

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0061011712:

LINDA WETZEL,	)	Case No. 2180-2006
	)	
Charging Party,	)	
	)	
vs.	)	<b>FINAL AGENCY DECISION</b>
	)	
ARTHRITIS AND OSTEOPOROSIS	)	
CENTER,	)	
	)	
Respondent.	)	

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**I. Procedure and Preliminary Matters**

Linda Wetzel filed a human rights complaint alleging that her employer, The Arthritis and Osteoporosis Center (AOC), discriminated against her in violation of the Montana Human Rights Act by failing to grant her a reasonable accommodation (part-time work) for her disability. Hearings Examiner Gregory L. Hanchett held a contested case hearing in this matter on October 5, 2006 in Billings, Montana. Paula Saye-Dooper and Michael Moses, attorneys at law, represented Wetzel. John Crist, attorney at law, represented AOC. Linda Wetzel (Linda), Barbara Sample, Judy Callisto, Annette Robinson, Don Wetzel, Jr., and Julianna Smith testified in Wetzel's case in chief. Wetzel's Exhibits HH, E, N, Q, Q1, T, NN and AOC's Exhibits 113, 114, 116, 127, 106, 119, 122, 121, 123 were admitted into evidence. At the conclusion of Wetzel's case in chief, the hearing examiner granted judgment in favor of the respondent. The overwhelming evidence produced during Linda's case in chief showed that Linda, due to the severity of her illness and the deleterious side effects of the treatment for her illness, was not capable of fulfilling the essential functions of the job.

**II. Issues**

Did AOC discriminate against Linda Wetzel in violation of the Montana Human Rights Act by failing to accommodate her with part-time work where the symptoms of her illness and the deleterious side effects of treatment for the illness prevented her from performing the essential functions of her job?

### **III. Findings Of Fact**

1. AOC is a very busy medical practice owned by Drs. Roane and Arguelles. Cathy Evans is the AOC office manager.

2. AOC employed Linda in its Receptionist B position in March, 2004. In addition to this position, the office had one other receptionist holding the receptionist A position, Annette Robinson.

3. Linda's duties included greeting patients as they arrived at the office, getting updated information from patients and updating the office records with the new information, scheduling appointments, providing and copying medical information, mailing out medical transcriptions, rescheduling appointments, delivering mail to the building mail room and collecting and distributing mail, calling patients to remind them of upcoming appointments, answering phones at all times, and helping the Receptionist A and other office personnel as directed.

4. During any given day, the doctors would see in excess of 40 patients per day. Linda's job was extremely hectic and frequently involved working over-time. As Robinson succinctly stated in her testimony (and the hearings examiner finds), each of the receptionists had "tons of stuff to do each day."

5. During November, 2004, Linda began to notice large solid masses in her abdomen area. During November and December, 2004, Linda also became extremely ill at work. On several occasions, she would have to run from her receptionist position down the hall to the bathroom because she was vomiting. She had severe lower back and abdominal pain. She was in so much pain that she had to support her lower back with a towel. At the same time, she was losing weight. Wetzel also experienced problems with her memory which interfered with her job as a receptionist.

6. A coworker at AOC, Julianna Smith, observed Linda's difficulties and the difficulties she was having in performing the receptionist duties. She noticed that Linda was having problems with her memory and with focusing on work. Julianna

was (and is) a registered nurse in Montana and had served as an oncology nurse for Dr. Cobb, the oncologist who eventually ended up treating Linda. Linda's symptoms from the cancer were so bad and so pronounced that Smith wondered if the cancer had metastasized into Linda's brain.

7. In early December, 2004, Linda was diagnosed with Stage IV non-Hodgkins Lymphoma. By the time it was discovered, the cancer had already spread to other parts of Linda's body. The cancer had adversely affected Linda's liver function and required immediate surgery. On December 17, 2005, Linda underwent surgery to remove the cancer from around the liver in order to correct the liver function. At the same time, Dr. Chavez referred Linda to Dr. Cobb for treatment of the cancer.

8. As a result of her very serious cancer, its advanced stage, and the need to recover from the surgery, AOC and Linda decided that Linda should take the rest of the 2005 year off. The time off was also needed to permit Linda to meet with Dr. Cobb and formulate a treatment plan and to permit her to see how she would react to the treatment plan.

9. On January 4, 2005, Linda, Don, Julianna and Linda's close friend, Judy Calisto, met with Dr. Cobb to discuss the extent of the cancer and the possible treatment plans. Dr. Cobb advised Linda that she had B-Cell Lymphoma throughout her lymph nodes and that it had metastasized into her bone marrow. Dr. Cobb explained that her "situation was not good." Testimony of Don Wetzel. Dr. Cobb also advised Linda that her treatment regime would have to start as soon as possible. Dr. Cobb advised her that her ability to return to work would be conditioned on her body's reaction to the treatment.

10. At around the same time, Linda discussed her concerns about the effects of the treatment with Julianna. Linda was understandably concerned about being unable to work and the financial implications this would have for her. Julianna felt that it would be wiser for Linda not to attempt to work because of the intensity of the treatment and the almost certain deleterious side effects Linda would experience from her treatment.

11. Linda opted to begin aggressive chemotherapy and also to begin an experimental drug treatment involving the Genesense drug pump. When she started her treatment, it was "very intense." Testimony of Linda Wetzel. Her treatment consisted of one chemotherapy treatment per month and seven Genesense

treatments. The chemotherapy treatment was rigorous, requiring eight hours to complete.

12. Linda began her chemotherapy treatments on January 10, 2005. The chemotherapy treatments made her very ill. During that first treatment, Linda got so ill that they had to stop the treatment for that day and restart and then complete it the following day, January 11, 2005. During the week of January 17, 2005, Linda reported to Dr. Cobb's office that she was suffering from nausea, vomiting and headaches. Indeed, she made an appointment to see Dr. Cobb due to the severity of her illness. Linda's cancer and her reaction to her chemotherapy treatments rendered her unable to work at all. On January 20, 2005, Linda called into Dr. Cobb's office complaining of increasing pain, nausea and vomiting. Exhibit 116, page 5. On January 21, 2005, Linda called and later came into see Dr. Cobb, complaining of fever, pain and nausea. Exhibit 116, pages 6 and 7. Linda specifically told her doctor that she "had not been feeling well for several days." Exhibit 116, page 6.

13. On January 10, 2005, Linda applied to the Social Security Administration to obtain disability benefits. She submitted her application by telephone, speaking to a Social Security employee who took pertinent information from Linda regarding her disability (Exhibit 118). Among other things, Linda verified that she "became unable to work because of my disabling condition on January 10, 2005." *Id.*

14. Linda's disabling condition continued to render her unable to work for at least a year after she began her chemotherapy. She reported continued fatigue and nausea during her visit with Dr. Cobb on March 14, 2005. Exhibit 116, page 9. As part of her application for disability benefits, Linda reported on March 15, 2005 that she had vomiting spells at different times throughout her chemotherapy treatment. Exhibit 119, page 2. Dr. Cobb noted in an April 18, 2005 letter that Linda had "several complications," both from her chemotherapy and her underlying disease." Exhibit 120.

15. On June 2, 2005, Dr. Cobb, provided a statement of disability for Linda, noting that she had "not been able to work for the past several months during which time she has been going through extensive diagnostic testing and chemotherapy which is ongoing." He further stated that "the effects of her disease and chemotherapy are expected to last at least a year from the date of completion of her treatment which will be within the next two weeks." Finally, he noted that Linda's medical condition "is expected to persist for at least one year *during which time she will not be able to work.*" Exhibit 121 (emphasis added).

16. Linda's initial request for Social Security disability benefits was denied. She requested a reconsideration of that determination on June 19, 2005. Exhibit 122. In so doing, Linda stated that "her condition would last for the rest of her life and the effects of it will last for a minimum of 12 months." *Id.* In providing information to the Social Security Administration on October 21, 2005 about her request for reconsideration, Linda reiterated that she had to go through radiation and chemotherapy and that "the abdominal mass I have is so large I vomit all the time and I cannot sit for long periods." Exhibit 123, page 2. She further stated that her left kidney had stopped functioning and that she had severe headaches. *Id.*

17. Linda's request for reconsideration was unsuccessful. She filed an appeal from the denial of her request for reconsideration with the Social Security Administration. In filing her appeal, she requested that date of onset of her disability be amended to reflect the onset of her disability as December 20, 2004. Based on her testimony at the social security hearing, the social security hearings officer found that Linda was disabled, being unable to engage in any substantial gainful activity and that her impairment could be expected to last at least 12 months. Exhibit 125, page 1.

#### IV. Opinion<sup>1</sup>

Montana law prohibits employment discrimination based on physical or mental disability when the essential tasks of the job do not require a distinction based on disability. Mont. Code Ann. § 49-2-303(1)(a). If a person suffers from a disability, the employer has a duty to provide a reasonable accommodation if, with such an accommodation, the person could perform the essential functions of the job. Mont. Code Ann. § 49-2-101 (19)(b); Admin. R. Mont. 24.9.606(2). If a person is unable to perform the essential job functions, she is not a qualified person and, therefore, cannot make out a human rights violation. *Pannoni v. Brd. of Trustees*, 2004 MT 130, ¶127, 321 Mont. 311, ¶127, 90 P.3d 438, ¶127. The charging party bears the burden of proving that he or she can perform the essential functions of the job. *Pannoni, supra*, citing *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 328-29, 912 P.2d 787, 791-92.

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<sup>1</sup> 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.

The Respondent does not dispute that Linda had a disability. Rather, the Respondent correctly focuses on the question of whether Linda was otherwise qualified for the job. Here, the overwhelming evidence shows that Linda was not able to perform her job because of the very severe symptoms of her illness and the very debilitating physical side effects of her chemotherapy.

During the time she claimed she could have worked, Linda suffered persistently from nausea, vomiting, pain and a host of other maladies that kept her from working. This conclusion is buttressed by Dr. Cobb's repeated statements (the March 14 and June 2, 2006 letters) that Linda could not have worked during the time of her treatment or for a period of approximately twelve months after that treatment (i.e., until at least March, 2006, more than one year after she started her leave of absence). This conclusion is further substantiated by the fact that Linda repeatedly verified under oath to the Social Security Administration (through her application process and in the hearing for her disability benefits) that she could not work and had not been able to work since December, 2004. The force of Linda's verified statements to the Social Security Administration, coupled with her treating doctor's opinion and the nature of the maladies convinces the hearing examiner that Linda was quite obviously incapacitated and could not work.

Linda's testimony at the hearing in this matter that she could have worked at least part-time is simply not credible. Dr. Cobb's letters undermine the veracity of her testimony. And if Dr. Cobb's letters were not enough, Linda's statements to the Social Security Administration in her pursuit of disability benefits render her trial testimony unbelievable. While the hearing examiner does not doubt that Linda believed she could have worked part-time, the reality of the situation was that the severity of her illness and the very debilitating side effects of her treatment prevented her from fulfilling the essential functions of her job. Therefore, her human rights claim must fail. *Pannoni, supra.*

## **V. Conclusions of Law**

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

2. Linda was not otherwise qualified to perform the essential functions of her job due to the severity of her illness and the side effects from the treatment of her illness.

3. Because Linda did not prove that she was otherwise qualified to perform the essential functions of her job, her Montana Human Rights claim fails.

4. Because Linda has failed to prevail on her claim, this matter must be dismissed. Mont. Code Ann. §49-2-507.

## VI. Order

Based upon the foregoing, judgment is entered in favor of Respondent AOC and Linda Wetzel's complaint is dismissed.

Dated: November 17, 2006

/s/ GREGORY L. HANCHETT

GREGORY L. HANCHETT, HEARING EXAMINER

Wetzel FAD ghp