

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011370:

JANELLE MCDONALD,)	Case No. 384-2006
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
DEPARTMENT OF ENVIRONMENTAL)	
QUALITY,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

Janelle McDonald filed a human rights complaint against the Montana Department of Environmental Quality (DEQ) alleging that DEQ discriminated against her in violation of the Montana Human Rights Act by failing to provide her with a reasonable accommodation so that she could perform the functions of her job as a DEQ employee. At the joint request of the parties, jurisdiction in this matter was extended to permit the hearing to be held beyond the 12-month jurisdictional limit prescribed in Mont. Code Ann. § 49-2-509.

Hearings Examiner Gregory L. Hanchett held a contested case hearing in this matter on December 9, 2005 and January 4, 2006. Phillip Hoenlohe represented McDonald and James Madden represented DEQ. McDonald, Dr. Bruce Armstrong, D.V.M., Marjorie Jackson, PhD., Susan Smith, Sarah Holbert, Virginia Cameron, Wendy Forgey, Elizabeth Danzer, Thomas Livers, Aric Curtiss and Constance Entzweiler all testified under oath. Charging Party’s Exhibits 1-12 and 14-19 and Respondent’s Exhibits 101 and 103-105 were admitted into evidence.¹

¹ In the December 9, 2005 final prehearing order, respondent’s exhibits were denominated as exhibits 1,3, 4 and 5, which are the same as Exhibits 101,103,104,and 105, respectively.

The parties filed post-hearing briefs. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearing examiner makes the following findings of fact, conclusions of law, and final agency decision.

II. Issues

A complete statement of issues appears in the final prehearing order issued in this matter on December 9, 2005. That statement of issues is incorporated here as if fully set forth.

III. Findings of Fact

1. In July 2002, the Montana Department of Public Health and Human Services (DPHHS) certified McDonald as a person with a disability.

2. In August 2002, McDonald began working for DEQ as a fiscal officer. McDonald's work station was located in Room 3 on the ground floor of the Metcalf Building located in Helena, Montana. That room is carpeted.

3. At all pertinent times, McDonald had two disabilities. First, she had a permanent physical injury to her left leg, caused by a fracture she received earlier in life. Second, for the past fifteen years she suffered from dissociative disorder and chronic depression. When the dissociative disorder strikes McDonald, she loses track of her surroundings, becomes inattentive, loses track of time and is unable to complete tasks. These episodes occur suddenly and without warning. When McDonald experiences bouts of depression, she has poor concentration, poor memory and a sense of isolation. She withdraws from social interaction. On occasion, her bouts with depression caused her to miss work at DEQ.

4. At the time of McDonald's hire, the hallways of the ground floor of the Metcalf Building were tiled with linoleum flooring. During wet weather, this flooring would become slick. The hallways connected McDonald's office to other areas in the building that she regularly used such as the bathroom, meeting rooms, the entrance of the building and the elevator that gave her access to upper floors of the building.

5. Shortly after her hire, McDonald informed DEQ Human Resource manager Virginia Cameron that she was a person with a disability and that she needed to utilize her service dog, Bess, at work in order to perform the functions of her work. In response, DEQ acknowledged that McDonald had a disability. DEQ held a meeting with the employees who would be working with McDonald to advise them

that McDonald was disabled and would be bringing her service dog to work as an accommodation to enable her to carry out her job duties.

6. McDonald obtained Bess from CARES, Inc., a company that trains and provides service animals for disabled persons. Bess is a specially trained service animal, trained to assist McDonald with her disabilities by providing bracing support for McDonald (for example, when McDonald is climbing stairs) and tactile stimulation in the event of one of McDonald's dissociative episodes. In that circumstance, Bess is trained to bump into or otherwise nudge McDonald until such time as McDonald can calm down from her episode and come back into reality. Bess was specifically trained to adapt to all types of surfaces, including buffed tiled surfaces such as those which exist on the ground floor of the Metcalf Building.

7. One day in late 2002, Bess had trouble navigating the slippery floor. After this incident, Bess was hesitant to walk on the tile floor. McDonald consulted with CARES, which recommended that Bess practice walking on tile floors. McDonald began taking Bess in to work on the weekends or taking her to stores with tile floors. Smith provided McDonald a set of dog booties for Bess to try to see if they would solve the problem of Bess slipping, but they did not work. McDonald kept Bess' toenails and the fur on her paws trimmed, and there was no medical reason why Bess would have particular difficulty on tile floors. CARES had no other suggestions for solving the problem aside from changing the floor surface. McDonald did not know of any other ways to prevent the falls that Bess suffered.

