BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0061011889:

ROBIN E. SCHMITT,	)	Case No. 693-2007
	)	
Charging Party,	)	
	)	
vs.	)	**FINAL AGENCY DECISION**
	)	
INTERMOUNTAIN CLAIMS, INC.,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Robin Schmitt filed a Human Rights complaint against Intermountain Claims, Inc., alleging disability discrimination in her discharge from employment. Prior to hearing, Intermountain filed a motion for summary judgment alleging that Schmitt was not disabled within the meaning of the Montana Human Rights Act. Schmitt countered and filed a motion for summary judgment on the basis that the charging party was, as a matter of law, disabled. These motions were denied.

The contested case hearing in this matter was held on January 25 and 26, 2007 in Missoula, Montana. Erin Erickson and Tammy Wyatt-Shaw, attorneys at law, represented Schmitt. John Gordon, attorney at law, represented Intermountain. Schmitt, Dr. Anthony Williamson, Joe Maynard, Elenya Gallegos, Carrie Garber, Kim Stevens, Mike Haxby, David Ward, and Wayne Capp all testified under oath in this matter. Charging Party's Exhibits 1, 2, 3, 4, 9, and 10 and Respondent's H, I , K, L, and M were all admitted at hearing.

Following the hearing, the parties filed post hearing briefs. The charging party then filed a motion for sanctions, which included an attachment denominated as Exhbit A. For purposes of this decision, that exhbit is admitted as Motion Exhbit A in order to provide a complete record of the proceedings, but is ordered sealed, not to be opened or disseminated except upon further order of this tribunal, by any tribunal reviewing this decision, or by order of any tribunal having authority to do so.[1] The Hearings Bureau received the last brief on the

[1]In their briefing on the motion for sanctions, the parties disagree with one another over whether the information contained in Motion Exhibit A is subject to a protective order in Schmitt's pending wrongful discharge case in Missoula County District Court. The hearings examiner cannot tell whether the information contained in the

motion for sanctions on June 12, 2007 at which time the record closed. 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 pre-hearing order issued in this matter. That statement of issues is incorporated here as if fully set forth.

III. Findings Of Fact

1. Kim Stevens, branch manager at Intermountain Claims, hired Schmitt into a senior adjuster position with Intermountain on August 17, 2004. Stevens recruited Schmitt for the position because he had worked with her previously at Liberty Northwest Insurance and he found her to be professional in the adjuster position she held there. He also believed that Schmitt had the qualifications to assume a senior adjuster position because of her work at Liberty Northwest.

2. Stevens hired Schmitt to work the Gallagher-Bassett accounts. Gallagher-Bassett is a national third party administrator that oversees claims for employers. Stevens told Schmitt at the time she was hired that she was being hired to handle the Gallagher-Bassett account. Because Schmidt was hired in at the senior adjuster level, her training would be primarily focused on the Gallagher-Bassett system.

3. Stevens and another adjuster, Marcia, provided Schmitt's initial training in the Gallagher-Bassett system. Later, in October, 2004, Intermountain brought in Linda Wilson, an individual from its Boise office who was well versed in Gallagher-Bassett to provide additional training to Schmitt in processing Gallagher-Bassett claims. Wilson trained Schmitt on Gallagher-Bassett on October 21 and 22, 2004.

4. Intermountain maintains a personnel policy that outlines steps to be taken in the case of employee discipline. Exhibit 3. The policy requires employees to conform to the standards and policies of the organization and to correct performance problems if the employee is not meeting performance standards. Under the policy, "corrective action is applied progressively, relative to he severity of the problem." Exhibit 3, page 21. The policy further notes that "not all situations will involve each step or the specified progressive discipline process." *Id.* Stevens provided Schmitt provided a copy of the employee handbook in its entirety.

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exhibit (102 e-mails) is subject to the district court's protective order and the hearings examiner is not about to hazard a guess as to whether or not the material is subject to the protective order. Thus, in order to ensure that the information is not disseminated in contravention of the district court's order, and at the same time to ensure that any reviewing body has the opportunity to review the exhbit, the exhibit has been ordered sealed in this proceeding.

5. Schmitt had problems in maintaining her caseload with respect to closure rates and documentation of files. In several instances, Schmitt did not input plans of action or update claims in a timely manner despite the need to do so. In one instances, Schmitt failed to update one open claim for a period of over seven months, despite reminders to do so. Exhibit 2, Page 30. In another instance, (Exhibit 2, page 31), Schmitt had failed to update and include a plan of action in the file for a period of over six months despite two admonitions to do so. Charging Party's Exhibit 2, page 30.

6. In yet a third instance, Schmitt failed to complete a plan of action on a particular claim despite the fact she had received four supervisory notes to that effect on October 26, 2004, November 17, 2004, January 1, 2005 and April 11, 2005. Exhibit 2, page 45.

7. Intermountain expected that Schmitt and all other adjusters would place an updated plan of action in the claim at least every 90 days. Updates and plans of action were integral parts of Intermountain's service to its clients. Clients could check these updates and used them as benchmarks to ensure that claims were moving forward expeditiously. Gallagher-Bassett considered these plans of action and updates as a important benchmark for measuring the performance of Intermountain and its adjusters in processing Gallagher-Bassett claims.

8. When seeing these problems with Schmitt's work, Stevens would also verbally inquire as to the problems and ask her how these problems could be fixed. Schmitt would respond that she in essence would take care of the problem. She did not complain that Steven's requests were too "nit picky" or not part of her responsibility.

9. The problems with Schmitt's work occurred at all times throughout her tenure at Intermountain. These problems were not confined to the time after her December, 2004 blackout.

10. "E-billing" was the method by which Gallagher-Bassett provided payment to medical providers for bills related to worker compensation claims that it was processing. Intermountain's adjusters would receive a "hard" copy of a particular medical bill and the adjuster would review the bill and decide whether to approve payment. The bills would then be batched together and sent to Gallagher-Bassett's Tucson, Arizona processing facility. At that facility, the data related to the medical bill would be entered into the Gallagher-Bassett database and then payment would be sent back to the Intermountain adjuster to release the payment.

11. Efficiency in the billing process required that the Intermountain adjuster not permit the e-bills to pile up, but rather to process them immediately and send them off to the Gallagher-Bassett Tucson facility. A failure to process a bill immediately would result in a second bill from the provider and this would cause the system to bog down because that second bill would have to be processed as had the first bill. As Steven's remarked, this would create "double work." RT p. 437, ll. 19-21.

12. Schmitt had recurring problems keeping up with her e-bills. The problem was noted by Cliff Connor of Gallagher-Bassett and brought to Stevens's attention in October, 2004. Stevens approached Schmitt at that time and discussed the problems with her untimely processing of e-bills. Schmitt would respond to Stevens that she would resolve the problem. She did not complain that Stevens's expectations were unreasonable.

13. Gallagher-Bassett kept a close eye on Intermountain's processing of the e-bills. Several of Intermountain's customers had contracted with Gallagher-Bassett to receive reports, known as detailed status reports (DSR's) that provided information to employers on the status of e-bills and the progress of claims. Any problems with delays in processing would be noted not only by Gallagher-Bassett but also their clients who received theses back reports. Schmitt had problems with processing the DSR's in a timely fashion and on a consistent basis. Stevens would speak to her about it, and the problems would be corrected for a while, only to reemerge at a later date.

14. Schmitt also had recurrent problems with typographical errors in DSR's and plans of action. It was important to Gallagher-Bassett, and also to Intermountain (because Gallagher-Bassett was their client), that these reports go out with as few typographical and factual errors as possible. Schmitt had recurring problems with this. Stevens counseled Schmitt about these problems, but they kept recurring.

15. Each time that Schmitt's conduct elicited a corrective e-mail from Stevens, He would also speak to her about the problems with her work. When confronted with these problems, Schmitt's attitude was positive and she would indicate that the problems could and would be corrected. Later, however, she became frustrated as the work began to pile up.

16. On December 29, 2004, Schmitt awoke as normal at 5:30 a.m. and proceeded to complete her daily workout at the YMCA. She then returned home to shower and prepare to go to work. When she tried to leave for work at 8:15 a.m., she began to feel lightheaded. She then apparently passed out and was awakened some two and one-half hours later when her daughter's friend phoned the house. Schmitt managed to call in to work on the day of her spell to report that she would be absent. She did not go into work on December 29, 2004 but she did return to work on the following day. She did not exhibit any problems that day during her work.

17. As a result of this spell, Schmitt had her sister-in-law take her to the emergency room at a Missoula hospital where she was seen by an emergency room physician, Dr. Tim Donovan. At that time, Dr. Donovan ran a CT Scan which appeared to be normal. She also had a cardiogram which appeared normal. She was given pain medication for a headache and after the evaluations was released.

18. Schmitt did not have an epileptic seizure during her December 29, 2004 episode, nor does she suffer from epilepsy. The basis for these findings is the testimony of Dr. Lennard

Wilson, M.D., which the hearing examiner adopts as his findings of fact with respect to whether Schmitt suffered from epilepsy. Schmitt suffered from migraines, but this did not affect any major life activities. She was able to work normally.

19. Both before and after the December, 2004 incident, Schmitt worked 50 plus hour work weeks. She did reduce or attempt to reduce her hours as a result of any alleged side effects of the December, 2004 incident.

20. Though Schmitt believed that she exhibited problems with cognitive behaviors, she never complained of any such problems to her treating physician, Dr. Anthony Williamson, while she was employed at Intermountain Claims. Instead, it was not until after she had been discharged that she related any problems about cognitive behavior to Dr. Williamson.

21. Schmitt never mentioned any problem with any "out of body" spells until after she had been discharged from her employment. Schmitt never complained about having any problems with her medication while she was treating with Dr. Williamson. In addition, except for the blackout she had in December, 2004, Schmitt never reported to Dr. Williamson that she had any spells.

22. Dr. Williamson never placed any restrictions on Schmitt during the entire time he treated her. In addition, Dr. Williamson never diagnosed Schmitt with epilepsy.

23. Schmitt responded well to treatment with the drug Topamax. Schmitt has had no side effects from the Topamax since her dosage was increased to 150 mg. twice per day. Indeed, Williamson opined that the medication has helped Schmitt to overcome whatever difficulties she faced as a result of her fainting spell in December, 2004.

24. Schmitt worked with worker compensation attorney Joe Maynard during the time she was taking Topamax. At no time during this period did he ever notice that Schmitt had any problems in communicating. Neither did he notice any personality problems with Schmitt. On one occasion, Schmitt confided in Maynard that she felt she was being set up for discharge by her manager. At no time during this conversation did Maynard ever get the impression that Schmitt had any problems communicating.

25. Schmitt never suffered from an episode like the December 29, 2004 episode until August, 2006, at which time she reported that she had another such episode.

26. After the December 29, 2004 spell, Schmitt's physician placed her on the drug Trazodone. This drug was administered to Schmitt for a short time, but was discontinued because she felt that she was sedated by the drug. In March, 2005, Dr. Williamson switched Schmitt over to Topamax. With the Topamax, Schmitt no longer encountered the sedation she had felt with the Trazodone.

27. Schmitt's dosage of Topamax started at 25 milligrams twice per day and was then increased to 100 and then 150 milligrams twice per day. She reached a therapeutic level of Topamax in April, 2005, when her dose was increased to 100 milligrams twice per day.

28. The cognitive and physical impairments which Schmitt perceived she had at work were not likely caused by the Topamax. As Dr. Wilson opined, and the hearing examiner finds, confusion, psychomotor slowing, difficulty with attention and concentration, and speech or language problems would not likely occur in the 25 to 100 milligram range. And, any of those types of problems, if they were present, would only be enhanced at higher dosages, not reduced. Rather, any problems that Schmitt might have perceived with the Topamax were more likely just part of the initial adjustment to the medication but then dissipated or were residual effects from the Trazodone. The Topamax, under the facts related in this case, was not the cause of any cognitive problems that Schmitt perceived to be occurring to her.

29. Prior to February, 2005, Stevens was only required to review cases with claims in excess of $50,000.00. In January, 2005, a directive came down from Intermountain management requiring that all files be periodically reviewed by Stevens. After this point, Stevens was in a position to review Schmitt's work more often and this accounts for the increased number of corrective e-mails that Stevens began to forward to Schmitt in the spring of 2005.

30. Stevens was aware of Schmitt's December 29, 2004 fainting spell. He was also aware that Schmitt had undergone some type of scan due to the spell. Stevens was also aware that Schmitt was seeing a neurologist during this time.

31. On one occasion, Sandy, Schmitt's co-worker and friend in the Intermountain Office, , walked by Steven's office and flippantly remarked that perhaps some of the problems Schmitt had been experiencing were "because of the spot on her brain." Neither Stevens nor any of the management was aware that Schmitt had any "spot on her brain." Likewise, neither Stevens nor any of the management at Intermountain perceived or thought that any of Schmitt's problems with her job were related to any disability they perceived. No customer ever complained of any odd behavior on Schmitt's part while she was conducting her work. Schmitt herself never requested any type of accommodation for any problem that she might have perceived with her work that might be affected by any type of disability.

32. In February or March, 2005, Schmitt told Stevens that she was on Topamax. Stevens, howver, was not aware of what that drug was designed to do and there is no evidence to suggest that he was made aware of what Schmitt was using it for or how it might affect or not affect her work.

33. After recurring problems with Schmitt's work in timely completing e-bills and properly and timely completing detailed status reports, Haxby began to discuss with Stevens and

Ward about a personnel change for the Gallagher-Bassett accounts by discharging Schmitt and hiring a new adjuster. These discussions began in April, 2005.

34. By May, 2005, Intermountain had come to the conclusion that Schmitt could not carry out the duties of the job. Stevens, Haxby and Ward decided to discharge Schmitt. On May 31, 2005, Stevens discharged Schmitt informing her that the requirements of the job she had been assigned, the Gallagher-Bassett account, was not a "good fit" for her. Stevens reiterated this as the basis for Schmitt's discharge in a letter to Schmitt's attorney on June 21, 2005.

35. At the time of deciding to discharge Schmitt, neither Haxby nor Ward was aware of any medical problems affecting Schmitt's work performance. Stevens did not believe that Schmitt's work was being affected by any medical problems or medication that she was taking. Any medical problems that Schmitt was facing were not a basis for the decision to discharge Schmitt. Schmitt's discharge was based on legitimate business reasons.

36. After being hired at Liberty Northwest in July, 2005, Schmitt worked as a legal assistant. She performed her work competently. Notably, she had no problems communicating, understanding or completing her work as required.

37. Neither Schmitt's mental or physical difficulties, nor her use of the drug Topamax, have caused her to suffer any substantial limitation in major life activities.

38. After her discharge, Schmitt retained legal counsel to pursue various claims against Intermountain including a wrongful discharge claim. As part of its investigation, Schmitt's counsel arranged to have an interview with Stevens in the presence of Intermountain's corporate counsel, Doug Balfour, on November 15, 2005. At the time of the interview, Stevens, Balfour, Schmitt's counsel Erin Erickson, and co-counsel Wayne Capp were present.

39. At the time of the interview, Stevens disclosed that Schmitt's work had been inconsistent. He also mentioned that he was aware that some people in his office had commented about some unusual behavior that Schmitt had exhibited in the office.

40. Schmitt filed her human rights claim on February 24, 2006, more than 6 months after her discharge.

41. Additional e-mails disclosed by Intermountain in Schmitt's wrongful discharge case (currently pending in Missoula County District Court) after the hearing in this matter concluded support Intermountain's claim that Schmitt had persistent problems in her position which predated her December, 2004 episode and continued unabated after that episode. These e-mails do not support Schmitt's claim that she was is disabled within the meaning of the Montana Human Rights Act. Moreover, they were not willfully concealed from Schmitt. The failure to disclose them in this case was inadvertent.

IV. Opinion[2]

Schmitt contends that she was disabled or perceived by Intermountain as disabled within the meaning of the Montana Human Rights Act and that Intermountain failed to accommodate her disability. Intermountain counters that Schmitt did not timely file her claim, that she is not disabled, and that she was not perceived by her employer as if she were disabled. While the hearing examiner does not agree that Schmitt's claim is untimely, it is apparent that she is not disabled nor was she perceived as disabled by her employer. Therefore, her claim must fail.

A. *Schmitt's Claim is Timely.*

A charging party must file her claim within 180 days after "the alleged unlawful discriminatory practice occurred or was discovered." Mont. Code Ann. §49-2-501(4). A cause of action does not accrue until a charging party discovers that discrimination is the basis for an employment action. *Powell v. Salvation Army*, (1997), 287 Mont. 99, 951 P.2d 1352. In *Powell*, the charging party initially believed he was being fired for drinking on the job. He claimed that he did not learn that his employer might have fired him because of a "past history of alcoholism" (which Powell alleged to be a disability) until some time after his discharge. 287 Mont. at 106, 951 P.2d at 1356. Recognizing that the case had come to the Supreme Court after a District Court's ruling on a motion to dismiss which was adverse to Powell, the Supreme Court reversed the District Court decision, noting that "Powell may well be able to demonstrate that his cause of action did not accrue until sometime after his February 18, 1994, termination and, therefore, that he complied with the applicable 300-day limitation period." *Id.*

Applying the rationale of *Powell,* it appears that Schmitt had no basis for believing that her discharge might be related to some type of disability discrimination until the November 15, 2005 interview with Stevens. Thus, the claim in this matter, being filed within six months of the date of discovery, is timely.

B. *Schmitt is Not Substantially Limited In a Major Life Activity.*

Schmitt has the burden of establishing a prima facie case of discrimination. To do this, she must show: (1) that she belonged to a protected class; (2) that she was otherwise qualified for continued employment and her employment did not subject her or others to physical harm; and (3) that Intermountain denied her continued employment because of her disability. *Reeves v. Dairy Queen, Inc.* (1998); 287 Mont. 196, 204, ¶21, 953 P.2d 703, 708, ¶21; Mont. Code Ann. § § 49-4-101 and 49-2-303(1)(a). In addition, Schmitt at all times retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. *Heiat v. E.M.C.* (1996), 275 Mont. 322, 912 P.2d 787.

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[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.

To be a member of a protected class under the Act, Schmitt must prove she is "disabled." *Reeves*, 287 Mont. at 204, ¶¶ 22-24; 953 P.2d at 708, ¶¶ 22-24. Under the Montana Human Rights Act, a physical or mental disability is defined as:

> (I) a physical or mental impairment that substantially limits one or more of a person's major life activities;
> (ii) a record of such an impairment; or
> (iii) a condition regarded as such an impairment.
>
> Mont. Code Ann. § 49-2-101(15)(a).

To establish that she is a person with a "disability," Schmitt must show that her impairment substantially limits one or more of her "major life activities." Federal regulations define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. 1630.2(I). *Reeves*, 287 Mont. at 204, ¶ 24; 953 P.2d at 708, ¶ 24

To determine whether an impairment "substantially limits" the person's major life activities, the same Federal regulations require consideration of the following factors:

> (I) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2); *Fraser v. Goodale*, 342 F.3d 1032, 1038 (9th Cir. 2003). In *Fraser* the Ninth Circuit held that the employee failed to prove a substantial limitation where there was a very limited impairment duration. *Fraser* at 1040 to 1044. See also *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001). (epileptic employee not disabled because she had to write notes to remember); *Arnold v. City of Appleton*, 97 F.Supp.2d 937 (E.D.Wis.2000) (firefighter not "disabled" when epilepsy controlled by medication and no seizures in four years); *Todd v. Academy Corp.*, 57 F.Supp.2d 448 (S.D.Tex.1999) (employee not disabled who had five to fifteen second seizures once a week with warnings from aura effect).

In its closing brief, the respondent concedes that Schmitt may have a physical or mental impairment, but argues that whatever malady afflicts Schmitt, it does not substantially limit her in one or more major life activities. The hearing examiner agrees with this contention.

Schmitt's treating physician testified that the symptoms of Schmitt's malady (as well as the potential of seizures) are well controlled by the Topamax which he has prescribed for her. Neither Schmitt's treating physician nor any other doctor has at any time restricted her in her work or in engaging in any other major life activity, including driving. Nothing in Schmitt's medical charts introduced at the hearing give any basis to believe that Schmitt was or should be restricted in any major life activity. Schmitt has reported no other spell like the one that afflicted her on December 29, 2004. And, except for the two days of work she missed immediately after the December 29, 2004, spell, she missed no other days of work .

Schmitt does not recall ever being confused during the period after the December 29, 2004 spell and while employed at Intermountain. Schmitt was able to work 58 hours a week before the December 29, 2004 spell, a schedule that never changed while she was employed at Intermountain. Further, she testified that her medical condition – excluding the medication—did not substantially limit her ability to work. Neither did her medical condition substantially limit her ability to walk, take care of herself, speak, learn, or breathe.

The finding that Schmitt has not been limited in any major life activity is further corroborated by the fact that Schmitt did not tell Dr. Williamson that the Topamax made her confused. She never reported to Dr. Williamson that she had problems communicating or had any personality problems. Significantly, her treating physician was not aware while treating Schmitt that she was experiencing any problems with side-effects of Topamax except tingling.

At the time she was discharged, Schmitt's Topamax dosage was 200 mg per day and she currently takes 300 mg per day. Stevens, Joe Maynard, and Carrie Garber, people who worked with her on a daily basis both before and after her discharge from Intermountain, did not observe any signs of confusion, communication problems, language or hearing at any of the dosages. At most, if Schmitt had any cognitive impairment as a result of the Topamax, it occurred only from the transition to the therapeutic level and was not something of lasting effect.

The finding that the Topamax did not affect Schmitt is further buttressed by the testimony of Dr. Wilson to the effect that confusion, psychomotor slowing, difficulty with attention and concentration, and speech or language problems would not likely occur in the 25 to 100 milligram range. And, any of those types of problems, if they were present, would only be ***enhanced*** at higher dosages, not ***reduced***. In light of this evidence, and the escalation of the dosage of the Topamax, if Schmitt was affected by either any mental or physical impairment or by the administration of the medication, it would certainly have appeared while Schmitt was working at Liberty Northwest after her Intermountain job. It did not. Rather, any problems that Schmitt might have perceived with the Topamax were more likely just part of the initial adjustment to the medication but then quickly dissipated after she switched to Topamax and had no lasting or pronounced effect upon Schmitt. Neither Schmitt's mental or physical difficulty, nor her use of the drug Topamax, have caused her to suffer any substantial limitation in major life activities.

Schmitt has also suggested that because of the Topamax she did not know she was confused and suffering personality changes. This argument is undercut, however, by her experience with the Trazodone. When Schmitt was placed on Trazodone, she almost immediately reported to Williamson that it made her feel over medicated; and consequently the doctor terminated it. She was then placed on Topamax and Dr. Williamson described all of the side-effects to her. Schmitt reported some tingling, but no other side effects. Had the Topamax affected her cognitive abilities in any appreciable way, she would most certainly have reported it. As the respondent points out, it does indeed stretch credulity to believe that Schmitt would

not have realized a an impact on her cognitive abilities when she had identified such a problem with Trazodone immediately before being placed on Topamax.

The evidence in this case plainly shows that Schmitt's alleged out-of- body spells are well controlled as a result of the administration of Topamax. There is no evidence that Schmitt has been afflicted by any spells occurred at work or that any such spell affected her work. There is no evidence that the spell substantially limited any major life activity. And Schmitt's treating physician does not believe that she has a seizure disorder.

Furthermore, even though the Topamax dosage was increased by one-third, Schmitt obtained a job at Liberty Northwest within six weeks after her termination at Intermountain. As a paralegal she is again working long hours in an intense job, "doing the job of one and one-half people," according to Carrie Garber. RT p. 357, ll. 23-24. She has received a promotion and a raise in her work at Liberty Northwest. The hearing examiner agrees with the respondent that whatever impact, if any, that Schmitt's confusional migraine may have had on December 29, 2004, that impact was short lived and impermanent.

The fact that Dr. Williamson did not place any work or other restrictions on Schmitt also supports the finding that any impairment that she had did not limit her in any substantial life activity. It shows that not only in Dr. Williamson's view but in fact that Schmitt's mental or physical condition had no limiting effect on Schmitt's major life activities. *See*, e.g., *Williams v. Houston Lighting & Power Co.*, 980 F.Supp. 879 (S.D.Tex.1997) (Employee with migraine headaches not disabled where employee was released to work without restrictions).

Moreover, this agency has previously held that a "substantial limitation must be severe, i.e. involving more than simply the inability to return to the prior job. It involves, instead, the inability to pursue a broad range of jobs, so that the actual employment prospects of the claimant are *substantially limited*. [citation omitted]. Substantial limitation must also be either permanent or of sufficient duration to have a significant impact." *Nisbet vs. Parkside X-Corp.* Final Agency Decision, Case No. 9901008686. However, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. §1630.2 (3). *See also, Nisbet, supra,* page 5 (Temporary limitations that interrupt work are not always disabilities, and limitations that prevent employment in a particular job are not always disabilities).

It is evident from the testimony that Schmitt's condition does not prevent her from pursuing any job of her choosing in her areas of expertise, let alone a broad range or jobs in the areas in which she has pursued employment such as a claims adjuster or a paralegal. In her job at Liberty Northwest, Schmitt was first hired as a legal secretary and then promoted to paralegal – with a commensurate pay raise. A review of Schmitt's resume establishes that she has moved from paralegal to workers compensation adjuster and back to paralegal fairly regularly over the past 10 years. To be "disabled" for the major life activity of "working", Schmitt must show that she cannot work in any of the class of jobs she has previously had. As the respondent correctly

notes, the evidence in this case does not show that. To the contrary, it shows that Schmitt works without any problem at Liberty Northwest. Schmitt is not disabled within the meaning of the Montana Human Rights Act.

C. *Intermountain Did Not Perceive Schmitt As Disabled.*

Schmitt further argues that even if she was not substantially limited in a major life activity, Intermountain nonetheless perceived her condition as disabling and, therefore, she is entitled to recover form Intermountain. An employee is considered disabled when an employer perceives a condition as disabling . Mont. Code Ann. §49-2-101(15)(a). An employer regards its employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved. *Butterfield v. Sidney Public Schools*, 2001 MT 177, ¶30, 306 Mont. 179, ¶30, 32 P.3d 1243, ¶30, citing *Haffner v. Conoco, Inc.* (1994), 268 Mont. 396, 886 P.2d 947. Simply showing that the employer regards the employee as being incapable of satisfying the demands of the particular job is not sufficient to show that the employer perceived the employee as disabled. *Butterfield*, ¶30.

The charging party argues that Stevens, Ward and Haxby "had direct knowledge" that Schmitt was suffering from a neurological condition. Charging Party's reply brief, page 7. That assertion overstates the force of those witnesses' testimony. Haxby stated that Stevens informed him that Schmitt had "passed out in her car" on December 29, 2004. RT p. 585, ll 4-13. He was not aware of anything about her medical treatment or any issues other than the performance issues that had been noted throughout Schmitt's tenure at Intermountain. Haxby further stated that during his contact with Schmitt on April 12, 2005, she did not exhibit any problems in communication nor did she seem confused. Ward stated that he had been informed by either Stevens or Haxby that Schmitt had a "migraine headache or something and missed a day or two of work." RT p. 609, ll. 17-21. In addition, Ward and Haxby were not in Missoula's Intermountain office. Their testimony shows at most that they were aware that Schmitt had some type of incident on December 29, 2004. It does not show that they knew or even had a reason to suspect that Schmitt suffered from a neurological disorder that caused her to be disabled.

Steven's testimony shows that he was aware that Schmitt had the incident on December 29, 2004 and that she had some type of brain scan. Schmitt reported to Stevens that the incident was related to some type of migraine. RT p. 185, ll.1-4. Schmitt's co-worker had made a flippant remark to Stevens that perhaps Schmitt's work problems perhaps were related "to the spot on her brain." As far as Stevens was concerned, however, that comment was only hearsay and management "didn't know of any significance to that." RT p. 187 ll 22-25, p. 188, ll. 1-25. In addition, Stevens quite obviously attached no import to the non-management office worker's comments about Schmitt's alleged inappropriate laughing on the phone with customers because he had not personally observed that conduct and he had no complaints from customers to that effect. RT p. 189, ll 19-25, p. 190 ll. 1-14.

Beyond this, Stevens observed Schmitt's personality, communication skills and interactions with others on a daily basis. He did not observe any personality changes nor did he see any problems in her ability to speak or communicate during her tenure at Intermountain. This is wholly consistent with Schmitt's lack of any complaints to her treating physician until after her discharge that she was having any personality problems or problems at work that would have put Intermountain management on notice that Schmitt was disabled or would have caused management to perceive that she was disabled. It is further consistent with the testimony of Maynard and Garber and convinces the hearing examiner that Stevens testimony is credible and that Schmitt did not exhibit behaviors that would have caused any of the persons responsible for discharging Schmitt to perceive her to be disabled. Schmitt has thus failed to carry her burden of persuasion to show that the persons responsible for her discharge knew she was disabled or perceived her to be disabled. Because Schmitt has failed to show that she was either disabled or perceived to be disabled as a result of any condition she may have had, she has failed to establish that she is disabled within the meaning of the Montana Human Rights Act and cannot recover under the act.

D. There Is No Basis For Granting The Motion for Sanctions.

After the conclusion of the hearing and post-hearing briefing in this matter, Schmitt filed a motion to supplement the record and for sanctions, indicating that the respondent had withheld material evidence in its discovery responses of which Schmitt was unaware until after the hearing. Schmitt asserts that the material, certain e-mails that were produced in discovery in Schmitt's ancillary state court wrongful discharge claim against Intermountain after the hearing in this case, was intentionally withheld and on that basis alone the sanction of a default judgment against the respondent should be entered Pursuant to Rules 11 and 37 of the Rules of Civil Procedure. The respondent indicates that the material was not withheld intentionally and further argues that in any event, the material is not helpful to Schmitt's case. Having painstakingly reviewed the additional e-mails, the hearing examiner finds that the respondent did no intentionally withhold material and, more

importantly, the material in fact supports the respondent's case. Therefore the hearing examiner declines to impose any sanctions.

Rule 37 (b) (2) and (d) of the Montana Rules of Civil Procedure provide that where a tribunal finds that a discovery violation has occurred, it may "make such orders in regard to the failure as are just" which include taking any action authorized under Rule 37 (b)(2)(A), (B), or (C). The Montana Supreme Court has recognized that the sanction imposed "should relate to the extent and nature of the actual discovery abuse and the extent of the prejudice to the opposing party which results therefrom." *Smith v. Butte-Silver Bow County* (1996), 276 Mont. 329, 339-40, 916 P.2d 91, 97.

In *Smith*, the plaintiff failed to disclose a summary of grounds for it's expert witness' testimony in response to the defendant's interrogatories requesting such information and even though the district court had specifically ordered the plaintiff to do so. Also, the district court initially warned the plaintiff that a failure to comply with its order would leave it no other choice but to dismiss this case with prejudice, but later modified its order to indicate that it would only require the reopening of the expert witnesses' depositions. *Id.* at 339, 916 P.2d at 97. As a sanction for failing to comply with the district court's order, the district court sanctioned the plaintiff by dismissing its case with prejudice. On appeal, the supreme court reversed the district court's dismissal, noting both that the dismissal sanction bore "little relationship to the nature and extent of the discovery abuse and the resulting prejudice in the case." *Id.* at 340, 916 P.2d at 97. The court further noted that most importantly, the imposition of a sanction of dismissal was much greater sanction than the district court had told the plaintiff it might impose. *Id.*

Here, as in *Smith*, the respondent's failure to disclose the material was at most inadvertent. It was not an attempt to hide relevant information from Schmitt's counsel.

More importantly, having reviewed all of the documents, and particularly 20463 to 20468 and 20507 and 20508, the hearing examiner agrees with the Respondent that the documents do nothing to advance Schmitt's claims.[3] Even taken in the light most favorable to Schmitt, the e-mails simply corroborate the legitimacy of Intermountain's decision to discharge Schmitt because they show that Schmitt's problems with her work predated her December 29, 2004
episode and continued up until Intermountain discharged Schmitt. the decision to terminate was made. Exhibits 20463 to 20468 reinforce that the October series of e-mails regarding problems with Schmitt's performance were in fact based on legitimate criticism of her work.

[3] Other than to assert generally that the e-mails contained in Exhbit A (102 e-mails numbered 20442 to 20545) of Schmitt's motion support Schmitt's claim, Schmitt's counsel has not articulated with any specificity how the e-mails support her case. Instead, she has posited that such a determination is "within the purview of the hearing examiner." Schmitt's Reply Brief in Support of Sanctions, Page 3. Without input from Schmitt's counsel as to how that evidence supports Schmitt's case, the hearing examiner is left to guess at how the e-mails support her claim. The hearings examiner is unable to see how the e-mails advance Schmitt's case.

They do not reinforce a notion that Intermountain management was conceding that the problems with Schmitt's work were not Schmitt's fault. Likewise, the hearing examiner agrees with the Respondent that Exhibits 20507 and 20508 do nothing more than reinforce what Haxby admitted at hearing: that he was aware that Schmitt had health problems at the time the decision to discharge was made. Even with the admission of these new e-mails, there would be no factual basis for finding that Haxby, Stevens or Ward perceived Schmitt to be disabled. Because the respondent's failure to initially disclose the additional e-mails was inadvertent and because there is no prejudice to Schmitt, the hearings examiner cannot surmise a basis for finding that the imposition of sanctions, particularly the sanction of defaulting the respondent, is just under the circumstances of this case. *Smith, supra.*

V. Conclusions of Law

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

2. Schmitt timely filed her claim of disability discrimination pursuant to Montana law. Mont. Code Ann. § 49-2-501(4).

3. Schmitt was not disabled within the meaning of the Montana Human Rights Act nor did Intermountain perceive her as disabled. Schmitt has, therefore, failed to carry her burden of persuasion to prove that she was disabled or that intermountain treated her as disabled.

4. Schmitt's motion for sanctions is unwarranted. Intermountain's discovery violation, if one occurred, resulted in no prejudice to Schmitt. The evidence claimed to have been withheld supported Intermountain's case, not Schmitt's.

VI. Order

Judgment is found in favor of Intermountain and Schmitt's case is dismissed.

Dated: August 8, 2007.

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Examiner
Montana Department of Labor and Industry

Schmitt FAD ghp