BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012467:

MICHAEL GORDON,	)	Case No. 1243-2008
	)	
Charging Party,	)	
	)	
vs.	)	**HEARING OFFICER** DECISION
	)	
INTERBEL TELEPHONE	)	
COOPERATIVE, INC.,	)	
	)	
Respondent.	)	

* * * * * * * * * * * * * * *

Michael Gordon filed a complaint with the Department of Labor and Industry on June 15, 2007, alleging that InterBel Telephone Cooperative, Inc., discriminated against him in employment because of his disability. On January 29, 2008, the department gave notice Gordon's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing proceeded on June 12, 2008, in Missoula, Montana. Gordon attended with his counsel Gary D. Seaman, Seaman Law Firm. InterBel attended through its designated representative, Randy Wilson, general manager, with its counsel, Darrell S. Worm, Ogle & Worm, PLLP.

Michael Gordon, Randy Wilson and Craig Dyk testified at hearing. The deposition testimony of Serban Ionescu, M.D., Michael Newman, M.D. and Steve Lidwin was made part of the evidentiary record by agreement between the parties. Pursuant to the Hearing Officer's order, the deposition of Lidwin was reconvened after hearing and the transcript of the reconvened deposition made part of the evidentiary record.

Exhibits 2-4, 6-9, 11 and 12 were admitted by agreement of the parties. Exhibit 14 was admitted. Objections to Exhibit 13 were sustained and the exhibit was refused and sealed. Exhibit 10 was admitted but later withdrawn as irrelevant.

The Hearings Bureau received the last post-hearing filing on October 9, 2008, and the deadline for a reply brief passed on October 17, 2008, without any such brief being filed. The Hearings Bureau file docket accompanies this decision.

II. ISSUES

The key issues are whether InterBel illegally discriminated against Gordon in employment because of his disability and what reasonable measures the department should

order to rectify the harm Gordon suffered and to guard against further similar discrimination. A full statement of the issues appears in the final prehearing order.

III. FINDINGS OF FACT

1. Michael Gordon began work for the InterBel Telephone Cooperative, Inc., in May 1982. He was plant manager in January 2007. Working as the plant manager, Gordon supervised 14 people. His was a stressful position, combining technical demands and the demands of supervision of staff and coordination with co-workers.

2. Having someone present and working as the plant manager was critical to InterBel, particularly during the time at issue in this proceeding. At the beginning of 2007, InterBel was embarking on an extensive modernization plan for its physical plant at a cost of approximately $11.4 million. InterBel was in the initial stages of meeting with engineering firms and preparing to interview vendors.

3. The plant manager was the leader of the team involved with the planning and implementation of the modernization plan, responsible for technical aspects of the project and supervising others working on the project.

4. More than 15 years before 2007, Gordon, while employed by Interbel, underwent treatment for alcoholism and drug addiction, successfully completing the treatment and returning to his employment.

5. Gordon had struggled with suicidal ideation and depression in late 2006. He began drinking again, after 16 or 17 years of abstinence, in December 2006.

6. Also in late 2006, InterBel's general manager, Randy Wilson, heard rumors that Gordon was again drinking and received a report that Gordon had been observed driving an InterBel truck in an erratic manner on a public road. Wilson, who already had some concerns about what he considered to be Gordon's decreasing ability to interact with his peers and subordinates at work, contacted Gordon to ask whether the erratic driving resulted from operating the company vehicle while under the influence of alcohol. Gordon admitted that he had resumed drinking and reported that he did not remember whether he had driven the company vehicle under the influence of alcohol.

7. One of Gordon's physicians, Dr. Michael Newman, recommended to Gordon that he enter a rehabilitation program at Hazelden in Minnesota and prescribed medication for Gordon. On or about January 1, 2007, Gordon voluntarily entered the inpatient treatment program recommended by Dr. Newman.

8. InterBel first learned Gordon was on leave after he had left, when his wife called Wilson in January 2007 and left a voice message. Wilson contacted her and asked for information about when Gordon would return. He then received a letter from Hazelden (addressed to Gordon) confirming that Gordon had been admitted for inpatient medical care.

9. Next Gordon called and told Wilson that he was in inpatient treatment for alcoholism and that he anticipated returning at the end of February 2007. InterBel placed

Gordon on short-term disability leave, for which there were insurance benefits pursuant to the coverage through InterBel's employee benefits package.

10. The next contact Wilson had with Gordon was in a telephone call on or about February 19, 2007, in which Gordon advised him that he would be released from treatment and would show up for work on February 26, 2007. Wilson was not sure whether Gordon would be completing the treatment or leaving without completing treatment. Wilson thought the best course was to place Gordon on administrative leave until he could get more information to determine Gordon's fitness to return to his position.

11. Gordon returned to work on February 26, 2007 and met with Wilson. Gordon was lucid when he met with Wilson on February 26. Wilson thought that Gordon appeared to be about the same condition as he was in before he went into inpatient treatment. At the meeting, Gordon told Wilson he was not mentally fit to return to work.

12. At the meeting, Wilson presented Gordon with a letter and an authorization for Gordon's signature for the release of medical information. The letter indicated that InterBel was putting Gordon on administrative leave of absence with full pay (which ended his short-term disability leave). It also requested that Gordon provide Wilson with a medical release and a list of all physicians he had seen and requested that Gordon undergo an independent medical examination.

13. After reviewing the letter, Gordon told Wilson that he had consulted with attorneys and was aware of his rights. Gordon did not sign the release, saying that he would get back to Wilson.

14. Wilson was concerned about Gordon's mental state as it affected his ability to supervise and work with others as a team member, particularly in light of Gordon's recent problems before and after he resumed drinking. Wilson wanted to obtain information about Gordon's treatment and prognosis so that he could determine whether and when Gordon could return to work.

15. Gordon consulted with an attorney after receiving the release form.

16. Gordon and Wilson met again on March 6, 2007. Gordon told Wilson on March 6, 2007, that he had decided not to sign a release. Gordon did not object to the release being too broad and did not suggest narrowing it.

17. Wilson did not consider extending Gordon's administrative leave to be an option. InterBel had no policy for administrative leave. Wilson created Gordon's administrative leave with pay as an immediate response to an immediate situation. Although Wilson testified that any extension of Gordon's administrative leave would have been unpaid, Gordon, as general manager, had the power to make that decision, just as the original creation of Gordon's administrative leave was Wilson's decision.

18. Gordon told Wilson that he did not want to "carry this on" and asked Wilson to "just make me a reasonable offer." Gordon did not request a second period of short-term disability benefits.

19. Wilson testified that he would have been open to dialogue about medical information to be disclosed, if Gordon had initiated such a dialogue. Gordon did not ask that InterBel consider any specific alternatives to Gordon's demands. Instead, Gordon became defensive, which Wilson viewed as being uncooperative.

20. When he met with Gordon, Wilson did not consider Gordon unable to care for himself, to perform manual tasks, to walk, talk and move about, to see and hear, to speak and to concentrate. Wilson did believe that Gordon had been having difficulties in his job before he resumed drinking. Wilson had counseled Gordon on improving his performance. As a result of this previous concern and Gordon's stated mental unfitness to return to work, Wilson questioned whether Gordon could work.

21. Wilson decided that if the medical information he demanded was not forthcoming for his review he would fire Gordon.

22. Wilson did not follow InterBel's Policy No. 511 ("HIPAA Compliance Policy"). The policy was created to comply with the Health Insurance Portability and Accountability Act (HIPAA) by ensuring the confidentiality of employees' private (protected) health information through limiting access to such information to the minimum necessary to conduct the operations of InterBel. The policy identified a contact person and privacy officer (Michelle Schutte) who was responsible for training authorized employees and establishing disciplinary procedures for any violation. There is no credible evidence that Wilson considered the policy, consulted with Michelle Schutte or took any action to comply with the policy in his efforts to ascertain Gordon's condition or in his decision to terminate Gordon's employment for refusing to provide the unfettered access to Gordon's medical information which Wilson requested.

23. Wilson offered no credible explanation for this failure and refusal to follow InterBel's HIPAA policy. His rationalization at hearing (that by handling the whole matter himself, he thought he was better ensuring Gordon's privacy) is utterly unconvincing. Wilson ignored the written policy and required that Gordon provide a sweeping release, in addition to undergoing an independent evaluation, with all information to be provided to Wilson, Gordon's immediate supervisor, a high level member of management. It is absurd to propose that such a procedure would better ensure Gordon's privacy than InterBel's written policy, and it appears on its face that the information Wilson demanded exceeded the information InterBel was entitled to obtain under HIPAA and under its own written policy.

24. There is no evidence that either Wilson or Gordon, in their interactions, made any reference to InterBel's HIPAA policy, let alone that they discussed it together. InterBel's policy governs InterBel's conduct, not the conduct of the employee whose privacy is at issue. Wilson, rather than Gordon, had the obligation to reference and follow the policy. InterBel has not presented any credible evidence, let alone any substantial credible evidence, of any legitimate business reason for treating Gordon's privacy in a significantly different and more adversarial fashion than that required by InterBel's HIPAA policy.

25. On March 21, 2007, Wilson sent a letter to Gordon indicating that since InterBel had not received a medical authorization from Gordon, his leave of absence could not be

extended. Additionally, Wilson wrote that Gordon's employment with InterBel would terminate on April 6, 2007, 30 days after Gordon told him that he was not willing to sign the medical release form.

26. On or about March 29, 2007, and clearly by April 2, 2007, counsel for Gordon forwarded to Wilson a copy of a letter written by Serban Ionescu, M.D., advising that Gordon would not be able to return to work for 3-6 months thereafter because of his medical condition. Counsel for Gordon also notified Wilson that Gordon refused to provide Wilson with more extensive access to his medical records, and was not required to sign the medical authorization.

27. The hardship that InterBel experienced because of Gordon's absence from work in January through March 2007 would have continued had InterBel left Gordon's position open for up to an additional 3-6 months after March 2007. Gordon had been gone for slightly more than three months when he was terminated and would have been gone for up to an additional six months if his leave had been extended, meaning InterBel would have been without a plant manager for over 9 months during an important phase of the modernization project.

28. Dividing the responsibility among existing staff was impractical. Filling the Plant Manager position temporarily would have been difficult. Most likely it would have been filled with one of three existing staff people who were interested in the job permanently and that would have created difficulties when the position was being filled permanently. Gordon had pending retirement plans, and permanently replacing him was part of InterBel's existing long-term plan.

29. InterBel, acting through Wilson, refused to extend further administrative leave to Gordon and terminated Gordon's employment in conformity with the March 21 letter, effective April 6, 2007.

30. On April 10, 2007, InterBel's attorney sent a letter to Gordon affirming that Gordon's failure to authorize release of his medical records was the immediate reason for InterBel's termination of Gordon's employment.

31. Based upon the medical evidence available to InterBel at the pertinent times, Gordon was unable to engage in the major life activity of work from January through at least June 2007.

32. Had InterBel complied with its own HIPAA policies, the decision to discharge Gordon would not have occurred until after receipt of Dr. Ionescu's letter at the end of March or beginning of April, at the very earliest. InterBel would have necessarily given Gordon notice, after receiving that letter, of its intent to terminate his employment because of the undue hardship in extending his leave further.

33. Had InterBel complied with its own HIPAA policies and obtained more limited medical information than Wilson requested, Wilson could have and reasonably should have extended Gordon's paid leave until InterBel had the information necessary to make a proper decision about further accommodation. As a result, Gordon would have continued to receive his pay for one more month after InterBel's receipt of Dr. Ionescu's letter at the end of March or

beginning of April, during the term of a notice of intent to terminate Gordon's employment. Thus, Gordon lost his salary and the value of his benefits for one month, as well as suffering substantial emotional distress, as he described credibly at hearing, which was more distressing than it would otherwise have been because InterBel terminated him improperly, out of discriminatory animus, and with undue haste.

34. For the additional month that Gordon would have received pay, his lost earnings would have been $6,442.83 ($77,314.00 /12). 10% per year simple interest from May 10, 2007 (the approximate date upon which InterBel would have properly discharged Gordon with the information subsequently received regarding the projected likely length of his continuing absence) to the date of this decision is $912.73 ($6,442.83 x .10/12 x 17 months). The increase in his pension cash out value had he remained on paid administrative leave would have been $7,419.37 ({$560,252.00 - $493,477.66}/9). The value of his health insurance and long term disability insurance over that additional month would have been, respectively, $1,218.00 and $47.00. An additional month's company contribution to his 401K would have been $250.00. The value of the enhanced emotional distress he suffered is $15,000.00. His total damages are $31,289.93.

35. Had InterBel's general manager followed InterBel's own policies, no illegal discrimination would have occurred in this matter. Therefore, the conditions upon InterBel's future conduct relevant to this particular kind of disability discrimination and the reasonable measures necessary to correct this discriminatory practice are, in addition to a mandatory injunction, an order requiring InterBel to submit to the Human Rights Bureau a plan for training of its management team, including specifically its general manager, regarding HIPAA privacy requirements (including similar Montana statutory and regulatory requirements) as well as applicable state and federal employment disability law generally for HRB review, thereafter revising and/or then implementing that plan as HRB may direct.

IV. DISCUSSION[1]

SUMMARY

InterBel fired Gordon because he refused to give unfettered access to his medical records to his supervisor as demanded, in violation of InterBel's own medical privacy procedures. Gordon was an otherwise qualified individual with a disability. InterBel failed and refused to accommodate him by appropriately considering a further leave of absence until he could return to work. After it decided to fire Gordon, InterBel received a medical report indicating Gordon could not return to work for 3 to 6 months after March 29, 2007. Leaving Gordon's position open or filling it temporarily with another employee would have been an undue business hardship. Damages because of Gordon's discriminatory discharge ended a month after his discharge, when InterBel could have and would have lawfully fired Gordon.

A. InterBel Unlawfully Discriminated against Gordon.

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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.

Montana law prohibits discrimination against an employee because of disability. Mont. Code Ann. § 49-2-303(1)(a). A disability is a physical or mental impairment that substantially limits one or more of a person's major life activities, or a record of such an impairment, or a condition regarded as such an impairment. Mont. Code Ann. § 49-2-101(19)(a). Disability discrimination includes failing or refusing to make accommodations (that would not be an undue hardship for the employer) for an otherwise qualified employee. Mont. Code Ann. § 49-2-101(19)(b). Since Gordon was such a person, InterBel's decision to fire him for refusing unfettered access to his private health information without attempting reasonable accommodation was unlawful disability discrimination.

1. Alcoholism Can Cause a Disability Under Montana Law.

Montana has no statutory exclusion from the general definition of disability for alcoholism. Alcoholism is a mental or physical impairment under the Americans with Disabilities Act. ***See*** 42 U.S.C. § 12114(a) (excluding from "qualified individual with a disability" any employee or applicant against whom the entity takes adverse action because of current illegal drug use, but not extending this exclusion to alcohol abuse). In the Analysis section of the regulations implementing Title I of the ADA, the E.E.O.C. commented that disabled employees "includ[e] those disabled by alcoholism," 56 Fed. Reg. 35.726, 35.733 (1991).

Montana amended its Human Rights Act to confirm it to the language of the ADA in 1993. House Bill 496, Laws of Montana 1993, Chapter 407, ***see*** Preamble and Section 3. In conforming the Human Rights Act to the ADA, Montana presumably adopted the existing federal interpretations and applications of the existing ADA provisions, including existing regulations addressing alcoholism as a disability in 1993. On the other hand, Montana did not necessarily adopt the regulations and court decisions issued after the effective date of the Montana amendments.[2] Subsequent federal precedent can provide guidance when there are substantive similarities in the law and also in the public policy considerations and there is no controlling Montana law, *Butterfield v. Sidney Pub. Sch.*, 2001 MT 177, 306 Mont. 179, 32 P.3d 1243; *and*, *Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 886 P.2d 947, 950-51.

InterBel did not dispute that, under the Human Rights Act, alcoholism is a condition that may cause a substantial limitation in one or more major life activities, may generate a record of such an impairment, or may be a condition regarded as such an impairment. The Hearing Officer agrees that Montana appropriately should apply the prior federal law, and also more recent federal law consistent with our state disability law, to find that alcoholism is a condition that may, depending upon the facts of the case, constitute a disability.

Indeed, in *Powell v. Salvation Army* (1997), 287 Mont. 99, 951 P.2d 1352, there is a clear indication that Montana does regard alcoholism as a condition that may constitute a disability.

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[2] *State ex rel. Kommers v. District Court* (1939), 109 Mont. 287, 96 P.2d 271, 272 (rejecting originating jurisdiction's case interpretations issued after the date Montana adopted statute).

In *Powell*, the Montana Supreme Court reversed a summary judgment dismissing a disability discrimination complaint as untimely. Powell argued on appeal that he learned after his firing that his discharge was because of his history of alcoholism, not because he was at work with alcohol on his breath and slurring his speech, and that statutory limitation period did not begin to run until his discovery.

The dismissal would have been affirmed if the Montana Human Rights Act permitted adverse employment action against a worker due to alcoholism. The Montana Supreme Court has a "longstanding practice of affirming a trial court's result, even if that result was based on incorrect reasoning." *Nelson v. State*, ¶34, 2008 MT 336, _ Mont. _, _ P.3d _; *citing In re Trust B (In re Will of Dunham)*, ¶19, 2008 MT 153, 343 Mont. 240, 184 P.3d 296 and *W. F. Bank v. Talmage*, ¶23, 2007 MT 45, 336 Mont. 125, 152 P.3d 1275. *E.g.*, *Saucier v. McDonald's Rest.*, ¶78, 2008 MT 63, 342 Mont. 29, 179 P.3d 481; *Estate of Bovey*, ¶9, 2006 MT 46, 331 Mont. 254, 132 P.3d 510. The Court would have affirmed the dismissal even if the statute of limitations defense was inapplicable, since without a potentially valid claim of discrimination because of alcoholism the result–dismissal–would have been correct even if the reason was wrong. *Powell* is a clear indication that Montana will follow the federal approach, as it should, under its Human Rights Act.

2. Under Applicable Precedent, Gordon's Alcoholism Was a Disability.

The ADA recognizes some reasonable limitations upon its application to alcoholics. 42 U.S.C. § 12114(c) provides, in pertinent part, that employers can hold an employee who is an alcoholic to the same standards for job performance and behavior as other employees, even if any unsatisfactory performance or behavior is related to the alcoholism. ***E.g.***, *Bekker v. Humana Health Plan, Inc.* (7th Cir. 2000), 229 F.3d 662, ***cert. den.*** (2001) 532 U.S. 972.

Alcoholism is not considered a ***per se*** disability. "Although alcoholics may be detrimentally impacted in many facets of their lives by their addiction, the ADA requires an individualized determination of impact, not simply an assumption." *Goldsmith v. Jackson Mem. Hosp. P.H.T.* (S.D. Fla. 1998), 33 F. Supp. 2d 1336, 1341; ***see also*** *Burch v. Coca-Cola Co.* (5th Cir. 1997), 119 F.3d 305, 316 (rejecting alcoholism as a *per se* disability, unlike HIV, which is automatically considered a disability without requiring proof of substantial limitation of a major life activity). Consequently, an alcoholic must establish that his or her alcoholism in fact substantially limits a major life activity (or has generated a record of or is perceived as causing such a limitation). *Goldsmith* ***at*** 1342.

Inability to walk, speak, think, drive or sleep while intoxicated is not evidence of limitation of a major life activity because non-alcoholics and alcoholics alike can suffer such short term impairments from alcohol consumption. *Burch* ***at*** 316; *Goldsmith* ***at*** 1342. Conversely, an alcoholic can prove that alcoholism substantially limits a major life activity by demonstrating that alcoholism affects his or her ability to engage in major life activities for a much longer term. *Burch*; *Goldsmith*; *Williams v. Anheuser-Busch, Inc.* (D.C.M.D. Fla, 1997) 957 F. Supp. 1246, 1249-50.

In *Senate Sergeant at Arms v. Senate Fair Employment Practices* (Fed. Cir. 1996), 95 F.3d 1102, 1105-6, the court held that when the claimant proved that his alcoholism was "under control" during the entire time of his treatment, and that with such treatment he would be able to perform the essential functions of his job, he was a qualified individual with a disability of alcoholism.

Substantially limited in regard to working means the individual is limited in performing a class of jobs or a broad range of jobs compared to an individual with similar training, skill, and ability. 29 C.F.R. § 1630.2(j)(3)(I) ("Substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities"); *Sutton v. United Air Lines, Inc.* (1999), 527 U.S. 471, 492 ("To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice").

Unlike Paul Adamson, the charging party in *Adamson v. Pondera County*, 2004 MT 27, 319 Mont. 378, 84 P.3d 1048, Gordon suffered from a permanent and chronic condition that had already persisted, at the time of this hearing, for decades. He ultimately lost his job, after missing a substantial amount of work, whereas Adamson only lost time from work while recuperating from surgeries, and was never at risk to lose his job. Over the years, Gordon was twice unemployable while he underwent treatment for the very same condition, which had persisted (albeit in "remission" during the interim in which Gordon was not drinking). Adamson was once unemployable during recuperation from surgery on his left shoulder and once unemployable during recuperation from surgery on his right shoulder, two different conditions, each of which was resolved entirely by the respective surgeries. The medical evidence upon which InterBel was entitled to rely and which it had at the time of his discharge, established that Gordon was unable to work at all from January until his discharge. The same reasoning which, in *Adamson*, mandated the conclusion that Paul Adamson did not have a disability supports the conclusion, in this case, the conclusion that Michael Gordon did indeed suffer from a disability. *Adamson* ***at*** ¶¶ 23-30.

<u>3. InterBel's Failure to Follow its own Policy was Discriminatory.</u>

Gordon had a right to the benefits of InterBel's HIPAA policy regarding employee's personal health information. Instead, Wilson ignored the policies and insisted upon a full disclosure of personal health information to <u>him</u> rather than to the privacy officer empowered to receive and deal with such records. When Gordon refused to make such a disclosure, InterBel fired him. Discharging an employee who requests reasonable accommodation for a disability, because that employee insisted that the employer follow its own policies regarding what disclosures of medical records it sought in investigating the accommodation request, is, in the absence of a justifiable non-discriminatory reason, disability discrimination. Counsel for InterBel did yeoman's work in developing plausible explanations for the discharge decision, but the Hearing Officer ultimately found the explanations pretextual.

<u>B. Gordon Is Entitled to Damages Caused by the Discriminatory Discharge, until the Date that InterBel otherwise Would Have Discharged Him for a Legitimate Business Reason.</u>

Gordon provided InterBel with some limited documentation of the additional time he would be off work. With that information of the expected duration of Gordon's inability to work, InterBel could have and would have discharged him, because the additional lost work time would have caused an undue hardship to the employer. A leave of absence to obtain treatment for alcoholism can be a reasonable accommodation, if granting it is not an undue hardship and if treatment would likely relieve the disability to the point that the employee would then be able to return to employment. ***See***, *Evans v. Fed. Ex. Corp.* (1st Cir. 1998), 133 F.3d 137, 140 ("Otherwise, an employer could always withhold a reasonable accommodation needed by the worker and then discharge the worker 'because' of inadequate performance," ***citing*** *Teahan v. Metro-North Commuter R. Co.*, (2d Cir. 1991) 951 F.2d 511.

InterBel's proved that it was more likely than not that having a Plant Manager on board and active was vital to the modernization plan for its physical plant. Extending Gordon's leave for another 3-6 months (it turned out to be 4 months before he was actually ready to return to work[3]) would have been an undue hardship. Because it would have been an undue hardship, InterBel was not required to provide the extended leave as an accommodation. Mont. Code Ann. § 49-2-101(19)(b).

The real damages issue here is whether this case involves a "mixed motive" situation or a "subsequent evidence" situation. In a "mixed motive" case, no compensatory damages are awarded. *Laudert v. Richland County Sheriff's Office*, 218 MT 2000, 301 Mont. 114, 125, 7 P.3d 386. The reason for this denial of compensatory damages is that a "mixed motive" case arises when the charging party proves the respondent engaged in unlawful discrimination but the respondent proves it would have taken the same action even without unlawful discrimination. *Laudert* ***at*** ¶39, ***citing*** Admin. R. Mont. 24.9.611. If InterBel proved that it would have fired Gordon just as it did, by a letter dated March 21, 2007, effective April 6, 2007, even without his refusal to provide the unfettered access to his medical records, then obviously, Gordon would have suffered the same consequences even without the illegal discrimination. Thus, no compensatory damages could result from the illegal discrimination.

This is patently not a "mixed motive" case. At the time the decision was made to fire Gordon, Wilson and InterBel had no medical information upon which to determine how much longer Gordon would be off work. InterBel, as it admitted in writing, fired Gordon because he would not provide unfettered access to his medical information, not because a further administrative leave of any length would be an undue hardship. Asking for more information than it legally could obtain and then firing Gordon for failure to provide any information is no more legal than refusing a reasonable accommodation, then firing Gordon for failure to perform without accommodation.

On the other hand, this case does involve the same principles as employment cases of after-discovered or "subsequent" evidence. An employer cannot use after-acquired (or subsequent) evidence to justify adverse employment action. *Jarvenpaa v. Glacier Electric Coop.*,

[3] On August 2, 2007, Dr. Ionescu reported that from a medical standpoint, Gordon was able to be employed in any type of job for which he was qualified.

Inc. (1998), 292 Mont. 118, 970 P.2d 84, 90; *Galbreath v. Golden Sunlight Mines, Inc.* (1995), 270 Mont. 19, 890 P.2d 382, 385. The employer can use after-acquired evidence to address the propriety or duration of damages. *Jarvenpaa*, ***op. cit.***, 970 P.2d at 128; ***see*** *McKennon v. Nashville Banner* (1995), 513 U.S. 352, 361-62.

Ordinarily, subsequent evidence cases involve evidence discovered after the respondent has taken the adverse action rather than after the respondent has simply made the decision to take the adverse action. In the present case, InterBel received the limited medical information that identified how much longer Gordon would be off work after its decision to fire Gordon, and after it had given him notice of his discharge, but before the effective date of his discharge. Even so, the reasoning of the subsequent evidence cases fits the present case precisely.

Assume for the sake of analysis that Wilson had referred Gordon to Interbel's privacy officer and relied upon her to provide him with such general information about Gordon's fitness to work as he needed to determine whether Gordon could be accommodated. Interbel would still have discovered that Gordon would be off work for another 3-6 months. At that point, the evidence supports the finding that InterBel faced an undue hardship in keeping Gordon's job open for him, and could legally have notified him of its intent to terminate his employment and replace him.

This hypothetical action of firing Gordon would not have been the same action at the same time as the action InterBel actually took. Instead it would have been a similar action at a later time. This is a subsequent evidence case, in which Gordon's damages are cut off as of the point in time when InterBel would have legally fired him, because thereafter he suffered no further damages because of the illegal discrimination. After the date upon which InterBel would have legally fired him, his damages due to his discharge would have occurred even if InterBel had not already illegally fired him.

Although discrimination law does not use the same terms, the reasoning is precisely the same as it is in the application of the tort defense of an intervening independent cause of harm. InterBel's illegal discrimination did not cause the harm resulting after early May 2007, and InterBel is not liable for that harm.

C. Gordon's Damages Total $31,289.93.

Gordon argued that InterBel's termination of his employment was illegal under the Montana Wrongful Discharge from Employment Act (MWDFEA), because it was in retaliation for his refusal to violate public policy by disclosing his medical records to Wilson, rather than the designated "privacy officer," and for his refusal to disclose more of his medical records than the law required. This is not the appropriate forum in which to consider this argument.

The MWDFEA provides for an "action" for wrongful discharge as the exclusive remedy for such statutory claims. Mont. Code Ann. § 39-2-902. "Action," undefined by the MWDFEA, means a judicial proceeding in a court of justice prosecuted for enforcement or

protection of a right, redress or prevention of a wrong, or punishment of a public offense. Mont. Code Ann. §§ 25-1-101, 27-1-101 and 27-1-102(a).[4] The MWDFEA expressly excludes claims made before administrative bodies and claims of illegal discrimination because of protected class membership or other similar grounds. Mont. Code Ann. § 39-2-912(1). This present case is an administrative proceeding on a complaint filed with the department. Gordon's claims are claims of illegal discrimination because of protected class membership and other similar grounds. Mont. Code Ann. § 49-2-512(1).[5] Thus, MWDFEA claims are not cognizable in administrative discrimination complaints filed with the department. Gordon's MWDFEA claims and the additional kinds and amounts of damages he seeks thereunder are outside the scope of the department's power.

Upon a finding that InterBel engaged in the discriminatory practice alleged in Gordon's complaint, the department can require any reasonable measure "to rectify any harm, pecuniary or otherwise, to the person discriminated against." Mont. Code Ann. § 49-2-506(1)(b). The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole from harm suffered because of the illegal discrimination. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405. The department has no power to remedy other damages resulting from illegal acts which are not discriminatory, whether or not those other damages might be recoverable under MWDFEA. Mont. Code Ann. § 49-2-506(1)(b) and (2).

As already noted, Gordon's damages resulting from the discriminatory discharge can only extend from the date of the discharge to the date when he would otherwise have been discharged, which on this record would have occurred a month later. Those are all the damages that the department has the power to award for this illegal discrimination.

Gordon proved discrimination, establishing his presumptive entitlement to lost wages. *Albermarle Paper Company*, ***supra***, 422 U.S. ***at*** 417-23. He proved he lost the salary and benefits awarded here, which he was not required to prove with unrealistic exactitude. *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, (7th Cir. 1985) 755 F.2d 599, 607; *Goss v. Exxon Off. Systems Co.* (3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Mich. Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626.

Prejudgment interest on lost income is a proper part of the department's award of past lost wages. *P. W. Berry, Inc.*, ***op. cit.***, 779 P.2d ***at*** 523; *Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987). Calculation of prejudgement interest is proper based on the elapsed time without the lost income for each pay period times the appropriate rate of interest applied over the

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[4] The definition of a word or phrase in the Mont. Code Ann. applies to the same word or phrase throughout the code, absent an express contrary intention. Mont. Code Ann. § 1-2-107.

[5] "The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of . . . this chapter . . . . A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter."

elapsed time. ***E.g.***, *Reed v. Mineta* (10th Cir. 2006), 438 F.3d 1063. 10% per year simple interest is the appropriate measure, as the interest applied to tort losses capable of certainty by calculation. Mont. Code Ann. § 27-1-210. Thus, the appropriate calculation of prejudgment interest is 10% of the loss for the month involved, divided by 12, times the number of months elapsed since the loss, which occurred at the end of the month during which the wages and benefits would have been earned.

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a *per se* invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm, including emotional distress, due to violation of such a fundamental human right. *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351; *Campbell v. Choteau Bar & Steak Hs.* (3/9/93), HRC#8901003828.

The standard for emotional distress awards under the Human Rights Act derives from the federal case law. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836:

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the "broad remunerative purpose of the civil rights laws," the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern Penn.Transp. Auth.* (3d Cir.1994), 21 F.3d 29, 34; ***see also*** *Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2d Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden*, in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (***quoting*** *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman*, 107 F.3d at 385.

In this case, as in *Johnson v. Hale* and *Foss*, the evidence regarding the illegal acts (here, discriminatory discharge from a high-paying and secure position) and Gordon's evidence of his emotional distress, through both his testimony and his demeanor while testifying, establishes a basis for an award of damages for that emotional distress. The evidence of emotional distress here is stronger than in those cases, based both upon the degree of distress involved and the inferences of distress that arise from the circumstances of the substantial losses resulting from Gordon's discharge. $15,000.00 is reasonable, and certainly not excessive.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case, pursuant to Mont. Code Ann. § 49-2-512(1) (2007), for the limited purposes of deciding whether InterBel violated the Montana Human Rights Act.[6]

2. InterBel illegally discriminated against Gordon because of disability when it decided to discharge him, gave him notice of that decision on March 21, 2007, and implemented that decision effective April 6, 2007, because he refused to provide unfettered access to his personal (protected) health information as demanded, contrary to law and company policy, without properly attempting a reasonable accommodation. Mont. Code Ann. §§ 49-2-303(1)(a) and 49-2-101(19).

3. The harm Gordon suffered because of this illegal disability discrimination in employment ceased upon the date (May 10, 2007) that InterBel legally and reasonably could have and would have discharged Gordon because the duration of his accommodation was an undue burden. Mont. Code Ann. § 49-2-101(19).

4. The reasonable measures to rectify the harm suffered by Gordon as a result of that illegal discrimination are those set forth in Finding of Fact No. 34 herein. Mont. Code Ann. § 49-2-506(1)(b).

5. The department must order InterBel to refrain from engaging in the discriminatory conduct and should prescribe the conditions on InterBel's future conduct relevant to the type of discriminatory practice found and require the reasonable measures to correct the discriminatory practice as set forth in detail in Finding No. 35 herein. Mont. Code Ann. § 49-2-506(1)(a) and (b).

VI. ORDER

1. Judgment is granted in favor of Michael Gordon and against InterBel Telephone Cooperative, Inc., on Gordon's charges of illegal disability discrimination against him as alleged in his complaint herein. Within 30 days of this decision InterBel Telephone Cooperative, Inc., shall pay to Michael Gordon the sum of $31,289.93, for lost earnings of $6,442.83, prejudgment interest of $912.73, lost increase in his pension cash out value of $7,419.37, lost health insurance and long term disability insurance, valued at, respectively, $1,218.00 and $47.00, lost company contribution to his 401K of $250.00 and emotional distress caused by the unlawful discriminatory discharge of $15,000.00.

2. The department permanently enjoins InterBel Telephone Cooperative, Inc., from discriminating in employment against any person with a disability by failing to follow its own HIPAA policy or otherwise failing and refusing to provide reasonable accommodation as

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[6] This does not include the power to determine whether, as Gordon argued, InterBel wrongfully discharged Gordon in violation of the Montana Wrongful Discharge from Employment Act (Mont. Code Ann. §§ 39-2-901 ***et seq.***), as discussed ***infra***..

required by law. Within 20 days of this decision, InterBel shall submit to the Human Rights Bureau a plan of proposed training of its management team, including specifically its general manager, regarding HIPAA privacy law and rules (and similar Montana statutory and regulatory requirements) as well as applicable state and federal employment disability law generally, for HRB review, thereafter revising and then implementing that plan as HRB may direct.

3. Exhibit 13, refused from evidence, is and remains sealed and not in the public record. Exhibit 13 shall be treated by all persons who have access thereto as confidential and privileged medical information, and shall be neither used nor disclosed, except with the express written permission of Michael Gordon, or as permitted by a tribunal issuing a subsequent order permitting its use.

Dated: November 13 , 2008.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry

Gordon Decision tsp