BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0101014541:

PAUL GREEN,	)	Case No. 1405-2011
	)	
Charging Party,	)	
	)	
vs.	)	
	)	HEARING OFFICER DECISION
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Paul Green filed a complaint with the Department of Labor and Industry on July 30, 2010. He alleged that the Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters (BMWED) discriminated against him in employment because of disability when it rejected his application for a Safety Assistant position with the Burlington Northern Santa Fe Railway Company (BNSF). On March 1, 2011, the department gave notice that Green's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing proceeded on August 15, 2011, in Billings, Montana. Green attended with his counsel, Elizabeth J. Honaker, Honaker Law Firm. BMWED attended through its designated representative, Bruce Glover, with its counsel, Mark D. Parker, Parker Heitz & Cosgrove, PLLC. Brett Ouellette (Field Manager, Medical and Environmental Health, BNSF)[1], Green and Glover testified. Exhibits 1, 3, 5-9 and 101 were admitted into evidence.

The parties filed and served their post hearing proposed decisions and briefs. Having considered the evidence, the arguments and authorities and the proposed decisions of the parties, the Hearing Officer now issues this decision.

[1] Ben Rechtfertig, Hedger Friend, PLLC, appeared as counsel for Ouellette and BNSF, during the questioning of Ouellette.

II. Issues

BMWED raised, as jurisdictional issue, whether Green's Human Rights claim is preempted by federal labor law because deciding it requires interpreting the Collective Bargaining Agreement (CBA) between BMWED and the railroad. Since it ultimately is necessary to interpret the CBA to determine whether BMWED rejected Green's application for the Safety Assistant job for a legitimate nondiscriminatory reason, the department cannot decide this case, and must dismiss it. A full statement of the issues appears in the final prehearing order. The fact findings herein go beyond the jurisdictional issue only to the extent necessary to frame that issue.

III. Findings of Fact

1. Paul Green resides in Hardin, Montana with his spouse and two children. He began working for the Burlington Northern Santa Fe Railway Company (BNSF) in 2008, in the Maintenance of Way Division. Prior to that employment, he had been in the Navy, was a commercial diver, worked for NASA, and performed development work in Hardin. He has a degree in management.

2. The entire time that Green worked for BNSF, he was a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters (BMWED). BMWED is a portion of the Teamsters Union. BMWED is the exclusive collective bargaining representative, pursuant to a Collective Bargaining Agreement (CBA) covering the northern part of Iowa, eastern part of South Dakota, Wisconsin, Minnesota, North Dakota, South Dakota, Montana, the northern part of Idaho, Oregon, Washington, Vancouver, B.C., and northern California down to a point in Susanville, California, within which territory approximately 2,500 men and women who are BNSF employees and members of the union are the members of the bargaining unit.

3. On September 2, 2009, Green was placed on medical leave from BNSF for hip surgery, as the result of an injury. Green completed physical therapy, and on January 1, 2010, his surgeon placed him on a permanent 25-pound lifting restriction, specifically for continuous or repetitive lifting.

4. After Green was cleared by his physician to return to work, BNSF reflected his status variously, on multiple internal reports, as being on medical leave, as being on restricted duty and as being on furlough. Green knew nothing of such reports. He was cooperating with Thomas Goetz, BNSF Vocational Rehabilitation, to see what jobs he would qualify for with his lifting restriction, as he was not able to go back to his prior position within the Maintenance of Way Division.

5. Green also worked with BNSF Medical Representative Amanda Gambrell in Fort Worth. Later during the incomplete return to work process commenced with BNSF, he worked with Brett Ouellette, who took on the BNSF position of field manager, medical and environmental health, in September 2010. Ouellette worked with injured employees trying to put together plans for return to work, in light of their restrictions, which sometimes include lifting restrictions. With information and clearance from both the BNSF Medical Department and BNSF Vocational Rehabilitation, Ouellette attempts to return employees to actual work once they are cleared to return to work.

6. Ouellette knew that Green was cleared to return to work with some permanent restrictions, and that Green might successfully apply for positions where his lifting restriction would not be an issue. Although Green's clearance to return to work allowed him to return to the Maintenance of Way Division, his lifting restrictions disqualified him not only from the position he held when he went on medical leave, but also from most other positions in that Division.

7. Green and BNSF Vocational Rehabilitation personnel reviewed job announcements, and identified a Safety Assistant position (Safety Assistant positions were coming open system wide in June 2009) that seemed to be a good fit for Green, who had a background in safety issues, having been a commercial diver, in the Navy, and now having worked on the Railroad.

8. The job announcement for the Safety Assistant position came out in the bulletin separately from the bid seniority jobs. Instead of the typical bid, where the bidding employee with seniority gets the job, the Safety Assistant position involved an application/interview, competitive process with BMWED.

9. BNSF, in common with virtually all American railroads, has a unique relationship with its union (or unions). One very small aspect of that unique relationship is that a union sometimes participates in hiring decisions, and for some unique positions, may actually select the applicant that BNSF hires. The Safety Assistant positions, including the particular Safety Assistant position for which Green was considering applying, were such unique positions, where BMWED would select, from among the candidates for those jobs, which of its members would be hired by BNSF for each such position.

10. Over the years, BNSF sometimes made unilateral decisions, as the employer, about various internal business practices to address safety at work in the employer's operations across its system. At other times, BNSF and BMWED had negotiated over and agreed upon some internal business practices to address safety at work. BMWED and BNSF had entered into a particular Safety Agreement in

approximately 1997, and renewed it in approximately 2005. The Safety Assistant positions involved in this case were created exclusively through that Safety Agreement, which became part of the CBA between BMWED and BNSF. Pursuant to the terms of the applicable Safety Agreement, BMWED selected, from applicants among its members, the individuals that BNSF would hire as the Safety Assistants.

11. From the point of view of the BMWED, BNSF's agreement that the union would select the Safety Assistants, for BNSF's hire, was an important concession. BMWED saw the particular Safety Agreement as inclusion of the employees in a safety process that BNSF management had sometimes handled exclusively. Now, BMWED, for the life of that Safety Agreement, could select, from its members who applied for the Safety Assistant positions, members trusted by both BMWED leadership and the rank and file members of the bargaining unit to voice their concerns in the employer's decision-making process regarding safety.

12. Bruce Glover, General Chairman of the Burlington Northern System Federation, and current President of the BMWED, individually chose, from among the qualified applicants, the BMWED members employed by BNSF that BNSF would then hire into the Safety Assistant program in his territory.

13. Glover first started working with the railroad in September of 1974. Glover worked as a rank and file BNSF employee and member of the BMWED from 1974 until 1985. In 1985, he became an employee of the Union Hall itself. In 1988, Glover was appointed to the general chairman position. Glover has been responsible for negotiations that have led to CBAs (including the current CBA), and the rules thereunder, since 1985.

14. Experience working for BNSF as a BMWED member, as well as experience with BMWED's responsibilities and operations as exclusive bargaining representative for bargaining unit(s) of BNSF employees, were important qualifications for Glover's hiring choices for the Safety Assistant positions. How well a particular applicant was known, liked and trusted by the members who worked in the particular Safety Assistant's territory were also significant considerations. A fundamental requirement for being a good Safety Assistant was to have generally good relationships with the rest of the members working for BNSF. Glover wanted Safety Assistants who already had good relationships with the members. Glover, on behalf of BMWED, wanted Safety Assistants that he, as well as the members, knew and trusted. He also wanted Safety Assistants who were loyal, active members of the Brotherhood, because he and BMWED needed Safety Assistants who shared and could and would articulate the concerns of the members when safety issues arose.

15. In 2010, six or seven Safety Assistant positions came up for renewal throughout the portion of the system under the jurisdiction of BMWED. The incumbents in those positions were all eligible for reappointment. They also were all interested in being reappointed and remaining in those positions.

16. Green reviewed the duties for Safety Assistant position under Addendum W of the CBA. He saw they did not include any lifting requirements in excess of his lifting limitations. He believed he was fully qualified and would not subject others or himself to any undue risk of harm.

17. In June 2010, Green submitted an application, cover letter and other documentation to Glover for the BNSF Safety Assistant position. In the letter, Green informed Glover of his limitations.

18. From BNSF's perspective, Green was an employee of BNSF at the time he applied for the Safety Assistant position, although he was still receiving benefit payments as a result of his injury because he had not returned to a working position with BNSF. BNSF had an interest in returning Green to work.

19. Green had never been a Safety Assistant at any time. He had never been an employee of BNSF or any other railroad at any time before 2009. He had never attended a Union meeting during the time he was actively employed by BNSF, although he received notifications. Green did not know how often his Union met. He knew the Union meetings were held in Laurel, and he did not want to travel from Hardin to Laurel, a distance of approximately 60 miles, to attend those meetings, because he had other things to do. He had never run for any elective office in the BMWED.

20. Glover signed a letter, dated June 28, 2010, to Green to arrange an interview. One of the union's selection officials read Green's letter, application and other documentation, in the first stages of the process by which BMWED selected the applicants who would be chosen for the BNSF Safety Assistant positions, and prepared the letter for Glover's signature.

21. Green contacted BMWED Vice Chairman Duane Maier on July 6, 2010, to confirm a July 7, 2010, interview, and Maier informed him the interview was now scheduled for July 13, 2010. The Safety Assistant position was to commence the end of July 2010.

22. After that contact between Green and Maier, BMWED learned that Green was "on medical leave." From BMWED's point of view, it learned that this applicant for a Safety Assistant job was not an active employee of BNSF, did not currently hold

a job in the system, was not receiving wages, and was not paying dues to BMWED, while he was recuperating from his injury.

23. Green was one of two applicants for the various Safety Assistant positions who was "on medical leave," in the sense defined in Finding 19, at the time the application screening process took place. Both individuals were removed from the interview pool at Glover's direction.

24. On July 12, 2010, Maier informed Green that the interview was cancelled and Green was no longer being considered for the Safety Assistant position because of his 25-pound lifting restriction. During this telephone conversation, Green informed Maier that there was no lifting restriction in the job description and that he still wanted the opportunity to interview. Maier told Green to talk with Chairman Glover so Green called Glover.

