BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0081013386:

| | | |
|---|---|---|
| ROSS WELCH, | ) | Case No. 1697-2009 |
| | ) | |
| Charging Party, | ) | |
| | ) | |
| vs. | ) | HEARING OFFICER DECISION |
| | ) | AND NOTICE OF ISSUANCE OF |
| HOLCIM, INC., | ) | ADMINISTRATIVE DECISION |
| | ) | |
| Respondent. | ) | |

* * * * * * * * * *

## I. INTRODUCTION

Ross Welch filed a human rights complaint alleging that Holcim, Incorporated (Holcim) discriminated against him in discharging him without taking steps to accommodate his alleged disability. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on April 19, 20 and 21, 2010 in Bozeman, Montana. Stephen Pohl, attorney at law, represented Welch. Terrence Miglio, attorney at law (admitted pro hac vice) and Teri Walter, attorney at law appeared on behalf of Holcim. Welch, Valerie Aughney, Holcim Human Resource Manager, Dr. James Murphey, PhD., Cody Welch, David Johnson, economist, Michael Mullaney, Welch's direct supervisor, Diane Phillips, plant controller, Julie Anderson, Holcim Corporate Human Resources Manager, Pat Lane, Holcim Manager of Employee and Labor Relations, Eric Ervin, Holcim Trident Facility Plant Manager, Mike Mullaney, Welch's direct supervisor, and John Todd, plant manager at the Holcim Portland, Colorado facility all appeared and testified under oath. In addition, the parties stipulated to the introduction of certain depositions as noted in the record.

At hearing, Welch's Exhibits 1, 2 (pages 41, 44, 73, 74, 76, 119 and 160), 3, 4, 7, 14, 18, 21, 23, 24, 27, 28, 32, and 38 and Respondent's Exhibits 102, 103, 107, 108, 110 through 119, 121 (except for the first page), 122, 125, 126, 127, 141, and 142 were admitted into evidence.

Counsel for each party submitted post-hearing briefs, the last of which was submitted on September 17, 2010 at which time the record closed. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

## II. ISSUES

A complete statement of issues appears in the final pre-hearing order issued in this matter. That statement of issues is incorporated here as if fully set forth.

## III. FINDINGS OF FACT

1. Holcim manufactures and supplies portland and blended cement. It operates a cement plant in Trident, Montana, as well as 10 other cement and grinding plants in the United States. Holcim has closed four cement plants since April 2008 and "several" terminals. During 2010, 47 of approximately 78 employees were laid off at the Trident facility.

2. Holcim hired Welch in August of 2004 as a Production Supervisor to work at the Trident facility. He held that position until he voluntarily resigned from his employment on July 3, 2008.

3. Welch reported directly to Mike Mullaney, Production Manager, at the Trident plant. Mullaney has been with Holcim for more than ten years, and has been the Production Manager since 2001. Mullaney reports to the Trident Plant Manager, Eric Ervin.

4. Mullaney participated in the decision to hire Welch as a Production Supervisor. Prior to the job opening, Welch had expressed to Mullaney that Welch was interested in working for Holcim. When the Production Supervisor position at the Trident plant became vacant, Mullaney contacted Welch to ask him if he was interested in the job. Welch expressed interest in the job, and Mullaney, together with other Holcim employees, interviewed Welch and found him to be "the most qualified" candidate for the Production Supervisor position.

5. Welch was one of five Production Supervisors at the Trident plant. All Production Supervisors are required to work 12-hour rotating shifts, meaning they alternately work the day and night shift. Rotating shifts are an essential function of the Production Supervisor job.

6. Welch found the Production Supervisor position to be a high stress job because he was responsible for making decisions that affected the safety of employees working under him.

7. From 2005 to 2007, Mullaney completed yearly performance appraisals, of Welch's work. Mullaney always rated Welch as"meets expectations" ( e.g., Exhibit 1) and Mullaney was pleased with Welch's performance. In 2007, Mullaney wrote that he "look[s] forward to Ross's contribution to the success of the plant. (Ex. 1, p. 26). In 2006, Mullaney wrote that "Ross brings a lot of knowledge to the table" and that he was "a good supervisor." (Ex. 1, p. 30). In 2005, Mullaney wrote that Welch "is a good contributor to the cement plant" and "enjoyable to work with." (Ex. 1, p. 33).

8. In each of his yearly performance evaluations, in response to questions asking if he was willing to relocate to other Holcim facilities, Welch indicated that he was "not mobile" and "prefer[red] to stay," at the Trident plant. (Ex. 1, p. 25, 30, 33).

9. During his employment, Welch received copies of Holcim's policies and guidelines. (Ex. 1, p. 9). He signed an acknowledgment form indicating that he had "been informed that Holcim (US) Inc.'s policies and guidelines are available for review on Holcim's Intranet website." (Ex. 1, p. 9).

10. One of the policies Welch received was Holcim's Educational Assistance Program Policy, which reimburses qualifying employees "up to a maximum of $10,000 per calendar year for course-related expenses." (Ex. 102).

11. In 2005, Welch applied for a vacant Safety Manager position at the Trident plant. (Welch, p. 435-436). The job description for the position indicated that, among other things, a Bachelor's degree was "preferred." (Ex. 1, p. 4).

12. Although he was interviewed for the position, Welch did not get it. He was not the most qualified applicant and lacked a college education. Trident Plant Manager Ervin counseled him to "go back and seek additional education, potentially leading to a degree." (Hearing Transcript, p. 814, ll. 11-13, denominated hereinafter as HT p.__, l.__). Despite this advice, Welch did not take any college courses or obtain any additional education. Welch never utilized Holcim's Educational Assistance Program Policy to pay for college courses.

13. On April 3, 2008, Welch went to the emergency room after experiencing chest pains. Dr. Anderson Mehrle, a cardiologist, treated him. Welch had not

suffered a heart attack, but Dr. Mehrle nevertheless advised Welch not to return to work. Dr. Mehrle did not indicate for how long Welch should remain off work.

14. Welch was scheduled to work on April 3, 2008. He called Mullaney from the emergency room to notify him of his condition and that he (Welch) would not be reporting for work. Welch did not tell Mullaney how long he would be off of work. Mullaney advised Welch to contact Val Aughney, the Human Resources Administrator for the Trident facility.

15. Aughney's job responsibilities include a variety of personnel-related functions, including assisting in hiring and disciplining employees. Aughney does not have the authority to terminate employees.

16. Aughney is also responsible for administering Holcim's short-term disability benefits policy. The policy "provide[s] income protection for short periods of disability for a maximum of 180 days" for qualifying employees. (Ex. 32, p. 137) Employees with three to five years of service are eligible for 100% of their pay, minus withholdings, for the first 30 days of disability, and 75% of their pay for up to four months, if the disability continues. Short term disability benefits cease if the employee is no longer considered totally disabled or the employee separates from employment. (Ex. 32, p. 138).

17. If the duration of the disability is less than 10 days, Aughney oversees the payment of benefits. If the duration is longer than 10 days, Holcim utilizes a third party, CIGNA Insurance Company, to oversee the payment of benefits. (Id.). While CIGNA reviews an employee's medical documentation to determine his or her entitlement to disability benefits, the benefits themselves are paid directly by Holcim. (Id.).

18. Aughney plays only a limited role when a short term disability claim is administered by CIGNA. In that case, she simply monitors the claim to ensure that the benefit is continuing and provides information to the employee's supervisor so that the supervisor will know when the employee will be available for work. CIGNA decides whether the employee is eligible for benefits. Aughney does not instruct CIGNA regarding the payment of benefits. It is the employee's responsibility to provide CIGNA with the requisite medical information in order to establish eligibility for benefits.

19. After being released from the emergency room, Welch contacted Aughney and told her he had "a serious heart condition." Aughney informed Welch

that he should contact CIGNA since he might be eligible for short-term disability benefits.

20. Welch overstated the severity of his condition to Mullaney, Aughney, and CIGNA, claiming that he had a "leaking valve," a "hole" in his heart, and that he was "being seen in Billings by somebody for angioplasty." (Aughney, p. 31, 108; Mullaney, p. 597, Welch, p. 449). Welch further claimed that he was on medication for the valve leak, and even told Aughney that the "medicine was doing its job" because the leak was "much smaller." (Ex. 3, p. 245). Dr. Mehrle, actually diagnosed Welch with angina, did not put him on medication for a valve leak, and that Welch did not undergo angioplasty. (Ex. 190; Welch, p. 307).

21. On April 18, 2008, Welch contacted Catherine Novak, a Claims Manager with CIGNA, to begin the claims process. Welch told her that he had been diagnosed with stress, which caused him chest pain, and a valve leak. He also told Novak that his wife had just left him. He indicated to Novak that he was treating with a cardiologist and a psychologist. As part of the application process, Novak asked Welch whether he was employed elsewhere, aside from Holcim, or performing work for any other employers at that time. Welch told her that he was not working anywhere else.

22. Before, during, and after his disability leave, Welch worked for two other employers aside from Holcim. He worked part-time for Headwaters Livestock cleaning livestock pens. He also did work for his father-in-law at Topp's Custom Crates.

23. As part of the intake process, CIGNA asked Welch if he had other employment. Welch answered "no," even though he was in fact working part-time.

24. After their conversation, Novak sent Welch a letter on April 18, 2008, approving him for short-term disability benefits for the period of April 4, 2008 to May1, 2008. The letter informed Welch of his responsibility to provide the necessary medical information to ensure his continued eligibility for benefits.

25. As early as May 12, 2008, Holcim inquired of CIGNA whether Welch's treating physicians would release him to perform a temporary, light-duty position that Holcim would create to accommodate his condition.

26. During the claims processing period, Welch failed to return calls from CIGNA, or otherwise respond to CIGNA's requests for medical information, thereby delaying approval of his short-term disability benefits claim. On May 8, 2008, Novak emailed Aughney regarding her inability to obtain information from Welch, noting :

> I have tried to reach Ross Welch twice, and left voice mails. I am unable to reach him. I will review the current medical information, however, he has been released to work by his cardiologist. I will notify you as soon as possible if I can determine a benefit extension.
>
> Please notify Ross that CIGNA must speak with him. We are in need of his current diagnosis and treatment plan. We need the names and numbers of any new doctors.

(Ex. 38, p. 3).

27. CIGNA sent Welch a certified letter on June 4, 2008, reminding him that "it is your responsibility to provide us with continuing medical documentation" in order to validate his claim for benefits. (Ex. 2, p. 74; Ex. 38, p. 15). Aughney also asked Welch to get in touch with CIGNA, telling him that "it was important for him to call [Novak]…and that [Novak] needed updated medical [information]." (Ex. 3, p. 259).

28. Dr. Mehrle, Welch's cardiologist, and Dr. Murphey, his psychologist, delayed providing information to CIGNA regarding Welch's medical condition. (Ex. 2, p. 74). During May 2008, CIGNA sent both treating physicians numerous requests for information, which went unanswered. (Id.). Two months after Welch was first seen for chest pain, his physicians had still not provided CIGNA with "[o]ffice visit notes," "work restrictions and limitations," "test results/findings/evaluations," "treatment plan/referrals," and the "date [Welch] is able to return to work for sedentary/desk duties." (Id.).

29. Dr. Mehrle provided CIGNA somewhat conflicting information regarding his restrictions and return to work status. On April 24, 2008, Dr. Mehrle submitted a CIGNA Medical Request Form indicating that Welch could return to work with the restriction of "no night shifts." (Ex. 190). On May 7, 2008, Dr. Mehrle submitted a second CIGNA Medical Request Form indicating his restrictions for Welch were: "No night shifts. No heavy exertion. Routine breaks." He further indicated that Welch could not return to work even with those restrictions until July 15, 2008. In a note dated June 12, 2008, Dr. Mehrle indicated that Welch was still under his care and that further evaluation "needs to be done before returning to work" (Novak Dep., p. 128-129; Ex. 190). Dr. Mehrle provided no estimated return to work date. (Id.). On June 13, 2008, Dr. Mehrle told Novak that Welch "is released for light duty, sedentary work, and day shifts." (Ex. 38, p. 15). Dr. Mehrle also indicated that Welch "should not return to his former job." (Id.).

30. The information Dr. Murphey ultimately provided to CIGNA regarding Welch's return to work status was somewhat inconsistent with the information provided by Dr. Mehrle. On May, 7, 2008, Dr. Murphey submitted a CIGNA Medical Request Form indicating that Welch was to "avoid stress and/or situations in which attention/concentration problems might impact safety." (Ex. 23). He further indicated that Welch's return to work date was "undeterminable." (Id.). In a status report submitted to CIGNA sometime between May 7 and June 12, 2008, Dr. Murphey indicated that Welch was "not currently in a mental state where he can return to his job." (Ex. 23). On June 12, 2008, Dr. Murphey submitted a CIGNA Behavioral Health form, indicating that Welch could not return to work full-time. (Ex. 23). Dr. Murphey stated, however, that Welch could "return to work part-time if he could work only day shifts, did not perform physical work, did not have supervisory responsibilities, and did not experience demands from supervisors." (Id.). Dr. Murphey further stated that Welch "could probably handle desk work [without] interaction with supervisors." (Id.). On June 18, 2008, Dr. Murphey sent Novak an email indicating that Welch's return to work date should now be determined by Dr. Mehrle. (Ex. 24). Dr. Murphey also stated that he had "spoken with [Welch's] cardiologist (Dr. Mehrle), who informs me that Mr. Welch's heart condition is such that he SHOULD NOT return to work at this point, not even with 'light duty.' Thus, you need to base your determination on Dr. Mehrle's info, and NOT mine." (Id.).

31. As of June 18, 2008, Dr. Mehrle had told Novak that Welch could return to light-duty work, while Dr. Murphey claimed he could not. (Ex. 38, p. 15; Ex. 24).

32. In addition to the conflicting reports from Welch's physicians regarding his return to work date, Holcim was also receiving conflicting reports from CIGNA. On May 9, 2008, Novak emailed Aughney and informed her that she had received Welch's information that day, and that Dr. Mehrle had not cleared him to return to work. (Ex. 38, p. 5). On May 15, 2008, Novak emailed Aughney and informed her that Welch "could return to work with restrictions, light duty," but that "his Psychologist [ ] states he cannot work." (Ex. 38, p. 7). On May 16, 2008, Aughney contacted CIGNA to clarify Welch's status, and spoke with another Claims Manager, Christopher Geis. (Ex. 38, p. 9). Aughney contemporaneously memorialized the conversation with Geis in an email, writing that he "found documentation from Mehrle, the cardiologist stating Ross cannot work, even with restrictions until 7/15/08…Why Catherine [Novak] sent the 5/15 email saying he was released for light duty from the cardiologist we don't know." (Id.). On May 23, 2008, Novak called Aughney and indicated that "[t]here is confusion on the doctor's notes on whether he is saying all work is restricted until 7/15, or whether he is saying [Welch] can do sedentary work now." (Ex. 38, p. 14).

33. Welch was playing golf every Wednesday in a golf league while receiving disability benefits. Welch's golf activities added to Holcim's confusion as the golfing appeared to Holcim to possibly be in conflict with Welch's physician's orders that he remain off work and not be subject to "heavy exertion." In an email dated May 19, 2008, Aughney wrote Christopher Geis of CIGNA:

> Can someone let us know what restrictions Ross may have with Dr. Mehrle? We know Ross participated in a golf tournament on 5/5 and 5/6. Is golfing within his restrictions? Obviously, we are concerned if he can golf, can he work in some manner. (Ex. 2, p. 253-254).

34. Ten days later, Holcim was still uncertain whether Welch's playing golf was consistent with his physician's restrictions. On May 29, 2008, Aughney wrote to Novak:

> Any news on Ross? We still have concerns on the fact that he was golfing. Would that be something he could have done with his doctor's permission? Have we found out if he can come back to sedentary tasks? Hope to have some answers in regard to Ross soon. (Ex. 3, p. 255). Who is restricting him? The MD or the psychiatrist.

35. While Welch was on short-term disability leave, he failed to answer or return phone calls from his supervisor Mike Mullaney.

36. The conflicting reports from Drs. Mehrle and Murphey, Welch's refusal to communicate, and the lack of definitive answers from CIGNA created significant frustration and confusion on Holcim's part with respect to Welch's condition and return to work status. (HT p. 88, ll. 8-14; p. 621, ll. 19-23; p.622, ll. 1-13; Ex. 38, p. 2).

37. While Holcim was trying to get Welch to return to work, Welch did not want to return to his job at Holcim. On April 9, 2008, Welch completed an intake form for Dr. Murphey, his psychologist, indicating that he had problems with his supervisor and "the job itself." (Ex. 23). Welch noted in the report that "my boss is an armchair quarterback," and that Welch was "burned out" after "doing shift work for 22 years." Welch told Dr. Murphey the same thing during counseling sessions held in June 2008, stating: (1) his job was "burning [him] out," (2) it was "increasingly clear that [he] cannot & will not return to Holcim, (3) he was "not thinking clearly, he wasn't sleeping, he was stressed out, and did not want to get one of his supervisees hurt because his head was somewhere else,"(4) he was "still struggling with feelings of guilt about deciding not to go back to work," (5) he was "very clear that he could not and would not return to Holcim," and (6) his "stress [was] extremely high at [his] job."

38. During the hearing, Welch reiterated the complaints he made to Dr. Murphey during his counseling sessions, agreeing that he had had enough of the job and that he could not work with Mike Mullaney because Mullaney agitated him.

39. Welch was also afraid to return to work for health reasons. He told Dr. Murphey that Dr. Mehrle had told him that "if you don't do something different, you're going [to] die here." According to Dr. Murphey, Welch "was afraid that he was going to die because of this heart thing and that if he went back to work, that it would kill him."

40. Welch additionally blamed Holcim for the breakdown of his marriage. In March 2008, Welch's wife of 26 years left him. Dr. Murphey explained that Welch attributed his wife's leaving to his job because Welch had spent so much time at work "he hadn't been around for the family." (Murphey Dep. p. 18-19).

41. Welch was also "very angry and resentful" that Holcim was inquiring about his ability to return to work. This further fueled his unwillingness to return to work. He reiterated this to Dr. Murphey.

42. Welch also considered other employment during this time period. He told Dr. Murphey he was planning on "taking over his father-in-law's business at some point, you know, in the relatively near-ish future." Dr. Murphey testified that, it was his understanding, based on what Welch was telling him, that the business was "fairly low-stress" and that Welch would only be working "just a couple, three days a week." (Murphey Dep., p. 48).

43. Consistent with what Welch had been telling him, Dr. Murphey contemporaneously noted in medical documentation he submitted to CIGNA that Welch (1) continued to have a strong anxiety reaction when even thinking about the workplace; (2) had a stressful work environment; (3) felt resentment toward his employer, (4) was unable to tolerate demands from supervisors, (5) was unable to feel responsible for supervisees, (6) experienced agitation when thinking about the job, (7) felt anxiety or anger when thinking about work and (8) that Welch was "considering options re: work." (Exhibit23.)

44. Welch was not the first employee on disability leave to whom Holcim had offered a light-duty position. Holcim's regular practice is to consider some type of light duty position for employees on short-term disability leave.

45. It is CIGNA's responsibility to decide, based on medical information provided by the employee, whether the employee can return to work to a temporary light-duty position. (HT p. 57, ll. 8-11).

46. Consistent with its practice, on May 12, 2008, Holcim asked CIGNA whether Welch could perform a temporary light-duty position, provided that his physician cleared him to come back to work. Throughout Welch's disability leave, Aughney continued to discuss the possibility of Welch returning to a temporary, light-duty position with CIGNA.

47. In May and June of 2008, Mullaney planned a temporary, light-duty position for Welch to perform on a short-term basis. The position was comprised of three tasks: filling out Job Safety Analyses ("JSAs"); creating work instructions, or Standard Operating Procedures ("SOPs") for the plant; and scheduling. (HT pp. 608-610, 803-804).

48. The light-duty position Mullaney would have created for Welch was not an existing position, since there is no job at Holcim that solely involves performing JSAs, SOPs and scheduling. These tasks were to be taken from other employees across the Trident facility. The JSAs were normally prepared by supervisors, employees, and managers. The SOPs were normally prepared by several employees, both hourly, supervisors, managers. Scheduling was normally completed by the crew leaders with Mullaney's assistance.

49. The temporary, light-duty position that Holcim created for Welch would not provide enough work to occupy a full-time employee, and would have only been sufficient to last 2 to 4 months. It was not meant to be a permanent position, but rather a "modified" position that would allow him a chance to work while recuperating from his condition.

50. Novak and CIGNA were also aware of this limitation on the duration of the light duty position. Holcim never told CIGNA that the light-duty position for Welch was permanent. Neither Holcim nor CIGNA told Welch or his treating physicians that the light-duty position was permanent. Aughney and Welch talked about the sedentary desk job on a temporary basis. Novak did not tell Welch that the position was a permanent position.

51. As of mid-June 2008, there was still no clear indication based upon the medical documentation that CIGNA had received as to whether Welch could return to work, and if so, under what restrictions.

52. On June 23, 2008, Aughney, Novak and Virginia Cyrus, Team Leader for CIGNA and Novak's supervisor, talked on a conference call. As there was no resolution as to whether Welch could return to light-duty work, CIGNA decided to refer his claim to Kim Bedner, a Registered Nurse and Nurse Claims Manager for CIGNA. Bedner was directed to contact Welch's physicians and review the medical documentation that had been provided to reach a determination as to the nature of his restrictions and whether he could come back to a light-duty position.

53. After conferring with Dr. Mehrle and Dr. Murphey, Bedner reported on June 25, 2008, that Welch could return to work with restrictions of "no night shifts, no heavy exertion, and routine breaks." (Bedner Dep., p. 22, ll. 2-3). Bedner also stated that the "no night shift" restriction was permanent. (HT p. 147, ll. 12-15). From Bedner's report, Holcim learned for the first time that Welch's restriction on the rotating shift work would become permanent. This meant the temporary light-duty position was still "on the table," but that the restrictions prevented Welch from coming back to his rotating production supervisor job.

54. On June 27, 2008, after CIGNA had informed Holcim that Welch could return to a light-duty position, Welch and Aughney spoke by telephone. Aughney told Welch about the temporary light-duty position that Holcim would create for him. She also told him that because the restrictions that had been placed upon him by his doctors (that he could not work nights) had become permanent, the production supervisor position would not be available to him. (HT p. 162, ll. 17-24). She also told him that if there was any type of change in the restriction to let Holcim know. Id.

55. Also on June 27, 2008, Welch contacted CIGNA and spoke to Novak stating that "he finally spoke with his employer today to find out what his pay will be. He advised that now he needs the information from his employer and provided to Catherine [Novak] regarding the return-to-work accommodations." Welch told Novak that Holcim had informed him that the light duty position was only temporary and for that reason he wanted to get his documentation in order "to confirm what his work restrictions and limitations were." (Novak Dep., p. 157, ll. 8-12).

56. On July 2, 2008, Welch called Aughney and told her his doctor would not change his restrictions to allow him to do shift work and that his health was more important. RT p. 234, ll. 20 through 24). He also told Aughney

to figure out what vacation he had coming and to get him his final check. Aughney contemporaneously memorialized her conversation with Welch in an email to Mullaney, Ervin, Regional Human Resources Manager Candace Isaacs, and Manager of Employee and Labor Relations Pat Lane:

> Ross called this morning to say that his doctor will not release him further to do shift work. He said, 'I guess the only thing is for you to fill out the termination paperwork. Please figure out my vacation pay and get me a final check.' I asked him if he could come in and do this formally and he said not today. He will be in tomorrow morning. I told him I was sorry it came to this, but I would have his paperwork ready for him tomorrow.

(Ex. 3, p. 261).

57. Also on July 2, 2008, Aughney learned from Novak that Welch had contacted CIGNA on June 27, 2008, seeking documentation regarding Holcim's offer of a light-duty position. (Ex. 38, p. 25-26). In an email documenting the conversations, Aughney wrote:

> We had told CIGNA we could bring him back for a short period at light duty, but that changed significantly on 6/25 when CIGNA told us it was a permanent restriction on working shifts, and that he needed a life-style change and could not go back to his old job.

58. Holcim's standard practice is to request a letter of resignation when an employee chooses to leave his employment. On July 2, 2008, after learning from Aughney that Welch had called in and indicated that he was going to resign, Lane and Aughney agreed that Aughney would ask Welch to sign a letter of resignation when he came in on July 3, 2008 to pick up his final check. Lane wrote to Aughney:

> I think a request for a resignation letter is appropriate. We continue to have his job and he can't return to the job so resignation would be in order.
>
> Val, if he doesn't agree to do a resignation letter, I would inform him that we will check resignation on the ECF as reason for leaving. I would suggest having someone with you on the ECF discussion. (Ex. 3, p. 267).

59. On July 3, 2008, Welch met with Aughney at the plant. Aughney asked Welch if Mullaney could attend their meeting, but Welch protested that he did not want Mullaney in on the meeting. Aughney then asked Diane Phillips, the plant controller, whose office is right across the hall, to sit in on the meeting. Phillips agreed to do so.

60. Aughney started the meeting by asking Welch what was up. In response, Welch stated "My health is more important. I'm never going to get released. I'm done. Cut me a check." HT p. 236, ll. 4 -6. Aughney then asked Welch if he would submit a letter of resignation, but he declined. Welch and Aughney then went through the exit checklist line by line. Welch signed the checklist and left. Phillips noted that when Welch came into the office that day "[i]t appeared that Ross had already made up his mind to separate." HT p. 666, ll. 15-16.

61. Welch did not display any anger or animosity during the meeting. Aughney and Welch exchanged a hug and the interaction was amicable. Welch was clearly doing what he wanted to do. Phillips, too, felt that the meeting was "pleasant," and that Welch "sounded relieved" because "he was ready to quit." (HT p. 665, ll 20-21). Aughney noted in her email memorializing the meeting that Welch "was relieved and happy to be leaving." (Ex. 3, p. 264-265).

62. Welch patiently went over the Exit Checklist with Aughney, did not refuse to sign the checklist, and never sought out Plant Manager Eric Ervin to protest what he claims was his termination.

63. Welch was working as a Production Supervisor at the time of his resignation. An essential function of the Production Supervisor position is the ability to work rotating shifts. Welch could not perform an essential function of the Production Supervisor position, with or without accommodation, since he admitted that his physician permanently restricted him from working rotating shifts due to his heart condition.

64. Welch's diagnosis of angina has not affected any major life activity. Welch himself testified that he continues to golf, go camping, exercise, and hike. Moreover, during his disability leave and after he left Holcim's employ, Welch worked for Headwaters Livestock driving a skid steer and for Topp's Custom Crates.

## IV. OPINION[1]

The Montana Human Rights Act ("MHRA") prohibits discrimination against employees on the basis of a physical disability. Mont Code Ann. §49-2-303(1)(a). Disability discrimination claims are analyzed using a burden-shifting approach. Heiat v. Eastern Montana College, 272 Mont. 322, 328; 912 P2d 787 (1996) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256; 101 S.Ct. 1089 (1981)). See also, Martinez v. Yellowstone County, 192 Mont. 42, 626 P.2d 242 (1981).

At the outset, the parties dispute whether this is a "direct evidence" case or a "indirect evidence" case. It is plainly an indirect evidence case as the parties dispute both the reasons for any employment action (in fact, whether any employer action was taken at all) and also whether any such action amounts to illegal discrimination. Direct evidence cases are those in which the parties do not dispute the reasons for the employer's action, but only whether such action is illegal discrimination. Reeves v. Dairy Queen, Inc., 1998 MT 13 ¶ 16, 287 Mont. 196, 953 P.2d 703. When there is no agreement by the parties that adverse action was taken or no agreement as to the reason an adverse action was taken, the applicable standard of proof is the three-step standard of proof articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed 2d 668 (1973). Admin. R. Mont. 24.9.610(1)-(4); Heiat, supra. See also, Stuart v. First Security Bank, 302 Mont. 431, 15 P.3d 1198 (2000).

Under the three tier McDonnell Douglas analysis, Welch must first demonstrate a prima facie case of discrimination by showing that (a) he belonged to a protected class; (b) he was otherwise qualified for continued employment; and (c) Holcim denied him continued employment because of a disability. Mont. Code Ann. §49-2-303(1)(a); Admin. R. Mont. 24.9.610(2)(a). If Welch proves a prima facie case of discrimination by a preponderance of the evidence, the burden shifts to Holcim to articulate a legitimate, non-discriminatory reason for Welch's alleged termination and its alleged failure to accommodate him. Heiat , 275 Mont. at 328. The burden then shifts to Welch to establish "by a preponderance of the evidence that the legitimate reasons offered by [Holcim] were not its true reasons, but were a pretext for discrimination." Id.; Admin. R. Mont. 24.9.610(3). At all times, Welch retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. Heiat, 912 P.2d at 792.

---

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

The hearings officer agrees with the respondent that Welch has not carried his burden of demonstrating that he was subject to discrimination on the basis of disability. He has failed to show that he is disabled or was perceived as disabled, and therefore has failed in his prima facie case. And, ultimately, he has failed in his burden of persuasion to show that his employer took any adverse employment action against him because he resigned from his employment without seeking any type of accommodation, thus precluding his employer from engaging in any reasonable accommodation colloquy.

A. Welch Is Not Disabled Within The Meaning of the Human Rights Act.

To qualify as a member of a protected class under the Montana Human Rights Act (MHRA), Welch must prove he has a "physical disability" within the meaning of the MHRA. The statute defines "physical or mental disability" as an impairment that substantially limits one or more of a person's major life activities or is regarded by the employer as such an impairment. Mont. Code Ann. § 49-2-101(19)(a).

Welch argues that he was either disabled as he had both physical (angina) and mental (Dr. Murphey's diagnosis of adjustment disorder with anxiety and major depression) disabilities or he was regarded as disabled by his employer. Welch's opening brief, page 69. Holcim contends that Welch was not disabled and was not perceived as disabled by his employer. .

1. Welch Was Not Substantially Limited In A Major Life Activity.

Welch essentially contends that he was disabled because of his physical impairment of angina and his mental diagnosis of adjustment disorder with anxiety and major depression. Welch's opening brief, page 69. Under the statute, however, it is not enough to simply be diagnosed with a physical or mental impairment. Rather, the impairment must be one that results in the substantial limitation of a person's major life activities. "Major life activities" means "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, writing, and mobility." McDonald v. Department of Environmental Quality, 2009 MT 209, ¶ 39; Admin R. Mont. 2.21.1427(2). Work is also considered one of life's major activities. Id.

At hearing, Welch conceded that the only restriction caused by his heart condition and his anxiety disorder was the inability to work night shifts. He produced no evidence that he is limited in the major life activities of caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing or learning. On the contrary,

Welch's testimony reveals that his condition has not affected his ability to golf, go camping, exercise, or hike.

Welch also cannot show that his heart condition substantially limits his ability to perform the major life activity of working, To do so, Welch must show that he is "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. " Butterfield v. Sidney Public Schools, 2001 MT 177, ¶ 21; 306 Mont. 179; 32 P.3d 1243, ¶ 21; 29 C.F.R. §1630.2(j)(3)(I). The inability to perform a single, particular job does not constitute a substantial imitation in the major life activity of working. Id. As the United States Supreme Court has recognized:

> To be substantially limited in the major life activity of working, . . . one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton v. United Airlines, Inc., 527 U.S. 471, 492; 119 S.Ct. 2139 (1999).

In Deibele v. USF Reddaway, Inc., WL 968813 at *6-7 (D.Or. 2000), the Court found that the plaintiff was not substantially limited in the major life activity of working where she claimed her diabetic condition precluded her from working night shifts. The Court's ruling was based in large part on undisputed evidence showing that the plaintiff had "accepted a swing shift job with a competitor." Id. Similarly, in Korzeniowski v. ABF Freight Systems, Inc., 38 F.Supp.2d 688, 693 (N.D. Ill. 1999), the Court rejected the plaintiff's claim of disability based upon an inability to work at night, holding that "innumerable jobs are of course available that do not involve rotating shifts." The Court went on to observe that since the plaintiff, "within two months after his termination ... obtained a job with another trucking company ... [i]t would indeed be a bizarre notion of disability under which Korzeniowski could claim statutory incapacity even while he is holding and performing an essentially equivalent job." Id.; see also Williams v. City of Charlotte, 899 F.Supp.1484, 1488-89 (W.D.N.C.1995) (inability to work at night poses no substantial interference with an ability to work); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (no substantial limitation where plaintiff worked numerous hours pursuing two different occupations while on leave of absence).

Welch has not demonstrated that his inability to work night shifts restricted him from performing a class of jobs or a broad range of jobs in various classes. 29 C.F.R. §1630.2(j)(3)(I). Similar to the plaintiffs in Deibele and Korzeniowski, Welch has been able to work a wide range of jobs, both before and after he resigned his employment. He admitted that, while on disability leave, he worked part-time cleaning livestock pens with a skid steer and also worked at his father-in-law's business, Topp's Custom Crates. Since March 2009, Welch has worked in a warehouse position for Rocky Mountain Supply. (Welch, p. 379-382, 473, 537). Moreover, since his resignation, Welch has applied for various positions, including two Production Supervisor positions and a "Night Production Supervisor" position, despite his claimed restriction of no night shifts. (Ex. 27; RT pp. 425-426). Welch cannot show that he is impaired in his ability to work, since he has, in fact, been working a host of different jobs, including while on disability leave.

In making the argument that he is disabled, Welch relies on Butterfield, Martinell v. Montana Power Co., 268 Mont. 292, 886 P.2d 421(1994) and Rothe v. Motel 6, H.R.B. Case Number 9901008615 (1999). He argues that the federal cases of Deibele, supra, Korzeniowski, supra, Williams, supra and Holihan, supra, cannot be followed as those cases conflict with Montana case law. Those cases do not conflict with Montana case law. Butterfield in fact supports the respondent's position here. In Butterfield, the supreme court found that the charging party was significantly limited because he had a back condition that prevented him from performing any heavy labor job. Thus, the court reasoned "an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs." Butterfield, ¶ 23(emphasis added). Unlike Butterfield, in this case there is no showing that Welch is unable to perform a class of jobs, only that he cannot work at night.

In Martinell, the court found that the charging party's disability, endometriosis, fit both the definition of a disability and it had the effect of substantially limiting the charging party's ability to work. 268 Mont. at 305-06, 886 P.2d at 429-30. Again, even conceding that angina and the mental ailments from which Welch suffered were physical and mental impairments within the purview of the MHRA, Welch has not shown how those impairments substantially limited his ability to work within the confines of the definition of "substantially limits."

In Rothe, the hearings officer found;

> "with her range of potentially available jobs derived from her experience and skills, a medical recommendation that she only work day shifts constitutes a disability. Rothe's impairment dictated a limited number of work opportunities in any job, not just motel management. Her impairment . . . stretched across the lines of various jobs and careers. Rother, with her impairment, was unable to perform a class of jobs or a broad range of jobs, compared with her unimpaired average twin."

Case Number 9901008615 at p. 10.

No such evidence has been proven in this case. Nothing about Welch's experience and skills suggests that merely limiting him to day shifts will prevent him from engaging in other supervisory positions in heavy industrial processes. Welch presented no evidence that his impairment stretched across a broad range of jobs. Indeed, the fact that he continued to be able to operate a skid steer to clean livestock pens while he was off from Holcim merely confirms that at most he was prevented by his impairment only from a single job – production supervisor with a night-time rotating shift requirement.

Nor is it readily apparent from Welch's afflictions themselves that they substantially limit a major life activity such as work. See, e.g., Walker v. Montana Power Company, 278 Mont. 344, 924 P.2d 1339 (finding that substantial evidence supported a jury verdict that the plaintiff was not disabled within the meaning of the MHRA where the plaintiff alleged that his depression and stress prevented him from holding only a lineman position but did not prevent him from working as a supervisor as he previously had or from working at other employment); Holihan, supra, 87 F.3d at 366 (plaintiff's diagnosis of depression and anxiety did not render him disabled within the meaning of the ADA because the depression and anxiety did not prevent him from working at a broad range of jobs, but only at a particular job). See also, Charbonneau v. Gorczyk, 176 Vt. 140, 838 A.2d 117 (2003)(holding that plaintiff's diagnosis of Prinz-metil angina did not substantially limit his ability to work and therefore the plaintiff was not disabled under the Americans With Disabilities Act nor did his employer perceive him as disabled because the employer did not perceive his Angina as substantially limiting the plaintiff's ability to work). Accordingly, Welch has failed to meet his burden of demonstrating that he is disabled within the meaning of the MHRA.

2. Holcim Did Not Regard Welch As Disabled.

An employee can also prove his prima facie case by showing that his employer perceived him as being disabled. In order to show that he is disabled under the "regarded as" definition of physical disability, Welch must establish that Holcim regarded him "as handicapped in his ability to work by finding [his] impairment to foreclose generally the type of employment involved." Hafner v. Conoco, 268 Mont. 396, 402, 886 P.2d 947, 951 (1994), citing Forrisi v. Brown, 794 F.2d 931, 934 (4th cir. 1986). Welch can only make this showing if he can produce evidence that Holcim refused to allow him to continue working because it believed that he was "restricted in basic job functions." Butterfield, 2001 MT at ¶ 32; 306 Mont. 179; 32 P.3d 1243, ¶ 32.

The only evidence Welch produced here of Holcim's perception of Welch's condition is that Holcim knew as of June 27, 2008 "that the restriction [no night shifts] is going to be permanent on the rotating shifts." RT p. 162, ll. 18-20. Beyond this, Holcim harbored no perceptions about whether Welch's physical or mental impairments substantially limited him in his ability to perform basic job functions. The evidence demonstrates that Holcim repeatedly tried to place Welch in a temporary light-duty position in order to allow him time to recuperate from his condition. This is apparent from the numerous inquiries to CIGNA by Aughney regarding Welch's return to work status, and attempts by other Holcim employees to contact Welch directly about his status and return to work. Holcim never sought independent confirmation or clarification regarding Welch's medical status.

When it became clear that his restrictions were permanent, Welch resigned of his own accord. Thus, Holcim did not make the determination that Welch could not perform "basic job functions." Welch made that decision. Butterfield, 2001 MT at ¶32.

Simply because Holcim was willing to accommodate Welch's restrictions with a temporary light-duty position does not mean that Holcim was "conceding that [Welch] is disabled…or that it regard[ed] [him] as disabled." Hafner, 268 Mont. at 402, 886 P.2d at 951 (noting that an employer does not necessarily regard an employee as disabled simply by finding the employee incapable of satisfying the demands of a particular job); Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 798 (9th Cir. 2001) (observing that "[a] contrary rule would discourage the amicable resolution of numerous employment disputes and needlessly force parties into expensive and time-consuming litigation"); see also Hafner, 268 Mont. at 402, 886 P.2d at 951(holding that an employer, however, does not necessarily regard an employee as handicapped simply by finding the employee incapable of satisfying the demands of a particular job); Bute v. Schuller Intem, Inc., 998 F. Supp. 1473 (N.D. Ga. 1998) (Where an employer

recognizes an employee's limitations put in place by the employee's own doctor, "a finding that plaintiff was regarded as disabled and, therefore, entitled to the protections of the ADA is inappropriate"). As in Bute, Welch informed Holcim that his doctors placed a restriction on him working night shifts, and therefore a finding that Holcim regarded him as disabled is inappropriate.

Further, Welch has presented no evidence to suggest that Holcim considered him foreclosed generally from employment. Holcim planned to place Welch in a temporary, light duty position performing job functions they understood he could perform until he recuperated. Accordingly, Welch has failed to meet his burden of demonstrating that he was "regarded as" disabled within the meaning of the MHRA. §49-2-101(19)(a)(iii), MCA.

B. Welch Was Not An Otherwise Qualified Employee.

Even if Welch had established that he was disabled within the meaning of the Act, he failed to show that he was otherwise qualified. A person is "otherwise qualified" for continued employment where he is, with or without accommodation, "able to meet all of a program's requirements in spite of his handicap." Hafner, 268 Mont. at 403, 886 P.2d at 951; Admin. R. Mont. 24.9.606(2). The failure to make this showing is fatal to a claim of disability discrimination. Pannoni v. Board of Trustees, 2004 MT 130, ¶ 27; 321 Mont. 311, ¶ 27; 90 P.3d 438, ¶ 27. It is Welch's burden to prove that he can perform the essential functions of the job. Heiat, 275 Mont. at 328-29.

The parties have not disputed that an essential function of the Production Supervisor position was being able to work rotating shifts which include night work. Welch could not meet that essential function because he could not work at night as a result of his doctor's restrictions. On that basis alone, the hearings officer agrees with the Respondent that Welch was not "otherwise qualified" for the Production Supervisor position, since he could not perform an essential function of his job and Holcim could not accommodate him by eliminating the essential function of working rotating shifts. Hafner, 268 Mont. at 403, 886 P.2d at 952.

C. Holcim Did Not Fail to Accommodate Welch.

Assuming that Welch had proved a prima facie case of either being disabled or being perceived as disabled by his employer and he were otherwise qualified, the question then becomes one of whether Holcim failed to accommodate him. Welch must demonstrate that Holcim failed to provide an accommodation. Mont. Code Ann. §49-2-101(15)(b)(providing that "[discrimination based on, because of, or on the grounds of

physical…disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person"). Because Welch quit and did so because he wanted to quit (not because of any conduct on the part of the employer), Welch has failed to demonstrate that Holcim failed to provide him a reasonable accommodation.

At the outset of this discussion, it should be noted that Welch's argument is premised upon his perception of the facts that Holcim "offered, then withdrew the offer of a reassignment job and refused in bad faith to enter into an interactive process to discuss other accommodation options." Welch's Responsive Post hearing Brief. While this is sufficient to make out a prima facie case, Welch has not carried his burden of persuasion on this issue.[2] Welch's version of what happened on July 2 and July 3, 2008 is not what occurred in this case. Rather, Holcim was willing to provide a temporary reassignment for him until he recuperated. Welch, however, had decided that he would resign from his job and did so.

"The duty to launch the interactive process to search for a reasonable accommodation is triggered by a request for an accommodation. Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 736 (5th cir. 1999), citing Taylor v. Principal Finance Group, 93 F.3d 155, 165 (5th Cir. 1996). The burden of requesting an accommodation is generally on the employee. Reeves, supra, 1998 MT ¶ __. See also, Norris v. Allied-Sysco Food Services, 948 F. Supp. 1418, 1436 (N.D. Cal. 1996) ([i]n general, an employee must request reasonable accommodation from an employer in order for the employer's duty to reasonably accommodate the employee to be triggered). Moreover, an employee who expects reasonable accommodation has a duty to engage in an interactive process with the employer to find a reasonable accommodation. Branett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000). Federal courts have found that an employer cannot be found to have violated the Americans With Disabilities Act when the responsibility for the breakdown of the interactive process is traceable to the employee and not the employer,. Loulseged, supra.

---

[2] Welch asserts that Aughney's deposition testimony on this issue is "unequivocal"that Holcim withdrew the offer of temporary light duty when it learned Welch could not return to the production supervisor position (Welch's opening brief, page 80) and Aughney's deposition testimony therefore amounts to a judicial admission that precludes Holcim from arguing that Welch resigned. Aughney's deposition testimony is not the clear admission that Welch perceives. If anything, it indicates that when Holcim became aware of Welch's restriction from the production supervisor position, it precluded Holcim from accommodating him in the full-time production supervisor position. It does not suggest unequivocally that Holcim was withdrawing the offer of temporary employment because Welch was restricted from working in the production supervisor capacity. See, e.g., Aughney Deposition, RT pp. 132, ll. 7-9, 139, ll. 19-22, 156, ll. 9-13, 157.

Here, the blame for the breakdown of the interactive process lies squarely at the feet of Welch. Nothing in the facts as determined by the hearings officer shows that Holcim contributed in any way to the break down of the interactive process. Welch failed to speak to Aughney, Mullaney or the CIGNA personnel despite their repeated attempts to contact him to ascertain his status and his ability to return to work after his recuperation. Holcim offered Welch the make work position in order to keep him doing something productive while he was off, but Welch wouldn't take it. Welch made it abundantly clear to everyone connected to this case-his doctors, Aughney and the CIGNA personnel- that he did not want to come back and work in a rotating shift position under Mike Mullaney and that he did not want to work at Holcim any longer because his health was more important.

Aughney understandably took Welch at his word when he said that he was done and that his health was more important. In his responsive brief, Welch argues that "there is no possibility that Welch voluntarily quit his job." Welch's responsive brief, page 11. The hearings officer disagrees with this contention. Welch had been telegraphing his decision to quit for quite some time, beginning with discussions with Dr. Murphey in April that he had problems with his supervisor and "the job itself, " that "my boss is an armchair quarterback," and that Welch was "burned out" after "doing shift work for 22 years." His actions on July 2 and July 3, 2008 were wholly consistent with that position. He told Aughney that very thing during their conversation on July 2, 2008. Consistent with his July 2nd phone call, Welch came into the office on July 3, determined to quit his job. Aughney documented the particulars of Welch's decision to quit that very day. Diane Phillips' testimony corroborated that Welch quit his job at Holcim. Holcim never got the chance to engage in any interactive process because Welch, through no fault of the employer, took that opportunity away from Holcim by quitting.

Welch further argues that even if Welch resigned in the fashion which the respondent claims, Holcim nonetheless "violated the law by failing to initiate the [interactive] process. . ." because it was aware by the time of the July 2nd phone call between Welch and Aughney of Welch's inability to continue in the production supervisor position. Under circumstances other than those found in the case at bar, the hearings officer might be inclined to agree. However, under the facts of this case, the hearings officer does not agree. Welch's resignation was clearly the sole cause of the break down of the interactive process. Nothing in this case suggest that Holcim planted in Welch's mind the decision that he had to quit his job because Holcim was unwilling to accommodate him in some other job at a different plant. Holcim had clearly contemplated Welch's return to at least temporary, light duty position at the Trident plant. Holcim did nothing to communicate to Welch that was not a viable

option. Holcim did nothing to communicate to Welch that other positions within the Holcim organization (though perhaps not at the Trident plant) would not be available to Welch and he was or should have been aware of how to look at other positions within the Holcim company which were regularly posted on the company's website. Aughney said nothing to Welch during the July 2nd phone call that would have given him a belief that other Holcim positions might not be available to him. At most, Aughney communicated only that the production supervisor position was not available because Welch could not meet an essential qualification of that job, working rotating shifts.

When Welch came into to talk to Aughney on July 3, she did nothing to dissuade him from taking the temporary position. She did nothing to dissuade him from looking at other positions that Holcim potentially offered at other plants. Instead, Welch, who had obviously made up his mind that he did not want to work under Mullaney or in a rotating shift supervisor position, told Aughney to draw up his last check because he was done and his health was more important. Welch has cited no authority for the proposition that Aughney was required to continue to suggest accommodations in the face of Welch's decision to resign.

Welch's suggestion that this was a forced resignation similar to the situation in Jarvenpaa v. Glacier Elec. Co-op., Inc., 271 Mont. 477, 898 P.2d 690 (1995), is incorrect. In Jarvenpaa, the employer presented the charging party with a Hobson's choice of either resigning or taking mandatory retirement. In finding that the employer had discriminated against the employee, the court specifically noted "the termination was initiated by the employer when it issued its ultimatum to the employee that he would be fired if he did not accept the retirement package." 271 Mont. at___, 898 P.2d at 692 (emphasis added). Unlike the situation in Jarvenpaa, Holcim did not give Welch an ultimatum. It was willing to accommodate him in a temporary light duty job. Holcim never told Welch that he could not apply for other positions in the Holcim company. Instead, it was Welch that initiated the separation because he no longer wanted to work in the production supervisor position. To adopt Welch's position under the circumstances of this case would require the employer to be more than reasonable, it would require the employer to be omniscient. There is no such requirement in the law.

Welch has also argued strenuously that Holcim acted in bad faith as it knew that Welch was disabled and that Holcim simply wanted to get rid of a disabled employee. Nothing in the history of the case up to the date of Welch's resignation suggest bad faith on the part of Holcim. Holcim had clearly been getting mixed signals about Welch's status from both his doctors and from CIGNA. Welch did not

provide CIGNA with adequate information to keep it apprised of his status. Welch did not return calls of Aughney, Mullaney or of CIGNA personnel. This corroborates Holcim's contention that it did not know Welch's status and did not act in bad faith.

Holcim never got the chance to interact with Welch in regards to any other positions because he quit as he did not want to work with Mullaney or in the production supervisor position. It was Welch, not Aughney or Holcim through its conduct, that shut down the interactive process. Holcim cannot be held liable for discrimination under these circumstances.[3]

## V. CONCLUSIONS OF LAW

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

2. Holcim did not discriminate against Welch on the basis of disability.

3. As Welch has not proven discrimination, his claim for damages, and the attendant motions related to those issues (mentioned in this tribunal's final prehearing order) are moot.

4. Because Welch has failed to prevail in his claim of discrimination, this matter must be dismissed. Mont. Code Ann. §49-2-507.

## VI. ORDER

Based upon the foregoing, judgment is entered in favor of Holcim and Ross Welch's complaint is dismissed.

DATED: December 15, 2010

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearings Officer
Hearings Bureau, Montana Department of Labor and Industry

[3] The parties have both ably argued about whether there is any requirement to reasonably accommodate an employee who is not disabled but is perceived as disabled by his employer. In light of the finding that Welch was not perceived as disabled by the employer and that Welch was the cause of the breakdown of the interactive process in this case, resolution of that issue is unnecessary.

* * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Stephen C. Pohl, attorney for Ross Welch; and Teri Walter and Terrence Miglio, attorneys for Holcim, Inc.

The decision of the Hearings Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Katherine Kountz
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The original transcript is in the contested case file.

WELCH.HOD.GHP