BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Kathy Jarrell, Charging Party, versus **Deaconess Billings Clinic and Scott K. Ross, M.D.**, Respondents.	*HR Case No. 0021010070* *Final Agency Decision*

I. Procedure and Preliminary Matters

Kathy Jarrell filed a complaint with the Department of Labor and Industry on April 19, 2002. She alleged that Deaconess Billings Clinic and Scott K. Ross, M.D., discriminated against her on the basis of disability when they refused to hire her as a radiology technician on or about March 21, 2002. On November 11, 2002, the department gave notice of hearing on Hunter's complaint and appointed hearing examiner Terry Spear as hearing examiner.

The hearing convened on February 24, 2003, and concluded on February 25, 2003, in Billings, Montana. Jarrell attended with her attorney, Thomas Lynaugh, Lynaugh Fitzgerald & Eiselein. Carlene Lewies, Director of Human Resources, attended as designated representative for Deaconess Billings Clinic, with John Crist, Crist Law Firm, attorney for both respondents. Scott K. Ross, M.D., attended only part of the hearing, without objection.

The exhibits offered and the witnesses who testified appear in the transcript of hearing, prepared before this decision. Jarrell also offered, and the hearing examiner admitted without objection (except as respondents presented objections in their post-hearing brief) the testimony by deposition of Kimberly C. Powers. Jarrell decided not to procure a deposition of another physician after hearing. The hearing examiner gave the parties notice that he intended to consult the Dictionary of Occupational Titles to compare the job description therein with the descriptions in evidence. Jarrell filed the final brief on April 21, 2003. The hearing docket accompanies this decision.

II. Issues

The issue in this case is whether respondents discriminated against Jarrell because of disability when Deaconess Billings Clinic withdrew its conditional employment offer to her based upon the physical limitations that Scott K. Ross, M.D., assigned to Jarrell because of her prior back surgery.

III. Findings of Fact

1. At all times pertinent to this proceeding, the respondent Deaconess Billings Clinic (DBC) was a not-for-profit Montana corporation. The corporation owned and operated a full-service hospital, clinic and long-term care facility in Billings, Montana. It employed approximately 2,640 people.

2. The respondent Scott K. Ross, M.D., is a doctor employed by DBC in his professional capacity. Ross obtained his medical degree at the University of Ottawa Health Science Center in Ottawa, Canada. He completed a rotating internship at the Royal Jubilee Hospital in Victoria, B.C., then engaged in family practice in the Victoria and Vancouver area. He relocated to the United States in 1980 and practiced family medicine and industrial medicine in Rockwell, Texas, until 1991. He obtained a Master's Degree in business administration at Southern Methodist University.

3. In 1991, Ross became Medical Director of the Occupational Health Department at Black Hills Medical Center in Deadwood, South Dakota, and also served as the medical director for Homestake Gold Mine. In 1993, Ross obtained Board Certification in occupational medicine and became Medical Director for Workers' Compensation for the state of Oregon and worked in the Department of Consumer and Business Services for two years, providing his professional services to Oregon's Workers' Compensation Board, Workers' Compensation Division, OSHA and the Oregon Insurance Division. In 1995, he received a Master's Degree in public health.

4. DBC hired Ross in 1995, as an occupational medicine physician under the supervision of William Shaw, M.D. He worked in that position for a year, then accepted a position as a partner with a group in Springfield, Oregon called Cascade Medical Associates, an association of emergency room and occupational medicine physicians. He practiced there for two years, and then returned to DBC as chairman of its Occupational Health and Wellness Department. He still held that position during this case. He is one of three board certified occupational medicine physicians in the state of Montana and the only one in Billings.

5. The charging party Kathy Jarrell graduated from high school in Florida in 1980. She worked a number of secretarial jobs over the next 10 years. She suffered serious injury in a car accident in 1990. As a result, she had back surgeries that involved a fusion from her second to fourth lumbar vertebrae, accomplished by inserting plates, screws, and bone grafts into her back. The fusion and the hardware were permanent. She also had right leg below-knee amputation, necessitating use of a prosthesis.

6. In 1991, Jarrell received financial assistance from Florida's disability vocational rehabilitation program to attend school to train as an x-ray technician, also known as a radiological technician or a diagnostic imaging technician (tech). She qualified for assistance because of her injuries in the car accident. Jarrell was under the care of the physicians who had treated her and operated upon for her car accident injuries. They assigned her no medical restrictions limiting her participation in the training. She completed the training and received certification as a tech in 1993.

7. During her two years of training, Jarrell attended classes and worked as a tech under the supervision of qualified techs. She learned and performed tech tasks, beginning with simple chest x-rays and progressing to more complex procedures. She transported ambulatory patients and patients in wheelchairs and on stretchers. She helped patients onto the table and into proper positions for the procedures. She obtained and prepared the materials (the actual films, the contrast material, the protective aprons and so forth) and positioned the equipment. She took the x-rays and developed the films. She performed the work, including standing, bending, stooping, lifting and carrying, without any difficulties, and none of her doctors advised her to cease or limit any of her activities.

8. From 1993 until August 2001, Jarrell held a series of tech jobs in Florida and Montana. In her jobs, as in her training, she adequately performed the full range of tech tasks without needing any accommodation and without undue risk of injury to herself, her co-workers or her patients. She continued periodically to seek medical treatment and evaluation, when she experienced back pain or other symptoms of concern to her, and made her doctors aware of her work. None of her doctors, in Florida or Montana, advised her to cease or limit any of her activities.

9. After she received her certification as a tech, Jarrell's first tech job was with Physician's Specialty Group in Boca Raton, Florida. The employer did not require a preemployment physical. The job entailed taking all x-rays, from extremity x-rays to abdominal and chest x-rays, as well as orthopedic x-rays (specialty views for the orthopedists on staff). She also assisted with patient care, such as injections and vital signs. She transported patients from the examining rooms to the x-ray room, helping them if they needed help getting on the table or standing for the x-rays as needed, such as with patients on crutches or in casts. She helped get patients out of chairs, twisting and turning them to get them up on the table and into position against the x-ray board and bending to lift the wheelchair legs and to help them get out of wheelchairs. She performed her duties safely without accommodation or difficulty.

10. In 1994, Jarrell obtained certification as a mammographer, a sub-speciality within the tech field. She thereafter performed mammography as well. Mammography involved less lifting and more stooping, bending and twisting to assist the patient and assure proper patient positioning. She performed the additional duties involved in working as a mammographer safely without accommodation or difficulty.

11. In May 1995, Jarrell left her job in the doctors' offices for a tech job with the Boca Raton Community Hospital, because she wanted more challenging and diverse work. In her new job she did all the x-rays normally required of techs, including contrast studies, barium enemas, upper gastrointestinal tract x-rays, intravenous pyelograms and so forth. She also worked extra hours as a tech at an off-site walk-in clinic affiliated with the hospital. She did all the lifting, bending, twisting and stooping necessary to perform her job. She worked on the entire range of hospital patients, from ambulatory to comatose, and properly adjusted and moved the hospital's radiology equipment in her work. She performed her duties safely without accommodation or difficulty.

12. Jarrell left the hospital tech job to work for Boca Radiology Associates as a tech and mammographer from January to November 1997, again doing the entire range of tech work, this time in the context of a radiology facility. She performed her duties safely without accommodation or difficulty.

13. In November 1997, the volume of the Associates' work decreased. As the newest staff member, Jarrell was laid off. She found a tech job with Alex Soller, an allergist, doing standard x-rays (chest, legs, arms, back), electrocardiograms, medical assisting and allergy injections (after in-office training). The job did not involve the more complex tech work Jarrell had routinely performed in previous jobs. She performed her duties safely without accommodation or difficulty.

14. Jarrell worked for Soller for several months. She discovered that he would not be able to provide the employee health insurance coverage she expected. She took another job with Palm Beach-Broward Medical Imaging, a private radiology facility, in 1998. She performed the full range of tech duties, comparable to her prior work with Boca Radiology Associates, including mammography and cross training of other techs to do mammography. She performed her duties safely without accommodation or difficulty.

15. Jarrell visited Montana in 1999 on a vacation. She decided to relocate and found a tech job at Front Range Healthcare in Great Falls, Montana. She began that job in March 2000 and worked there through the

end of the year, performing the typical range of tech work. The employer had x-ray equipment and wanted to expand to mammography. It recruited Jarrell to set up the mammography department and to obtain the required national accreditations for the department. Jarrell performed her duties safely without accommodation or difficulty.

16. Jarrell left her job with Front Range Healthcare at the end of 2000, to move to Billings, Montana, where her fiancé resided. In January 2001, she began a night tech job at St. Vincent Hospital and Health Care Center in Billings. She took the general range of hospital x-rays, including fluoroscopy and barium studies. She moved the equipment as required and transported the patients. The work was slightly heavier than some of her previous jobs. She provided operating room x-ray work, moving the equipment required for fluoroscopy during surgeries and processing the films. She also took x-rays patients in the recovery room who were unconscious. The equipment involved, called a "C-Arm," was a machine approximately eight feet tall that fit around a patient during surgery. It moved on wheels, and had a monitor station on wheels that accompanied it. The C-Arm itself weighed between 300 and 500 pounds, and the TV monitor station weighed more than 200 pounds. Jarrell performed her duties safely without accommodation or difficulty.

17. Jarrell married in June 2001. She resigned her tech job at St. Vincent in August 2001 to obtain a real estate license in order to work daytime hours and have more time with her family, which included her child and her husband's child. She remained a relief tech at St. Vincent, working at least one shift every six to eight weeks. She obtained the real estate license in November 2001, but did not like real estate work. By the time she got the license, she had separated from her husband. She never worked under the license, but instead took temporary jobs and continuing to work as a relief tech for St. Vincent. In 2002, she was seeking a new full-time tech job in Billings. St. Vincent had no full-time openings at that time.

18. In early February 2002, Jarrell applied for an opening with DBC as a Mammography/Diagnostic Imaging Technologist, a job within the scope of her existing certifications and experience, to work in the hospital's radiology department. She was awaiting an opening at St. Vincent, where there was little turn over of techs, and saw that DBC had the opening at a higher wage.

19. DBC had a policy that neither employees nor applicants for employment would be discriminated against on the basis of disability. To implement that policy, DBC established a procedure for interviewing and hiring new employees, to ensure, to the greatest extent possible, that applicants are considered for a position on the basis of merit, without regard to whether

they have a physical or mental disability. The procedure was as follows, in the order that DBC took the steps:

a. The applicant completed an application form, which contained no questions about physical or mental limitations and focused solely on the applicant's qualifications.

b. The applicant received a copy of the job description and job analysis for the job, read both and then acknowledged reading and understanding the documents.

c. A recruiter in DBC's Human Resources Department interviewed the applicant and determined whether the applicant had the qualifications for the position based on experience and education. The recruiter asked no questions concerning physical or mental limitations.

d. If the recruiter considered the applicant qualified for the job, one or more persons in the department containing the job (usually including a supervisor) interviewed the applicant. The interview did not include questions about physical or mental limitations.

e. If after the interviews DBC was interested in hiring the applicant, it made a conditional offer of employment, subject to reference checks and satisfactory completion of the pre-employment physical, including drug-screening.

f. The DBC Human Resources Department had the applicant undergo a pre-placement physical conducted by medical professionals in its Occupational Health and Wellness Department, to whether the applicant had physical or mental limitations that might preclude performance of the essential functions of the job.

g. DBC contracted with Occupational Health and Wellness for the physicals, in the same way an outside company would contract for such services. The DBC recruiter or the applicant scheduled the applicant's appointment. The recruiter advised Occupational Health and Wellness about the physical requirements of the job, based on job analysis.

h. During the typical pre-employment physical, the applicant completed a health history form, had vital signs taken by a nurse or physician's assistant, and answered inquiries about any prior injuries or health problems. Occupational Health and Wellness obtained and/or

discussed all relevant information and medical records. Depending upon the information learned, the applicant might be asked to obtain and provide past medical records.

i. Often the applicant underwent strength and flexibility testing, depending on the requirements of the position sought, and sometimes depending upon the doctor's decision whether the applicant could safely complete the testing.

j. After completion of the pre-employment physical, the doctor completed a Physician's Recommendations form. The form stated whether the applicant was released to work and whether there were any restrictions based on the applicant's medical condition. Occupational Health and Wellness sent the form to DBC's Human Resources Department without any of the underlying medical records. Likewise, Occupational Health and Wellness did not provide the reasons for the limitations. Medical professionals made all medical decisions.

k. After receiving the Physician's Recommendations form, Human Resources compared the recommendations to the physical requirements in the job analysis. If the applicant could perform all the activities in the job analysis, DBC confirmed the hiring. If the applicant could not, DBC withdrew the conditional offer of employment.

20. DBC, following its routine practice, prepared job analyses for essentially all of its jobs. In January 1997, an independent company, Compensation Adjusters, located in Missoula, Montana, had performed an on-site evaluation of the tech job for which Jarrell applied. The job analysis authored by Compensation Adjusters was unchanged when Jarrell applied in 2002.

21. Jarrell completed an application form and received a copy of both the DBC job description and the Compensation Adjusters' job analysis for the tech job. She read both, and signed an acknowledgment that she had. She reviewed the job description and concluded that she could do the job. The duties of the job were identical to some of the duties she had performed successfully at St. Vincent. St. Vincent classified her former job as a "medium" labor position and DBC classified the job she sought as a "heavy" labor position.[1] Jarrell knew that she actually performed a wider range of duties at St. Vincent, because she had also been working as a mammographer. The

[1] Curiously, the Dictionary of Occupational Titles classifies "radiological technician," a.k.a. "radiographer" and "x-ray technician," as a light duty job.

DBC position, as described to her during the interviews, did not include mammography even though the advertisement identified the position as that of a "Mammography/Diagnostic Imaging Technologist."

22. DBC employees Jeanne Holm and Kit Hagenston interviewed Jarrell. Holm was a Recruiter in the Human Resources Department. Hagenston was a Supervisor in the Radiology Department. Both DBC employees liked Jarrell, believed she had the technical qualifications and experience for the tech job, and wanted DBC to hire her.

23. There was a shortage of qualified applicants for the tech job. Holm and Hagenston were excited that they had found a qualified applicant who had already successfully performed the job elsewhere.

24. During her interview of Jarrell, Hagenston explained that although the job DBC needed to fill was for two 12-hour weekend shifts, additional tech work in either the hospital or clinic would make the job a full time position. At the end of the interview, Hagenston said to Jarrell, "Just please tell me you don't have metal in your back." She made the comment because she had previously recommended hire of an applicant for a tech job, whose application was ultimately rejected after pre-employment screening revealed that she had hardware in her back as a result of prior back surgery. Jarrell responded that she did have metal in her back. Hagenston was embarrassed and said (thinking about the prior applicant of whom she was aware), "They [DBC] have a dumb policy about [against] hiring people with metal in their back."

25. DBC followed its standard procedure for applicants it wished to hire, making a conditional offer of employment to Jarrell, expressly subject to a pre-employment physical examination and drug testing. DBC referred her to its Occupational Health and Wellness Department for the exam. She provided a specimen for the drug testing and scheduled an appointment for the exam.

26. Before and after applying to DBC for the job, Jarrell worked out at 24-Hour Fitness, a gym in Billings, an average of three or four times each week. Her workout included 30 minutes of cardiovascular exercise on either the Stair Master or exercise aerobic machines. She lifted free weights and used the weight machines, doing multiple 10 to 20 repetition sets for each exercise. She used 10-pound dumbbells to do bicep curls and flies. She used a leg press machine to do leg presses with 90 to 100-pound loads. She did straight leg lifts with a barbell with approximately 55-pound loads including the bar. She did other barbell exercises to the backs of her legs, thighs and buttocks. She did pull-downs on a "lat" machine with 70 to 90-pound loads.

27. In addition to her work outs, Jarrell rode horses, motorcycles and four-wheelers, and participated (for the "trekking" not the hunting itself) in deer hunting. With her activities and her history of successfully performing tech jobs, Jarrell did not expect any problems with the pre-employment physical.

28. On March 13, 2002, Jarrell went to DBC's Occupational Health and Wellness for her appointment for the exam. She completed a medical history form, was seen by a nurse who took various vital signs, and then met with Dave Johnson, a physician's assistant who worked with Ross. Johnson performed a physical exam. Jarrell advised Johnson of her injuries and surgeries resulting from the car accident.[2]

29. DBC included an Ergonomics Test (ERGOS), involving strength, stamina and flexibility, for jobs that required more than sedentary activity. Johnson followed DBC's standard practice and delayed the ERGOS test because Jarrell's medical history and interview indicated possible physical limitations pertinent to her work, which might also restrict her capacity to perform the ERGOS test. He advised Jarrell that she would need to provide additional medical information regarding her car accident and the treatment that resulted before she could take the ERGOS test. She told him that St. Vincent had her most recent back x-rays and Joseph Erpelding (practicing in Billings) was her most recent orthopedist.

30. Jarrell had previously taken ergonomics tests in the pre-employment physicals she received at Boca Raton Community Hospital and St. Vincent. Over the years of her work as a tech in Florida and Montana, she had periodically visited orthopedists to obtain new prostheses for her leg and occasionally for back exams when she experienced back pain.[3] Neither her Florida nor Montana physicians had placed any limitations upon her activities at or away from work because of her post-surgical back. She reasonably anticipated easily completing the ERGOS test successfully. She attempted to provide the appropriate records to DBC.

31. Ross called Jarrell within a few days after her appointment for the physical. He advised her that he wanted the records of her initial hospitalization, surgery and treatment. She told him the records were more than 10 years old and in Miami, Florida. She asked if current local records

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[2] Johnson also made inquiries regarding her prosthesis. Ross did not ultimately place any limitations upon Jarrell because of her amputation, after some follow-up inquiries.

[3] Jarrell was careful to consult with her doctors when she had more than what seemed a routine backache. If problems developed, she wanted them addressed and resolved.

would suffice. He told her they would not. She questioned the utility of getting the old records, but authorized him to call about the Florida records.

32. Ross followed up with the Florida hospital, had a release faxed there and obtained some records directly. He wanted the operative reports, to detail the procedures, but he used what he got. From the records he obtained, he ascertained the specific surgical procedures used. He accurately concluded that Jarrell had a fusion of her vertebra, with hardware as well as bone grafts, immobilizing the third lumbar vertebra (the damaged segment) by fusing it to the second lumbar vertebra above and the fourth lumbar vertebra below. These three normally movable bones were now one solid bone. As a result, the discs immediately above and below the fused segments (between the first and second lumbar vertebrae and between the fourth and fifth lumbar vertebrae) were subject to greater stress because the two discs that would normally cushion movement within the now fused segments (between the second and third lumbar vertebrae and between the third and fourth lumbar vertebrae) no longer provided that flexibility and cushioning. The stresses normally spread between these vertebrae and discs were now focused entirely upon the segments above and below the fusion. Ross also noted that Jarrell's orthopedist had cautioned her in 1996 to be careful how she lifted.[4]

33. Ross did not have Erpelding's records of more recent evaluations of Jarrell. After Jarrell filed her discrimination complaint he did examine those records and testified at hearing that they did not change the conclusions he had already reached.

34. Ross never examined Jarrell. He did not inquire into her work history or levels of physical activity, although she told him during their telephone conversations that she worked out on a regular basis and he had documents indicating that she had worked successfully as a tech.

35. Ross concluded, based entirely upon Jarrell's back surgeries, that she could not safely lift more than 25 pounds and advised her that she could not complete the ERGOS test except within that limitation. He allowed her to take the test, modified to limit lifting to a maximum of 25 pounds. Jarrell completed the modified ERGOS test with no problems.

36. Ross prepared a Physician's Recommendations form which contained statements about the restrictions he placed on Jarrell. He sent the

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[4] Ross also noted a reference in the records to a broken screw in the hardware in her back. Although the medical records indicated that no action was necessary regarding the broken screw (and no limitations imposed on activities because of it), he cited it as additional justification for the limitations he ultimately imposed, without explaining why.

form to the DBC Human Resources Department. It contained the following restrictions:

a. Avoid repetitive lifting, bending, twisting and stooping;
b. No lifting more than 25 lbs.;
c. Get assistance with any lifting more than 25 lbs.;
d. Change positions frequently.

37. Ross based the restrictions upon the fusion in Jarrell's back. He considered the restrictions to apply to all of Jarrell's activities, at any job she might work and in all activities away from work. Ross would never release any patient with Jarrell's surgical history to do work beyond that consistent with the limitations he placed upon Jarrell. Had she produced a report verifying that she had successfully completed the ERGOS test at some other facility in March 2002, he would not have changed his restrictions. No particulars regarding her activity levels, physical fitness or successful work as a tech would have changed his opinion. Ross concluded that Jarrell was not able to perform the wide range or class of jobs, including but not limited to the tech job at DBC, which required that she work beyond the restrictions he assigned to her.

38. Persons with post-surgical backs have a significant risk of further back injury and surgery, as a statistical group. Ross cited a University of Washington study reporting that 25% or more of the patients with fusions eventually have another back surgery. His conclusions, like the study, were statistical. He could not predict that Jarrell would, over any amount of time, sustain another injury to her back. He did conclude that her risks, with or without high levels of physical activity, remained greater than those of the population at large. His conclusions were based upon his professional expertise and his application of statistical risks to her as a patient. He did not cite any data establishing or indicating that her risks of further injury were greater if she maintained her current activity level than her risks if she reduced her activity level. He did not cite any data indicating how her risks compared to those of an overweight, out of shape, sedentary person (with or without a fusion) who commenced working a tech job.

39. Jarrell's back was more susceptible to injury with the fusion than without it, due to the greater stress borne by the segments above and below the fusion. Ross concluded that higher stress resulting from lifting, bending and twisting while weight bearing (including repetitive lifting of smaller weights) would cause an unacceptable risk of further injury, a risk Jarrell shared with the entire class of persons having similar fusions. He did not particularize the risk to Jarrell. He did not consider her work history and activity levels over the

prior eight years as indicative of a reduced risk. He dismissed physical conditioning as a factor that diminished her risks.[5]

40. Ross knew or reasonably should have known that the restrictions he placed on Jarrell, based upon his verification of the surgical procedures performed on her back, prevented her from attempting some of the physical tasks detailed in the job description for the tech job. He knew or reasonably should have known that Jarrell asserted that she could do, and had been doing (in her tech work at St. Vincent's) those same physical tasks. He knew or reasonably should have known that she wanted to attempt the entire range of physical activities involved in the ERGOS, without honoring the restrictions he placed upon her. He knew that no restriction similar to his appeared in any of Jarrell's medical records which he had reviewed. Although he contacted a treating physician regarding the effect of Jarrell's prosthesis, he did not contact or attempt to contact any treating physician regarding the effects of Jarrell's fusion upon her risk of back injury.

41. On March 21, 2003, after receiving Ross's report, DBC withdrew its conditional offer of employment to Jarrell. The Human Resources individuals making this decision for DBC did not consider either Jarrell's work history of successful performance of tech jobs or her medical history of unrestricted work in tech jobs and did not examine the possibility of making any reasonable accommodations that could reduce risks of substantial harm. They looked solely at whether the job description included activities inconsistent with the restrictions imposed by Ross, relying entirely upon Ross for the medical determination of limitations. In so deciding, DBC necessarily considered Jarrell unable safely to perform the entire range or class of jobs which required physical activities beyond the restrictions that Ross assigned.

42. On March 22, 2002, Jarrell received notice that DBC would not hire her for the tech job. DBC encouraged Jarrell to apply for other jobs it might have that were consistent with her restrictions. Jarrell was furious and deeply hurt. She had worked hard to maintain her physical condition. With the approval of her physicians and the State of Florida, she had spent two years training to be a tech. She had successfully worked as a tech for eight years. She had taken and completed ergonomic tests for tech jobs. None of her doctors had ever restricted her from that work. Now DBC was denying her a tech job, solely because Ross gave her physical restrictions inconsistent with the work she had been doing for the past eight years.

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[5] Ross' basis for these opinions appeared to be his unexplained conclusion that no valid data confirmed that any of these factors verifiably diminished the risks of further injury.

43. Even if her doctors had restricted her activities in the same fashion as Ross, and told her that she had an increased risk of further back injury, Jarrell would not have followed the restrictions. A life consistent with the restrictions Ross assigned was not one she would willingly accept as long as she could be more active without immediate consequences. Her occasional backaches did not constitute a good reason to cut down her physical activities, either at and away from work. She was willing to take any risks (which she did not consider undue) involved in maintaining her current lifestyle.

44. After DBC decided not to hire Jarrell, Hagenston raised a concern with her supervisor, Courtney Konop, that DBC was unable to hire qualified tech applicants because of the physical requirements for the position in the job analysis. Konop reviewed the job analysis and compared it to what she knew the job required, hoping to find a way to reduce the lifting requirements. She could not. The job analysis accurately depicted the lifting requirements for the job. The requirements for lifting people had not changed and did not vary appreciably from the hospital to the clinic setting. DBC maintained its policy of refusing to hire any applicant whose assigned restrictions, according to Occupational Health and Wellness, were incompatible with all of the job activities in the job analysis, without considering any accommodations. Neither Hagenston nor Konop demonstrated any training or expertise in ascertaining what accommodations might be possible. DBC did not invite Jarrell's input regarding accommodations.

45. DBC had previously settled two complaints alleging disability discrimination in employment. In obtaining approval for those settlements, DBC represented to the Human Rights Bureau that its Human Resources supervisors, Occupational Health and Wellness physicians and physicians' assistants who provide pre-employment screening tests, as well as department managers, had received training with regard to perceived disability.

46. The practice and procedure DBC applied to applicants with potential medical restrictions inconsistent with its job descriptions assured that it would reject any applicant whose restrictions, based upon medical history only, prevented performance of any job duties in the descriptions. DBC's practice and procedure precluded both individualized assessment of any applicant's actual risks of harm and modification of job duties to accommodate any applicant with medical restrictions.

47. The full time tech position for which Jarrell applied had a wage of $17.50 per hour. After DBC withdrew its conditional offer of employment, Jarrell worked for JMC Engineering and St. Vincent. Her wages from March 21, 2002, through the date of hearing, February 24, 2003, totaled $20,815.63. Her wages for the same time period at DBC would have been $33,600.00. Her

lost wages to the date of hearing are $12,784.37. She currently earns, from both sources, $546.00 per week, and would have earned $700.00 working as a DBC tech. Her lost wages from the date of hearing through June 17, 2003, at the current differential of $154.00 per week, are $2,485.87. Her total lost wages to the date of decision amount to $15,270.24. Interest on her lost wages, through June 17, 2003, at 10% per annum simple, amounts to $1,029.71.[6]

48. It is impossible to project wage losses after Jarrell secures full time employment at St. Vincent, which she reasonably anticipates doing once there is an opening. Comparative wages at DBC and St. Vincent may fluctuate. Also, Jarrell may, by choice or out of necessity, find different employment in the meantime. With her current work, Jarrell will continue to lose $154.00 per week, but that amount could fluctuate. Jarrell is entitled to recover, for each calendar month, the difference between her actual gross wages and the sum of $700.00, for each calendar week or fraction of a week within the month, until she takes a full time job as a tech or refuses an offer of a full time permanent job as a tech.

