BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012203:

DENISE RIDDLE,	)	Case No. 15-2008
	)	
Charging Party,	)	
	)	
vs.	)	**DECISION**
	)	
DOLLAR TREE STORES, INC.	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Denise Riddle filed a complaint of discrimination on November 28, 2006. The complaint alleged that Dollar Trees Stores, Inc., discriminated against her in the area of employment because of her disability (cancer), in violation of the Montana Human Rights Act, Title 19, Chapter 2, Mont. Code Ann.[1] On July 5, 2007, the department gave notice Riddle's complaint would proceed to a contested case hearing, and appointed Terry Spear as Hearing Officer.

The contested case hearing was held on October 15 and 16, 2007, and November 2, 2007, in Billings, Yellowstone County, Montana. Riddle attended with her counsel, Patricia D. Peterman, Patten, Peterman, Bekkedahl & Green, PLLC. Dollar Tree attended through its designated representative, June Hartman, with its counsel, Tom Singer and Jill Gerdrum, Axilon Law Group, PLLC.

Denise Riddle, David Milton, Peggy Rogers, June Hartman, Lonnie Miller, and Meg Bennett attended and testified. The Hearing Officer admitted the deposition testimony of Dr. Roger Santala and Dr. John Schallenkamp. The Hearing Officer also admitted Exhibits 1, 6-11, 13-15, 105 (after initially admitting the first 21 pages and refusing pp. 22-83 of the exhibit on a relevance objection, the Hearing Officer admitted the rest of the exhibit when it was offered again and no objection was interposed), 106-108, 110-112, and 114-116. The Hearing Officer refused Exhibit 113 on a foundation objection. The Hearing Officer reserved ruling upon the

[1] Riddle also asserted violation of the Americans with Disabilities Act, to which this decision does not speak, because the department has no power to adjudicate, as opposed to investigating, such claims.

admission of medical records of Denise Riddle, Exhibits 2-4, and exhibits to the doctors' depositions, and now seals and admits these exhibits. Other exhibits listed in the prehearing order either were not offered or were withdrawn.

The evidentiary record closed on November 2, 2007. Riddle filed the last post-hearing brief on December 17, 2007. A copy of the Hearing Officer's docket accompanies this decision.

II. Issues

The key issue in this matter is whether Riddle suffered a disability in Fall 2006 for which Dollar Tree had a duty reasonably to accommodate her. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Respondent Dollar Trees Stores, Inc., hired charging party Denise Riddle in Billings, Montana, as a part-time cashier, beginning September 15, 2004.

2. On January 2, 2005, Riddle became a full-time assistant manager in the Billings Heights Dollar Tree Store. David Milton, the store manager, was her immediate supervisor from January 2005 until mid-October 2006. Lonnie Miller, the District Manager, supervised Milton. The assistant manager position description required assistant managers to assist with the complete operation of the store, including scheduling, ordering, freight processing, all opening and closing procedures and all other day to day store activities. The assistant manager position generally required an individual to be available for all shifts.

3. Immediately below Milton, the Store Manager, there were four assistant manager positions at the Heights Store–Sales Assistant Manager (Riddle's new position), Freight Assistant Manager, Checklist Assistant Manager and Impulse Assistant Manager. The Sales and Freight Assistant Manager positions were full-time positions. The Checklist and Impulse Assistant Managers could either be full-time or part-time. When there was no Checklist Manager, one of the other management employees would perform the duties of that position.

4. In early 2005, Riddle was a highly valued employee and "outstanding" in her position at Dollar Tree. Riddle trained many Dollar Tree employees, because of high turnover within the stores. Miller and Milton relied on Riddle for her work ethic; they were impressed with her as an employee, and considered her to have great insight into the store's workings. Miller considered Riddle to be Milton's "backbone" in the store. She covered for Milton in his absence and served as the backup Store Manager.

5. In early 2005, Miller and Milton agreed that Riddle should be offered a store manager position. Dollar Tree was building its West End store. Dollar Tree offered and Riddle accepted the Store Manager position at the West End store, for when it opened.

6. In April 2005, Riddle was diagnosed with lung cancer, and informed Milton that she had cancer and would be receiving treatment. Miller also learned of Riddle's cancer. Miller and Milton decided to allow Riddle as much time off work as she needed for her cancer treatment and recuperation.

