# BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

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| **Carole Nisbet**, Charging Party, vs. **Parkside X-Corp.**, a Montana corporation, Respondent. | ) | **Human Rights Act Case No. 9901008686**<br><br>*Final Agency Decision* |

## I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on October 7, 1998. She alleged the respondent, Montana Regional Orthopedics, LLC, discriminated against her when it dismissed her from employment because of her age and perceived disability. On May 7, 1999, the department gave notice Nisbet's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

On May 26, 1999, respondent filed a motion to correct its name to "Parkside X-Corp." Charging party did not object to the motion. The hearing examiner granted the motion and changed the name of the respondent. Final Prehearing Order, November 5, 1999, Sec. XII.

On July 19, 1999, the parties agreed to the department retaining jurisdiction of this case for more than 12 months after the complaint filing. The department reset the hearing in accord with the agreement of the parties.

This contested case hearing convened on November 8, 1999, in Missoula County, Missoula, Montana, in the offices of Mullendore & Watt, 310 West Spruce. Nisbet attended with her counsel, Peter Michael Meloy, Meloy & Morrison. The company attended through its president and designated representative, Dr. Robert Seim, with its counsel, Jeremy G. Thane, Worden Thane & Haines, P.C. The hearing examiner excluded witnesses on Nisbet's motion. Accompanying this decision are dockets of witnesses and exhibits. Counsel made telephonic closing arguments on November 9, 1999.

## II. Issues

The legal issue in this case is whether the company discriminated against Nisbet in employment either by refusing reasonably to accommodate her

limitations due to a disability or because of her age. A full statement of the issues appears in the final prehearing order.

## III. Findings of Fact

1. Carole Nisbet (date of birth 10/5/42) graduated in 1962 from radiology technician training. She began work in 1962 as staff radiology technician for St. Patrick's Hospital in Missoula, Montana. Between 1962 and 1989, she worked full-time or part-time as a radiology technician, for either the hospital or private providers. She began working for Missoula Orthopedic Associates, an association of orthopedic surgeons practicing in Missoula, in 1989. Dr. Robert Seim was one of the physicians in Missoula Orthopedic Associates in 1989. Testimony of Nisbet and Seim.

2. Parkside X-Corp ("the company") is a Montana corporation, in existence for 7 or 8 years. Seim is its president, a position he held since he and his wife formed the company. During its active existence, the company employed radiology technicians and leased equipment, in order to provide radiological services to the patients of orthopedic surgeons in individual practice and associated together as Missoula Orthopedic Associates. Testimony of Seim and Peterson.

3. The company employed Nisbet as a full time radiology technician since its inception in approximately 1991. The physicians in Montana Orthopedic Associates each hired their own office staff. All of the physicians sent their patients to the company (which maintained its place of business and its equipment on the same premises) for radiological services. Final Prehearing Order, Sec. IV, para. 1; testimony of Nisbet, Seim, Bisson, Jones, Humphreys, Bordner, Seim and Dorfler.

4. On November 17, 1997, Nisbet injured her cervical spine in a fall at work. A few days later, she fell again, away from work. Her injuries limited her ability to work, and her last day of work for the company was December 1, 1997. She filed a claim for workers' compensation. Dr. Howard Chandler, a neurosurgeon, performed surgery on her cervical spine on December 3, 1997. Following her surgery, she received treatment at Mountain West Rehabilitation under the supervision of Dean E. Ross, M.D. She received worker's compensation benefits in connection with the cervical spine injury and surgery. Final Prehearing Order, Sec. IV, para. 2; testimony of Nisbet.

5. On January 7, 1998, Seim informed Nisbet that he was hiring a temporary replacement but that Nisbet's job would be open until she was able to return. On or about January 16, 1998, Nisbet's physician released her to

light duty as of February 1, 1998, with a 50 pound lifting restriction. The company told Nisbet that there was no light duty work available for her. Exhibit 1; testimony of Nisbet and Seim.

6. On February 3, 1998, Seim informed Nisbet that he was having her position evaluated. Her position had no job description. Steve Achabal of the Crawford Consulting Agency performed the evaluation. Achabal included a lifting requirement of 100 pounds in the job description. Exhibits 3 and 15; testimony of Nisbet and Seim.

7. Seim refused to allow Nisbet to return to work, because he could not guarantee she would not have to lift 100 pounds. Nisbet had worked for the company since 1989, and as an x-ray technician since 1962, without ever needing to lift 100 pounds without assistance. Testimony of Nisbet and Seim.