49. Jarrell suffered emotional distress as a result of DBC's withdrawal of its conditional offer of employment. When she learned of the restrictions assigned by Dr. Ross, her initial reaction was to challenge him to meet her at the gym, so she could prove she could lift more weight than he could. At the time DBC withdrew its conditional offer, Jarrell had also divorced her husband. She was experiencing depression and emotional distress for which she had obtained professional treatment, including medication. She was unusually vulnerable and ill-equipped to withstand the additional harm of disability discrimination. She did not incur additional expenses for treatment because of the discrimination, but it did intensify and extend her emotional distress. The intensified and extended emotional distress, caused by DBC, entitled her to recover the sum of $5,000.00.

50. Most pre-employment physical evaluations will not involve the issues in this case. There is a risk that DBC, acting as or for a prospective employer, will assign medical restrictions to persons taking a pre-employment physical, based solely upon a history of prior back surgery. As it did with Jarrell, DBC will assign the restrictions even when the applicant has many

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[6] Simple 10% annual interest on $12,784.37 accruing from March 21, 2002, to February 24, 2003 (340 days) is 12784.37/2 x .1/365 x 340, which equals $595.44. The same interest rate on $12,784.37 from February 24, 2003 to June 17, 20003 (113 days) is 12784.37 x .1/365 x 113, which equals $395.79. The same interest rate on $154.00 per week, accruing from February 24, 2003, to June 17, 2003, is ($154.00 x 113/7)/2 x .1/365 x 113, which equals $38.48. The sum of the interest numbers is the total prejudgment interest.

years of continuous successful work or other frequent activity more strenuous than the physical restrictions. DBC will assign the restrictions despite absences of medical verification of increased problems over those years. DBC, acting as a prospective employer, will also compare the assigned physical limitations to its job analysis and without any further inquiry or evaluation reject the applicant based solely on the requirements of the job analysis for physical activities beyond those allowed by the assigned physical limitations.

51. It is reasonable to require that when DBC assigns medical restrictions to an applicant for a job with DBC or any other prospective employer on whose behalf DBC acts, any medical restrictions customarily assigned on the basis of a history of prior back surgery must be reconsidered when the applicant also has a history more than three years of continuous successful work or other frequent activity more strenuous than the physical restrictions. DBC must also consider whether there have been prior medical restrictions inconsistent with the activities and whether there have been increased problems over those years, as well as all medical history related to the back during those years. Under those circumstances, DBC may not rely solely upon the history of prior back surgery in assigning limitations.

52. It is also reasonable to require that for applicants within the scope of finding 51 who seek jobs with DBC, DBC must compare the assigned physical limitations to its job analysis. When the two are inconsistent, DBC must verify that the limitations were assigned only with consideration of the factors articulated in finding 51. DBC must further engage the applicant in a dialogue regarding ability to perform the job duties and possible modifications of the job consistent with the information the applicant provides as well as the assigned limitations.

IV. Opinion[7]

Montana law prohibits employment discrimination based on disability,[8] when the essential tasks of the job do not require a distinction based on disability. Mont. Code Ann. § 49-2-303(1)(a). This is a direct evidence case. There is no dispute about why DBC withdrew its conditional offer of employment. The direct evidence analysis applies. *Reeves v. Dairy Queen* 1998 MT 13, ¶¶ 16-17, 287 Mont. 196, 953 P.2d 703.

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[7] Statements of fact in this opinion are hereby incorporated by reference to supplement the fact findings. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

[8] All references to "disability" in this case refer to physical disability.

To establish her case of disability discrimination in employment, Jarrell must show that (1) she had a disability; (2) she was otherwise qualified for the job she sought and doing that job would not subject her or others to any undue risk of physical harm; and (3) DBC denied her the job because of her disability. *Reeves **at*** ¶ 21; (***citing*** *Hafner v. Conoco, Inc*. (1994), 268 Mont. 396, 886 P.2d 947, 950; ***see*** Mont. Code Ann. §§ 49-4-101 and 49-2-303(1)(a).

Jarrell presented evidence that she had a disability. She presented evidence that she was otherwise qualified for the job and that she could do the job safely. She presented evidence that DBC denied her the tech job because of her perceived disability. She presented sufficient evidence to prove the elements of her claim. The respondents presented evidence both that Jarrell did not have a disability and that she nonetheless could not do the job safely. The key questions of this case involve whether she had a disability and whether she could do the job safely without an undue risk of harm.

A. Disability

A disability is: (1) an impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) a condition regarded as such an impairment. Mont. Code Ann. § 49-2-101(19)(a).

Work is a major life activity. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 428. Jarrell has a "back condition that either prevents [her] from performing heavy labor or which [her] employer regards as precluding heavy labor. [She] is therefore substantially limited in the major life activity of working because [her] impairment eliminates [her] ability to perform a class of jobs." *Butterfield v. Sidney Public Schools*, 2001 MT 177, ¶ 24, 306 Mont. 179, 32 P.3d 1243 (male pronouns converted to female).

Respondents argued that federal case law[9] established that Jarrell's condition resulted in limitations insufficient to constitute a disability. They asserted that the limitations did not constitute a substantial limitation in a major life activity. DBC also asserted that it only considered her precluded from performing one job, instead of considering her precluded from a range or

[9] *Toyota Motor Mfg. v. Williams* (2002), 534 U.S. 184; *EEOC v. United Parcel Service* (9th Cir. 2002), 306 F.3d 794; *Mack v. Great Dane Trailers* (7th Cir. 2002), 308 F.3d 776; *Thompson v. Holy Family Hospital* (9th Cir. 1997), 121 F.3d 537, ***amended*** 311 F.3d 1132 (2002)*; Deppe v. United Airlines, Inc.* (9th Cir. 2000), 217 F.3d 1262; *Williams v. Channel Mst. Sat. Sys,* (4th Cir. 1996), 101 F.3d 346, ***cert. den.*** 520 U.S. 1240 (1997); *Aucutt v. Six Flags [etc.]* (9th Cir. 1996), 85 F.3d 1311; *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996).

class of jobs. The reasoning of the federal cases is not applicable in the face of controlling Montana precedent.[10]

Although there are some distinguishable characteristics between Jarrell and the plaintiff in *Butterfield*, *Butterfield* applies to this case. The distinguishing characteristics are addressed below.

