BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012259:

RANDALL MILLER,	)	Case No. 231-2008
	)	
Charging Party,	)	
	)	
vs.	)	**DECISION**
	)	
KALISPELL SCHOOL DISTRICT #5,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Randall Miller filed a complaint with the Department of Labor and Industry on November 17, 2006, alleging that Kalispell School District No. 5 discriminated against him in employment because of disability. By the hearing in this case, Miller's pertinent complaints involved the district's requirement that he teach more than two consecutive classes during the school day, commencing in the 2007-2008 school year and thereafter in the future, as needed for the district's schedule, despite his repeated requests for a schedule with no more than two consecutive classes during each day, as he had worked in previous school years. On August 9, 2007, the department gave notice Miller's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing occurred on January 24, 2008. Miller participated on his own behalf. The district attended through its designated representative, Karen Breeding, Human Resources Director, with its counsel, Jeffrey M. Hindoien, Gough, Shanahan, Johnson & Waterman. Miller, Breeding, Barry Grace (Kalispell Middle School Principal) and Callie Langohr, (current principal of Glacier High School, and previously the project manager for the district's transition to two high schools) testified. Exhibits J1 through J23, 1 through 9, 11, 13 through 15, 17 through 22, 35 through 37, 40 and 41, 138 and 139, 141, and 145-148 were admitted. The district's "Reply Brief of Respondent" was filed February 29, 2008, and this matter was deemed submitted for decision. No transcript of hearing has been filed. The Hearings Bureau file docket accompanies this decision.

II. ISSUES

The key issue in this case is whether the district made a sufficient effort to accommodate Miller's disability. A full statement of the issues appears in the final prehearing order.

III. FINDINGS OF FACT

1. Charging party Randall Miller worked for years at an aluminum plant in Columbia Falls, Montana, during which time he suffered injuries to his back, neck, head and shoulder area on multiple occasions, including 2 industrial accidents in the early 1980's, which cumulatively precluded his continued work at heavy labor jobs by the middle 1980's, thereby constituting a physical impairment or multiple physical impairments that substantially limited him in the major life activity of working. Miller received a "Certification of Eligibility for Handicapped Preference in Public Employment" from the State of Montana, Department of Social and Rehabilitation Services, dated September 18, 1989, indicating that he was "considered disabled under state law and should be given preference in appointment and employment."

2. With the assistance of various vocational rehabilitation providers and with and through workers' compensation insurance entitlements, Miller returned to school and obtained a degree in business education with teaching certification in 1989. He started employment as a full time teacher for respondent Kalispell School District #5 in the fall of 1990 as a business and computer education instructor at the Kalispell Junior High School (KJHS) and the Laser facility (the alternative high school setting).

3. Miller subsequently suffered additional injuries, including a bicycling accident in Glacier Park in 1994; falling out of the back of a pickup in 2003; and a slip and fall injury in 2004. These subsequent injuries may also have exacerbated his physical impairment or impairments. Over the years, the scope of Miller's limitations has gradually expanded, probably as a cumulative result of his injuries together with aging and normal wear and tear.

4. Miller possesses a Montana Class 2 Educator License with endorsements in Business Education and Traffic Education K-12.

5. The district consists of an elementary school district and a high school district organized and operated pursuant to Title 20, Mont. Code Ann.

6. The district has employed Miller as a teacher for each school year since his initial hire in the fall of 1990. He is currently employed as a business and computer education instructor at Kalispell Middle School ("KMS"). Miller's job performance as measured by his evaluations since his hire has met or exceeded district standards.

7. From his initial hire through the 1999-2000 school year, Miller worked without any accommodations from the district for his physical condition. As his condition deteriorated over time, he experienced more pain and physical difficulties, until he decided to request changes to his teaching schedule to enable him to continue working. Miller's first written request to the district for accommodation was in early January 2001, by a memorandum to KJHS Principal Barry Grace and Assistant District Superintendent Dan Zorn asking that "[b]ecause of my disabilities, I need a schedule that doesn't have me teaching more than two classes in a row, and

I need my prep periods scattered throughout the day so I can get off my feet and rest my back/neck/shoulder."

8. Shortly thereafter (on or about January 17, 2001), Miller typed up a list of accommodations that he felt he needed in order to continue working. He submitted this document, entitled "Accomodations [sic] Request" to the district, with a hand-written note from a medical provider (Dr. Ned Wilson) stating, "This patient has a serious lumbar condition that requires limited activity. Please accommodate as described above."

9. The request proposed (1) no more than 2 class teaching periods in a row; (2) prep periods scattered throughout the day, with no 2 prep periods together and no prep period linked to a lunch period; (3) no 1st or 8th period prep and (4) no traveling from one school to another.

10. From its receipt of the request in January 2001 through the end of the 2005-06 school year, the district provided Miller with the schedule accommodations reflected in the request. Sometimes Miller had to "remind" the district of his accommodations when a proposed schedule circulated or when he was asked to teach three classes in succession, but ultimately the district did honor his requests over the next 5 full school years (2001-02 through 2005-06) following the initial request.

11. At the end of the 2005-06 school year, discussions concerning Miller's schedule for the 2006-2007 school year raised concerns on his part about whether the district would continue to accommodate him. Miller sent a memorandum dated June 2, 2006, to KJHS Assistant Principal Tryg Johnson concerning the issue, characterizing his proposal for a schedule that "would be the best for [his] needs" as "just a suggestion from me to you," and "not in any way an accomodations [sic] request."

12. Miller met with district officials on or about June 5, 2006. The district requested that Miller undergo a Functional Capacity Evaluation [FCE] at district expense. This request was reasonable. The FCE was performed in July 2006, and provided to the district in early August 2006.

13. Miller sent a memorandum to Karen Breeding on August 18, 2006, regarding his "Accommodations Request." He included requests for a class schedule that involved teaching no more than 2 classes in a row and for no traveling from one school to another during the school day. Over the course of the next few weeks, Miller submitted additional copies of this document with notations from medical providers to the effect of "I have no problem with these requests," "agree" and "agree above."

14. Miller met with district officials in early September to discuss the FCE results. During the course of the meeting, Miller advised that he was not satisfied with the process, and indicated that the district had modified his accommodations against his will and that he was going to court.

15. Faced with the additional medical information Miller provided, it would have been reasonable for the district to go the extra mile and authorize the individual (Blaine Stimac, PT, MS) who performed the FCE to address the concerns Miller voiced and the additional medical information. However, it was also reasonable, if barely so, for the district to stick with the "favorable" FCE without doing further work to respond to Miller's concerns.

16. Following the early September meeting, Miller made arrangements on his own to see Stimac again. Stimac subsequently provided Miller with an "Addendum" to his original FCE report dated September 28, 2006. The addendum essentially confirmed Miller's need for the accommodation he was seeking.

17. Miller requested that the district pay for the addendum in order to see it. Breeding refused. Miller did not authorize Stimac to provide and did not himself at that time provide a copy of the addendum to the district.

18. It was not reasonable for Miller to withhold the addendum because the district refused to pay for it. It was not reasonable for Breeding to refuse the minimal cost of the addendum. But for this deadlock, the district would have learned, in plenty of time to explore whether the master schedule for 2007-08 would permit Miller's requested accommodation, that he genuinely needed the accommodation.[1]

19. On October 31, 2006, Miller transmitted a letter to Breeding advising that "[b]ecause of the district's attitude, lack of cooperation, and refusal to accept my accommodations request, I have filed a claim of discrimination with the Equal Employment Opportunity Commission against School District #5."

20. Miller's claim of "failure to accommodate" discrimination was "dual filed" with the EEOC and the Montana Department of Labor and Industry, as is the usual practice for discrimination claims arising under both laws, on November 17, 2006.

21. On January 23, 2007, Miller sent a letter to Assistant Superintendent Dan Zorn requesting a transfer to another school for the 2007-2008 school year. Breeding responded to the letter on January 30, 2007, and Miller then submitted a reply to that response letter on February 24, 2007. Miller was not transferred to another school for the 2007-2008 school year.

22. At no point during the 2006-07 school year at KJHS did the district ever require Miller either to work any schedule inconsistent with his previous schedule requests or to travel between school facilities as part of his assigned schedule. Miller's schedule during the 2006-07

[1] The evidence at hearing was that since the accommodation was not factored into the process of making the master schedule, the district's best witness on the issue did not know whether the district could have scheduled Miller's accommodation without an undue hardship.

school year (both before and after he filed his "failure to accommodate" claim) remained consistent with the schedule structures provided to him since January 2001.

23. After the resumption of school in January 2007, the preparation of the master schedule for the following school year proceeded. It went forward without any exploration of whether Miller's accommodation could be factored into the schedule without undue hardship.

24. Miller did not provide the district with a copy of the FCE Addendum until May 22, 2007. By that time, the master schedule planning for 2007-2008 had progressed beyond running additional computer models with new scheduling variables.

25. As of the commencement of the 2007-08 school year, the "junior high" model of education delivery to Grades 8 and 9 was discontinued at KJHS, and a "middle school" model of education delivery to Grades 6 through 8 was implemented at what is now known as Kalispell Middle School [KMS].

26. Miller remains employed at KMS. His assignment for the 2007-08 school year at KMS requires him to teach 3 classes in a row. All instructors at KMS similarly situated to Miller (i.e., those teaching non-core courses such as music, business/computers, foreign language, etc.) are required to teach 3 classes in a row at some point during the day. The only exception is a music teacher who travels between school facilities as part of her schedule.

27. Miller applied for open positions in the Business Departments at Flathead High School and Glacier High School in February/March 2007 and May/June 2007, respectively. He was interviewed for the positions, but was not hired. Miller has filed a separate Charge of Discrimination [Retaliation – HRB Case No. 0079012422] that, as of the time of the hearing in this case, was being investigated by the Human Rights Bureau. The evidence in this case does not establish that he was as well qualified for the positions as the teachers selected.

28. By the time of this decision, the master scheduling process is already underway and probably well along the way for 2008-09. Because of the timing of the hearing, there is no evidence of record regarding whether the district has made any effort to determine, using the computer and committee methods it routinely uses for master schedule building, whether Miller can be accommodated without undue hardship in the coming school year. The district has known since May 2007 that Miller's accommodation requests are supported by the addendum to the FCE as well as the reports of his doctors.

IV. DISCUSSION[2]

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

Montana law prohibits discrimination against employees based on a physical or mental 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. Mont. Code Ann. § 49-2-101(19)(a). Work is a major life activity. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 428.

When a physical condition "prevents [the claimant] from performing heavy labor," and he has worked at heavy labor, he is "substantially limited in the major life activity of working because his impairment eliminates his ability to perform a class of jobs." *Butterfield v. Sidney Public Schools*, ¶ 24, 2001 MT 177, 306 Mont. 179, 32 P.3d 1243. This was Miller's situation in the mid-1980s, after which he worked to complete school and became a teacher. The district conceded that his physical limitations did make him a person with a disability at all times pertinent to this case.

Since Miller was working successfully for the district as a full-time teacher, he was an otherwise qualified person for whom the district had obligation to provide a reasonable accommodation if such an accommodation would enable him to continue to do his job. Mont. Code Ann. § 49-2-101(19)(b); Admin. R. Mont. 24.9.606(2). An employer illegally discriminates because of disability by failing to make reasonable accommodations to known physical (or mental) limitations of an otherwise qualified employee unless it can demonstrate that the accommodation would impose undue hardship on the operation of the business. Admin. R. Mont. 24.9.606(1). An accommodation is reasonable unless it would impose undue hardship upon the employer. Admin. R. Mont. 24.9.606 (4). An undue hardship means an action requiring significant difficulty or extraordinary cost when considered in light of the nature and expense of the accommodation needed, the overall financial resources of the facility, the overall financial resources of the business, and the type of operations of the employer. Admin. R. Mont. 24.9.606(5).

The district was able to accommodate Miller without undue hardship for 6 full school years following his initial accommodation requests. During the sixth year (2006-07), changes in the district's educational programs called into question whether the accommodation would be available the following year. The primary issue in this case is whether the district, in light of those changes, discharged its obligations to engage in an interactive process with Miller to determine whether another reasonable accommodation was necessary.

The employer's obligation to accommodate disability includes engaging in an interactive process if the first accommodation fails. *Humphrey v. Mem. Hosp. Assoc.* (9th Cir. 2001) , 239 F.3d 1128, 1137-38. When Miller again requested essentially the same accommodation, which the district might no longer be able to provide, the district initially discharged its duty to "gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job." *Buckingham v. United States* (9th Cir. 1993), 998 F.2d 735, 740. It paid for a functional capacities evaluation. It literally, even woodenly, applied the report generated to deny the accommodation requested as unnecessary. Nonetheless, although the Hearing Officer finds the aggressive use of the report

to justify denying Miller's requested accommodation over his vigorous protests a dubious kind of "human resource" work, the district acted within the letter of the law with the information available to it at that time.

Thereafter, neither side engaged in a good faith interactive process. Miller withheld information vital to his request for accommodation, because the district, behaving in an equally inappropriate fashion, wouldn't pay for the addendum. The evidence does not support a finding that it is more likely than not that Breeding balked at paying for the report because she already had a report that let the district deny accommodation, and out of discriminatory animus toward Miller wanted to hang onto the report unchanged. Therefore, the onus for the mutual refusal to cooperate falls upon Miller, who could have provided the report and continued to insist that the district pay the provider for it so he would be reimbursed.

The entire accommodation case for the 2007-08 school year hinges upon the foolish uncooperative behavior of both sides. This case might have come on to a contested case hearing anyway, but at least it would have included evidence to answer what should be and would then have been the critical question–could the district accommodate Miller without undue hardship? As it is, the district prevails on the accommodation question for the 2007-08 school year, because it reasonably relied upon the FCE, without notice until too late for its scheduling process that Miller did still need the requested accommodation.

The department recently issued a decision in *Riddle v. Dollar Tree Stores, Inc.* (Mar. 14, 2008), H.R. No. 0071012203, Case No. 15-2008, which presents a sharp contrast to this case. In *Riddle*, the employer unilaterally decided to stop providing the initial accommodation, without asking for any medical information beyond the information it had accepted in originally providing that accommodation, despite there being no significant change in the job situation. In the present case, when the job situation changed significantly (3-grade middle school replacing 2-grade junior high school, "academy" format implemented), the employer sought an FCE and relied upon it in deciding it could not accommodate Miller. On the facts presented, for the 2007-08 school year, the district did not illegally discriminate against Miller when it refused to provide the same accommodation it had provided for the previous 6 years.

In terms of Miller's assertions that the district had a duty to transfer him, it is not the law that the district had an obligation to grant his transfer requests even if it had better suited candidates for the open positions. The provisions of the Montana Human Rights Act that prohibit discrimination mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. 2000e ***et seq.*** Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof from *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792.[3]

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[3] ***E.g.***, *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632 ; *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813, 816; *Johnson v. Bozeman S. D.* (1987), 226 Mont. 134, 734 P.2d 209; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d

The first tier of *McDonnell Douglas*, ***op. cit.***, required Miller to prove his prima facie case by establishing four elements:

> (i) that he belongs to a [protected class] . . .; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [his] qualifications, he was rejected; and (iv) that, after [his] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
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> *McDonnell Douglas*, ***supra***, 411 U.S. at 802.

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. The four elements may not necessarily apply to every disparate treatment claim. Thus, in this case Miller needed to prove that he, unlike the teachers transferred, had a disability, that he was as qualified to fill the open positions as the teachers transferred (or hired) for the open positions, and that despite his qualifications, the employer chose the other teachers.[4]

Miller testified that he was at least as qualified as the persons selected, with very little if any evidence regarding their qualifications. The district responded with slightly more specific testimony that Miller, though certainly qualified generally, did not fit the open positions as well as the teachers selected. This rather diffident rebuttal to Miller's very general proof of his prima facie case sufficed to defeat it.

For the 2007-08 school year, the district's refusal to accommodate Miller was based upon its reasonable belief that he did not need the accommodation. Miller also failed to establish a prima facie case that the district's refusals to transfer him for the 2007-08 school years were because of disability (his limitations and/or his request for accommodation).

There are two cautionary notes regarding the scope of this decision. First, failure of Miller's proof regarding discriminatory refusal, because of disability, to transfer him in January, February/March and May/June 2007 should have no impact whatsoever upon his other complaint of retaliatory refusal to transfer, which must stand or fall on its own investigative merits and thereafter upon its own merits in any further forum that may hear it. Second, it is impossible to address in the present case any dispute about accommodation during the 2008-09 school year, but the Hearing Officer hopes that the district, in light of the evidence in this case, has already utilized or will yet utilize its standard computer and committee procedures to ascertain whether Miller can be accommodated without undue hardship during next school year. The district clearly has been on notice for almost a year that the addendum to the FCE supports Miller's accommodation request.

1029; *Martinez v. Yellowstone Co. Welf. Dept.* (1981), 192 Mont. 42, 626 P.2d 242, 246.

[4] ***Cf.***, *Martinez*, 626 P.2d ***at*** 246 (1981) ***citing*** *Crawford v. Western Electrical Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over the discrimination claims asserted by Miller. Mont. Code Ann. §§ 49-2-509(7) (2003) and 512(1) (2007).

2. The district reasonably refused to provide Miller with the same or a similar accommodation for the 2007-08 school year as was previously provided during the prior 6 school years, because the district believed until it was too late to schedule the accommodation that Miller did not require it. Further, the district did not engage in illegal disability discrimination by refusing Miller's transfer requests in January and February 2007. Mont. Code Ann. § 49-2-303(1)(a).

3. Because Miller did not prove illegal disability discrimination, as alleged by Miller's complaint, for the time period through the 2007-08 school year, the complaint must be dismissed. Mont. Code Ann. § 49-2-507.

VI. ORDER

1. The department grants judgment against charging party, **Randall Miller**, and in favor of respondent, **Kalispell School District # 5**, on Miller's charges of illegal disability discrimination as alleged in his complaint herein, which is now dismissed.

Dated: March 31, 2008.

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

Randall Miller Decision tsp