

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

Jeannine Brown,)	
Charging Party,)	HRC Case No. 0011009575
versus)	<i>Final Agency Decision</i>
Federal Express Corporation,)	
Respondent.)	

I. Procedure and Preliminary Matters

Jeannine Brown filed a complaint with the Department of Labor and Industry on February 6, 2001. She alleged that Federal Express Corporation discriminated against her because of her disability when it refused to return her to a position as a part-time courier in Helena, Montana, otherwise refused to accommodate her disability and eventually terminated her employment effective August 12, 2000. On August 10, 2001, the department gave notice Brown's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on December 10-12, 2001, in Helena, Lewis & Clark County, Montana. Brown attended with her counsel, Andrew D. Huppert, Lewis Huppert & Slovak P.C. FedEx attended through John Lahaderne, its designated representative, with counsel, Teri A. Walter and Thomas E. Hattersley, Gough Shanahan Johnson & Waterman. Brown's counsel filed the final post-hearing brief on May 9, 2002. The transcript of hearing reflects the witnesses who testified and the exhibits the parties offered. The hearing examiner's docket accompanies this decision.

II. Issues

The issue in this case is whether FedEx illegally failed reasonably to accommodate Brown's disability when it refused to return her to work in a position consistent with her limitations. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Federal Express Corporation (FedEx) is an express package delivery company. It uses both air and ground transportation. It relies on its reputation and its ability to provide prompt and reliable pick up and delivery of packages. A significant portion of its business is its guaranteed overnight delivery service. Its couriers are central to prompt delivery and pick up of

packages. FedEx employs full-time and part-time couriers. Full-time couriers work between 35 and 55 hours per week. Part-time couriers work between 17.5 hours and 30 hours per week.

2. FedEx hired Jeannine Brown on October 1, 1984. Brown worked initially as a part-time courier. Following FedEx's customary practice, she signed a letter of understanding that as a part-time courier FedEx would normally schedule her to work at least 15 and not more than 32 hours per week. FedEx permitted a part-time worker who regularly worked more than 32 hours a week to file a protest as an "abused part-time worker." The protest procedure permitted a part-time worker who worked full-time hours while having only part-time benefit entitlement to apply for conversion of the job to full-time. Brown filed a protest within a few months after starting work as a part-time courier, and FedEx ungraded her job to full-time courier after she had worked for approximately six months.

3. From her upgrade until February 1998, Brown regularly worked from 6:30 a.m. to 3:30 p.m. as a full-time courier based at the Helena, Montana, FedEx facility. She frequently worked overtime. Her duties included unloading airplanes, sorting packages, delivering packages and loading packages into the airplane at night. She also worked as a ramp agent for four to five years which involved work at the loading ramp for one to two hours per day, in addition to her regular courier duties.

4. Tim Petrick was Brown's direct manager and supervisor. Petrick supervised 15-16 employees in Helena in four positions: ramp agent, part-time courier, full-time courier and customer service agent. He also managed the Butte station and usually was in Butte two days each week.

5. John Lahaderne was the Senior Manager and Petrick's supervisor. Lahaderne oversaw the daily operations of four FedEx stations in Montana, including Helena.

6. FedEx couriers had input into how routes were structured. They often met with the local manager to determine the most effective way to schedule and divide the routes in the Helena service area.

7. Brown was an excellent employee. She received at least 18 unsolicited, written accolades from superiors and customers over the course of her 13½ years of work for FedEx until February 1998. Petrick considered her a good worker who got along very well with customers, was dedicated and received "well above satisfactory" reviews. She enjoyed every aspect of her job as a courier because it provided an opportunity to work outdoors and develop

friendship, loyalty and trust with her customers and coworkers. She planned to remain a courier for FedEx until she retired.

8. On February 11, 1998, Brown was making deliveries, driving her FedEx delivery vehicle on Lower Confederate Gulch, a two-lane dirt road in the rural area outside of Helena. Another vehicle came over the crest of a hill in the middle of the road and collided head-on with Brown's vehicle. The accident was the fault of the driver of the other vehicle.

9. In the accident, Brown suffered a closed head injury, a fractured right ankle, an avulsion of her anterior cruciate ligament in her right knee, abrasions on the left side of her body and face, a laceration of her tongue and other contusions, bruises, cuts and abrasions. She was hospitalized and required extended physical rehabilitation.

10. On February 12, 1998, FedEx placed Brown on workers' compensation leave. She received workers' compensation benefits including temporary total disability payments for the period from February 12, 1998 through September 14, 1998.

11. On March 5, 1998, FedEx Human Capital Manager Terry Lopez sent Brown a letter outlining her benefits, leave issues and responsibilities and identifying a contact person. Lopez' letter gave Brown notice of FedEx's Position Retention policy, which provided that positions for employees on medical leave remained available for their return for a minimum of 90 calendar days, after which FedEx could fill the position with another employee. Brown knew that she would require a longer recovery period than 90 days. She filed an internal grievance with FedEx, requesting that her employer hold her courier job open more than 90 days. FedEx agreed that she could return to her courier job within one year after her accident.

12. After her vehicular accident, FedEx asked Brown to sign a medical release to allow it direct access to her medical information through her treating physicians. Brown refused to provide the release because she wanted to control what information FedEx had about her condition and status. She never gave FedEx the release.

13. Brown worked hard for months on her rehabilitation, enduring multiple surgical procedures that interrupted her recovery and lengthened her rehabilitation. She focused on her recovery, narrowing her life activities to direct all of her energy toward that recovery. She made a recovery that exceeded the expectations of her physicians. Her motivation for working as hard as she did was, in part, to return to her courier job at FedEx. While recovering, she developed persistent frontal daily headaches, of varying

severity. Brown received treatment and evaluation of her headaches from her primary treating physician, V. Lee Harrison, M.D., and a neuropsychologist, two neurologists, a psychologist and a neuro-feedback specialist. She also utilized daily physical workouts to control her headaches.

14. FedEx had a formal temporary return to work (TRW) program. The program permitted a 90-day temporary return to work by an injured employee who would perform modified light duties. FedEx designed the program to permit a worker with an industrial injury to return to work during the course of recovery. FedEx recognized that the longer an injured employee was absent from work, the less likely it was that the employee would ever return to full employment. Because FedEx was a large employer, it was able both to find appropriate tasks for injured workers who returned to modified light duties under the program and adequately to monitor those workers to verify their abilities to work safely. FedEx absorbed the costs of creating and filling these modified light duty positions in order to return more of its injured workers to full employment sooner, saving it both training costs and disability benefit costs. FedEx did not intend to make any modified light duty job within the TRW program a permanent position. If an employee at work under the TRW program did not receive a medical release to return to the pre-injury job by the end of the 90 days, FedEx placed the employee back on the same form of leave of absence as before commencing the program.

15. Effective September 14, 1998, FedEx returned Brown to work under the TRW program. Brown enthusiastically participated in the TRW program, recognizing that it offered her a “way back to my life, so it was wonderful.”

16. In order to participate in the TRW program, Brown obtained a work release from Dr. Harrison. She released Brown to work 6 to 8 hours a day with a 20-pound lifting limitation. Dr. Harrison did not know if Brown actually could work 6 to 8 hours a day. Brown was anxious to return to work and Dr. Harrison gave Brown the release because of Brown’s progress and her diligence in her rehabilitation program. In the release, Dr. Harrison expressed continued concern about the persistent and sometimes severe headaches, persistent bilateral elbow and shoulder pain, lack of regained full function in the right ankle and knee, developing pain in the left ankle and knee and low back pain. Dr. Harrison emphasized that Brown should not be carrying full loads or working full time.

17. Under the TRW program, Brown initially worked for 5 weeks, 4 hours a day, as a dispatcher and customer service agent. The duties she assumed involved no deliveries and less demanding work than courier duties.

18. In October 1998, Brown requested that she be permitted to work as a part-time courier under the TRW. On October 5, at Brown's request, Dr. Harrison provided a release for her to work as a courier ("a return to work in a Federal Express Truck"), effective October 12. On October 12, Dr. Harrison filled out a FedEx functional capacities evaluation form, reporting that Brown was able to lift, push or pull 75 pounds continuously and was able to use her hands and feet for repetitive action without restriction. Dr. Harrison believed that Brown's limitations did not make her a danger in her courier job. She doubted that Brown could work full time with her existing limitations, but believed that the only way to verify Brown's ability to perform her courier job was to let her try. Because of Brown's headaches, knee pain and ongoing rehabilitation, Dr. Harrison wrote Brown two releases, one limiting Brown to half-time work, the other without such a time limitation. Dr. Harrison left the decision of how many hours Brown could work for Brown to decide. Brown provided both releases to FedEx.

19. FedEx generally did not assign an injured worker to courier work during a TRW period, because it was difficult to monitor the employee's progress while the employee was on the road making deliveries. Nevertheless, Petrick believed allowing Brown back into her truck provided him with a good opportunity to assess her ability to return to work as a courier. He rode with her to assess her work capabilities. He was confident that he could use her as a courier to make deliveries on the road, based upon the information he had regarding her limits, which he viewed as solely a time restriction. Petrick decided to return Brown to limited courier duty. Lahaderne agreed that this was a good opportunity to see whether Brown could work again as a courier.¹ Petrick agreed to allow Brown to resume limited driving duties (approximately 2 hours per day) during the balance of her 90-day TRW period.

20. Earl Phillips had replaced Terry Lopez as the FedEx Human Capital Manager having oversight for the Helena operation. Petrick contacted Phillips on October 20, 1998, indicating he intended to use Brown on a part-time delivery route (with her doctor's approval). Petrick noted that Kelly and Lahaderne had concurred.

21. Phillips had become involved in Brown's workers' compensation case in June 1998 and was thereafter the Human Capital Manager handling her case for FedEx. Phillips was FedEx's primary contact with Sedgwick Claims Services, the claims adjusting service on Brown's workers' compensation claim.

¹ Lahaderne's supervisor, Tim Kelly, also agreed with the decision to allow Brown to work part-time as a courier.

22. Phillips had no input into structuring courier routes or determining courier schedules and hours. He was not involved in the decision to create or eliminate courier positions and did not participate evaluating an individual employee's job performance. Phillips knew that Petrick was in the best position to assess a Helena FedEx employee's job performance and provide a yearly evaluation. Phillips knew that the TRW program was essentially a work-hardening program, providing an opportunity for an employee to develop and demonstrate over time the ability to return to the pre-injury position with FedEx. He knew that the TRW program gave local managers the opportunity to monitor and verify how injured workers could function as they recovered.

23. Nonetheless, Phillips immediately rejected Petrick's decision. He did so because he believed (1) an essential function of the courier position was the ability to work the hours specified in the job descriptions, to preserve the flexibility of the routes; (2) the nature of the courier position made monitoring Brown's performance and progress difficult and (3) Petrick, Lahaderne and Kelly "went against" an unwritten corporate policy by allowing Brown to go back to work as a part-time courier during the TRW. Petrick implemented his decision despite Phillips' disagreement.

24. Beginning October 26, 1998, Petrick assigned Brown limited courier duties (approximately 2 hours per day) during the balance of her 90-day TRW period. Brown was able to perform her duties as a part-time courier and had no difficulty with the lifting requirements of the job, including lifting packages containing automobile car parts weighing up to 75 pounds. Brown did not perform all the job duties of the courier position, and she knew at the time that it was not typical for a worker to resume work as a courier during the TRW program.

25. Brown "felt great" working as a part-time courier during the balance of her TRW period. She viewed her return to work was a "real celebration" for her and her customers. Everybody was happy to see her, and she felt that people were rooting for her. She felt she had risen to the occasion, and would now be able to return to her full-time courier job and her life, even though the debilitating headaches persisted.

26. Brown continued to experience severe headaches while driving as a courier during the TRW period. She contacted Dr. Harrison in both October and November 1998 complaining of the headaches. Because of the headaches, Brown had difficulty working more than half a day at a time. She exercised the prerogative Dr. Harrison had given her, limiting her work to "half-time" (which she and Dr. Harrison defined as up to 5 hours a day). Despite the daily

headaches, she successfully completed the 90 days of work under the TRW program, working part-time as a courier.

27. In the second week of December 1998, at the end of the TRW program, Brown had not reached maximum medical improvement. Neither Brown nor her physician had advised FedEx that her hours restriction might be permanent. Dr. Harrison hoped in December of 1998 that Brown's condition would improve and her headaches would no longer be a problem.

28. Pursuant to its policy regarding return to the pre-injury job, FedEx normally would have placed Brown back on workers' compensation leave at the conclusion of her TRW program. Brown told Petrick she wanted to continue working as a part-time courier within her 5 hour per day restriction, even though this meant she would be demoted to a part-time status. Brown did not mind the demotion. She wanted to pursue the opportunity to work part-time to sustain her career with FedEx while trying to work back to full time capacity.

29. Petrick decided to assign Brown as a part-time courier. He had observed her safe operation of the vehicle and her completion of deliveries, and her customer service "was as good as it always had been." Petrick then sent an e-mail to Phillips on December 12, 1998, reporting that Brown would return to work on December 14, with a change of status from full-time to part-time courier, since her doctor had released her to work part-time hours without any restrictions.

30. Brown returned to work at Fed Ex as a part-time courier on December 14, 1998. On her first day back, she received a call from Petrick requesting that she come into the office and call Phillips.

31. Phillips objected to Petrick's decision to allow Brown to keep working as a part-time courier. He e-mailed his objections to Lahaderne, Kelly and Petrick on December 14, 1998. His concerns were that Brown had not reached maximum medical improvement and still had headaches and an uncertain final prognosis on her right knee. He also had questions about whether FedEx would or should accommodate Brown's physical limitations, within the scope of the Americans with Disability Act.

32. FedEx normally did not restructure or create a courier route without the prior input of couriers, senior management, and engineers. FedEx viewed the process of creation of a new permanent route as a significant business decision with many implications. It added head count to the station, incurring additional salary and benefit expenses. FedEx required a formal requisition process in order to hire a new employee and create a new position at the

station. Multi-level input addressing the delivery stops involved and the adjoining existing routes was a prerequisite to a decision about adding or restructuring routes. The couriers, the manager, the senior manager and an engineering specialist examine the proposed new or restructured route and compare it with current and recent delivery patterns. A manager could not routinely create a part-time route by fiat for a particular employee. Petrick had visited with the local couriers and defined an initial part-time route for Brown with their input. He had not otherwise followed the normal process for creating a new route in returning Brown to work.

33. Phillips made the unilateral decision to overrule Petrick and pull Brown off the road on December 14, 1998. He ordered Brown “out of the truck right now” and told her that she would have to “go out on long-term disability.” His actions were consistent with FedEx policy regarding the TRW program, since Brown did not have a release to return to her pre-injury job and had not reached maximum healing. His actions were also consistent with the routine practice of FedEx regarding prerequisites (which Petrick had not satisfied) regarding creation of new courier routes.

34. Brown was devastated. She felt she had passed a major milestone in her recovery. Now, when she had already begun regular part-time employment, Phillips had taken it back from her. She feared that Fed-Ex would never let her come back to work.

35. Dr. Harrison pronounced Brown at maximum medical improvement on February 4, 1999, stating that Brown was at maximum medical improvement and was “fully capable” of performing all of the physical requirements of her job as a courier, including lifting up to 75 pounds. Dr. Harrison also reported that full 8 to 12-hour work days were not acceptable for Brown. The headaches had not resolved. Brown could not work more than half-days. Although physical activity and rest sometimes abbreviated or ameliorated the headaches, the daily onset of intense headaches restricted Brown to 5 hours of effective work time. Her ability to work or engage in other major life activities then ceased for 16-18 hours, effectively until the next day. Brown’s report to her doctor of the continuing headaches resulted in the only limitation on her return to employment, a limit upon the hours per day she could work.

36. Dr. Harrison clarified her release in a February 11, 1999, functional capacities evaluation, in which she confirmed that Brown was at maximum medical improvement, could lift and carry up to 75 pounds continuously, but was limited to working 4-5 hours per day. Dr. Harrison placed no other

restrictions on Brown's employment. The limitation of hours applied to all jobs, from sedentary to heavy.

37. Dr. Harrison knew the physical requirements of Brown's courier job when she released Brown in February 1999. Dr. Harrison reviewed the official FedEx courier job description and found it entirely consistent with her understanding of the physical requirements for a FedEx courier when she released Brown to work in February 1999. Brown never discussed any FedEx jobs other than the courier jobs with Dr. Harrison.

38. In February 1999, one year after Brown's injury, FedEx filled her full-time courier position with another employee. FedEx behaved reasonably in doing so, properly addressing a business necessity.

39. On February 23, 1999, Brown met with Phillips, Lahaderne and Petrick in Helena. She requested that FedEx return her to work as a part-time courier in the Helena operation. Petrick was ready to hire Brown for a part-time courier's position, on the modified route he had created specifically for her return. He believed Brown could perform that job, and that he could accommodate her by assigning her to that job. He believed that any problems resulting from Brown's limitations on daily working hours could be resolved by the current staff at the Helena station. Lahaderne deferred to Petrick. Phillips did not accept Petrick's view. Brown's limitations capped her daily work availability at 5 hours, and limited her weekly work availability to 25 hours. Even though this was within the specified range for a part-time courier, Phillips insisted that every part-time courier had to be able to work at least the 30 maximum hours specified in the job description, divided in all possible fashions over the work week. He therefore rejected Brown's pleas to return to work as a part-time courier in the Helena operation, despite the readiness of the station manager to hire her and schedule her with her limitations.

40. After Phillips rejected her request to return to work as a part-time courier in the Helena operation, Brown told Phillips, Lahaderne and Petrick, that she would have to "go out and find work." She asked Lahaderne for a letter of recommendation. Lahaderne agreed to write one for her. He never did. She never followed up on the conversation.

41. Brown told Phillips at the end of the February 23 meeting that she wished to file a grievance before the Federal Express Human Capital Management panel. Brown specifically asked that the panel accommodate her request to go back to work as a part-time courier, four to five hours a day, in

the Helena operation. Brown attempted to contact Phillips several times after this meeting to follow up on the grievance. She never received a response.²

42. FedEx had a specific procedure for addressing employee requests for reasonable accommodations. The procedure called for FedEx to notify the employee that she had reached maximum medical improvement and that she had 90 days in which to find a position within FedEx that met her limitations and restrictions. Under the procedure, Phillips was responsible to send Brown a bulletin of internal job postings called "Career Opportunities" every week. Brown could apply for any FedEx position for which she felt qualified and able. Phillips then was to send a description of Brown's restrictions and limitations to the hiring authority for the position. If the hiring authority concluded an accommodation was possible, FedEx would make a job offer. If the hiring authority believed no accommodation was possible, Phillips then was to notify Brown of that determination.

43. Phillips did not begin this procedure in February 1999 because he was not content with Dr. Harrison's reports that Brown was at maximum medical improvement and could work 4-5 hours per day. Phillips believed he needed information from the adjusting agency on Brown's workers' compensation claim regarding Brown's limitations and MMI status. Phillips reasonably concluded that more information was necessary, because Dr. Harrison's reports to date were internally incomplete and in conflict with regard to the degree of limitation involved.

44. On February 23, 1999, Joanne Rubenstein of FedEx called Dr. Harrison requesting clarification of the medical information provided about Brown. Dr. Harrison refused to provide any clarification to FedEx because she did not have an appropriate consent to release of medical information from Brown.

45. Phillips contacted Sedgwick Claims Services and requested they obtain additional information, given the conflicting releases from Dr. Harrison. Phillips acted reasonably in pursuing his questions about the medical information, since FedEx could not obtain the information directly from Dr. Harrison. As the compensation adjusting agency, Sedgwick had the legal right to obtain medical information from Dr. Harrison. Sedgwick instead elected to obtain an independent medical evaluation of Brown. Sedgwick told Phillips it was obtaining the IME.

² Phillips testified that the local Human Capital Management Committee met and discussed Brown's request for an accommodation, without generating any written record of the decision. It is not credible that FedEx would fail completely to document the disposition of an employee grievance regarding return to work, purportedly reached at a committee meeting.

46. At Sedgwick's request, Brown attended and cooperated in an independent medical evaluation in Missoula, Montana on May 4, 1999. Sedgwick received the report on May 17, 1999. The report confirmed that Brown had been at maximum medical improvement since Dr. Harrison declared her so in February.

47. Although Phillips would not have hired Brown for a part-time courier position in May 1999, he could have started the accommodation process had he obtained the report at that time. He could have written Brown in May 1999, notifying her she was at maximum medical improvement and that she had 90 days to find a position with FedEx that met her limitations. He could have sent Brown career opportunities and told her she could apply for openings at FedEx. Because he did not receive the report, he took no action.

48. Phillips did not follow up with Sedgwick to determine when the IME report would be generated or to obtain the report itself. He waited for Sedgwick to provide the report. Sedgwick did not provide the report until May 2000. Whether the failure resulted from lack of diligence on the part of Phillips or on the part of Sedgwick, it was not reasonable for FedEx to delay confirmation of Brown's recuperation and limitations for the extra year.

49. A part-time courier position opened in the Helena operation in the summer of 1999. FedEx filled the position on July 4, 1999, hiring Christopher Hendrix. Brown received no notice of the opening. She first heard about the position after FedEx had filled it. Had she received timely notice, she could have applied for the position. Petrick would have hired her (for the same reasons he was willing to hire her in February) unless Phillips had directed him not to do so.

50. After Dr. Harrison released her to work in February 1999, Brown never applied for, asked for or sought any position at Federal Express other than as a part-time courier in the Helena operation. She no longer trusted FedEx. She did not believe that Phillips would permit Petrick to hire her. Distraught at FedEx's treatment of her, she was now unwilling to accept any position with FedEx other than a part-time courier position in the Helena operation. She was unwilling to seek comparable positions with other delivery services because they did not pay as well and were (in her opinion) abusive to their workers as well as of a lower caliber than FedEx as employers.

51. As a result of her injuries, Brown had a physical impairment that substantially limited her major life activities, including working, to a maximum

of 4 to 5 hours per day.³ She had a disability. Until November 2000 [see subsequent findings], Brown was limited to 25 hours a week in any job, including work as a part-time courier, because of her headaches. FedEx required part-time couriers to be able to work up to 30 hours a week. Part-time couriers could work even greater numbers of hours, to qualify for conversion to full-time (as Brown originally did), but FedEx required 30 hours of availability per week. Even if FedEx scheduled a courier to work a 4-hour shift, that employee might instead work more hours to complete the assigned deliveries, for any number of reasons. If a part-time employee could not work more than the scheduled hours, it could be difficult to find another courier to cover the shift, and FedEx might face either increased labor costs or delays in delivery of the packages.

52. Petrick, the Helena station manager, believed that he could accommodate Brown's hours restrictions without unreasonable problems. He based this belief upon his knowledge of the operation and his knowledge of the cooperation between the employees (including Brown). Although there were no vacant part-time courier positions available in February of 1999, Petrick had created a part-time route to assign to Brown, with the concurrence of the other couriers in the Helena operation. Petrick was the management representative in the best position to evaluate and decide whether FedEx could provide Brown with a reasonable accommodation by modification of the hours requirement. The ability to work up to 30 hours a week as a part-time courier was not an essential job function for Brown to work in the Helena operation in that capacity in 1999.

53. The primary factor limiting Brown to part-time work was the severity of her headaches. That condition has persisted since February 1999, and that the headaches remain Brown's primary limiting factor for employment. Brown has tried every available mode of treatment to diminish her headaches, but they remain a chronic daily problem, and that problem is permanent.

54. On May 16, 2000, Earl Phillips sent a letter to Brown, informing her that her 30-month leave of absence would expire on August 12, 2000. That letter also referenced the weekly Career Opportunities job postings and informed her that she could consider other positions with Federal Express for which she qualified. Phillips' letter was a FedEx form letter routinely sent to all employees in the course of their disability leave. Nothing in the body of the letter departed from the standard form.

³ FedEx did not offer any credible evidence to rebut Brown's testimony establishing this substantial limitation to work, exercise and all other major life activities.

55. Phillips' May 16, 2000, letter contained statements inconsistent with the facts of Brown's case. The form letter stated that Phillips had not received any documentation of a release to return to work and that Brown had an obligation to medical documentation to support her ability to perform any position for which she applied. It also notified her that when released to return to work, she would have from the date of her release until the expiration of her disability period to seek a position for which she met the minimum specifications and could perform the essential functions. It admonished her that she had to provide medical documentation to verify her ability to perform any position for which she applied. Brown's restrictions and condition had not changed in any way between her February 1999 and the date she received Phillips' May 16, 2000, letter. She concluded that she had already provided all of the information requested in the letter, and that FedEx had already refused her request for accommodation as a part-time courier in the Helena operation. She reasonably concluded that the letter constituted a pro forma contact that did not indicate any willingness on FedEx's part to accommodate her request for a part-time courier position in the Helena operation so long as she could not work the maximum number of hours specified in the job description. She never responded to the FedEx May 16, 2000, letter.

56. After Phillips refused to allow Petrick to hire Brown as a part-time courier, in February 1999, FedEx made no subsequent effort to accommodate her request to return to work as a part-time courier in the Helena operation for 4-5 hours per day. Phillips' refusal in February was reasonable, as already noted, because of conflicting information in Dr. Harrison's releases and also because Brown had not reached maximum healing. FedEx's continued failure and refusal to commence its accommodation process in May 1999 was unreasonable. Brown could have and should have had the opportunity to apply for and obtain the part-time courier position that opened in July 1999. She was otherwise qualified and not a danger to herself or others in that position, and FedEx denied her that position (and even the opportunity to apply for that position) because of her disability.

57. By letter dated August 18, 2000, FedEx terminated Brown's employment effective August 12, 2000, at the conclusion of her long-term disability leave entitlement.

58. As of November 2000, Dr. Harrison concluded that Brown could work three-quarter time despite the continuing headaches. Brown's restriction to four to five hours ("half time") per day of work until November 2000 and thereafter to three-quarter time work applied to all types of employment, from heavy manual labor to light or sedentary employment. Effective November

2000, Brown could work at least the 30-hour maximum FedEx required of a part-time courier.

59. Brown was qualified for the part-time courier job, even under Phillips' definition of the essential job duties, beginning in November 2000, when her limitation in hours expanded to three-quarters full time (37.5 hours a week).⁴ Brown never attempted to obtain the job from FedEx, or a comparable job with any other delivery service, after Dr. Harrison changed her limitations. Brown knew or should have known that she qualified for the part-time courier job effective November 2000. Any wage loss resulting from FedEx's refusal to return her to work ceased a reasonable time thereafter. Neither Brown nor FedEx submitted any credible evidence of when part-time courier positions opened in Helena after November 2000. The reasonable period within which Brown could have obtained a part-time courier position in the Helena operation ended by June 1, 2001, and Brown suffered no losses because of FedEx's conduct thereafter.

60. In July 1999 and January through August 2000, Christopher Hendrix worked a total of 1214.47 hours. Had Brown, with her limitations, held that part-time courier position, with the same average hours of work available, she would have worked a total of 919.78 hours (an average of 27.05 hours per week) July 1999 through October 2000 (70 weeks). She would have worked 1102.14 hours (an average of 32.53 hours per week) within Brown's limitations from November 2000 through May 2001 (30 weeks). Brown would have worked those hours, with the station manager arranging for other couriers to work the additional hours, if FedEx had properly accommodated her disability. Brown's wages, had she obtained the position Hendrix filled, would have been at her hourly rate of \$14.85 per hour. This was Brown's residual earning capacity (with her limitations) during the indicated time periods.

61. Brown found work with Rocky Mountain Development Company at \$9.39 per hour. She elected not to work all the available hours, during periods of illness in her immediate family. She could have worked more hours, and would have if she had been back at FedEx, where she wanted to sustain a career. During the various periods from July 1999 through May 2001, Brown earned or could have earned \$9.39 per hour for 25 or 37.5 hours a week (applying the appropriate limitation), at a job other than FedEx part-time courier. Her weekly offset earnings for the 70 weeks from July 1999 through

⁴ Brown and Dr. Harrison interpreted a half-time limitation to be 5 hours daily, and therefore 7.5 hours is a reasonable 3/4ths of a 10 hour work day for Brown's limitation beginning in November 2000.

October 2000 at 5 hours per day, subtracted from her residual earning capacity as a part-time FedEx courier, generated a net loss of \$136.50 per week, a total of \$9,555.00. Her weekly offset earnings for the 30 weeks from November 2000 through May 2001 at 7.5 hours per day, again subtracted from her residual earning capacity as a part-time FedEx courier, generated a net loss of \$204.75 per week, a total of \$6,142.50. Her entire net wage loss was \$15,697.50. Interest on her net lost wages to date, at 10% simple, is \$2,948.31.

62. The fringe benefits with FedEx, typical of Montana employers, were worth approximately 19.4% of wages. That percentage of \$15,697.50 is \$2,982.53, which is the value of the benefits Brown lost because of her actual wage loss in July 1999 through May 2001.

63. Brown suffered emotional distress because FedEx refused to allow her to work part-time as a courier. She had persevered in her rehabilitation with the specific goal of resuming her career employment with FedEx. Denial of that opportunity devastated her. She felt anger, powerlessness, despair and frustration. Her testimony and her demeanor established that her emotional distress was genuine and serious. Only that portion of the emotional distress relating to FedEx's rejection of her from May 1999 (when the independent medical exam verified that she had reached maximum medical improvement) through May 2001 was a result of FedEx's illegal discrimination. Thereafter, Brown met even Phillips' requirements for the part-time courier position. But for her failure to apply for the job, she would have thereafter held it. Her entitlement for that emotional distress is \$12,500.00.

64. Brown received workers' compensation benefits and payment of medical expenses, and an insurance company's payment in settlement of her claims against the driver of the other vehicle in her 1998 vehicular accident. None of the payments or benefits she received were for the damages for which FedEx is liable to her in this case.

IV. Opinion

Montana law prohibits employment discrimination based on physical disability. §49-2-303(1)(a) MCA. To establish a prima facie case of discrimination, Brown must show: (1) she had a disability (protected class membership); (2) she was otherwise qualified for continued employment and her employment did not subject herself or others to undue risk of physical harm; and (3) FedEx denied her continued employment because of her disability. *Reeves v Dairy Queen*, 287 Mont. 196, 204, 953 P.2d 703, 708 (1998) (citing *Hafner v. Conoco, Inc.*, 268 Mont. 396, 401, 886 P.2d 947, 950 (1994)); §§49-4-101, 49-2-303(1)(a) MCA. There is no factual dispute

regarding the third element—FedEx did deny Brown continuing employment because of her hours limitation. The facts in question involve the first two elements and damages.

The Human Rights Act defines a physical or mental disability, in pertinent part, as an impairment that substantially limits one or more major life activities. §49-2-101(19)(a), MCA. The Montana Supreme Court has applied the definition in *Butterfield v. Sidney Pub. Schools*, 306 Mont. 179, 32 P.3d 1243 (2001). The Court held that an individual precluded from performing heavy labor by a back injury was substantially limited in the major life activity of working because the impairment eliminated his ability to perform the entire class of jobs that required a strong (or at least intact) back. *Butterfield at* 1246.

FedEx capably argued that proof of disability requires proof that Brown was precluded from more than one type of job, one specialized job, or a particular job of choice. FedEx argued that if jobs utilizing Brown’s work skills (if not her unique talents) were available or if a host of different types of jobs were available, then Brown failed to establish that she was precluded from a broad range of jobs. *Toyota Motor Manufacturing v. Williams*, 543 U.S.184 (2002); *Sutton v. United Airlines*, 527 U.S. 471, 492 (1999); *see also* 29 C.F.R. §1630.2(j)(3)(i).

Montana looks to federal precedent for guidance when there are similarities in statutory language and public policy considerations and no controlling Montana law. *Butterfield, supra; see also Hafner v. Conoco, Inc.*, 268 Mont. 396, 886 P.2d 947, 950-51 (1994). However, the Montana Supreme Court has already articulated the appropriate standard to decide whether there is a disability, so application of that standard to this case turns on the facts, not on the varied legal expressions of the standard in the wide range of disability cases decided in federal courts.

Many cases hold that preclusion from one specific full-time job, while other full-time jobs or part-time jobs generally are available, does not constitute disability. *E.g., Driscoll v. Grouse Mountain Lodge*, Mt. Fed. D. C., CV-99-173-M-LBE, “Order” (12/4/2001); *Walker v. Montana Power Company*, 278 Mont. 344, 924 P.2d 1339 (1996). However, Brown’s chronic headaches limit her to less than a full day of work every day in every job, not simply in courier jobs, or FedEx jobs, but in all jobs.⁵ Her ability to engage in other activities is also

⁵ FedEx tried to rebut the evidence of this limitation, largely by pointing out that Dr. Harrison only considered the courier job in assigning the limitation, but both Brown and

comparably limited. Once a headache sets in, she is incapacitated for 16 to 18 hours (*i.e.*, until the next day). This incapacity exists whether she is delivering packages, sitting at a desk moving paper, socializing with friends or engaging in any other types of activity. This is a far more serious limitation than Pamala Driscoll's inability to work full-time in one specific waitress position at the Grouse Mountain Lodge. This is a far broader limitation than Lawrence Walker's alleged inability to work as a lineman for MPC. Brown's headaches did result in a substantial limitation in many major life activities, including working. Brown proved she had a disability.

The question of whether Brown was otherwise qualified arose because FedEx, by corporate fiat, decided as a matter of policy that an employee had to be able to work 30 hours a week to perform the essential functions of the job of part-time courier. According to Phillips, FedEx made this decision because of the exposure to additional labor costs or delay in deliveries if any part-time courier anywhere was not able to work 30 hours a week. Lahaderne and Petrick agreed, when examined by FedEx's counsel, that such costs or delays were a risk of hiring Brown in 1999, with her limitation to 4-5 hours per day.

However, Phillips, Lahaderne and Petrick agreed, when examined by Brown's counsel, that Petrick was in the best position to decide whether it was unreasonable to hire Brown and accommodate her 20-25 hours per week maximum hour limitation. Petrick was the station manager, directly responsible for the profitability and performance of the Helena station. Lahaderne, responsible for Petrick's performance, deferred to Petrick regarding hiring Brown. Petrick concluded that hiring Brown was reasonable, and he would have hired her in December 1998 and again in February 1999, but for the vetoes of Phillips. He would have hired her again in July 1999, had Brown known of and applied for the opening at that time for a part-time courier.

Because Brown suffered from a disability, FedEx had a duty to provide a reasonable accommodation if thereby Brown could perform the essential job functions of a part-time courier. §49-2-101(19)(b) MCA; 24.9.606(2) A.R.M.

FedEx ably cited and analyzed extensive federal case law regarding the ability to work the number of hours the employer wanted as an essential job function. The key distinction for all of those cases is that Brown's station manager did not consider it essential that Brown be able to work 30 hours in order to assume the position of part-time courier. He believed he could

her doctor were clear that the headaches arose regardless of Brown's activities during the day.

schedule around Brown's limitations, and was ready to do so. Given Petrick's testimony, FedEx failed to prove that being able to work 30 hours a week was an essential job function for the part-time courier position in the Helena operation in 1999 and following.

The Human Rights Act also prohibits an employer from discriminating on the basis of disability unless the accommodation would create an "undue hardship." §49-2-101 (19)(b) MCA. The burden was on FedEx to prove that the reasonable demands of a part-time courier required them to discriminate against Brown or that accommodating her disability would create an undue hardship.⁶ FedEx failed to do so. FedEx's evidence that it could not use a part-time courier who could only work 25 hours a week in the Helena operation was not credible, given Petrick's testimony.

As a legitimate business reason, as a bona fide occupational requirement, as an undue hardship, as the reasonable demands of the job or as an essential job function, FedEx failed to prove that the ability to work 30 hours a week was a valid requirement that prevented Brown from holding the position. Phillips' insistence upon that requirement was pretextual, since the actual station manager was ready, willing and able to hire Brown and use her. An employer may designate the ability to work a certain number of hours per week as an essential job function, but the employer must also prove that the hours requirement it adopted is actually an essential job function in the particular case, or it will not defeat the discrimination claim. *Compare Pannoni v. Browning School District No. 9*, H.R. No. 0009009280 (11/15/01 *with Butterfield, op. cit., and Staats v. Wal-Mart*, H.R. No. 9801008292 (3/18/99). The essence of reasonable accommodation is being willing to depart from rigid rules and look at what is possible in individual circumstances.

In addition, FedEx could not reject Brown for the part-time courier position because of her disability "when the reasonable demands of the position do not require a . . . physical or mental disability . . . distinction." §49-2-303(1)(a) MCA. By law, any grounds FedEx urged as a "reasonable basis" for a disability distinction "shall be strictly construed." §49-2-402 MCA (1999). Strictly construing the hours requirement, in light of Petrick's decision to hire Brown with her hours limitation, results in the conclusion that Brown was otherwise qualified. Strictly construing the hours requirement, instead of giving it the very liberal construction Phillips applied, results in the conclusion that Brown met the requirements of the job description as soon as she reached maximum healing. She clearly had the ability to work between 17 and 30

⁶ See also, *Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997).

hours a week. FedEx cannot sustain its reading that “between 17 and 30” means “30” under a strict construction of the job description.

The department may order any reasonable measure to rectify any harm Brown suffered, including monetary damages. §49-2-506(1)(b) MCA. The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); *cf.*, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Brown proved discrimination that resulted in a diminished earning capacity for two time periods. Until November of 2000, she could only work 5 hours a day, and therefore could only have worked 5 of the hours that Hendrix worked.⁷ From November 2000 until May 2001 (a reasonable time during which Brown would still have suffered a loss even if she had gone back to FedEx with her lesser restrictions, until another part-time courier job opened in Helena), Brown could have worked up to 7.5 hours a day. The hearing examiner quantified the lost wages accordingly, in both cases after deducting the amount Brown could have earned in other employment during those same time periods.

Brown proved lost wages. She did not have to prove those losses with unrealistic exactitude. *Horn v. Duke Homes*, 755 F.2d 599, 607 (7th Cir. 1985); *Goss v. Exxon Office Systems Company*, 747 F.2d 885, 889 (3rd Cir. 1984); *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award).

FedEx properly argued that Brown shared with it the duty to engage in the interactive process to seek proper accommodation. *E.g.*, *Mengine v. Runyon*, 114 F.3d 415,420 (3rd Cir. 1997). In this case, Brown’s failure to allow FedEx direct access to Dr. Harrison justified Phillips’ February 1999 request for an independent medical evaluation, so her lost wage entitlement did not arise in February. But when that evaluation was complete, and the report was in the hands of the workers’ compensation adjustment service in May, FedEx had the obligation to go forward in a timely fashion, and it utterly failed to do so. That is FedEx’s responsibility and FedEx’s failure, whether Phillips or the compensation service had the duty to go forward with use of the report. FedEx

⁷ Ordinarily, an otherwise qualified individual is not entitled to a particular accommodation or particular job. Here, however, she was not simply suited to the part-time courier position, her station manager was ready to give that job to her. Phillips blocked that entirely appropriate accommodation, generating the losses awarded.

cannot blame Brown for its failure to obtain that report for a year, and failure to use the report after it did have it. FedEx did an execrable job of interacting with Brown about any accommodation after the end of her TRW program, far beyond Brown's recalcitrance.

FedEx offered no documentation that Brown's attempt to grieve Phillips' rejection of her as a part-time courier was ever before FedEx's Human Capital Management panel. It seems extremely unlikely that such a review could take place in a corporation as careful as FedEx with no documentation of any kind, even if the procedure did not allow Brown any input into the review.

Brown had an obligation to make reasonable efforts to mitigate harm from discrimination by seeking other employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). The evidence did establish that she failed to exercise reasonable diligence in mitigating damages from lost wages and benefits. *P. W. Berry, Inc. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Hullett v. Bozeman School Dist. #7*, 228 Mont. 71, 740 P.2d 1132 (1987). Brown was not required to exhaustively seek out all possible employment opportunities. But she did not make reasonable efforts to seek work. Having no income instead of some income was not an economically feasible and appropriate mitigation effort. The unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position. *Ford Motor Co.*, *supra* at 231; *accord*, *Hullett*, *supra*. But here, Brown could have done more to mitigate her damages in two respects.

First, she could and should have generated earnings in other employment during the entire period (July 1999 through May 2001) over which she suffered lost wages. Therefore, the earnings she could and should have obtained reduced her recovery. Second, since Phillips' objection to employing her as a part-time courier employment was her inability to work 30 hours a week, she could and should have gone back to FedEx in November 2000, to apply for that position. She either knew or should have known that she now could work more than 30 hours a week. If she did not know, asking the question of Dr. Harrison would have confirmed it. Except for a reasonable period after November 1, 2000, to allow for an opening at FedEx's Helena operation for a part-time courier, Brown had no entitlement to lost wages after that time. She was entitled to that additional "reasonable period" recovery, because but for FedEx's discriminatory refusal to hire her in July 1999, she

would already have been working there, and could simply have expanded her hours.⁸

An award of prejudgment interest is also proper on lost past wages due to illegal discrimination. *P. W. Berry Co.*, *supra*; *see also Foss v. J.B. Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987). Since the experts agreed on the value of benefits, Brown is also entitled to the value of the benefits she would have earned on the wages lost from July 1999 through May 2001.

Brown's emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1993). A claimant's testimony can, by itself, establish entitlement to damages for compensable emotional harm, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). The illegal discrimination itself can establish an entitlement to damages for emotional distress, because it is self-evident that emotional distress does arise from enduring the particular illegal treatment. *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C.Cir.1984) (42 U.S.C. §1981 employment discrimination); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974) (42 U.S.C. §1982 housing discrimination based on race); *Buckley Nursing Home, Inc. v. MCAD*, 20 Mass.App.Ct. 172 (1985) (finding of discrimination alone permits inference of emotional distress as normal adjunct of employer's actions); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.App. 253, 261-262, *rev. den.*, 287 Ore. 129 (1979) (mental anguish is direct and natural result of illegal discrimination); *Gray v. Serruto Builders, Inc.*, 110 N.J.Super. 314 (1970) (indignity is compensable as the "natural, proximate, reasonable and foreseeable result" of unlawful discrimination).

This is a case where emotional distress can be inferred from the facts, but Brown also testified very credibly to her emotional distress. Brown worked hard to return to her job. She used the goal of return to her job as a beacon to steer toward during the long and painful recovery from her injuries. When she reached that goal, and her station manager was ready to return to her a part-time courier position, FedEx extinguished the beacon, for no valid reason. Her emotional distress was genuine and she is entitled to recovery for it.

⁸ Starting on June 1, 2001, Brown's lost wages result from her failure to apply for the part-time courier position, for which she is qualified even under Phillips' reading of the job description. Fed-Ex is not responsible for that failure. If Brown elects never to apply, that is certainly her right, but her choice will not create additional liability on the part of Fed-Ex.

The requirement of proof of serious or severe emotional distress, imposed by *Sacco v. High Country Independent Press*⁹ is not applicable under the Human Rights Act. *E.g.*, *Vortex Fishing Systems, Inc. v. Foss*, 308 Mont. 8, 38 P.3d 836, 841 (2001). Brown proved her right to recover for emotional distress. In this case, her distress was significantly greater than that of Foss, who did not require counseling, but considerably less than that of Nina Benjamin. *Benjamin v. Anderson*, “Final Agency Decision,” Nos. 0001009023 & 0001009034 (Jan. 2, 2002) (\$75,000.00 award for emotional distress, reduced to \$40,000.00 by the Commission). Therefore, \$12,500.00 is a proper award to remedy her emotional distress.

FedEx argued that it should receive credit (an offset against any award) for the payments Brown received in settlement of the civil personal injury claims arising out of the vehicular accident and for the workers’ compensation benefits she received for injuries sustained in the vehicular accident. The argument is unconvincing.

Montana has not decided whether §27-1-308 MCA mandates offsets against recovery under §49-2-506 MCA. The collateral source statute expressly applies to offsets in actions arising from personal injury or death, where the recovery exceeds \$50,000.00. Brown did not recover that much, and there is no precedent establishing that a claim under the Human Rights Act is a claim arising out of personal injury or death.¹⁰

In any event, Brown’s recovery in this case is based upon lost residual earnings after recovery from her injury, prejudgment interest on those lost earnings, lost benefits based on those lost earnings and emotional distress resulting from the illegal discrimination by FedEx. None of those items would properly be part of any recoveries from the driver of the vehicle that collided with her truck. Her residual ability to earn was not part of what she lost in the accident, and interest and lost benefits on lost residual income would likewise never be part of her claim in the personal injury case. Emotional distress resulting from illegal discrimination by the employer also could not be an element of her damages in the civil case.

⁹ 271 Mont. 209, 896 P.2d 411 (1995).

¹⁰ Until *Foss*, *op. cit.*, the hearing examiner assumed recovery in Human Rights Act cases was at least directly analogous to personal injury recoveries in civil actions, but the decision in *Foss* that the standard for proving emotional distress was lower than the standard in such civil actions suggests that such an analogy may be faulty.

Since there is no duplicative recovery, there is no part of Brown's civil settlement that FedEx can offset. "Section 27- 1-308, MCA, clearly provides for reduction of only that part of a recovery which has previously been compensated by a collateral source." *Busta v. Columbus Hospital Corporation*, 276 Mont. 342, 916 P.2d 122, 141 (1996). Because there is no duplicative recovery, no equitable right of subrogation or offset can arise in favor of FedEx when it pays the award in this case.

With regard to Brown's workers' compensation claim, if the compensation insurer settled with her, it made that decision with knowledge (actual or imputed) of the pendency of this claim. Otherwise, it can assert any right to recoup excess benefits if somehow the award for lost wages herein is duplicative of a wage loss paid in the compensation claim. Legally and logically, her lost wages in this case could not be part of her workers' compensation wage replacement benefit, since her losses here arise out of her residual wage earning capacity as it existed after recovery from the industrial injuries. All other recovery herein is different in nature from entitlements under the Workers' Compensation Act, which does not compensate an injured worker for lost benefits, loss of the use of wages (interest) or emotional distress. There is no basis for FedEx to get credit against its liability for illegal discrimination because its compensation insurer (or the branch of FedEx that self-insures) satisfied Brown's statutory entitlements under the Workers' Compensation Act, which did not overlap with her damages herein. If there were any such overlap, the compensation insurer, absent settlement, might have a better right to recoupment (or subrogation under §39-71-414 MCA) than FedEx would have to any offset.

FedEx also argued Brown took positions inconsistent with her claims in this case in both her personal injury claims and her workers' compensation claim. There was no persuasive evidence of any inconsistent positions by Brown in either case. FedEx failed to prove any potential judicial or administrative estoppel.

Upon a finding of illegal discrimination, the law requires affirmative relief, enjoining any further discriminatory acts and prescribing appropriate conditions on the county's future conduct relevant to the type of discrimination found. §49-2-506(1)(a) MCA. In this case, the appropriate conditions involve requiring FedEx to give weight to the station manager's conclusions about workable accommodations within the range of hours in the job description.

V. Conclusions of Law

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

2. Federal Express Corporation illegally discriminated against Jeannine Brown because of her disability when it refused to return her to a position as a part-time courier in Helena, Montana, from July 1999 (when it had an opening) through May 2001.

3. Federal Express Corporation is liable to Jeannine Brown for her resulting damages, being a wage loss in the amount of \$15,697.50, prejudgment interest on the wage loss in the amount of \$2,948.31, lost benefits she would have earned on the wage loss in the amount of \$2,982.53, and emotional distress for which she is entitled to recover the sum of \$12,500.00. §49-2-506(1)(b) MCA.

4. The law mandates affirmative relief against Federal Express Corporation. The department enjoins the company from discrimination against employees or candidates for hire on the basis of their physical disability. The department also requires the company to revise its policies regarding accommodation of employees with disabilities so that its Capital Human Resources management personnel do not disregard a decision by station manager responsible for direct supervision of the employee or prospective employee that the disability can be accommodated in the particular instance. The company must submit its revised policy to the department's Human Rights Bureau within 60 days of this decision and then adopt and implement the policy as approved by the Bureau. Finally, the company must provide Earl Phillips (if he is still in the company's employ) with a 4-hour training course on disability accommodation, and the course provided must be approved in advance of the training by the Human Rights Bureau. The company must submit the proposed training for Bureau approval within 60 days of this decision. §49-2-506(1) MCA.

VI. Order

1. The department grants judgment in favor of Jeannine Brown and against Federal Express Corporation on the charge it discriminated against her because of her disability when it refused to return her to work as a part-time courier in Helena, Montana, from May 1999 through May 2001. The department awards Brown \$34,128.34 and orders the company to pay her that amount immediately. Interest accrues as a matter of law.

2. The department enjoins and orders Federal Express Corporation to comply with all of the provisions of Conclusion of Law No. 4.

Dated: June 6, 2002

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry