BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0061011732:

JOHN G. MARTHALLER,	)	Case No. 2355-2006
	)	
Charging Party,	)	
	)	
vs.	)	**FINAL AGENCY DECISION**
	)	
WAL-MART STORES, INC.,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

John G. Marthaller filed a complaint with the Department of Labor and Industry on October 17, 2005. He alleged that Wal-Mart Stores, Inc., discriminated against him in employment because of a physical disability (diabetic foot ulcer) when it refused to accommodate his disability. On June 1, 2006, the department gave notice Marthaller's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on September 28, 2006, in Missoula, Montana. Marthaller attended and participated on his own behalf. Wal-Mart attended through its designated representative, Rebecca (Becky) Mounts, with its counsel, Mark P. A. Hudson, Baird Holm, LLP. Julie Marthaller (claimant's wife), John Marthaller, Becky Mounts and Robert Ogg (attorney for Marthaller on a workers' compensation claim he settled with Wal-Mart) testified. Exhibits 2, 5, 5a, 19-20, 24-25, 31-32 and 101-112 were admitted. Exhibit 30 (Marthaller's notes about a conversation with Anni Druce, an employee of the department in its Workers' Compensation Assistance Bureau) was not offered, but Wal-Mart's hearsay objection to testimony about what Druce said in the conversation was sustained. Since Marthaller may have decided not to offer the exhibit because of the sustained objection, the exhibit remains in the hearings file. The Hearings Bureau file docket accompanies this decision.

The hearing examiner now denies Marthaller's motion to submit new information and grants Wal-Mart's motions to strike, for reasons and with exceptions stated in the discussion herein.

II. ISSUES

The key issue in this case is whether Marthaller was entitled to a reasonable accommodation. A full statement of the issues appears in the final prehearing order.

III. FINDINGS OF FACT

1. Wal-Mart hired John Marthaller on September 4, 2002 as an Associate at Store No. 2147, a Division One Store. Marthaller received a copy of Wal-Mart's Handbook. He completed Wal-Mart's computer-based learning modules regarding the ADA process and was familiar with Wal-Mart's Open Door Policy. He knew that any associate could use the Open Door Policy to discuss ideas, issues or concerns with higher level associates within Wal-Mart.

2. Marthaller is of legal age. He and Julie Marthaller are married. Marthaller is the father of two children, 25 and 28 years old. Marthaller has a Bachelors Degree in Communications from the University of Montana.

3. Since 1983, Marthaller has maintained regular, full-time employment in various positions, including construction worker, Inventory Control Specialist ("ICS"), and Sporting Goods Associate.

4. Marthaller is familiar with the legal system and has employed various attorneys over the years to represent him on various issues, including property damage and workers' compensation claims.

5. Marthaller is very familiar with the workers' compensation process based on his previous claims. Over the course of his employment history, he has filed at least six specific workers' compensation claims—four at Wal-Mart, one at One Way Sign, one at Resource Data Group—and numerous other claims when he worked for the State.

6. Over his workers' compensation history, he settled at least five of these claims. Marthaller understood the settlement agreements and did not file suit on any of the workers' compensation claims thereafter.

7. Marthaller suffers from diabetes. As a result, he is at risk for foot ulcers, which typically heal within one or two days. When a foot ulcer does not heal, further treatment, including hospitalization, may be necessary. The nature of diabetes places Marthaller at higher risk of complications, from foot ulcers and other conditions involving his feet, that can ultimately lead to amputation of portions of his lower extremities.

8. Preventive limitations upon Marthaller's walking or otherwise being on his feet are exactly that–measures that may prevent or reduce the likelihood of developing the kinds of problems and complications that can result in hospital care, time off work, eventual amputations and so forth. Following preventive limitations does not eliminate the risks,

although it may decrease the likelihood of Marthaller developing lower extremities problems made worse by his diabetes.

9. Marthaller believes he can safely walk up to a mile a day, but has limitations upon his walking that result from his condition.

10. After Marthaller began employment for Wal-Mart at Store No. 2147, the non-SuperCenter store in Missoula, he voluntarily transferred to Wal-Mart Store No. 3259 as an ICS team member. Rebecca Mounts is Store Manager at the latter store.

11. On April 14, 2003, Marthaller allegedly suffered an injury, a neck strain, while at work. He filed a workers' compensation claim.

12. On January 9, 2004, Marthaller allegedly suffered another injury while at work and filed a workers' compensation claim.

13. Throughout Marthaller's employment at Wal-Mart, he had various problems with his knees and right foot. Some of these problems were work related and others were not. Wal-Mart granted Marthaller's numerous requests for a Medical Leave of Absence from work. After each absence from work, he returned to work without any medical restrictions. From April of 2003 until August 15, 2005, Wal-Mart permitted Marthaller's leaves of absence for foot ulcers.

14. As an ICS team member, Marthaller was responsible for pulling merchandise from the backroom and stocking the entire store. ICS team members are not assigned to one area of the store, instead stocking the entire store. Marthaller performed his job duties.

15. In 2005, Marthaller requested a transfer to Sporting Goods in 2005 because he wanted to reduce the size of his work area. Wal-Mart granted his request.

16. Marthaller was familiar with the Sporting Goods Job Description and acknowledged that it was an accurate description of the job. On February 21, 2005, Marthaller certified he could perform the Sporting Goods position with or without a reasonable accommodation. Marthaller had not requested any reasonable accommodation on or before February 21, 2005.

17. The essential functions of the Sporting Goods Sales Associate included:

> (1) "Accurately and efficiently stock[ing] merchandise in Sporting Goods Department,", which required an associate to pull merchandise from the back and bring it to the floor;
>
> (2) "Effectively resolving Customer concerns, involving moving throughout the facility," meaning that as an associate Marthaller would assist customers whether in his department or anywhere in the Store;

(3) "Physically and visually locating merchandise for Customer, involving moving throughout the facility and grasping, reaching, bending, and lifting;" and

(4) "Provid[ing] quality Customer service by effectively communicating with Customers to answer questions, locat[ing] and retriev[ing] merchandise . . . ."

18. Marthaller chose Dr. Nathan B. Thomas as his treating physician. He considers Dr. Thomas trustworthy, detail-oriented, honest and accurate. At all relevant times, Dr. Thomas was Marthaller's treating physician.

19. On May 5, 2005, Dr. Thomas released Marthaller back to work without any restrictions.

20. On May 29, 2005, Marthaller allegedly suffered an injury while at work, resulting in a leave of absence. He filed a workers' compensation claim.

21. On August 5, 2005, Marthaller returned to work from the leave of absence following his May 29, 2005 injury. Dr. Thomas released Marthaller to return to work full time "without any restriction."

22. Between August 5 and August 15, 2005, Marthaller did not suffer any injury or reaggravate his foot condition.

23. On August 15, 2005, Marthaller requested an accommodation. He asked that Wal-Mart reduce the Store area in which he would perform his duties to a department sized area, and limit his weight bearing to a maximum of 50 pounds.

24. Mounts assisted Marthaller in his request for accommodation, providing the necessary forms and advising that his doctor should complete the forms.

25. By a letter dated August 15, 2005, Dr. Thomas wrote a letter to Wal-Mart stating again that Marthaller has been medically released to return to full time employment. Dr. Thomas described "reasonable accommodations [that] would allow John to return to full time work and lessen the possibility of recurrence." The "prescribed accommodations" were (1) a 50-pound weight bearing limit without assistance, (2) limiting Marthaller's work area to a single department, (3) providing parking for Marthaller as close to the building entrance as possible and (4) one additional 15-minute break after the dinner break at 4-6 hours into his shift, so he could check his feet for skin break down. The express purpose of the proposed accommodations was to reduce the risk to Marthaller of recurrences of medical problems with his feet resulting from his diabetes.

26. The requested accommodation, as expanded by Dr. Thomas, meant that Marthaller would not perform some of the essential functions of the sporting goods position. He could not stock the department while restricted to the square footage of the department, because the stock supply was not stored within the department. He could not provide customer service outside of the department, a core value vital and critical to the success of the business. For example, the automotive department adjoined sporting goods and closed early. Sporting goods employees regularly provided customer service in automotive. Marthaller could not help a customer find a broom or clean up an oil spill in automotive with his requested accommodation. He could not clock in to work. He could not visit personnel. Marthaller wanted Wal-Mart to assign these essential functions to other associates.

27. Following Wal-Mart's customary accommodation request process, Mounts requested that Dr. Thomas complete a Wal-Mart form asking various questions about the requested accommodation. One of those questions asked, "What, if any, major life function (walking, breathing, caring for oneself, performing manual tasks, seeing, hearing, speaking, learning, working, etc.) is affected by patient's condition, and how is such life activity affected." Dr. Thomas responded, "No major life function affected except if gets infected and amputation is necessary."

28. When Wal-Mart analyzed Marthaller's accommodation request, the related documentation it had consisted of Marthaller's signed reasonable accommodation request (Exhibit 112), Dr. Thomas' two letters confirming that Marthaller could work full-time without restrictions (Exhibits 110 and 103) and Dr. Thomas' answers to the questions on Wal-Mart's form (Exhibit 104). Marthaller provided no further medical documents or information.

29. Dr. Thomas stated that Marthaller's condition did not limit any major life function. As a result, Wal-Mart saw no legal obligation to accommodate his condition. Wal-Mart refused to provide the requested accommodation. Wal-Mart did not propose any alternative accommodation.

30. On August 30, 2005, Marthaller allegedly suffered an industrial injury when he team-lifted a gun safe. Contrary to Wal-Mart safety practices, Marthaller neither waited for the ICS team nor got more people to help lift the gun safe. Contrary to Wal-Mart policy, Marthaller reported the injury two days later instead of immediately. He then filed a workers' compensation claim over the alleged injury.

31. On October 17, 2005, Marthaller signed a "Petition for Full and Final Compromise Settlement and Release (Disputed Liability)" covering his claims for industrial injuries on April 14, 2003, January 9, 2004, May 29, 2005 and August 30, 2005 (Exhibit 101), for a sum of $52,500.00. Wal-Mart's workers' compensation insurer had denied liability on all these claims. On October 25, 2005, the Montana Department of Labor and Industry approved the disputed liability settlement.

32. On October 17, 2005, Marthaller also signed a "Resignation Agreement, General Release and Covenant Not to Sue" (Exhibit 102). By his signature, Marthaller agreed that he had voluntarily resigned his position with Wal-Mart, and that he "irrevocably and unequivocally releases, covenants not to sue, acquits, and forever discharges" Wal-Mart (among others) from "any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, attorney's fees, and expenses, of any nature whatsoever" that Marthaller "now has, owns, or holds, or claims to have, own or hold arising out of or otherwise related to any aspect of Employee's employment with" Wal-Mart, "or his resignation therefrom and his association with the Released Parties." The resignation agreement listed, without limitation, a number of specific laws, claims under which were expressly included within the claims Marthaller was releasing. The Montana Human Rights Act was one such specific law. The consideration due to Marthaller for entering into the resignation agreement was payment of the $52,500.00 due under the disputed liability settlement of his industrial injury claims.

33. The disputed liability settlement of Marthaller's industrial injury claims did not reference or disclose that the total amount to be paid thereunder was payment for Marthaller's global settlement of all his claims. There is no indication in that document that the Montana Department of Labor and Industry approved the disputed liability settlement with knowledge that payment of the settlement amount was the consideration for the resignation agreement.

34. At all relevant times, Robert Ogg was an attorney licensed to practice law in the State of Montana. Ogg represented Marthaller in negotiating the disputed liability settlement and the resignation agreement and was present with him when Marthaller signed both documents.

IV. DISCUSSION[1]

1. THE RESIGNATION AGREEMENT THAT MARTHALLER SIGNED IS VALID AND BINDING.

The determinative issue in this case is whether Marthaller can escape the express consequences of the global settlement of his claims, to which he agreed in October 2005. The validity of a settlement agreement rests upon contract principles. ***E.g.***, *Patton v. Madison County* (1994), 265 Mont. 362, 877 P.2d 993; ***and*** *Heatherington v. Ford Motor Co.* (1992), 257 Mont. 395, 849 P.2d 1039. The requirements for a contract are parties capable of contracting, a lawful object, sufficient consideration and mutual consent. Mont. Code Ann. § 28-2-102.

Marthaller, represented and advised by counsel at the time, was fully capable of entering into the two contracts.

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[1] 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.

Settlement of existing claims is a lawful object for a contract. In fact, it is a favored lawful purpose. There are statutes approving arbitration of such disputes and there are rules excluding settlement discussions from liability determinations in litigation. ***Cf.***, Mont. Code Ann., Title 27, Chapter 5 ***and*** Rule 408, M.R.E.

The resignation agreement was supported by sufficient consideration. Marthaller released and extinguished all of his various existing claims in return for payment of $52,500.00, the amount stated in the disputed liability settlement. The resignation agreement included any and all existing claims Marthaller had or could assert under the Montana Human Rights Act as part of that agreement. Failure of the disputed liability settlement to give notice to the approving agency that the dollar figure was for the global settlement cannot vitiate the express terms of the resignation agreement releasing discrimination claims. When parties contract in writing, their intent is found, if possible, in the writing alone. Mont. Code Ann. § 28-3-303. Their intent at the time of contracting is the issue. Mont. Code Ann. § 28-3-301.

Marthaller accepted Wal-Mart's global offer by signing both documents, entering into a binding agreement. *Bar OK Ranch Co. v. Ehlert*, ¶ 36, 2002 MT 12, 308 Mont. 140, 40 P.3d 378, ***quoting and citing*** *Marta Corp. v. Thoft* (1995), 271 Mont. 109, 894 P.2d 333 ***and*** *Hetherington v. Ford Motor Co.* (1992), 257 Mont. 395, 849 P.2d 1039. His voluntary, irrevocable and unequivocal release of his Human Rights claims, among others, with the advice of his attorney, was not obtained through duress, undue influence or mistake, and he cannot escape his agreement on that basis. Mont. Code Ann. § 28-2-401.

Marthaller could escape the resignation agreement's release of his discrimination claim if the provisions releasing that claim were unconscionable. *All States Leasing Co. v. Top Hat Lounge* (1982), 198 Mont. 1, 649 P.2d 1250, 1252-53. However, Marthaller did not prove that Wal-Mart took unfair and grossly oppressive advantage of him by exploiting his confidence or its authority over him. *Westlake v. Osborne* (1986), 220 Mont. 91, 713 P.2d 548, 551, ***quoting*** Mont. Code Ann. § 28-2-407. Marthaller had no confidence in Wal-Mart and did not rely upon Wal-Mart when he accepted and subsequently signed the resignation agreement, in the presence of the attorney representing him.

Marthaller knew or should have known of the terms of the resignation agreement when he signed it. Any mistake about the terms of the release was therefore neither a mistake of fact, since it would have resulted from Marthaller's failure to make adequate inquiry about those terms, Mont. Code Ann. § 28-2-409, nor a mutual mistake of law, since any mistake about the law was Marthaller's alone and unknown to Wal-Mart at the time, Mont. Code Ann. § 28-2-410.

Justice Nelson's special concurrence in *Kloss v. Edward D. Jones & Co.*, 2002 MT 192, ¶¶ 48-77, 310 Mont. 123, 54 P.3d 1, exhaustively discusses unconscionability in contracts. This case does not present the glaring disparities in relative positions present in *Kloss*. Kloss relied upon her investment broker instead of reading the Full Service Account and the

Customer Loan Account agreements she signed, each of which contained the (in that instance) arbitration clause at issue. Unlike Kloss, Marthaller did not rely upon the party he was releasing, Wal-Mart, and did not sign the resignation agreement based on Wal-Mart's explanations, without reading it. He signed the resignation agreement with a full opportunity to read and consider its contents, having the benefit of counsel representing him at the time he affixed his signature.

Marthaller's situation was also distinguishable from that of the plaintiff in *Kelly v. Widner* (1989), 236 Mont. 523, 771 P.2d 142. First, Kelly's dire financial situation, lack of education, lack of legal advice and isolated living arrangements created a vulnerability the defendant exploited. 771 P.2d ***at*** 145. The differences between Kelly's situation and that of Marthaller are considerable. Marthaller faced some serious financial problems, but unlike Kelly, he was not isolated in a cabin without means of communication, did not negotiate directly (on short notice) with professional insurance adjusters and did not sign a release without the opportunity to consider the agreement and consult with his attorney.

Kelly signed a complete release for barely enough to pay current medical expenses after a mere half hour in discussion with the adjusters. 771 P.2d ***at*** 145-46. Marthaller did not establish that his recovery was barely enough to pay current medical expenses. He signed the resignation agreement after negotiations while represented by counsel.

In *Kelly*, the Court held that these factors raised sufficient fact questions about the release to reverse summary judgment for the defendant and remand for trial on the merits of whether the release was unconscionable. In the present case, Marthaller, in the contested case hearing, failed to prove on the merits that the resignation agreement was unconscionable. He did not prove (indeed, he barely raised the issue) by a preponderance of the evidence that Wal-Mart subjected him to the exploitation and oppression sufficiently suggested by the motion records in *Kelly* to justify sending that case forward to trial.

Marthaller also argued that because the Department of Labor and Industry approved the disputed liability settlement without notice of the resignation agreement, this would somehow void the resignation agreement. He cited neither admissible evidence nor law to support this argument.

The remaining paragraphs of this section of the discussion address various statutes cited by Marthaller, that did not help him make his case. Marthaller apparently located as many statutes as he could that might facially apply to his challenges to the resignation agreement. None of the statutes, whether or not addressed in this discussion, applied. His arguments were off point. Whether his documents and other evidence regarding these legal arguments are stricken or in the record, they did not support his efforts to avoid the express effect of the resignation agreement.

Marthaller argued that Mont. Code Ann. § 28-2-701 and 702, regarding contracts that violate the policy of the law, voided the resignation agreement. The statutory prohibition applies to contracts releasing liability for claims involving injuries that arise after the effective date of the contract. *Miller v. Fallon County* (1986), 222 Mont. 214, 721 P.2d 342. This statute is inapplicable.

Marthaller argued that Mont. Code Ann. § 28-2-708 rendered the resignation agreement void. Pursuant to that statute, a stipulation or condition in a contract is void if it restricts any party thereto from enforcing rights under the contract itself by "the usual proceedings in the ordinary tribunals" or limits the time within which the party "may thus enforce his rights." The provision in the resignation agreement releasing Marthaller's discrimination claims places no such restrictions upon his rights under the resignation agreement itself. This statute is inapplicable.

Mont. Code Ann. § 39-71-409, cited by Marthaller, invalidates agreements by an employee to waive any rights under Title 39, Chapter 71. The same chapter and title authorizes disputed liability settlements. Mont. Code Ann. § 39-71-741(1)(a). Human Rights Act claims, arising under Title 49, Chapter 2, are not addressed by Mont. Code Ann. § 39-71-409. This statute does not invalidate either the disputed liability settlement or the resignation agreement.

Mont. Code Ann. § 28-2-705, cited by Marthaller, renders absolutely void any contracts to abrogate in advance of injury the employer's non-delegable duty to provide a safe workplace, and does not apply to settlements after injury.

Finally, Marthaller presented two additional arguments–that Wal-Mart failed to perform its obligations under the resignation agreement and that the disputed liability settlement was improperly approved by the department. He failed to prove either assertion, the latter of which (that the disputed liability settlement was improperly approved) would not have voided the resignation agreement in any event. The primary consideration for the releases Marthaller gave in the resignation agreement was payment of the disputed liability settlement, which Wal-Mart has performed.

2. IN ANY EVENT, WAL-MART DID NOT ILLEGALLY DISCRIMINATE AGAINST MARTHALLER

Even though the resignation agreement bars Marthaller's claims, the department still exercises the Commissioner's power to proceed against possible illegal discrimination. Mont. Code Ann. § 49-2-210. Pursuant to that provision, the department can intervene and seek appropriate affirmative relief if a settling respondent in a particular case does not provide such relief. Likewise, if Marthaller had proved disability discrimination at hearing, affirmative relief would be mandatory without department intervention, because a finding of illegal discrimination triggers affirmative relief. Mont. Code Ann. § 49-2-506(1). Thus, while Marthaller has no recovery right, the department remains bound to enforce the law and address the risk of

repetition of any discrimination found, and thus the hearing examiner must proceed to decide whether there was any such discrimination.

Montana law prohibits employment discrimination based on disability, when the essential tasks of the job do not require a distinction based on that disability. Mont. Code Ann. § 49-2-303(1)(a). Discrimination because of disability includes firing an employee because of disability, without first making inquiry to determine whether a reasonable accommodation is appropriate for an employee who seeks to continue employment despite a disability. An accommodation is not reasonable if it involves either undue hardship to the employer or danger to the health or safety of any person, including the claimant. Mont. Code Ann. § 49-2-101(19)(b). An employer has a legal duty to make independent inquiry regarding accommodation before discharging the employee due to danger to that employee's health or safety. *Reeves v. Dairy Queen* 1998 MT 13, ¶¶ 42-43, 287 Mont. 196, 953 P.2d 703.

To establish disability discrimination in employment, Marthaller must show that (1) he had a disability; (2) he was otherwise qualified to retain his job and capable of doing that job with an accommodation; and (3) Wal-Mart discharged him from his job because of his disability. *Reeves* ***at*** ¶ 21; ***citing*** *Hafner v. Conoco, Inc*. (1994), 268 Mont. 396, 886 P.2d 947, 950; ***see also*** Mont. Code Ann. §§ 49-4-101 ***and*** 49-2-303(1)(a). In this case of alleged failure and refusal to accommodate, Marthaller's burden of proof on the third element involved evidence that Wal-Mart failed and refused to accommodate him, instead discharging him.

Marthaller failed to prove that he suffered from a disability. Disability is defined by statute. It is an impairment that substantially limits one or more major life activities. Mont. Code Ann. § 49-2-101(19)(a). Whether impairment resulting from a particular condition is a disability under Montana law is a fact question, decided on a case-by-case basis. ***E.g.***, *Reeves*, ***op. cit.***

Work is a major life activity. *Walker v. Montana Power Company* (1999), 278 Mont. 344, 924 P.2d 1339; *Martinell v. Montana Power Company* (1994), 68 Mont. 292, 886 P.2d 421. A substantial limitation upon performance of work means the individual is unable to perform a class of jobs or a broad range of jobs as compared to an "average" person with comparable training, skills and abilities. 29 C.F.R. 1630.2(j)(3).

Federal regulations note that temporary, non-chronic limitations "are *usually* not disabilities." 29 C.F.R., Part 1630 App., §1630.2(j) (emphasis added). Many jurisdictions have determined that various kinds of temporary conditions – from pregnancy-related limitations to carpal tunnel syndrome – are not disabilities.[2] Each case turns on its own facts.

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[2] *Heintzelman v. Runyon* (8th Cir. 1997), 120 F.3d 143; *Robinson v. Neodata Services* (8th Cir. 1996), 94 F.3d 499; *Sanders v. Arneson Products* (9th Cir. 1996), 91 F.3d 1351; *Roush v. Weastec, Inc*. (6th Cir. 1996), 96 F.3d 840; *Rogers v. Intern'tl Marine Term*. (5th Cir. 1996), 87 F.3d 755; *McDonald v. Commonwealth of Pa*. (3rd Cir. 1995), 62 F.3d 92; *Hughes v. Bedsole* (4th Cir.), 48 F.3d 1376, ***cert. den.*** (1995), 516 U.S. 870; *Evans v. Dallas* (5th Cir. 1988), 861 F.2d 846; *Grimard v. Carlston* (1st Cir. 1978), 567 F.2d 1171; *Scott v. Flaghouse, Inc*.