7. On June 14, 2005, Riddle submitted a doctor's note to Dollar Tree, supporting her need for a temporary leave from work due to the side effects of her chemotherapy and radiation treatments. Riddle completed the initial round of cancer treatment. On July 6, 2005, Riddle submitted a doctor's note releasing her to return to work without any stated restrictions. Riddle returned to work, but continued to suffer from physical weakness and fatigue, which she believed resulted from the cancer or the cancer and her treatments. She did not regain either the energy or the enthusiasm she had previously brought to her work.

8. Roger Santala, M.D., board certified in internal medicine, hematology and medical oncology, who signed the return to work note, was actively involved in Riddle's cancer treatment from, in essence, the inception. During her initial chemotherapy and irradiation, Dr. Santala recommended that Riddle work not more than two to three days in a row on day shifts, to minimize her fatigue and other side effects. He testified that "Denise never accomplished [a performance status of a person at full activity] after her treatment was continued and [a performance status of a person working perhaps half time] was about where I would have described her performance." He also agreed that when he "fully endorsed her returning to work" (which he did in July 2005) that he "did encourage her to be cautious and to consider limited/restricted hours."[2]

9. With her continuing physical weakness and fatigue, Riddle, who otherwise was qualified to perform and in fact did perform the essential functions of her position, had a physical impairment that substantially limited the major life activity of working, since she was no longer able to work full-time. She requested and Dollar Tree assigned her to a schedule of morning shifts (8:30 a.m. to 2:30 p.m.) with Wednesdays and Sundays off. She met with Milton and with the other assistant managers and requested that this accommodation continue and that she remain the Sales Assistant Manager with this reduced schedule. Milton and the other assistant managers agreed that Riddle's proposed continuing reduced schedule was reasonable and caused no undue hardship. Riddle scheduled her medical appointments on Wednesdays whenever possible, and kept Milton informed of appointments that were not scheduled on Wednesdays.

10. Riddle, continuing to support and assist Milton in discharging his duties as the store manager, wrote the work schedules for the Heights store employees from June 2005 until mid-October 2006. Thus, Riddle set her own work schedule during that time, with Milton's approval, and maintained her accommodation.

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[2] The quotations are from pp. 11-14 and 35-37 of Dr. Santala's deposition testimony.

11. Miller, in his capacity as District Manager, was supportive of Riddle during her cancer treatment and was proud of how the store responded to her needs.

12. The West End store opened in August 2005. Shortly before it opened, Riddle declined the Store Manager position she had previously accepted, because she was unable to work full-time because of physical weakness and fatigue, which she believed resulted both from her cancer and from the after-effects of chemotherapy and radiation.

13. In mid-September 2005, Riddle again saw John Schallenkamp, M.D., a board certified radiation oncologist in Billings, Montana. Dr. Schallenkamp recommended additional radiation treatment, a "relatively low level" irradiation of Riddle's brain, with fifteen treatments over three weeks. Dr. Schallenkamp explained to Riddle that her particular lung cancer had "a preponderance of spreading to the brain in patients perhaps 50% of the time," and that the medical data indicated that patients with that particular cancer who, like Riddle, had a "good response" to the initial radiation and chemotherapy treatment had "a survival advantage" with the subsequent irradiation of the brain, "even though there is no radiographic evidence of disease there."[3]

14. Riddle underwent the recommended irradiation in late September and early October 2005. Her physical weakness and fatigue increased during these treatments. Later her physical weakness and fatigue returned to the levels existing in July 2005.[4] Dollar Tree was still providing her with the schedule accommodations she requested without asking her for further documentation of her medical condition, so she did not provide any to the employer.

15. Beginning in April 2005 and continuing until October 2006, Dollar Tree provided Riddle with the accommodations she requested regarding her work schedule and hours, without requiring her to provide any medical documentation beyond the two notes of June 14 and July 6, 2005, to support her requests. Not being asked, she did not provide any such medical documentation.

16. In August 2006, Dollar Tree offered Riddle the Heights Store Manager position. There were apparently some problems developing with Milton. Riddle declined because she was still experiencing on-going physical weakness and fatigue.[5]

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[3] The quotations are from p. 7 of Dr. Schallenkamp's deposition testimony.

[4] According to Dr. Schallenkamp's records, Riddle reported at the time of her last visit to him, over a year after completion of irradiation of her brain in December 2006, that her energy levels and condition had by then returned to where they were when she completed her initial radiation and chemotherapy treatments in July 2005, when, as already noted, her energy levels and condition were those of a person working perhaps half-time.

[5] Dr. Santala testified that, in retrospect, "one becomes suspicious that it was evidence at that time [Fall 2006], and particularly that her disease actually was recurring," although that suspicion was not confirmed medically until January 2007. Pp. 14-15 of Dr. Santala's deposition

17. After she declined the store manager position, Riddle's hours were further reduced by Milton, in early October 2006, at Miller's direction. This appears to have been a clumsy attempt to force Riddle either to return to full-time hours as the Assistant Sales Manager or accept one of the part-time assistant manager positions, which she viewed as a demotion.

18. Dollar Tree forced Milton to resign as Heights Store Manager in early October 2006, for reasons unrelated to Riddle's situation. Shortly after the new Store Manager, June Hartman, began work, Elton Rudolph replaced Miller as the District Manager, again for reasons apparently unrelated to Riddle.

19. Hartman started as the new Heights Store Manager in late October 2006. When she took over as store manager, she informed Riddle she would be taking charge of writing the store schedule for all employees.

20. Riddle told Hartman, in the presence of another management employee, Freight Manager Peggy Rogers, that her "availability," with Dollar Tree approval, was morning shifts, 8:30 a.m. to 2:30 p.m., with Wednesdays and Sundays off. Hartman responded that she needed to check with the new district manager about the schedule.

21. Hartman was aware Riddle had a prior diagnosis of cancer, but understood her to be in remission and believed she was not limited in any way by her prior diagnosis. Hartman could find nothing in Dollar Tree records regarding Riddle that verified any medical basis for a less than full time schedule. She did not ask Riddle the reasons for the part-time schedule request and did not ask Riddle for any medical verification of the need for a continuing part-time schedule. Rudolph neither asked Riddle nor directed Hartman to ask Riddle for any medical documentation of her need for a part-time schedule. Dr. Santala testified that at this time, he still "did encourage [Riddle] to be cautious and to consider limited/restricted hours."[6]

22. In the first week of November 2006, Riddle asked Hartman for permission to leave work immediately for an emergency medical appointment because of a swelling in her neck relating to her cancer. Hartman granted the request.

23. Hartman scheduled Riddle to work Monday through Friday, 8:00 a.m. to 1:30 p.m., for the week beginning Sunday, November 12, 2006, despite having documentation that Riddle had a Wednesday, November 15, 2006, medical appointment. When Riddle asked again to have her previously approved shifts, Hartman asked Riddle to try to work the assigned shifts, and urged her to be ready to start working full-time, including afternoons and evenings, in the future. Riddle resigned.

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testimony.

[6] P. 14 of Dr. Santala's deposition testimony.

24. Dollar Tree attempted to return Riddle to a full-time rotating schedule, even though the store had accommodated and could have continued to accommodate her 30 hour per week schedule, without asking Riddle for any further medical documentation. It was unreasonable for Dollar Tree to expect Riddle to provide additional medical documentation supporting her accommodation without a request from Dollar Tree for that additional medical documentation. It was unreasonable for Dollar Tree to refuse the continued accommodation without pursuing an interactive process with Riddle by requesting medical documentation of the physical limitations for which it had previously accommodated Riddle.

25. Riddle failed to prove that during her subsequent cancer treatment she would have been able to continue to work her 30 hour per week schedule. The fact that she was able to do so during her previous treatment is insufficient to establish her ability after January 8, 2007, when her treatment resumed, to continue to work.

26. From November 12, 2006, to January 8, 2007, Riddle could have continued to work 30 hours per week at $11.00 per hour for Dollar Tree. Therefore, she lost 8 weeks of wages, or $2,640.00.

27. Interest to date on her lost wages is computed by taking daily interest at 10% per annum for each week's lost wages, divided by 365 days, times the number of days between the end of that week and the date of this decision. $330.00 times 0.1 divided by 365 equals $0.090. $0.090 times 481 days, plus $0.090 times 474 days, plus $0.090 times 467 days, plus $0.090 times 460 days, plus $0.090 times 453 days, plus $0.090 times 446 days, $0.090 times 439 days, plus $0.090 times 432 days, equals $328.68.

28. Because she lost her job, Riddle also lost her life insurance police, which her cancer bars her from replacing. The face value of that policy was $63,000.00, but the evidence provides no means of valuing it other than speculation. Loss of the policy contributed to and exacerbated her emotional distress.

29. Dollar Tree's refusal in November 2006 reasonably to accommodate Riddle with the same accommodation previously provided caused Riddle severe emotional distress. Riddle experienced substantial anxiety, based both upon her feelings of betrayal and outrage and upon worry about her economic security, at the same time that she remained under the specter of possible return of her cancer, and then with the confirmed recurrence of her cancer in January 2007. Dollar Tree is not responsible for the recurrence of Riddle's cancer, but is responsible for the emotional distress resulting from Riddle's loss of her livelihood and from the emotional reaction to the unfair and illegal fashion in which her livelihood was taken from her. The value of the emotional distress for which Dollar Tree is responsible is $50,000.00.

30. As far as Riddle was aware, Dollar Tree did not offer to return her to her job, except as an offer of settlement of her discrimination claims. Meg Bennett, the Human Rights investigator, understood the offer as a settlement proposal and presented it to Riddle as such.

Given the uncertainty of her future, it is not reasonable to require Riddle to reduce or end her losses by abandoning her claims of illegal disability discrimination in exchange for getting her job back.

31. In addition to a mandatory injunction, the department should, to address the risk of recurrence of the illegal conduct involved in this case, order Dollar Tree (1) to fund appropriate training of current district and store management regarding disability discrimination and (2) to submit its current policies regarding disability accommodation to the Human Rights Bureau for review, thereafter revising or augmenting those policies as the bureau may direct.

IV. Opinion[7]

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.

Sometimes, for example, a physical condition "prevents [the claimant] from performing heavy labor." *Butterfield v. Sidney Public Schools*, 2001 MT 177, ¶ 24, 306 Mont. 179, 32 P.3d 1243. This means that the claimant is "substantially limited in the major life activity of working because his impairment eliminates his ability to perform a class of jobs." ***Id.***

A substantial limitation must also be either permanent or of sufficient duration to have a substantial impact. Federal regulations note that temporary, non-chronic limitations "are *usually* not disabilities." 29 C.F.R., Part 1630 App., §1630.2(j) [emphasis added]. Montana law follows both federal interpretations and decisions from other jurisdictions, that a "temporary" impairment is a substantial limitation to the major life activity of work if it interferes for such a long time that the worker has trouble securing, retaining or advancing in employment. *Reeves v. Dairy Queen, Inc.* (1998), 287 Mont. 196, 205, 953 P.2d 703, 708; *Martinell*, 886 P.2d ***at*** 430. The question is both one of duration and of severity.

In the present case, Riddle proved that her physical weakness and fatigue, because of her cancer and its treatment, prevented her from working full-time hours for a period of almost eighteen months, at the end of which Dollar Tree effectively forced her to resign by imposing hours upon her that she could not work. Her physical limitation clearly eliminated her ability to perform a broad class of jobs (all full-time jobs), substantially limiting her ability to work, even though she could work part-time jobs. Riddle proved that she had a substantial limitation of sufficient duration to have a substantial impact upon her ability to retain and advance in employment in the broad class of full-time retail sales management jobs.

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[7] 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.

Since Riddle had a disability, Dollar Tree had a duty to provide her with a reasonable accommodation if with it Riddle could perform the essential job functions of her position. 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 an undue hardship on the operation of the business. Admin. R. Mont. 24.9.606(1). An accommodation is reasonable unless it would impose an 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).