8. In March 2003, McDonald told Danzer about the problem and requested that something be put down in the hallway to prevent Bess from slipping. Danzer relayed the problem to Deputy Director Thomas Livers. McDonald repeatedly followed up by discussing her request with Danzer and others and she believed that they were working on solving the problem.

9. DEQ was aware of the hazard presented by the tiled surface of the ground floor in the Metcalf Building and requested General Services' assistance regarding the problem. On July 3, 2003, Doug Olson, Department of Administration General Services Division Facilities Manager, provided the DEQ Director's Office a memorandum described as a "facilities condition inventory." In discussing the condition of the tiled ground floor in the Metcalf Building, the memorandum states that "slippery conditions exist always but esp[ecially] when wet" on the tiled and travertine surfaces in the Metcalf building. Exhibit 20. The memorandum further noted that the ground floor was "especially bad." *Id.* Olson's suggested solution was to install floor runners or non-slip strips. *Id.* Because the General Services Division

(GSD) manages the building, requests for items needed in the building generally went through GSD.

10. Bess continued to have problems with the floor, and by September 2003, she had slipped and fallen on several occasions. On September 5, 2003, Bess fell to the floor with her legs splayed out, hit her chin on the floor, and needed assistance getting up.

11. Several months passed after McDonald's initial request to Danzer about the hallways but nothing was done. As a result, McDonald conferred with her vocational rehabilitation counselor and CARES and decided to put her request in writing. On September 15, 2003, McDonald sent an email to Cameron with the subject heading, "ADA Accommodation." Exhibit 6. McDonald explained in her written request that Bess had slipped and fallen numerous times, requiring retraining each time, and that the September 5 fall was severe enough that Bess was now refusing to walk in the hallway. *Id.* McDonald noted that she had consulted with CARES regarding possible solutions and that non-skid mats or runners were the best option; non-slip boots were not a viable solution. *Id.* She also wrote that the repeated falls were impairing Bess's ability to work. *Id.* McDonald requested that non-skid runners be placed from the north entrance to the single bathroom at the east end of the hallway; from the west wall to Room 35; and from the west wall to the ladies' restroom. *Id.*

12. Had DEQ provided runners as requested in the email, this would have provided a covered floor surface to all areas on the ground floor where McDonald would need to walk. By first speaking to her supervisor and then following up with an email, McDonald followed the appropriate procedure for making an ADA accommodation request.

13. Cameron responded to McDonald's formal request by sending an email to Doug Olson requesting assistance in "accomplishing a non-skid hallway in the bottom floor of the Metcalf building." The email noted, "In the winter the hallway is treacherous due to snow tracked in that melts. We have also had problems when folks who teach in the training rooms spill water in the hallway when carrying it to make coffee. There are numerous reasons to look for a non-skid hallway." Record Transcript, Pages 180-181. Cameron made several unsuccessful attempts to get General Services to address this issue, but was unable to get in touch with Olson.

14. Frustrated with Olson's failure to respond, Cameron requested the assistance of Constance Enzweiler, the ADA specialist at the Department of

Administration. On October 17, 2003, Cameron sent an email to Enzweiler reading, "Help us out please! With 2 tries, I have no luck." Exhibit 101. Enzweiler contacted Sheryl Olson, Doug Olson's supervisor, to try to get Doug Olson to respond. In a later email Enzweiler wrote that Sheryl Olson, "cannot excuse Doug [Olson]" for his failure to respond. Exhibit 6. Cameron found Olson to be "unresponsive." Danzer believed General Services was overworked and unable to respond to general maintenance requests in a timely manner.

15. On November 10, 2003, mats measuring 2 feet by 3 feet and 3 feet by 5 feet were placed in certain areas of the ground floor: at the north entrance, the Financial Services door, and the elevator doors. At some point, a larger carpet was placed at the main entrance to the ground floor. Large areas of floor space that McDonald had requested be covered in her September 2003 email remained uncovered by mats, carpeting, or runners. The mats were not what McDonald had asked for and did not provide a covered path from her office to any other area of the building. After the mats were installed, McDonald called Cameron and told her that the mats were not what she had requested, but that she would see if they helped. McDonald also told Danzer and Smith that the mats were not adequate.

16. Bess continued to suffer slips and falls on a regular basis while navigating the floors of the Metcalf Building. One time after the Christmas luncheon, Bess fell so hard that she needed assistance getting up. Bess became very reluctant to walk in the hallway and McDonald would leave Bess behind when she went to the restroom.

17. On January 16, 2004, Bess fell again in the hallway. McDonald took Bess to the veterinarian, who observed that Bess was experiencing pain in her neck, and also "root signature pain" in her left leg and shoulder. Although Bess's toenails were somewhat long, they did not cause the animal to fall in the hallway. Rather, the slipperiness of the tile was the cause of the fall. When Bess had not improved by January 21, 2004, the veterinarian took x-rays and found that Bess had cervical disk disease as a result of the slip and fall. As a result of this fall, McDonald was unable to utilize Bess' services at work for two weeks.

18. After that fall, Bess was not the same. On some days, she did not have problems, but on other days, she had a pronounced limp, had trouble navigating stairs, and wanted to stay in Financial Services once she got to work. McDonald left Bess behind when she had short errands inside the building. After the fall, Bess was no longer able to perform her bracing function, and McDonald was no longer able to use a choke chain on Bess.

19. On January 22, 2004, McDonald again talked to Danzer about the problem, and requested additional carpeting in the hallway. McDonald also informed Livers, Cameron, and Wendy Forgey, the Safety and Health Officer at DEQ, that the mats were not sufficient, and that Bess had slipped and fallen again. Cameron asked Forgey to work with McDonald on the request. Forgey responded by emailing Doug Olson and requesting "something to help prevent slips and falls in the hallway." She noted that there were some concerns about a service animal slipping and hurting her back. She wrote, "I have received numerous complaints that the floor does get slippery when snow is tracked in." Exhibit 16. Forgey also sent an email to Brett Dahl at the Department of Administration indicating that Bess had fallen on September 5, 2003 on the slippery floors and that the matter was again being brought to Respondent's attention. The email indicated that Bess was required to receive medical attention, and was off of work due to her injuries.

20. On February 19, 2004, Forgey met with Doug Olson, who explained that General Services would not pay for carpeting or runners, but that DEQ could pay for carpeting or runners out of its own budget. Olson did not make a recommendation as to runners versus carpeting. Olson offered to assist in obtaining prices and product literature. Forgey informed McDonald of General Services' position, and explained that because Forgey was new to her position, she did not know what to do next and would have to consult with her supervisor. Cameron advised Forgey to obtain price information from Olson and to continue to research the issue. By email, telephone, and written notes, Forgey tried repeatedly and unsuccessfully to get this information from Olson and believed that General Services was not treating the matter with sufficient urgency.

21. In March 2004, Bess slipped and fell again and hit her chin on the floor. Bess was limping and having difficulty, so McDonald took her to the veterinarian again. The veterinarian determined that Bess had suffered a soft tissue injury to her left shoulder as a result of the slip and fall. This injury could have been associated with the injury from the previous fall. After this fall, Bess had more difficulty navigating sloped surfaces, she limped on occasion, she was not as agile as she used to be, and she no longer ran and jumped. McDonald paid vet bills in the amount of \$333.84 related to treatment for the January and March falls.

22. On March 24, 2004, McDonald sent another email to Virginia Cameron indicating that Bess had fallen again, was limping again, and would need to see a veterinarian. McDonald requested that non-skid carpeting be installed "the length of the hallways on the ground floor and across between the elevator and the women's bathroom." She also stated that carpets were needed by the elevator on each floor

and “the length of the tile on each floor.” Exhibit 7. What McDonald meant by the last sentence was that she needed a small amount of carpeting between the elevator and the carpeted areas on the first and second floors; she did not mean that the entire first and second floors needed to be carpeted. McDonald explained this to Forgey. McDonald added a request regarding the first and second floors in addition to the ground floor because of changes in the office which now required her to go to meetings on those floors. On April 14, 2004, Forgey wrote a memorandum to Cameron stating “I do believe that the floors tend to become slippery when they are wet,” and wrote that she believed DEQ should look into installing carpeting or runners. Exhibit 18.

23. From March 2004 until McDonald left DEQ in August 2004, she had further conversations with Danzer, Forgey, and Livers regarding her request, but DEQ did nothing. Bess continued to have problems navigating the tile surfaces. McDonald frequently left Bess at home because she was afraid Bess would sustain further injury. When Bess was unable to accompany her in the hallway, McDonald was worried that she would have a dissociative episode or that she would fall and not be able to get up. McDonald was frustrated and upset with DEQ’s failure to provide the accommodation she needed and she experienced stress as a result. By May 2004, McDonald had lost faith that DEQ would ever comply with her accommodation request, and started looking for a new job.

24. On July 9, 2004, Olson finally provided Forgey the price information she had requested. Smith had researched the cost of carpeting or runners for the ground floor of the Metcalf building and estimated the cost to be between \$1,500.00 and \$2,000.00. Olson determined that runners for the ground floor hallway would cost \$7,500.00 to \$8,000.00 and would need to be replaced every six or seven years, and carpeting for the entire floor would cost \$12,808.00. McDonald provided these estimates to Danzer.

25. Using runners instead of installing carpet would cause additional work for the janitorial crew, but would not have been an undue hardship. DEQ had a large surplus in its proprietary fund and could have afforded \$13,000.00 for carpeting. In fact, on the ground floor of the Metcalf building, more areas were carpeted than not.

26. McDonald told Danzer that there was no need to carpet the entire hallway when runners would suffice. McDonald did not, however, withdraw her request for accommodation. Danzer told McDonald that she would conduct meetings in Room 35, which was closer to McDonald’s office, but this was not an adequate solution because McDonald would still have had to walk over tile floor to get to Room 35, and

there was still a possibility that other people might schedule meetings at other locations.

27. After McDonald received a job offer from another agency, Livers asked what it would take to keep her. McDonald replied that DEQ needed to do something about the floors and give her a raise of two dollars an hour. McDonald told Livers that she would not stay unless the floor problem was addressed. Livers replied that he would continue to work on these issues, but would not guarantee anything. McDonald left the job on August 6, 2004. At that time, DEQ still had not made any decision about providing the accommodation despite the passage of nearly nine months since the request had been made

28. In August 2004, McDonald, after consulting with CARES, made the decision to retire Bess because she was limited in her ability to provide assistance and McDonald did not want to risk any further falls. Bess was unable to brace, walk long distances, and was reluctant to walk on tile floors. Given the dog's physical condition and its apparent reluctance to walk on hard surfaces as a result of the falls in the Metcalf Building, retiring Bess was an appropriate decision.

29. Because McDonald was so dependent upon Bess, the loss of Bess's services caused her distress. At her current job, McDonald has a higher frequency of absences than she did when she was at her job at DEQ. She has difficulty completing her work in a timely fashion. She is also limited in her ability to engage in those physical activities that she could ordinarily engage in despite her disability. McDonald suffers more panic attacks and is afraid to go out of her house. Her previously active participation in the Girl Scouts has ended because it is difficult to engage in this activity without Bess. Her lessened ability to go out in public, due to the loss of Bess has worsened her depression. As a result of the loss of Bess's services, McDonald had to increase the dose of her antidepressants. She now has dissociative episodes at work which cause her to lose hours of time.

30. The market value of a service animal like Bess is about \$18,000.00, and the closest place to Helena where McDonald could obtain a comparable service dog is in Jud, North Dakota. The market value of an injured animal like Bess who is no longer able to provide services is essentially nothing. To obtain a new dog, she would have to travel to North Dakota and stay there for at least a week, and perhaps two to three weeks. The federal per diem travel rate for North Dakota is \$91.00 per day. Exhibit 11. It would cost \$656.80 to fly to North Dakota, and a rental car would cost \$242.00. Exhibits 12 & 13. Had Bess not sustained the injuries in January and March 2004, she likely could have continued to perform services for at least two more

years. Australian Shepherds like Bess can live to be live to be fifteen to seventeen years old.

31. McDonald did not pay full market value for Bess but received her for approximately \$500.00 from the CARES Foundation. There is, however, no evidence in this case that Bess can be replaced for any amount less than the full fair market value of this type of service animal, \$18,000.00.