Montana follows the federal interpretation (and decisions from other jurisdictions) that temporary impairment can be a substantial limitation to working when it interferes for long enough time so that the worker has trouble securing, retaining or advancing in employment. *Reeves, **op. cit.**,* ¶29-29; *Martinell, **supra***. The Montana Supreme Court in *Martinell* approved an analysis that "transitory and insubstantial" conditions were not disabilities. ***Id. at*** 429-30. Martinell's conditions, in contrast to such transitory and insubstantial conditions, did constitute a disability, because they had lasted for two years and had cost her potential promotions and her job. ***Id. at*** 430.

Montana looks at the facts of each particular case to apply the state's disability discrimination laws. *Butterfield v. Sidney Pub. Sch.*, 2001 MT 177, 306 Mont. 179, 32 P.3d 1243; *Adamson v. Pondera County* (1999), HRC Nos. 9501006838 & 9601007417. In *Butterfield,* the Supreme Court relied upon the underlying facts of limitations in a broad category of work and reinstated a department decision finding disability, which the Commission had overturned. In *Adamson,* the Commission adopted the hearing examiner's proposed decision finding no disability, based upon the temporary nature of the limitations. Both cases illustrate that a claimant must prove substantial limitation by both severity and duration, and that the sufficiency of that proof is a fact question.

Marthaller's evidence of disability established that when his diabetic foot problems recurred, he was temporarily unable to perform the essential job duties of his various positions with Wal-Mart. There was no real question about his ability to perform his job duties when his diabetic foot problems were not recurring. The intermittent diabetic foot problems were temporary, and, as his treating physician told Wal-Mart, during the times when Marthaller's diabetic foot problems were absent, he did not have an impairment that limited his performance of his job duties. Unless and until Marthaller suffered an infection that progressed and required amputation of parts of his foot, he had no disability. His diabetes, controlled as it was with medication, was not itself a disability.

The law is clear. If an employer fires a current employee or refuses to hire a qualified applicant because the individual has a disability, the employer has the burden of undertaking an independent evaluation to verify the safety risks caused by the disability. On the other hand, if

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(S.D.N.Y. 1997), 980 F.Supp. 731; *Wallace v. Trumbull Memorial Hosp.* (N.D.Ohio 1997), 970 F.Supp. 618; *Harris v. Un. Air., Inc.* (N. D. Ill. 1996), 956 F.Supp. 768 ; *Gerdes v. Swift-Eckrich* (N. D. Iowa 1996), 949 F.Supp. 1386; *Wilmarth v. City of Santa Rosa* (N.D. Cal. 1996), 945 F.Supp. 1271; *Johnson v. A.P.P.* (S.D.N.Y. 1996), 934 F.Supp. 628; *McCollough v. Atlanta Bev.* (N.D.Ga. 1996), 929 F.Supp. 1489; *Sutton v. N.M.D. of Children* (D.N.M.1996), 922 F.Supp. 516;
Mowat-Chesney v. Children's Hosp. (D.Colo. 1996), 917 F.Supp. 746; *Rakestraw v. Carpenter Co.* (N. D. Miss. 1995), 898 F.Supp. 386; *Muller v. Auto.Club S.Cal.* (S.D.Cal. 1995), 897 F.Supp. 1289; *Oswalt v. Sara Lee Corp.* (N. D. Miss. 1995), 889 F.Supp. 253; *Presutti v. Felton Brush, Inc.* (D.N.H. 1995), 927 F.Supp. 545;
Blanton v. Winston Prtg Co. (M.D.N.C. 1994), 868 F.Supp. 804; *Visarraga v. Garrett* (N.D.Cal.1992), 1993 WL 209997; *Paegle v. Dpt. of Int.* (D.DC. 1993), 813 F.Supp. 61; *McKay v. Toyota Mfg., USA, Inc.* (E.D.Ky. 1995), 878 F.Supp. 1012; *Stubler v. Runyon* (W.D.Mo. 1994), 892 F.Supp. 228, ***affirmed***, 56 F.3d 69 (9th Cir. 1995).

an employee asks for an accommodation, the employee has the burden of proving current disability to qualify for possible accommodation.