A.1. Inability to Perform a Class or Range of Jobs

Whether an employer considered an applicant or employee substantially limited and whether the person actually was substantially limited are fact questions. Respondents' counsel argued that *Butterfield* was not factually on point, because in *Butterfield* the Montana Supreme Court expressly referenced findings about the limited education, limited transferrable skills and spotty work history of the charging party. However, *Butterfield* also explained that to be disabled a claimant need not be totally unable to work:

> On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform *a class of jobs or* a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs . . . .

Butterfield ***at*** ¶ 23, ***quoting (and then applying)*** the EEOC interpretive guideline to 29 C.F.R. § 1630.2(j).

Jarrell had a wider range of jobs that she could do with her limitations than Robert Butterfield had. Nonetheless, Jarrell was also prevented from a wider range of jobs than Butterfield, because her limitations, according to Ross, precluded her from doing any job involving medium to heavy labor, including technical jobs for which she had trained. Thus, her wider range of skills, education and experience did not remove her from application of *Butterfield*, since it broadened both the range of jobs she could do and the range of jobs she could not do, as DBC perceived her.

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[10] Montana seeks guidance from federal cases that help interpret Montana law. *Harrison v. Chance* (1990) 244 Mont. 215, 797 P.2d 200, 204 (1990); *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841. If *Butterfield* is on point, it controls without reference to the federal cases.

A. 2. Varying Classification of Tech Jobs

The varying classifications of tech jobs, from light to heavy, did not indicate to DBC that Jarrell could safely do the same job in some settings but not in others. It only indicated to DBC that some employers would let her do the tech job, like St. Vincent, even though DBC would not. DBC clearly perceived Jarrell to be incapable of safely performing any jobs involving medium to heavy labor, including DBC's tech jobs. What other employers perceived did not change the perception of DBC. DBC regarded Jarrell as unable to perform any job that required medium to heavy physical labor, a significant restriction upon performing an entire class or broad range of jobs.

DBC argued that it could not have regarded Jarrell as disabled, because it never considered her ability to perform a class or wide range of jobs, only to perform one specific job.

Butterfield did not involve conflicting labor classifications of the same job with different employers. *Butterfield*, ***at*** ¶ 19, did address the specificity argument [emphasis added]:

> The District contends that . . . Butterfield failed to prove that he was significantly restricted in performing a "broad range of jobs" and showed only that he could not perform the custodian's job because it required lifting more than 50 pounds. Having reviewed the record and the hearing examiner's findings, we now conclude that the District mischaracterizes Butterfield's burden and that he satisfied his burden when he proved and the hearing examiner found that he is significantly restricted in the ability to perform that class of jobs which requires heavy physical labor, or at least that his employer regarded him as so restricted.

Exactly as in *Butterfield*, DBC in this case applied the restrictions Ross placed upon Jarrell. The restrictions were applicable to all activities, including all work activities. Therefore, when DBC applied the restrictions Ross placed upon her, it necessarily regarded her as incapable of performing a broad range or class of jobs. As DBC saw her, Jarrell was unable to perform any job that required medium to heavy physical labor, which was a significant restriction in performing an entire class or broad range of jobs. It regarded her as disabled.

Any other analysis would result in absurdity. The limitation that prevented Jarrell from working as a tech did not involve something unique to tech work. A commercial airline pilot's job may require uncorrected 20/20 vision, while most jobs (including pilots' jobs) require only 20/20 corrected

vision. A job requiring a DOT commercial license may similarly have more strict requirements than most trucking or driving jobs. Such restrictions may not preclude an applicant from a wide range or class of jobs, because they are so specific to a particular job. Lifting requirements, by contrast, apply to a broad range of jobs and other life activities. The limitations Ross assigned were to avoid repetitive lifting, bending, twisting and stooping, to lift no more than 25 pounds, to get assistance for any greater lifting and to change positions frequently. DBC cannot credibly deny that these limitations did significantly restrict Jarrell's ability to perform a broad class of jobs.

The existence of some tech jobs with lighter labor classifications (rightly or wrongly classified) does not change that fact. The insistence that DBC "only" regarded Jarrell as unable to perform the tech job she applied for does not narrow the actual scope of the restriction it regarded her to have.

Every employer considers an applicant for a particular job–the job to which the application applies. If employers thereby insulated themselves from any liability for considering applicants disabled, the "regarded as" provision of the law would be useless. The Legislature does not pass meaningless laws. "*The law neither does* nor requires *useless acts*." Mont. Code Ann. § 1-3-223 (emphasis added).

A. 3. Medical Evidence and Its Use

Ross credibly explained the medical reasons why a fusion increased the stress on the surrounding motion segments in the back. He also applied the data available to him regarding general risks of further injuries to persons with fusions. He placed Jarrell within the entire class of persons with low back fusions (or possibly all fusions) and applied to her the same limitations he would apply to anyone who had the same operations she had, without regard to work history, activity history, prior complaints with such activities or prior medical approvals to engage in those activities.

What he forthrightly acknowledged he could not do was predict whether or when Jarrell actually would have another injury, no matter what activity level she maintained. The class of persons with fusions included both people who worked as diligently as Jarrell did to maintain health and physical conditioning and people who did nothing more strenuous than to walk from one place of repose to another during the day while under-exercising and overeating. This entire class of persons, on the average, had a high risk of further injury. Ross concluded that higher levels of activities created higher stresses on the already compromised spine, and therefore he would never permit any person with a fusion to engage in any activities with the level of

physical labor involved in the tech job no matter. He discounted fitness. He discounted history of activity levels. He did not offer any convincing explanation of why the average risk for persons with fusions would apply directly to a person who successfully achieved unusual levels of fitness and activities for years after her fusion.

There was no direct evidence of the degree to which Jarrell individually increased her particular risk of further back injury when she exceeded Ross' restrictions. She had routinely done so at work and play for over eight years, without any of her doctors advising her to change what she did. Ross applied the statistics to her straightforwardly–since the class of persons with fusions is, overall, at a considerable risk of further injury resulting in additional surgery, he applied that risk to Jarrell individually. He did not provide any valid basis for that application, nor did he offer any comparison between the alleged risk for Ross and the risk of back injury for the general populace in performing heavy labor.

In some areas the law allows application of a statistical analysis to ascertain an individual person's entitlement. For example, under the Montana Workers' Compensation Act, impairment ratings, based on objective range of motion losses, generate minimum entitlements for injured workers and further entitlements accrue if an injured worker suffers an actual lost earning capacity. Mont. Code Ann. § 39-71-703.

In disability discrimination, by contrast, Montana law expressly rejects stereotyping based upon real or perceived disability as a basis for denying an otherwise qualified individual consideration for jobs the individual could safely perform. ***E.g.***, *Reeves*, ***op. cit. at*** ¶ 30. Thus, the law requires that to rely upon the defense of risk of harm the employer must prove that allowing the claimant to perform the job would create a reasonable probability of substantial harm to either that claimant or to others. *Hafner v. Conoco, Inc*. 1999 MT 69, ¶ 34, 293 Mont. 542, 977 P.2d 330. In short, the employer must perform an individualized assessment of the risk of harm in the particular situation and verify the risk before taking the adverse employment action. To satisfy this duty, DBC, through its medical evaluator and through its Human Resources personnel, had to make the appropriate inquiries about risk of harm. DBC had to take into account all relevant information. The pertinent information for Jarrell included the seriousness of Jarrell's condition, her work history, her medical history and the possibility of making any reasonable accommodations that could reduce risks of substantial harm. *Hafner* ***at*** ¶ 41.

Ross acted as an occupational medicine specialist assessing the safe range of activities for Jarrell. Yet, he considered only part of one of the

mandatory factors. He considered only her medical history, and did not consider her entire medical history. DBC, in relying entirely upon Ross, likewise ignored all the other factors in deciding to withdraw its conditional offer of employment.

If Jarrell had not worked successfully in the field for 8 years before applying for the tech job, the limitations assigned by Ross might have been the only pertinent medical information. In such a case, absent testimony from another physician,[11] a board certified occupational medicine physician might reasonably assign limitations based entirely upon prior surgical history. Given the facts of Jarrell's case, DBC failed to justify its exclusive reliance upon the prior surgical history.

Although Ross was the only doctor who testified, his testimony that the restrictions he assigned were appropriate did not constitute "undisputed medical evidence." The record is replete with evidence that Jarrell's treating physicians over the years had knowledge of her plans to go to tech school and her subsequent entry into and work within the tech field. There is no evidence any physician ever restricted her from those endeavors based upon her surgeries. DBC, defending on the basis of risk of harm to Jarrell and others, had the burden of proving that risk.

Ross should have made further inquiry about the fusion as he did regarding the prosthesis, ascertaining more about the treating physicians' views of Jarrell's ability to perform tech work, particularly since she had successfully and safely performed the work over the last eight years. He should also have considered, with those other medical opinions, Jarrell's work history and activity levels since her surgery. No one, on behalf of DBC, made those additional inquiries. Therefore, withdrawing the conditional employment offer because Jarrell had the fusion was the very impermissible stereotyping that the statute prohibits. Here, as in *Butterfield*, the employer impermissibly relied upon only that portion of the medical information that might preclude employment in the job at issue, disregarding all of the individual factors involved, including, in both cases, the other medical information.

DBC divided the decision-making so that Ross made the assignment of limitations and then Human Resources relied upon it. Dividing the decision did not sanitize it. First, relying upon inaccurate or unreasonably incomplete medical information does not satisfy the requirement for individualized assessment. Second, relying solely upon the medical conclusion of the

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[11] *Butterfield* involved conflicting medical opinions about the employee's limitations when he returned to work.

evaluator, to the derogation of the other requisite factors for individualized assessment, was itself discriminatory.

A. 4. Motive

DBC also argued that Jarrell failed to prove a discriminatory motive. Clearly, DBC needed more techs and wanted to hire Jarrell as a tech, until discovering she had a fusion. However, the argument that good intentions trump discriminatory action must fail.

There was no evidence that the school district in *Butterfield* acted out of any subjective desire to discriminate against persons with disabilities. The district did, in fact, take adverse employment action against Robert Butterfield because it perceived him as disabled, without a legitimate basis in fact and law for deciding that he could not safely perform his job. That fact established a discriminatory motive, without the need for Butterfield somehow to present a evidentiary snapshot of the subjective intent of the district. The same reasoning appeared in *Reeves*, ***op. cit.*** There was no evidence that Dairy Queen had subjective malice toward Donna Reeves, or that its claimed concern about the risks to her of working with high blood pressure was insincere. The employer's concern appeared genuine, albeit unsupported on the facts.

Indeed, sometimes disability discrimination results from genuine but undue concern for the employee. The motive for the employer's safety concern can be humanitarian or financial, or both. The question is whether the safety concern is reasonable.

The facts in this case did not establish that DBC harbored subjective malice toward Jarrell or any other applicant with "metal in her back." The facts did establish that DBC established a procedure that assured that it would never hire an applicant with such metal in her back for a medium to heavy labor position. No matter what any applicant's treating doctors recommended or what the applicant had accomplished while having the metal in her back, DBC's procedure guaranteed that the presence of the metal precluded hiring the applicant. That procedure illegally denied Jarrell employment because DBC wrongly regarded her as disabled and unable safely to perform as a tech.

Proof of discriminatory motive does not require proof that the employer harbored a subjective conscious intent to do wrong. Proof that the employer failed to do right gives rise to a presumptive discriminatory motive. In this case, Jarrell proved that DBC unreasonably relied upon limited medical facts, to the derogation of other medical and non-medical facts about her. That is adequate proof of discriminatory motive. Jarrell was not required to produce a

snapshot of the subjective state of mind of Ross, Hol, and Hagenston and Konop.

B. Liability of Ross

Montana law defines "employer" to include an agent of the employer. Mont. Code Ann. § 49-2-101(11). Jarrell named Ross personally, as an agent of DBC, pursuant to the statutory definition. However, Ross acted entirely within the course and scope of his employment by DBC. DBC made the final employment decision. There is no cause to award financial relief against Ross personally. The injunctive relief addresses the pertinent conduct.

C. Relief Awarded

Upon the finding of illegal discrimination by DBC, the department may order any reasonable measure to rectify resulting harm that Jarrell suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of damage awards in employment discrimination cases is to assure that the victim is made whole. *P. W. Berry, Inc. v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

By proving discrimination, Jarrell established an entitlement to actual lost wages. *Albermarle Paper Company*, ***supra. at*** 417-23. She must prove the amount she lost, but not with unrealistic exactitude. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Off. Sys. Co.* (3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Michigan Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626 (fact that back pay is difficult to calculate does not justify denying award). Prejudgment interest on lost income is part of the award. *P. W. Berry, Inc.*, ***op. cit. at*** 523; *Foss v. J.B. Junk*, HRC No. SE84-2345 (1987).

Front pay is an award for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is temporary while Jarrell reestablishes her "rightful place" in the job market. *Rasmussen v. Hearing Aid Inst.*, HRC Case #8801003988 (March 1992); *Sellers v. Delgado Com. Col.* (5th Cir. 1988), 839 F.2d 1132; *Shore v. Federal Expr. Co.* (6th Cir. 1985), 777 F.2d 1155, 1158.

Front pay is appropriate only if it is impossible or inappropriate to order DBC to employ Jarrell, for example if hostility or antagonism between the parties prevented it. *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987), 817 F.2d 1338, 1347 (upholding front pay award based on "some hostility" despite testimony that the plaintiff and the defendant were still friends);

Thorne v. City of El Segundo (9th Cir. 1986), 802 F.2d 1131, 1137; *E.E.O.C. v. Pacific Press Publ. Assoc.* (N.D. Cal.), 482 F.Supp. 1291, 1320 (when effective employment relationship cannot be reestablished, front pay is appropriate), *affirmed*, 676 F.2d 1272 (9th Cir. 1982). The evidence did not establish sufficient hostility on the part of DBC to preclude employment of Jarrell. However, Jarrell certainly is now hostile toward DBC, as a result of its treatment of her. Therefore, in lieu of ordering that DBC hire her, the hearing examiner awards Jarrell front pay based upon the differential between her actual wages and the salary at DBC until Jarrell obtains or turns down work as a full-time tech. It will be up to her, should DBC offer her a job, whether to work there or not.