8. On March 2, 1998, Dr. Chandler wrote a referral letter to Dr. Ross, a rehabilitation expert. Dr. Chandler stated his medical opinions about his patient:

> She has a stable, unimproved myelopathy. She is having some difficulty with gait and also getting up from a kneeling or sitting position. . . . . In my opinion, she would be a significant danger to her patients because of her incoordination if she has to assist significantly with patient transfers.

Seim received a copy of the letter. Exhibits 102 and 103; testimony of Seim.

9. On March 11, 1998, Dr. Ross wrote Dr. Chandler regarding Nisbet. Dr. Ross stated his medical opinions about his patient:

> Persisting cervical myelopathy secondary to the combination of her fall and underlying spondylosis, unimproved after decompression and stabilization surgery. I fully agree that for her own sake and that of her patients, it is not possible for her to return to her prior work as a radiology technician. . . . . I did not have other specific recommendations for therapy, but gave her cautious encouragement that over many more months, there may be further improvement in the degree of myelopathy, though not to the extent that would warrant a return to her former work.

Seim received a copy of the letter. Exhibit 104; testimony of Seim.

10. The company relied upon the physicians' opinions about Nisbet's condition and hired a replacement for Nisbet on April 15, 1998. The

company has not had a regular position vacancy since that time. Final Prehearing Order, Sec. IV, para. 3; testimony of Seim.

11. On June 5, 1998, after undergoing a functional capacity eamination (FCE), Nisbet received a release to return to her position with undefined "minor modifications." Achabal reviewed the job description and the FCE and agreed that Nisbet would be able to return to work. Dr. Ross, on or about July 1, 1998, released Charging Party to return to her prior position. This was followed by a Return To Work Report from Western Montana Managed Care Network apparently signed by Dr. Chandler dated August 4, 1998. This report indicated Charging Party was able to return to work without restrictions. On August 10, 1998, Nisbet received a letter from Dan Keith, her case worker at Western Montana Managed Care, stating that she was being dismissed from his care and released to work with a lifting restriction of not over 100 pounds.[1] Exhibits 4 and 105; testimony of Nisbet.

12. Nisbet asked for her job back. On September 10, 1998, Nisbet received a letter from Ron Peterson, stating that she had been permanently replaced as of May, 1998, but would be given preference for any openings consistent with her physical condition. The person who replaced Nisbet and the other x-ray technician are both younger than Nisbet, who was 55 years old. Final Prehearing Order, Sec. IV, paras. 3 and 4; exhibits 7, 8 and 9; testimony of Nisbet, Peterson and Seim.

13. During the past 18 months, the individual surgeons associated together as Missoula Orthopedic Associates joined their practices, and the practices of other interested physicians, into a limited liability company, Montana Regional Orthopedics, LLC. Montana Regional Orthopedics, LLC, has also taken over the radiological services previously provided by the company. Two radiology technicians who worked for the company, Bonnie Doerfler and Debbie Shannon, now work for Montana Regional Orthopedics, LLC or a subsidiary. Montana Regional Orthopedics, LLC, hired as chief executive officer a non-physician management professional, Ron Peterson. Peterson makes hiring decisions for Montana Regional Orthopedics, LLC and any subsidiaries. The company no longer operates. Testimony of Seim and Peterson.

[1] The conflict between a "full release" from the physician and a continued 100 pound lifting restriction is not pertinent to the decision.

## IV. Opinion

Montana law prohibits discrimination in employment because of age or disability. §49-2-303(a) MCA. Discrimination based on disability includes the failure to make reasonable accommodation for disability. The determinative issue in this case is whether the company unlawfully discriminated against Nisbet by refusing to accommodate her restrictions after surgery. The company did refuse to accommodate her restrictions, but the issue of reasonableness is moot. The case turns on whether Nisbet's condition after surgery constituted a disability. The age discrimination claim turns on whether the company legally replaced Nisbet due to her physical limitations.

*Nisbet's Temporary Limitations Were Not Substantially Limiting*

Montana law defines "physical or mental disability" as:

> (i) a physical or mental impairment that substantially limits one or more of a person's major life activities;
> (ii) a record of such impairment; or
> (iii) a condition regarded as such an impairment.

§49-2-101(15)(a), MCA.

Substantial limitation must be severe, i.e., involving more than simply the inability to return to the prior job. It involves, instead, the inability to pursue a broad range of jobs, so that the actual employment prospects of the claimant are *substantially* limited. *Sutton v. United Airlines, Inc.*, 527 U.S. ___, 119 S.Ct. 2139, 2152, 144 L.Ed.2d 450 (1999); *Thompson v. Holy Family Hospital,* 121 F.3d 537, 540 (9th Cir. 1997); *Butterfield v. Sidney Public Schools*, HRC No. 9801008296 (1999). Nisbet limited her proof—the job description, the doctor's letters, her efforts to gain employment—to her former job as a radiology technician for the company, in the same fashion as Sutton's allegations were limited to the job of global airline pilot. She did not prove limitation in a broad range of positions.