Riddle asked for the reduced hours and split days off that Dollar Tree provided. When an accommodation is requested to enable the employee to perform the essential functions of the job, the employer's duty to respond required that it "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. Dollar Tree initially agreed to the schedule that Riddle requested, with essentially no information except Riddle's report of what she could do and what she needed. It cannot now argue that because it had so little information it could simply stop accommodating Riddle when it chose to believe, without any inquiry, that she was no longer disabled.

Dollar Tree's argued that, pursuant to *Sutton v. United Air Lines, Inc.* (1999), 527 U.S. 471, 482-83, when Riddle's initial cancer treatment appeared to result in remission, she no longer had a substantial limit on the major life activity of working. The legal argument ignored the facts. In terms of her ability to work, Riddle was far from "doing well"–her doctor believed she was able to work perhaps half-time, and later noted that in retrospect Riddle's continued physical weakness and fatigue probably indicated that the recurrent cancer confirmed months later was already active. *Sutton* may be good law when the claimant actually proves only a potential or hypothetical substantial limitation, but it is irrelevant here, where Riddle proved a genuine substantial limitation.

Likewise, it is true and unremarkable that having a previous diagnosis of cancer does not necessarily prove that the claimant is disabled forever, as stated in *Thomas v. Trane* (M.D. Ga. 2007), 2007 U.S. Dist. LEXIS 72044.[8] On the other hand, the Hearing Officer does not agree

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[8] The actual context of this statement is rather remarkable, at pp. 14-16 of the opinion (which appears not to have been submitted for publication in the Federal Supplement):

> In the case at bar, Plaintiff cannot establish that he has a "disability" that is covered by the ADA. Initially, although Plaintiff has been diagnosed with both lymphoma and asthma, merely having a previous diagnosis of cancer or asthma does not make him disabled for purposes of the ADA. Further, while Plaintiff contends his previous lymphoma treatment has left him more susceptible to certain types of illnesses and he experiences breathing problems associated with his asthma and seasonal pollen, Plaintiff acknowledges that he can walk, breathe, and work. In fact,

with Dollar Tree's argument that Riddle "presented no evidence that in fall 2006 she was substantially limited in a major life function." She presented credible and uncontroverted evidence that she could not work full-time, through her own testimony and through the testimony and records of her physicians. Indeed, a fair reading of the doctors' testimony leaves a definite and firm conviction that Riddle was substantially limited, as her own testimony reflects, in the major life activity of working, from April 2005 through November 2006 and beyond, because she could no longer work full-time.

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. This particular employer did not prove that the first accommodation ever failed. Instead, Dollar Tree unilaterally decided to stop providing the first accommodation, without asking for any medical information beyond the information it had accepted in providing that first accommodation. Whether or not it would have been a good idea for Dollar Tree to get more documentation before agreeing to the initial accommodation, it certainly was necessary for Dollar Tree to ask for more documentation before dropping all of its efforts to accommodate Riddle when it decided the initial accommodation was no longer convenient.

It is ironic that after arguing vigorously that Riddle was not disabled, Dollar Tree then argued with equal vigor that Riddle was unable to perform the essential duties of her job because she could not close the store. As a question of fact, the Hearing Officer could not possibly find that closing the store was such an essential job duty for a sales assistant manager that an accommodation excusing her from that duty was an undue hardship for Dollar Tree. By November 2006, Dollar Tree had excused Riddle from that duty for around sixteen months, with no appreciable hardship or expense at all.

The department may order any reasonable measure to rectify harm suffered as a result of illegal discrimination against Riddle. Mont. Code Ann. § 49-2-506(1)(b). The purpose of awarding damages in a discrimination case is to make the victim whole. ***E.g.***, *P. W. Berry v.*

> the only problem reported by Plaintiff is that he sometimes has trouble breathing and in turn doesn't feel like walking because "it t[akes] away a lot of energy." (Thomas Dep. 101.) Plaintiff offers little more than a vague general description of his alleged disability and has failed to provide any evidence or explanation as to how his condition is any worse than is suffered by many adults. Thus, Plaintiff has shown, at most, that his ability to perform his daily activities is moderately below average. Finally, because upon returning to work Plaintiff's lymphoma was in remission and he was working under no restrictions from his physician, his condition no longer "substantially limited" his activities as it was corrected by treatment. Accordingly, Plaintiff has failed to establish that his lymphoma or asthma substantially limited his ability to breath, walk, or work. Therefore, he has not carried his burden of proving that he is "disabled" as defined by the ADA, and Defendant is entitled to summary judgment.

Suffice it to say that, at least in Montana, sworn medical testimony that Riddle's ability to function more likely than not limits her to working half-time is substantially more than "a vague general description of [her] alleged disability" and will not be dismissed as failure "to provide any evidence or explanation as to how [her] condition is any worse than is suffered by many adults."

Freese (1989), 239 Mont. 183, 779 P.2d 521, 523; ***see also*** *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. It follows that the appropriate measures to rectify the harm Riddle suffered is to award her what is reasonable to make her whole from the harm she suffered. The harm she suffered includes lost wages and benefits (back pay), prejudgment interest on those losses, and emotional distress, all resulting from illegal disability discrimination by Dollar Tree.

By proving that Dollar Tree's refusal to continue her accommodation work schedule left her no choice but to resign, Riddle established an entitlement to recover lost wages and benefits. *Albermarle Paper Co.*, ***at*** 417-23. She must prove the amounts of her losses, but not with unrealistic exactitude. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2nd 599, 607; *Goss v. Exxon Office Systems Co.* (3rd Cir. 1984), 747 F.2nd 885, 889; *Rasimas v. Mich. Dept. Mental Health*, 714 F.2nd 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award). In this instance, the lack of substantial evidence about how much longer Riddle could have worked with the accommodation once her cancer treatment resumed defeats any further lost wages once that treatment did resume.

Prejudgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, 779 P.2nd ***at*** 523. Calculation of prejudgment interest is proper based on the elapsed time without the lost income for each pay period times an appropriate rate of interest. ***E.g.***, *Reed v. Mineta* (10th Cir. 2006), 438 F.3rd 1063. The appropriate rate is 10% annual simple interest, as is applicable to tort losses capable of being made certain by calculation, only without the requirement of a written demand to trigger commencement of the interest accrual, which has not been required in Human Rights Act cases. Mont. Code Ann. § 27-1-210. The appropriate calculations are described in the findings.

Riddle sought compensation for the emotional distress she suffered as a result of the unreasonable cessation of her accommodation, in the amount of $50,000.00. Emotional distress recovery is proper for illegal discrimination in violation of Montana law. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596, 601; *Benjamin v. Anderson*, ¶70, 2005 MT 13, 327 Mont. 173, 112 P.3d 1039. Emotional distress recovery under the Montana Human Rights Act follow the federal case law. *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

Obviously, the emotional distress Riddle suffered was substantially greater that the emotional distress suffered by the plaintiffs in *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; ***cited in*** *Vortex* ***at*** ¶33. In *Johnson*, the plaintiffs suffered emotional distress resulting from the refusal of a landlord to rent living quarters to them due to their race. Those plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. Nonetheless, the appeals court increased their awards from $125.00 to $3,500.00 each for the overt racial discrimination.

Riddle lost her livelihood at a time when her health was at best precarious, and her opportunities to replace the income she was losing were very limited. She lost her benefits as well. In comparison to another disability discrimination claimant, Janelle McDonald, Riddle had far more serious emotional distress due to her losses. ***See***, *McDonald v. D.E.Q.* (Hearing Officer decision, 8/4/06), HR Case No. 384-2006, HRB No. 0051011370; ***aff'd***,(HRC, 12/28/06); ***reversed on liability on other grounds on*** (D.C. 12/28/06), 2007 Mont. Dist. LEXIS 365, First Judicial District Court, Lewis and Clark County, Cause No. CDV-2007-74 (employer not required to modify work environment to accommodate use of service animal–no discussion of damages); ***on appeal to Mont. Sup. Court*** (DA 07-0376, reply brief filed, 12-27-07).

McDonald was awarded $10,000.00 for emotional distress because, although the evidence did not establish that she was solely motivated to leave her job at D.E.Q. due to stress from failure to accommodate her service dog, she did suffer prolonged failure adequately to accommodate her service dog and some loss of social interaction due to injury and eventual loss of the service dog. Riddle, while dealing with the on-going risk of recurrence of her cancer and loss of her livelihood, experienced the withdrawal of an accommodation that allowed her to continue working and to remain self-supporting, without any explanation or request for additional medical information. It is entirely reasonable to conclude that Riddle's emotional distress, based upon the facts surrounding the discrimination as well as her testimony and demeanor during the hearing, requires a substantially larger award than that accorded to McDonald. Therefore, the Hearing Officer decided to award the amount requested.

The law requires an order enjoining Dollar Tree from discriminating against other disabled employees. Mont. Code Ann. § 49-2-506(1). In addition, the order may also prescribe conditions on Dollar Tree's future conduct that are relevant to accommodation of employees with disabilities and require both any reasonable measures to correct the discriminatory conduct and a report on the manner of Dollar Tree's compliance. Mont. Code Ann. § 49-2-506(1)(a), (b) and (c). The appropriate order is reflected in the findings and the conclusions herein.

V. Conclusions of Law

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

2. Riddle was an otherwise qualified individual with a disability who needed an accommodation in order to carry out the essential functions of her job with Dollar Tree. Dollar Tree illegally discriminated against Riddle because of disability when it discontinued her reasonable accommodation in Fall 2006, without engaging in the proper interactive process to ascertain whether she still was entitled to that accommodation, even though providing the accommodation did not cause Dollar Tree an undue hardship.

3. Riddle is entitled to recover $2,640.00 for lost wages, $328.68 for prejudgement interest on her lost wages and $50,000.00 for the emotional distress she has suffered as a result of the illegal disability discrimination.

4. The department must order Dollar Tree to refrain from engaging in the discriminatory conduct and should prescribe conditions on Dollar Tree's future conduct relevant to the type of discriminatory practice found and require the reasonable measures detailed in the findings and in the order to correct the discriminatory practice.

5. Riddle has a subjective, actual expectation of privacy in her medical records. Although she waived her privacy rights regarding the testimony of her physicians, by putting her medical condition at issue when she filed her discrimination complaint, she did not waive her privacy rights regarding her medical records. Society is willing to recognize that expectation as reasonable. Both the State's compelling interest in prohibiting employment discrimination and the due process rights of these parties clearly mandate that the Hearing Officer read and consider the pertinent information in the medical records. Nonetheless, Riddle's reasonable expectation of privacy clearly outweighs the public's right to know information that is contained in her medical records. Thus, Riddle's medical records, in evidence as exhibits, should be and remain sealed, subject to any subsequent order by a tribunal reviewing this sealing order upon a proper legal challenge to it.

VI. Order

1. Judgment is granted in favor of Denise Riddle and against Dollar Tree Stores, Inc., Riddle's charges of illegal disability discrimination against her as alleged in her complaint and stated in the final prehearing order herein.

2. Within 30 days of the date of this decision Dollar Tree Stores, Inc., shall pay to Denise Riddle the sum of $52,968.68, representing $2,640.00 for past lost wages, $328.68 for prejudgment interest and $50,000.00 for emotional distress.

3. The department permanently enjoins Dollar Tree from discriminating against any person with a disability by failing to provide reasonable accommodation as required by law.

4. Within 20 days of the entry of this order, Dollar Tree shall submit to the Human Rights Bureau for review its present policies regarding discrimination against disabled persons in the workplace. Thereafter, Dollar Tree shall adopt any additional policies recommended by the Human Rights Bureau and shall ensure prominent posting of any new policy recommended by the Human Rights Bureau.

5. Exhibits 2, 3 and 4 and all exhibits to the depositions of Dr. Schallenkamp and Dr. Santala are and shall remain sealed, available only to department personnel who need to review them in the performance of their duties, without thereby revealing the records or their contents to the public, to reviewing tribunals who require access to the sealed documents in the course of their review, to counsel for the parties while this case is pending, and, as needed in the judgment of counsel, to the parties while this case is pending, and otherwise are only available in accord with subsequent orders of tribunals exercising jurisdiction over the sealed documents. Upon the conclusion of this case and all review thereof, when the department closes its hearing

case files, the sealed exhibits shall be removed from the closed files and destroyed. Exhibits the parties either did not offer or withdrew from the record after they were offered have already been removed and destroyed.

Dated: March 14, 2008.

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

Riddle Decision tsp