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. The standard for such awards derives from the federal case law. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836:

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the "broad remunerative purpose of the civil rights laws," the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern Penn.Transp. Auth.* (3d Cir.1994), 21 F.3d 29, 34; ***see also*** *Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2d Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden,* in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (***quoting*** *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman,* 107 F.3d at 385.

Exactly as in *Johnson* and *Foss*, the evidence regarding the act of discrimination and Jarrell's testimony establish a basis for an award of damages for emotional distress. The evidence of emotional distress here is stronger than in those cases. $5,000.00 is an appropriate recovery rather than $2,500.00 (*Foss*) or even $3,500.00 (*Johnson*[12]).

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[12] *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351 (district court award of $125.00 per plaintiff set aside and district court directed to award at least $3,500.00 per plaintiff for

C. 2. Affirmative Relief

Upon a finding of illegal discrimination, the law requires affirmative relief, enjoining any further discriminatory acts and prescribing appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a).

DBC had in place a complex procedure, which for the most part probably functioned properly to prevent disability discrimination in hiring. Unfortunately, the procedure as applied to Jarrell denied her the requisite individualized assessment of the risk of harm should she commence work in the tech job. This denial resulted from two failures, neither of which the procedure addressed:

> (1) When an applicant, like Jarrell, has (a) successfully engaged in activities heavier than the limitations her surgery dictates, at work and away from it, for (b) a substantial period of time, with (c) at least tacit approval of the physicians who treated her and were aware of the activities, the assessor must consider these facts and all of the other factors articulated in *Hafner* in assigning limitations.
>
> (2) In such a case, the prospective employer must engage in an individualized assessment, including a dialogue with the applicant, about whether the job can be performed by the applicant with or without a modification.

There is no "bright line" regarding how heavy the activities must be or for how long the applicant must have engaged in them. Assigning an arbitrary time limit (8 years, 3 years, 18 months, and so forth) is inappropriate. The assessor, a medical or vocational expert, must weight the term of heavy activity and the degree of heavy activity in assessing the risks. Clearly, 8 years is more than enough to require consideration of the activities.

Permanent injunctive relief is necessary. The department can inspect to assure the compliance of a respondent for not more than one year, pursuant to Mont. Code Ann. § 49-2-506(3). The department's injunctive power authorizes a permanent injunction. Mont. Code Ann. § 49-2-506(1)(a).

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).

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emotional distress).

2. Deaconess Billings Clinic, acting through its agent, and Scott K. Ross, M.D., the agent, illegally discriminated against Kathy Jarrell on the basis of disability when Ross assigned her physical limitations in all activities based solely upon her prior surgical history (low back fusion). Deaconess Billings Clinic, illegally discriminated against Kathy Jarrell on the basis of disability when it relied solely upon the assigned limitations and refused to hire her as a radiology technician on March 21, 2002. Mont. Code Ann. § 49-2-303(1)(a).

3. DBC is liable to Jarrell for her economic losses and the emotional distress she suffered as a result of this illegal discrimination, in the sum of $21,299.95 (including $1,029.71 in prejudgment interest), with future losses accruing, for each calendar month, at the difference between Jarrell's actual gross wages and the sum of $700.00, for each calendar week or fraction of a week within the month, until she takes a full time job as a tech or refuses an offer of a full time permanent job as a tech. This sum is due to Jarrell from DBC within the next calendar month after she submits to DBC's counsel pay stubs or other reasonably acceptable verification of her entire income from employment for the immediately preceding calendar month, together with her sworn statement that she has not accepted or refused a job offer as a full time tech and continues to seek such jobs. Mont. Code Ann. § 49-2-506(1)(b).

4. The law mandates affirmative relief against DBC and Ross to address the risk of future similar discrimination. The department permanently enjoins DBC and Ross from further discrimination in employment by reason of disability. Mont. Code Ann. § 49-2-506(1)(a).

5. The department enjoins DBC, when it assigns medical restrictions to a job applicant with any other prospective employer on whose behalf it acts, from applying any medical restrictions customarily assigned on the basis of history of prior back surgery to an applicant with a history of substantial successful work or other activity more strenuous than the physical restrictions. DBC must expressly consider and determine whether there have been prior medical restrictions inconsistent with the activities and whether there have been increased problems over those years, as well as all medical history related to the back during those years. DBC may not rely solely upon the history of prior back surgery in assigning limitations. Absent verification of genuine safety problems through those additional factors, DBC may not assign limitations based upon the history of prior back surgery that are inconsistent with the applicant's prior post-surgical work and activity history.

6. The department further enjoins and requires DBC, for applicants within the scope of Conclusion of Law No. 5 who seek jobs with DBC, to compare any assigned physical limitations to its job analysis and when the two

are inconsistent, verify that the limitations were assigned in consideration of the factors articulated in Conclusion of Law No. 5. DBC must engage the applicant in a dialogue regarding ability to perform the job duties and possible modifications of the job or other accommodations consistent with the information the applicant provides as well as the assigned limitations.

7. Within 60 days of this decision, unless the Human Rights Bureau allows it additional time, DBC must submit for Bureau approval both (a) a specific plan to provide at least four hours of training within six months to all Occupational Health and Wellness and Human Resources personnel regarding disability discrimination in employment, and (b) a proposed policy that adopts the injunctive relief outlined in this decision into the existing policies and practices to prevent disability discrimination in hiring.

VI. Order

1. The department grants judgment in favor of Kathy Jarrell and against Deaconess Billings Clinic and Scott K. Ross, M.D., on the charge that they discriminated against her on the basis of disability when Ross assigned her physical limitations in all activities based solely upon her prior surgical history (low back fusion) and DBC refused to hire her as a radiology technician on or about March 21, 2002.

2. The department awards Jarrell the sum of $21,299.95 (including $1,029.71 in prejudgment interest) and orders DBC to pay her that amount immediately, with future losses accruing and due and owing from DBC to Jarrell, for each calendar month, at the difference between Jarrell's actual gross wages and the sum of $700.00, for each calendar week or fraction thereof within the month, until she takes a full time job as a tech or refuses an offer of a full time permanent job as a tech. The procedure for verifying the future losses appears in Conclusion of Law No. 3.

3. The department enjoins and orders the respondents to comply with all of the provisions of Conclusion of Law No. 4, and enjoins and orders DBC to comply with the provisions of Conclusions of Law No. 5, No. 6 and No. 7.

Dated: June 18, 2003.
/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry