exhibit 1.

29. During the May 13 meeting, Schippers argued that he was not responsible for the failure or refusal of his doctors to provide confidential physician's reports on the company's form. Parrill offered the company's help

in getting the doctors to complete the appropriate form. Schippers did not respond to that offer. Parrill told Schippers that because the company did not receive a confidential physician's report by April 18, and did not receive another confidential physician's report by May 7, that Schippers now had earned 3 of the 4 disciplinary points necessary for termination. Parrill also told Schippers that unless Schippers provided a confidential physician's report by May 15, Schippers would have the fourth and final point, and the company would fire him. Schippers acknowledged that he understood. Schippers refused to sign the "Notice of Disciplinary Action" the company presented to him during the meeting. He received a copy of the notice. Testimony of Schippers; Exhibits 1 and 16.

30. After listening to the discussion of possible termination, Schippers again questioned why the company had placed him on a special attendance program. Schippers argued that after September 13, 1996, he had provided reports from his doctors, simply not confidential physician's reports on the company's form. Parrill explained that the reports Schippers had provided did not provide all of the information specified in the confidential physician's report. Testimony of Schippers; Exhibit 1.

31. Dr. Cooper treated other employees of the company. He regularly provided confidential physician's reports to the company. Schippers admitted, during the May 13 meeting, that although he had asked his doctors to complete the company's form, he had never told Dr. Cooper, or any of his other doctors, that his employer required him to provide the completed confidential physician's report. Testimony of Schippers; Exhibit 1.

32. During the May 13, 1997, meeting, Parrill also told Schippers that his accumulated sick leave had run out. He told Schippers that to obtain vacation and salary continuance, Schippers need to make the proper requests and fill out the proper forms. Kranker gave Schippers directions about where and from whom to get the proper forms. Testimony of Schippers; Exhibit 1.

33. On Friday, May 16, 1997, at approximately 11:00 a.m., Schippers gave the confidential physician's report, signed by Dr. Cooper on May 15, to the company. Schippers did not believe the company would fire him for not providing the letter on May 15. He instead thought the company could only give him half a disciplinary point because he brought in the report during the first four hours of his "shift" on May 16. He obtained the report from Dr. Cooper late on May 15. He decided not to call the company and that he would not take the report to the plant until the next day, since the plant office might already have closed. Testimony of Schippers; Exhibits 15, 19, 39, p. 14, and 40, p. 52.

34. Schippers never requested any accommodation that would have allowed him to continue working despite his medical conditions. Testimony of Schippers.

IV. Opinion

Montana law prohibits employers from discriminating against employees based on disability. §49-2-303(1)(a) MCA. Schippers' lung condition constituted a disability for purposes of the Act. Discrimination because of disability includes failure to make reasonable accommodation. An accommodation that would endanger the health or safety of any person is not reasonable. §49-2-101(19)(b) MCA.

When the employer believes a disabled employee expressly willing to continue work is unable to work, the employer must support that belief through an independent investigation. *Reeves v. Dairy Queen*, 287 Mont. 196, 953 P.2d 703, 711 (1998). Here, Schippers actively resisted the company's inquiries about returning him to work. He called Dr. Anderson's release to return to work a fabrication. He rejected Kranker's initial inquiry into what he might be able to do within the limitations of Dr. Anderson's release. He then rebuffed Kranker's subsequent inquiries into when and how he might return to work.

The federal regulations adopted pursuant to the Americans with Disabilities Act (ADA) provide suggested procedures for compliance with the reasonable accommodation requirement, following the statute itself. 42 U.S.C. §12111(9)(b). A suggested procedure for finding reasonable accommodation instructs that the employer should:

1. analyze the particular job involved and determine its purpose and essential functions;
2. consult with the individual with a disability to ascertain the precise job-related limitations imposed by an individual's disability and how those limitations could be overcome with reasonable accommodation;
3. in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
4. consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employer and employee.

29 C.F.R. §1630.9

In order for an employer to undertake these kinds of particularized analyses, there must be sufficient medical information to identify the particular limitations involved. Then the employee must cooperate with the employer to identify what he can do and what he cannot do. Here, the company properly placed the onus upon the employee to obtain the medical information. The company even offered to help obtain the information. Both in September of 1996 and in May of 1997, Schippers rebuffed those offers. Between the two offers, Schippers was uncommunicative and uncooperative. Schippers did as little as he thought he could do, while still maintaining his sick leave, to inform the company of his condition and prognosis. As a direct result of Schippers' conduct, the company had neither the medical information it needed, nor the cooperation of the employee, in order to accommodate his condition.

Schippers communicated one point very accurately to the company. He had no intention, from September 1996 through May 1997, of coming back to work in any capacity until he obtained a release from his doctors that he trusted. Under those circumstances, the company had no obligation to seek out an accommodation acceptable to Schippers. Schippers closed the door in every way possible to working at Imperial Holly Sugar while still under medical care for his lung disease. Schippers testified that Kranker told him, one time when the two were talking alone, that he had to provide a full medical release. This testimony is not consistent with the substantial weight of the evidence and is not credible. Schippers, not Kranker, insisted without exception that his doctors would not permit him to return to work. Schippers, not the company, responded to every request for information and every question about what he could do and when he could do it with "not until my doctors release me."

In his Human Rights Act claim, Schippers asserted that he should have received an accommodation. He asserted that the company should have found and offered him a method of returning to work despite his medical limitations. However, Schippers said, in his HRA complaint, "There was nothing available that was compatible with my restrictions and I remained on disability leave." Schippers, not the company, came to that conclusion and insisted on its correctness. Schippers led Kranker and Parrill to believe that he would not consider working so long as he had the restrictions given by Dr. Anderson, Dr. Cooper and other physicians.

Faced with an employee expressly unwilling to consider working until he heard his doctors tell him in terms he accepted that he could safely return to

the plant, the company had no obligation to do more than it did. It continued to seek medical information, in accord with its attendance policy. Finally, it fired Schippers for his failure to follow that policy. At no time did it have enough information to obligate it to inquire further about accommodation.

The company proved that it fired Schippers because of his failure to provide confidential physician's reports. The company needed those reports so it could evaluate both Schippers' ability to return to any job at the plant and his prospects of eventually returning to his original job. The company did not fire Schippers because of his disability. Had Schippers, even as late as 5:00 p.m. on May 15, 1997, made any effort to provide the company with timely information, he might still be an employee. Instead, he elected to rely upon his interpretation of the attendance policy. He already had 3 disciplinary points for unexcused absences. The company expressly told him that failure to provide the confidential physician's report by May 15, 1997, would result in the fourth point and result in his discharge. Yet, Schippers decided that he could turn in the report on the morning of May 16. Whether or not the company correctly interpreted the master agreement and its attendance policy, it did not fire Schippers because of his disability.

V. Conclusions of Law

- 1 The Department has jurisdiction over this case. §49-2-509(7) MCA.
- 2 Schippers failed to prove that the company discriminated against him in employment by reason of physical disability.

VI. Order

- 1 Judgment is found in favor of Respondent Imperial Holly Sugar, Inc., and against Glenn M. Schippers on his complaint that the company discriminated against him in employment by reason of his physical disability.
- 2 The complaint is dismissed.

Dated: July 1, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry