

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0059011237:

JANE BRESE, ) Case No. 2219-2005  
)  
Charging Party, )  
)  
vs. ) **FINAL AGENCY DECISION**  
)  
K-MART, )  
)  
Respondent. )

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**I. PROCEDURE AND PRELIMINARY MATTERS**

On September 24, 2004, the charging party Jane Brese filed a complaint with the Montana Department of Labor and Industry alleging that the respondent K-Mart discriminated against her on the basis of a perceived disability (post traumatic stress disorder, high anxiety disorder and depression) when it demoted her from her job as a pharmaceutical technician to a part-time cashier after she returned to work from a medical leave in January 2004 and when it refused to hire or to promote her in April 2004. On May 3, 2005, after completing its investigation, the department's Human Rights Bureau forwarded the case to the department's Hearings Bureau for a contested case hearing. The parties jointly stipulated to extend time for the contested case hearing beyond 12 months after complaint filing to permit them adequate time for preparation.

On March 15-16, 2006, hearing examiner Terry Spear held a contested case hearing in Billings, Yellowstone County, Montana, where the alleged discrimination took place. Jeff Simkovic, Simkovic Law Firm, and Mary Ann Sutton represented Brese, who attended the hearing. David McLean and Ryan Willmore, Browning, Kaleczyc, Berry & Hoven, P.C., represented K-Mart, which attended the hearing through its designated representative, Don Metters. Jane Brese, Leon Odegaard and Don Metters testified in person. Ralph Yaney, M.D., Lowell Brown, Dory Henderson, Marilyn Martin and Richard Glatt testified by telephone, by agreement of the parties, who mutually agreed that the hearing examiner could make all credibility determinations regarding the testimony of the telephone witnesses without observing them during their testimony. The hearing examiner admitted Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, 101, 102 and 103 into evidence. Brese withdrew Exhibit A, as duplicative.

Subsequent to the hearing, the Hearings Bureau discovered that Hearing Tape

Number 7 was apparently defective. It sounded as if all the testimony given while that tape was recording was, in fact, recorded on the tape. However, the speed of the original recording slowed and sped up, so that it was extremely difficult to hear what was being said. The hearing examiner provided copies of Tape 7 to the parties and gave them an opportunity to request any relief they deemed appropriate, and no relief was requested, aside from postponements in briefing deadlines. Ultimately, the parties filed their proposed decisions and post hearing arguments and submitted the matter for decision. Copies of the Hearings Bureau's docket of this contested case proceeding accompany this decision.

## **II. ISSUES**

The determinative issue for this case is whether K-Mart discriminated against Brese in her employment because it perceived her as having a disability. A full statement of the issues appears in the final prehearing statement.

## **III. FINDINGS OF FACT**

1. K-Mart hired Jane Brese on August 22, 1980, as a cashier. Brese worked for K-Mart in varying capacities for approximately 24 years. Around 1989, she began working in the pharmacy in K-Mart's West End Billings store.

2. On April 17, 1996, K-Mart promoted Brese to a full-time position as a pharmacy technician in training in the pharmacy of the Billings store in which she was working on April 17, 1996. Pharmacy technicians are managed by the K-Mart store, not by the pharmacists in the store.

3. Brese was very excited about the promotion involved in this new assignment. Not only did she move from a level 2 employee to a level 4 employee (out of the six levels of employees then extant), she for the first time would now become a regular daytime worker.

4. Over the course of the remainder of her employment with K-Mart, Brese's employee evaluations noted some need for improvement in dependability, quality of work and attitude. Nonetheless, K-Mart periodically increased her hourly rate of pay and maintained her in the full-time pharmacy tech in training position. Her hourly wage ultimately reached \$11.90 per hour in that position. Aside from notations of areas needing improvement in her annual evaluations, Brese received one disciplinary "write-up" during her tenure at K-Mart.

5. In August 2000, in Brese's annual evaluation, K-Mart directed her to become a certified pharmacy technician. Her 2001 annual evaluation reiterated the need for Brese to obtain outside training and her certification. K-Mart expected the State of Montana to require licensure for pharmacy technicians in 2002.

6. In 2001, Brese began to experience what she called "female problems." Increased menstrual pain, typically for a "couple of days" during each cycle, impacted her work. From July 2001 through March 2002, Brese used leave time for her doctor appointments and for needed absences from work due to her pain.

7. By November 2001, Brese was working on the paperwork for registration with

the Montana Board of Pharmacy as a pharmacy technician in training. She ultimately submitted her registration to the Board in January 2002. She knew when she submitted the registration that she had 18 months, until the beginning of August 2003, to complete all of the requirements, including passing the National PTCB Certification examination. In Brese's case, since she did not have a high school diploma, she also needed to obtain her GED, a requirement of sitting for the PTCB Certification exam. Since the test was only given in Montana once or twice a year, applicants could not realistically expect to wait until the very end of their 18 month windows before completing their other requirements and then trying to arrange to take the examination.

8. When Brese submitted her registration to the Board, she indicated that she had no physical or mental impairments requiring accommodation. She also indicated that she did not have any physical or mental condition that adversely impacted her ability to practice.

9. Effective in 2002, as expected, the State of Montana began requiring that pharmacy technicians be licensed with the state.

10. On or about April 24, 2002, Brese underwent a total hysterectomy. After a four-week medical leave, Brese returned to work full time. She began missing more work.

11. In 2002, Brese received a corrective action notice based on excessive absences and tardiness. Leon Odegaard, one of the store pharmacists at the time, told K-Mart store management that Brese's absences and tardiness impacted the pharmacy operations negatively. Odegaard expressed frustration with Brese's attendance issues and her inability to get along with others. Tension also existed amongst other members of the pharmacy when Brese worked as a pharmacy technician, including tension and disagreement between Brese and Odegaard.

12. Then K-Mart district pharmacist Dick Glatt (who worked for Target as of the time of this hearing), counseled Brese regarding her absenteeism. K-Mart attempted to work with Brese in addressing her absences and tardiness by altering her work schedule. Brese did not want the altered schedule.

13. Brese's problems at work continued into 2003. In January 2003, as a result of problems between pharmacy staff members, including Brese, Operations Manager Don Metters prepared a memorandum for all pharmacy employees to sign outlining K-Mart's expectations of its employees. Brese refused to sign the memorandum.

14. In the first half of 2003, Brese wanted to move out of the pharmacy and requested to be removed from the pharmacy on several occasions. She reported to Odegaard that the pharmacy was a depressing place to work and that it created stress and anxiety.

15. In May 2003, Brese began seeing Dr. Ralph Yaney for psychiatric counseling and treating. Yaney found that Brese suffered from signs and symptoms of post traumatic stress disorder, depression, anxiety and some panic attacks as a result of prior abusive relationships with men, with the recurrence resulting from the relationship with her long term boy friend.

16. On July 18, 2003, K-Mart's management team decided to reduce Brese to part-time employment because she had not received her certification and another technician (Janice Tormaschy) had. The management team had no knowledge at that time that

Brese suffered from any disability. The history of problems with attendance and with personal conflicts with co-workers also influenced management's decision.

17. Odegaard had been instructed not to tell Brese about the decision because the K-Mart management team wanted to meet with Brese, both to inform her and to explain their decision. On July 22, 2003, despite his instructions to the contrary, Odegaard told Brese she would be reduced to part-time employment. Brese left the store without meeting with the management team.

18. Distraught, Brese consulted Yaney. At Yaney's direction, Brese requested and received, effective July 21, 2003, medical leave with benefits from K-Mart. No written status change from full-time to part-time was placed in Brese's file. She remained on full-time status during her leave. Tormaschy, who had two years experience in pharmacy, had obtained her PTCB certification in March of 2003 and was fully qualified for the position, replaced Brese as full-time pharmacy technician.

19. At the time Brese went on her leave, Dory Henderson, K-Mart District Pharmacy Manager, believed that Brese would return to the pharmacy as a part-time employee at the end of that leave. Metters also expected that Brese would return part-time to the pharmacy at the end of her leave, maintaining her same position. However, K-Mart did not initially expect Brese's leave to last as long as it actually did.

20. Based upon what Brese was telling him, Yaney believed she would and should return to the pharmacy after her leave. However, if Brese had shared with Yaney the feelings she expressed to K-Mart (that the pharmacy was a depressing place to work, and that it created stress and anxiety and that she wanted to be moved out of it), he would not have recommended her return to working in the pharmacy.

21. Before July 22, 2003, Brese had never communicated to K-Mart management that she had any disability and had never requested any disability accommodation. Before July 22, 2003, Brese never advised either the store manager, Lowell Brown, or the human resource officer, Marilyn Martin, that she suffered from depression, anxiety or post traumatic stress disorder.

22. On August 7, 2003, while on leave, Brese obtained her GED. She was not able to take the PTCB Certification exam within 18 months of her registration, because it was not again scheduled in Montana in 2003 after she obtained her GED. She sought and was granted an extension of time to become certified.

23. Odegaard and Henderson knew that Brese had applied for an extension on her PTCB certification. Brese did not submit documentation verifying that she had obtained the extension.

24. In November 2003, still on leave from K-Mart, Brese paid the application fee to sit for the upcoming PTCB certification exam.

25. On January 21, 2004, Yaney provided a letter releasing Brese to return to full time employment at K-Mart as a pharmacy technician in training, without restrictions (aside from an opportunity to continue seeing him once a week). Brese presented two written notices to K-Mart management, enclosing her physician's work release, of her intent to return to work on January 26, 2004.

26. When Brese reported for work on January 26, she was referred to Martin, who advised that K-Mart was scheduling Brese as a part-time front end cashier. Martin also

told Brese that there were no other openings in the store available and no full-time work available.

27. That same day, K-Mart management held a meeting with Brese and informed her that she would not be returned to her prior position in pharmacy due to her failure to obtain her GED and PTCB certification. Brese refused to sign the Personal Interview Record of January 26, 2004, because she disagreed with its summary of the meeting discussion.

28. Brese reasonably did not apply for any other positions at K-Mart after the store's management assigned her the part-time front end cashier position. She was told by Assistant Manager Kevin Vincellete that he nominated her for one of several full-time positions in the store that opened after her return, but that Metters would not consider her for the job.<sup>1</sup>

29. In February 2004, part-time pharmacy technician in training Susan Huff resigned. K-Mart did not replace her. Knowing of Huff's departure and seeing a cashier newly moved to the pharmacy, Brese asked Brown why she was not moved to the pharmacy to replace Huff. Brese volunteered to work part-time in the pharmacy as a pharmacy technician in training. Brown told her he did not think she could get along with others in the pharmacy.

30. In April 2004, Tormaschy resigned as full-time pharmacy technician. Brown called Huff and hired her back, incorrectly believing that Huff already had her full pharmacy technician license.<sup>2</sup> Brese learned of Huff's return after the fact.

31. As a part-time employee, Brese lost her level four employee status, although she retained her same rate of pay. She had no fringe benefits and lost more than half her income because of the limited hours she worked.

32. Brese sat for the PTCB on July 17, 2004, passed, and was certified as a pharmacy technician by the Montana Board of Pharmacy effective July 31, 2004.

33. Brese ended her part-time work as a K-Mart cashier on August 4, 2004.

#### **IV. OPINION<sup>3</sup>**

Montana law prohibits employment discrimination because of disability. Mont. Code Ann. § 49-2-303(1)(a). To establish her case of disability discrimination in employment, Brese had to prove that (1) she had a disability (actual, perceived or of record); (2) she was at least as well qualified for the job as the applicant or holder of the job and yet (3) because of her actual, perceived or record disability, K-Mart denied her the job. *Reeves v. Dairy Queen, Inc.*, ¶ 21, 1998 MT 13, 287 Mont. 196, 953 P.2d 703; *Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 886 P.2d 947, 950; *see McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792.

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<sup>1</sup> It is not the case that a current employee would never be considered for a better position without having applied for it. K-Mart management "scouts" for potential "keepers" among current employees and encourages good prospects to seek better positions that become available. Obviously, a current employee evidencing no interest in advancement would not be as good a prospect as a current employee eager to advance and seeking advancement.

<sup>2</sup> Huff and Brese would sit for and pass the same certification exam later that year.

<sup>3</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the fact findings. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

On July 18, 2003, when K-Mart decided to reduce Brese to part-time work, K-Mart management had no information upon which it could have decided that Brese had a disability. That decision could not have been based on disability. Brese did not prove a *prima facie* case of disability discrimination for this decision.

On January 26, 2004, K-Mart told Brese that she would be working outside of the pharmacy and working part-time. Dr. Yaney released her without restrictions. K-Mart had no basis upon which to conclude that Brese had a current disability. Even if K-Mart, in the face of contrary medical evidence, perceived Brese as disabled or considered her to have a record of a disability, K-Mart's action was based upon having a certified pharmacy technician, Janice Tormaschy, in Brese's old job. Brese was not as well qualified as Tormaschy. K-Mart had determined in July 2003 that Brese would return to part-time employment, even though it treated her as full-time during her leave because she was full-time when she went on leave. There is no evidence that a "better" part-time job was available on January 26, 2004. Brese did not prove a *prima facie* case of disability discrimination for this decision.

Brese's failure to establish a *prima facie* case of disability discrimination relieved the employer from the obligation to prove by a preponderance of the evidence that it had legitimate business reasons for those decisions.

Brese failed to prove that, after she returned to work in January 2004, she had an actual disability, or that K-Mart perceived her to have a disability, or that she had a record of a disability. Dr. Yaney, again, released her to return to work with no restrictions. Thus, all of the employment actions taken thereafter, however K-Mart might have reached them, could not possibly have resulted from animus toward Brese because of an actual, perceived or record disability—on the evidence of record, K-Mart had no basis to conclude that she had one. On the evidence of record, K-Mart did not conclude that she had a disability, and therefore did not regard her as disabled.

Only after the establishment of a *prima facie* case of disability discrimination does the burden shift to respondent to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas* **at** 802. Subsequent failure or refusal to consider Brese for better jobs could have been based upon her failure to apply for them, or upon her previous attendance problems and personality conflicts with co-employees, or both. However, since Brese did not prove a *prima facie* case of disability discrimination for any of the alleged "decisions" K-Mart might have made about other positions for Brese after she returned to work in January 2004, K-Mart had no burden to establish a legitimate business reason for any such decisions. Because Brese failed to prove a *prima facie* case, dismissal is required.

## **V. CONCLUSIONS OF LAW**

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

2. K-Mart did not take adverse employment action against Brese at any time from July 18, 2003, through the end of her employment, because of disability. Mont. Code Ann. §§ 49-2-303(1)(a) and 49-2-101(19).

4. K-Mart did not engage in the discriminatory practice alleged by Brese and the complaint must be dismissed. Mont. Code Ann. § 49-2-507.

## **VI. ORDER**

1. The department grants judgment against charging party, **Jane Brese**, and in favor of respondent, **K-Mart**, on Brese's charges of illegal disability discrimination against her as alleged in her complaint.

2. The department dismisses the complaint.

DATED: January 9, 2007.

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner

Hearings Bureau, Montana Department of Labor and Industry

Jane Brese FAD