IV. Opinion²

A. *DEQ Failed to Make a Reasonable Accommodation for McDonald.*

Montana law prohibits discrimination against employees based on a physical or mental disability. §49-2-303(1)(a) MCA. An employer commits unlawful discrimination by failing to make reasonable accommodations to known physical or mental limitations of an otherwise qualified employee unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Admin. R. Mont. 24.9.606 (1). An undue hardship means an action requiring significant difficulty or extraordinary cost when considered in light of the nature and expense of the accommodation needed, the overall financial resources of the facility, the overall financial resources of the business, and the type of operations of the employer. Admin. R. Mont. 24.9.606 (5). A “reasonable accommodation” may include making existing facilities used by the employee readily accessible and usable by the employee. Admin. R. Mont. 24.9.606 (3). An accommodation is considered reasonable unless it would impose an undue hardship upon the employer. Admin. R. Mont. 24.9.606 (4).

When an accommodation is required to enable the employee to perform the essential functions of the job, the employer has a duty to “gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job” *Buckingham v. U.S.*, 998 F.2d 735, 740 (9th Cir. 1993), *citing Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989). Disability accommodation includes an obligation to participate in an interactive process even if the first accommodation fails. *See, e.g., Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1137-38 (9th Cir. 2001) (The employer’s obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different

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

accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is necessary).

DEQ does not dispute that McDonald was otherwise qualified nor that she was disabled within the meaning of the Montana Human Rights Act. Rather, the thrust of DEQ's arguments is that McDonald did not need the accommodation she sought and that, in any event, the accommodation was not reasonable. McDonald's testimony demonstrates that she is an otherwise qualified person who needed the accommodation she sought in order to perform the essential functions of her job. As part of her duties, she was required to travel from her work space on the ground floor of the Metcalf building to other parts on the ground floor and the other floors in order to attend meetings and carry out the other functions of her position. She needed to have access to the bathrooms on the ground floor. She needed Bess in order to move about the building not only because of the stabilizing function that Bess provided, but also for the tactile function that Bess provided. Although Danzer indicated that some of the meetings which McDonald had to attend could be held in Room 35 of the ground floor, her testimony does not change the fact that McDonald had to travel to other floors in the building and to the bathroom. The hearing examiner is thus convinced that the essential duties of McDonald's job required her to be able to move relatively freely about the Metcalfe Building and that the placement of the runners was necessary to enable her to accomplish this task.

DEQ's argument that McDonald did not need the accommodation that she requested is undercut by its own response to McDonald's requests for the accommodation. DEQ did not dismiss her requests out of hand nor did DEQ take any efforts to explore other options with McDonald (such as the use of a walker or cane). Instead, DEQ obviously considered that at a minimum the runners requested on the ground floor were necessary in order to permit McDonald to undertake the functions of her job. This is shown by such things as Cameron's e-mail to Doug Olsen with GSD where she sought help in "accomplishing a non-skid hallway in the bottom floor of the Metcalfe building," (which shows that Cameron herself thought the floors were slippery and presented a problem for Bess) and her later pleas in October 2003 for assistance from Enzweiler when GSD did not respond in a timely fashion. It is also shown by DEQ getting pricing for the runners. DEQ clearly knew that McDonald needed the accommodation she sought in order to perform the essential functions of her job and DEQ, by its responses, clearly perceived the accommodation sought to be reasonable. Nonetheless, despite the passage of almost one year, DEQ inexplicably and unreasonably failed to obtain the runners or make other reasonable provision to accommodate McDonald.

These same facts also refute DEQ's suggestion that its delay did not amount to a violation of the Montana Human Rights Act. Delay in providing reasonable accommodation can be a violation of the ADA. *See, e.g., Selenke v. Medical Imaging*, 248 F.3d 1249 (10th Cir.2001).

DEQ did not engage in any discussion with McDonald about any course of accommodation except placement of the runners and holding meetings in a ground floor meeting room. The latter alternative was not viable and DEQ itself pursued but then inexplicably failed to provide the runners that McDonald needed in order to be able to carry out the functions of her job. Other than its assertion that placement of the runners was not reasonable (an argument that is rejected below), DEQ provided no rationale basis for the 1 ½ year delay that obviously affected McDonald in her employment. Indeed, even in the face of McDonald quitting because of the failure to install the runners, the most DEQ administrator Livers could say was that he would try to see about the runners but could not "guarantee anything." DEQ's conduct appears to result from stereotypical institutional inertia. To accept DEQ's argument that there was no unreasonable delay in this case would countenance the very type of conduct that the Human Rights act is designed to eliminate. The inordinate delay in providing and the ultimate failure to provide the accommodation that McDonald requested was a violation of the law.