Substantial limitation must also be either permanent or of sufficient duration to have a significant impact. Federal regulations note that temporary, non-chronic limitations "are *usually* not disabilities." 29 C.F.R., Part 1630 App., §1630.2(j) [emphasis added]. Montana law follows federal interpretations and decisions from other jurisdictions, that a temporary impairment *is* a substantial limitation to a major life activity if it interferes for

a long enough time, so the worker has trouble securing, retaining or advancing in employment. ***See, e.g.***, *Reeves v. Dairy Queen, Inc.*, 287 Mont. 196, 205, 953 P.2d 703, 708 (1998); *Martinell v. Montana Power Company*, 268 P.2d 292, 306, 886 P.2d 421, 430 (1994).

The question is both one of duration and of severity. Nisbet's argument that Montana law compels a determination of disability whenever an employer restricts employment because of medically prescribed physical reasons is over broad. Temporary limitations that interrupt work are not always disabilities, and limitations that prevent employment in a particular job are not always disabilities.

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

There are a multitude of cases decided by federal courts and courts in other states, involving various kinds of conditions--from complications arising out of pregnancy to carpal tunnel syndrome--determined not to be disabilities.[2]

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[2] *Heintzelman v. Runyon*, 120 F.3d 143 (8th Cir. 1997); *Robinson v. Neodata Services*, 94 F.3d 499 (8th Cir. 1996); *Sanders v. Arneson Products*, 91 F.3d 1351 (9th Cir. 1996); *Roush v. Weastec, 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.)***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.*, 956 F.Supp. 768 (N. D. Ill. 1996); *Gerdes v. Swift-Eckrich*, 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*, 934 F.Supp. 628 (S.D.Ny. 1996); *Mowat-Chesney v. Children's Hospital*, 917 F.Supp. 746 (D.Colo. 1996); *McCollough v. Atlanta Beverage Co.*, 929 F.Supp. 1489 (N.D.Ga. 1996); *Muller v. Auto. Club of So. Cal.*, 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 (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. Dpt. of Int.*, 813 F.Supp. 61 (D.DC. 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).

The point of the cases is that determination of whether and when a temporary condition is a disability is a fact-driven determination, made on a case-by-case basis. Montana law follows the same fact-driven approach. *Butterfield*, ***supra***; *Adamson v. Pondera County*, HRC Nos. 9501006838 & 9601007417 (1999).[3]

The company barred Nisbet from returning to work until she obtained a medical release consistent with the job description. After the surgery, she was off work without a full release for, at most, 246 days (December 1, 1997 until August 4, 1998). The last 60 days (starting June 5, 1998) came after a release to return to work. Before that work release, Nisbet would not have been able in any event to work in her radiology technician position, based upon the express opinions of her treating physicians. Thus, the time of lost work after the surgery involves 6 months.

Nisbet did not retain her job. However, the company replaced her because it had two doctors telling it that Nisbet could not safely return to *her specific job*, based upon a job description and actual medical evaluation. She did not lose her job because of temporary restrictions. She lost her job because her physicians stated their medical opinions that she *never* could return to that specific job.

The Montana Supreme Court relies on federal law to decide new issues under the Montana Human Rights Act. *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200, 204 (1990); *Snell v. Montana Dakota Util. Co.*, 198 Mont. 56, 643 P.2d 841 (1982). The same regulatory appendix--indeed, the same section--cited in *Martinell* can be quoted more extensively on the precise question of the standards by which a temporary condition is determined to be a disability. In a subsection addressing the meaning of the language "substantially limits"[4], the federal guidelines note that verifying the existence of a physical impairment "is only the first step in determining whether or not an individual is disabled." The explanatory comments are applicable to Nisbet's claim:

> Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises

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[3] In *Butterfield*, the Commission reversed a department decision finding disability. In *Adamson*, the Commision affirmed a department decision finding no disability. In *Butterfield*, the Commission relied upon the requirement that the physical limitation restrict the claimant from whole categories of work rather than simply the job at issue in the case. In *Adamson*, the temporary nature of the limitations was the pivotal fact. Both cases illustrate that a claimant must prove substantial limitation, with regard both the severity and duration.

[4] The federal language mirrors the language quoted in §49-2-101(15)(a), MCA.

to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

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

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

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

. . . .

*Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors 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 C.F.R., Part 1630 App., entitled "Subtitle B--Regulations Relating to Labor, Chapter XIV--Equal Employment Opportunity Commission, Part 1630--Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act" §1630.2(j).

The primary difference between Nisbet's back surgery and the myriad cases from other jurisdictions is that Nisbet's recuperative period was longer

than many off-work periods in those cases. The loss of approximately six months' wages is a very serious matter for the average worker. Under the facts of this case, that loss does not rise to a disability. Nisbet's temporary physical impairment from her surgery falls short of constituting disability.

*The Company Did Not Perceive Nisbet as Substantially Limited*

A condition the employer regards as impairment substantially limiting a major life activity is a disability. §49-2-101(15)(a)(iii) MCA. But the simple refusal to keep the employee in a particular job does not establish that the employer regards the impairment as a disability: "An employer does not necessarily regard an employee as handicapped simply by finding the employee incapable of satisfying the demands of a particular job." *Sutton*, ***op. cit.***; *Forrisi v. Bowen*, 794 F.2d 931, 934-35 (4th Cir. 1986).

Montana uses the same approach:

> The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding 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 demonstrated the employer did not regard an employee's acrophobia (fear of heights) as a "substantial limitation" in employability, but rather as a condition rendering the employee unsuited for one position. *Forrisi*, 794 F.2d at 935.
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> Hafner argues that he was "regarded as" physically disabled because Conoco viewed his physical impairment as a limitation of his overall ability to work in general. The Conoco personnel director testified by deposition that he regarded Hafner as "restricted ... in basic job functions that would limit his performance of work or could limit his performance of work." Under the federal standard, which we adopt, and based on the testimony of the Conoco personnel director, we conclude that Hafner has established that Conoco "regarded" him as physically disabled.

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

The company viewed Nisbet as unable safely to perform her specific job. Unlike the employer in *Reeves*, the company had relied upon occupational safety experts as well as medical professionals in reaching this view. The

company had obtained the kind of particularized analysis necessary for an employer, under *Reeves*. The company did not consider Nisbet disabled, merely impaired within a limited scope that precluded return to her specific job. This distinction may seem inconsequential to the employee who lost her job because of her impairment. It remains a legally valid distinction utilized under Montana law. ***E.g.***, *Hafner*, ***supra***; *Butterfield*, ***supra***; *Adamson*, ***supra.***

Nisbet presented evidence that she had never faced an actual 100 pound unaided lift in all her years as a radiology technician. Had she proved disability, the reasonableness of the company's refusal to accommodate the lifting restriction would be relevant. Certainly, the medical opinions of the two physicians regarding patient and employee safety would support the company's position. Had the fact-finder concluded that the company was unreasonable, then the question of appropriate relief against an apparently defunct employer would be relevant. However, since Nisbet's proof of disability failed, the inquiry need go no further into any of these questions.

*Nisbet Did Not Prove Her Age Discrimination Claim*

The company denies that age was a factor in replacing Nisbet. Where there is no directi evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas.*[5] ***See, e.g.***, *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); J*ohnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *Euro.Health Spa v. Human Rights Com'n*, 212 Mont. 319, 687 P.2d 1029 (1984).

The first tier of *McDonnell Douglas*, ***op. cit.***, required Nisbet to prove her prima facie case by establishing four elements:

> (i) that [s]he belongs to a [protected class] . . .; (ii) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [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.

*McDonnell Douglas*, ***supra***, 411 U.S. at 802, 93 S.Ct. at 1924.

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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. The four elements may not necessarily apply to every disparate treatment claim. Thus, Nisbet needed to prove that she was older than the women who replaced her, that she was as qualified to remain in her job as the women who replaced her, and that despite her qualifications, the employer did replace her with the younger women.[6]

Nisbet failed to prove her claim that she was qualified to return to work. Indeed, at the time the employer replaced her, it reasonably believed that Nisbet's limitations were permanent and resulted in safety risks for patients and Nisbet should she return to work. Thus, Nisbet did not establish a prima facie case and cannot prevail on her age discrimination claim.[7]

## V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. Nisbet did not prove that the company discriminated against her in employment based on her age and disability.

## VI. Order

1. Judgment is found in favor of Parkside X-Corp. and against Carole Nisbet on the charges that the company discriminated against Nisbet based on age and disability when it dismissed her from her position as x-ray technician.

2. The complaint is dismissed.

Dated: February 7, 2000.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

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[6] ***Cf.***, *Martinez v. Yellowstone County Welfare Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981) ***citing*** *Crawford v. West. Elec. Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

[7] Nisbet argued that she was "dismissed" from her job on September 10, 1998, when she was formally notified the company had replaced her. Although the date attributable to her "dismissal" is not germaine to the decision, the evidence did reflect that she was replaced effective May 1998.