Dr. Thomas may have believed that unless Wal-Mart provided the accommodation "prescribed" for Marthaller, a medically unacceptable risk of injury at work would exist. He did not testify to such an opinion. Dr. Thomas' written opinions did not establish that this was true. By the time of the hearing, Marthaller's problems with his feet had flared up again, resulting in amputation of (as of hearing) at least one of his toes, but there is no medical evidence establishing that this resulted from, or would have inevitably resulted from, his work duties at Wal-Mart, absent accommodation.

Suppose, strictly for the sake of analysis, that Dr. Thomas had testified that, to a reasonable degree of medical certainty, Marthaller would suffer infection that would require amputation if he continued to perform his job duties without the accommodation. Suppose further that Dr. Thomas had given such testimony with sufficient knowledge of Marthaller's working conditions and of the progression of Marthaller's disease so that the doctor's professional expertise would support his opinion. Marthaller would still have had to prove that the "prescribed" limitation upon his work activities constituted an impairment that substantially limited one or more major life activities. Mont. Code Ann. § 49-2-101(19)(a). Unless Dr. Thomas had also credibly disclaimed his statement in writing that Marthaller could work without limitations, Marthaller could not have met this burden of proof.

Even if Marthaller met this burden of proving that he had a current disability when he sought accommodation, he would not be entitled to the accommodation if it imposed an undue hardship upon the employer. Admin. R. Mont. 24.9.606(4). "Under the ADA, an accommodation that would cause other employees to work harder, longer, or be deprived of opportunities is not mandated." *Rehrs v. Iams Co.* (8th Cir. 2007), 2007 U.S. App. LEXIS 11332; ***citing*** *Turco v. Hoechst Celanese Corp.* (5th Cir. 1996), 101 F.3d 1090, 1094 ***and*** *Milton v. Scrivner, Inc.* (10th Cir. 1995), 53 F.3d 1118, 1125; 29 C.F.R. § 1630.2(p)(2)(v). The accommodation that Dr. Thomas "prescribed"[3] would have required that Wal-Mart assign essential functions of Marthaller's job to other associates, forcing a change in the store's work assignments and perhaps also a change in the store's staffing practices.

On the evidence presented in this case, the absence of current disability, or the evidence that the accommodation requested would have posed an undue hardship for the store, would have defeated Marthaller's discrimination claim even if he had escaped the express terms of the resignation agreement.

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[3] Marthaller offered and the hearing examiner admitted, over multiple objections, an unsigned copy of Marthaller's August 15, 2005, letter to Mounts, defining in writing the accommodation sought. Ultimately, the letter was not particularly helpful. Dr. Thomas' delineation of the accommodation that he "prescribed" defined the scope of the accommodation Wal-Mart considered, not oral and written statements of Marthaller.

Subsequent to the hearing, Marthaller moved for permission to file additional information regarding what he characterized as further adverse actions by Wal-Mart. None of these subsequent events are probative of the issues in this case. There are no findings of fact about them. Marthaller's motion is denied.

Wal-Mart moved after hearing to strike Marthaller's references to a number of documents and conversations. Except to the extent the hearing examiner has referred to the documents and conversations in this decision, the motion is granted.

V. CONCLUSIONS OF LAW

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

2. Wal-Mart did not illegally discriminate against John Marthaller, because of disability, in its employment decisions regarding his work assignments and duties, including but not limited to its decision not to provide him with a reasonable accommodation upon his request for it.

3. Marthaller released any discrimination claims he could otherwise assert against Wal-Mart relating to his employment, when he signed the resignation agreement dated October 17, 2005 and received payment of the consideration stated therein.

VI. ORDER

1. Judgment is granted in favor of respondent Wal-Mart and against charging party John Marthaller on his complaint of illegal disability discrimination.

2. The complaint is dismissed.

Dated: July 10, 2007.
/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

John Marthaller FAD tsp

John Marthaller FAD tsp