DEQ further suggests that it has no liability in this case because McDonald did not completely disclose the nature of her impairment. McDonald did disclose her need for the use of the service animal, because of her disability. DEQ accepted that McDonald needed to use the service animal and approved her use of Bess on the work premises. DEQ's suggestion that McDonald did not inform it of the specific reason she needed for the service animal is of no consequence to this case and does nothing to absolve DEQ of liability for its failure to accommodate.

DEQ's further contention that the requested accommodation was not reasonable also fails. DEQ had the burden of proving its point in this regard. *Morton v. United Parcel Service*, 272 F.2d 1249, 1257 (9th Cir., 2001)(undue hardship is an affirmative defense the employer must prove). As a matter of fact, there was no significant difficulty or extraordinary cost associated with placing the runners in the ground floor. The cost of supplying the runners was relatively minimal (Smith's research suggested that they could be obtained for as little as \$1,500.00 to \$2,000.00 or as much as \$13,000.00) compared to the overall financial condition of DEQ. The suggestion that the runners posed a safety hazard for other persons in the building is belied by DEQ's recognition (as demonstrated by the Cameron e-mails, for example)

that the ground floor hallways presented a safety hazard to all people using the facility, especially in the winter.

DEQ also argues that the interim attempt of placing small 2x3 and 3x5 mats at the entrance doors, the doors to some of the rooms, the bathroom and in front of the elevator provided an adequate remedy because McDonald was willing to try them. The testimony demonstrates that the mats were not adequate to meet McDonald's request for reasonable accommodation. The mats covered only a very small portion of the area that needed coverage in order to prevent the falls the dog experienced. In addition, DEQ's argument ignores the admonition of *Humphrey, supra*, that the interactive process extends beyond the first attempt at accommodation when either the employee asks for a different accommodation or the employer is aware that the initial accommodation is failing and further accommodation is necessary. In fact McDonald did try the mats for a while and they obviously did not work as the dog kept slipping and the mats did not come close to adequately covering the floor. McDonald then went back to the DEQ administrators and requested that her accommodation of runners be implemented, but to no avail. Her request for the runners was ignored for almost 1 ½ years and in doing this, DEQ discriminated against McDonald.

Finally, DEQ argues that the problem here was that the accommodation was being extended to the dog, not the employee, and there was no obligation to accommodate the dog. As McDonald pointed out (charging party's opening brief, page 15), this is analogous to arguing that failing to build an affordable wheel chair ramp for an otherwise qualified paraplegic who must use a wheelchair to access her job is not discrimination because there is no obligation to accommodate the wheelchair. DEQ's argument is simply an alternative formulation of its argument that the accommodation sought was not reasonable. McDonald's testimony and DEQ's actions both prove the contrary, i.e., that the accommodation was reasonable and should have been made. DEQ did not make the accommodation and, therefore, has violated Mont. Code Ann. §49-2-303(1) and Admin. R. Mont. 24.9.606(1).

B. The Department Should Order Reasonable Measures to Rectify the Harm McDonald Suffered and Must Impose Affirmative Relief.

The department may order any reasonable measure to rectify any harm McDonald suffered as a result of the illegal discrimination to which she was subjected. Mont. Code Ann. § 49-2-506(1)(b). The purpose of awarding damages in a discrimination case is to make the victim whole. *E.g., P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *see also 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.

McDonald seeks compensation for the emotional distress she suffered as a result of the failure to accommodate her in the amount of \$40,000.00. She also seeks compensation to replace her service animal, in the amount of \$18,000.00, the costs associated with obtaining a new animal (travel and training), in the amount of \$1,536.00, and \$333.84 she paid out for the veterinarian bills due to the injuries Bess sustained in her falls at the Metcalf Building. McDonald further requests (1) injunctive relief to prevent DEQ from discriminating against disabled employees, (2) affirmative relief to require DEQ to provide reasonable accommodations for its employees with disabilities, (3) an order requiring DEQ personnel to obtain ADA training, and (4) an order requiring DEQ to provide notice to all employees regarding reasonable accommodation.

Emotional distress damages are within the scope of the Human Rights act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601, *Benjamin v. Anderson*, 2005 MT 13, ¶70, 327 Mont. 173, ¶70, 112 P.3d 1039, ¶70. Emotional distress recoveries for illegal discrimination under the Montana Human Rights Act follow federal case law. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

McDonald suffered emotional distress as the result of DEQ's discrimination. While McDonald asserts that she is entitled to \$40,000.00, due in large part to her being forced to leave her job, it is not at all certain under these facts that McDonald was solely motivated to leave her job at DEQ due to the stress of the failure to provide an accommodation. McDonald was equally motivated to leave her job due to the possibility of receiving a higher salary at a new job. She premised her ultimatum for staying with DEQ not only on a demand that she be accommodated but also upon a demand of an additional \$2.00 per hour in salary. This cuts against her argument that she is due \$40,000.00 for emotional distress on the basis that she was forced to leave her job entirely because of the failure to accommodate.

McDonald's emotional distress was obviously more severe than that of the plaintiffs in the case of *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; *cited in Vortex at* ¶33. In *Johnson*, the plaintiffs suffered emotional distress resulting from the refusal of a landlord to rent living quarters to them due to their race. Those plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one

else present to witness their humiliation. Nonetheless, the appeals court increased their awards from \$125.00 to \$3,500.00 each for the overt racial discrimination.

McDonald was subjected to the distress of having to endure one and one half years of DEQ's failure to accommodate despite repeated requests. McDonald has also experienced some loss of social interaction due to the loss of the service animal. Under the circumstances of this case, she is due \$10,000.00 for emotional distress.

McDonald is also entitled to be compensated for the loss of her property due to the failure of DEQ to provide the accommodation. DEQ argues that McDonald only paid \$500.00 to CARES in order to receive Bess. The evidence, however, demonstrates that Bess is no longer useful as a service animal due to the falls the dog incurred at the Metcalf Building. There is no evidence to show that McDonald can replace the service animal for anything less than \$18,000.00. Moreover, Bess, had she not been injured, could have continued to serve McDonald. Additionally, in order to ensure that any new service animal will be able to work with McDonald and that McDonald will be properly trained to control the service animal, she will incur the \$1,536.00 in travel expenses that she seeks.³

As previously noted, the purpose of the remedial portion of the Human Rights Act is to make whole a person who has suffered discrimination. Awarding McDonald anything less than \$18,000.00 for the loss of Bess will not make her whole. DEQ should, therefore, be ordered to pay the fair market value of \$18,000.00, the \$333.84 that McDonald incurred for the veterinarian bills, and the \$1,536.00 that McDonald will incur in obtaining a new service animal.

Lastly, upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. It is proper and reasonable to enjoin DEQ from similar conduct in the future, and require it to adopt a policy to ensure that no similar treatment befalls any other disabled employees. Mont. Code Ann. § 49-2-506(1)(a) and (b).

³ McDonald has not sought nor argued for prejudgement interest and it has not been awarded.

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. McDonald was an otherwise qualified individual with a disability who needed an accommodation in order to carry out the essential functions of her job with DEQ in the Metcalfe Building.
3. DEQ discriminated against McDonald in failing to provide her a reasonable accommodation.
4. McDonald is entitled to \$18,000.00 for the loss of the service animal, \$333.84 she incurred in veterinarian bills, \$1,536.00 in additional expenses she will incur in replacing the animal, and \$10,000.00 for the emotional distress she has suffered as a result of the discrimination.
5. The department must order DEQ to refrain from engaging in the discriminatory conduct and should prescribe conditions on DEQ's future conduct relevant to the type of discriminatory practice found, require the reasonable measures detailed in the findings and opinion to correct the discriminatory practice. Mont. Code Ann. § 49-2-506(1)(a) and (b).

VI. Order

1. The department grants judgment in favor of McDonald, and against respondent DEQ on McDonald's charges of illegal disability discrimination against her as alleged in her complaint.
2. DEQ shall within 30 days of the date of this decision pay to McDonald the sum of \$29,869.84, representing \$18,000.00 for the loss of the service animal, \$333.84 in amounts paid for veterinarian services, \$1,536.00 in additional expenses that she will incur in replacing her service animal, and \$10,000.00 in emotional distress.
3. The department permanently enjoins DEQ from discriminating against any person with a disability by failing to provide reasonable accommodation as required by law.
4. Within 20 days of the entry of this order, DEQ shall submit to the Human Rights Bureau for review its present policies regarding discrimination against disabled

persons in the workplace. Thereafter, DEQ shall adopt any additional policies recommended by the Human Rights Bureau and shall ensure prominent posting of any new policy recommended by the Human Rights Bureau.

Dated: August 4, 2006

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Examiner
Montana Department of Labor and Industry