25. In the conversation with Glover, Green argued that his 25-pound lifting restriction did not disqualify him from performing the Safety Assistant position. Green also told Glover that he was working with BNSF vocational rehabilitation people who had encouraged him to apply for the position, as they saw no problems with his restriction. At the end of the conversation, Green still believed that his interview was canceled due to his lifting restriction.

26. Throughout his career, Glover has been involved in efforts to get members to work or back to work, to defend them, to get them what the CBA entitled them to, and to get them a fair shake over time. Discussing Green's limitations during their telephone conference, Glover suggested to Green that BMWED could help Glover remove the weight restriction, so that he could get back to work, if he could produce conflicting medical opinions about his condition.

27. Green did not follow up on Glover's suggestions. He interpreted them to mean that his limitations precluded him from the Safety Assistant job. He did not understand that Glover was trying to assist him to get back to work for BNSF by mounting a challenge to the permanent restrictions assigned to Green, with new and conflicting medical evidence, so that BMWED could help Green get changed limitations that might allow him to bid on jobs he could not bid with the permanent lifting restrictions.

28. Glover did not talk with Green about being more active in BMWED, about needing more experience with BMWED or about being well-known and trusted among the members. Glover did not specifically tell Green that he was ineligible for the Safety Assistant position because he was on medical leave.

29. Assuming that Green was eligible for the Safety Assistant position, it is more likely than not that Glover would not have selected him for that position, because Green was not known and trusted by BMWED's membership generally and had not participated in the union process.[2] From BMWED's point of view, an employee who was not actively involved with the Brotherhood and was not well-known or trusted by the members was not appropriate as "their" Safety Assistant.

30. From the evidence, it is clear that Green did not meet the criteria Glover reasonably considered important for a successful candidate for a Safety Assistant position, while the incumbent in the position did meet those criteria. Glover's decision to recommend that the incumbent remain in the Safety Assistant position at issue was because the incumbent met the needs of BMWED for a Safety Assistant known, liked and trusted by the membership as well as being sensitive to the membership's issues with safety practice protocols BNSF management might be considering. Green did not meet those criteria.

31. Glover testified that he decided not to interview Green because Green was ineligible for the position. Green was not currently working for BNSF and was not currently paying BMWED dues as an active member. BMWED did not prove that Glover was right about Green's ineligibility, but, on this record, Glover's belief was not based upon Green's physical limitations, but rather upon his employment status with BNSF. Had Glover been refusing to consider Green because of his physical limitations, it is unlikely that he would have suggested to Green that obtaining conflicting medical information could result in a grievance proceeding to force BNSF to reconsider those limitations and return Green to his previous work.

32. Green was fully qualified to perform all of the physical functions of the position of Safety Assistant for which he had applied and would not have required an accommodation in order to perform the functions of the position, which at most required occasional lifting above 25 pounds.

33. On the present record, it appears that Green did not "mark up" as available for work, after he was released for work with permanent limitations by his physician. On the present record, it appears that Green did not bid either his former job or any other biddable job under Rule 21, after he was released for work with permanent limitations by his physician.

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[2] Glover also testified that he would not have hired Green's because of his participation in the "Way Up Program," a program of BNSF for employees interested in working their way up into management positions. There is no evidence that Glover knew about Green's participation in that program until after the decision to reappoint the incumbent Safety Assistant was made. Thus, it could not have been a factor in Glover's decision about who to select for the Safety Assistant job.

34. Glover was very clear in his testimony. Rejecting Green for an interview was based upon his ineligibility to apply for the job because of his employment status, and not because he lacked some qualifications for the Safety Assistant job.

35. Without interpreting and applying the CBA, it is impossible to determine whether Glover, acting on behalf of BMWED, illegally discriminated against Green because of his physical disability when he decided not to interview Green for the Safety Assistant job.

IV. Opinion[3]

1. The Department Has No Jurisdiction to Interpret the CBA.

The federal Railroad Labor Act preempts employee state law claims against the employer when those state law claims are disputes over the interpretation or application of Collective Bargaining Agreements (CBA's), i.e., disagreements about how to give effect to the bargained-for agreement, called "minor disputes" under federal preemption case law. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 254 (1994). When state law claims do not depend upon interpretation of a CBA, instead involving purely factual questions about an employee's conduct and the employer's conduct and motives, such claims do not require interpretation of the CBA's terms and the state law claims are not preempted. Substantive protections provided by state law, independent of whatever labor agreement might otherwise govern the relationship, are not preempted under the RLA. Id. at 257.

The applicable federal preemption standard for this question was taken, in Hawaiian Airlines, from Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 423 (1988);

> In sum, we hold that an application of state law is preempted by §301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement.

There is a footnote (note 12) to this ultimate Lingle holding which is enlightening:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. See Baldsracchi v. Pratt

[3] 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.

> & Whitney Aircraft Div., United Technologies Corp., 814 F.2d at 106. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted. As we said in Allis-Chalmers Corp. v. Lueck, 471 U.S. at 211, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by §301 . . . ."

In Hawaiian Airlines at 266, Justice Blackmun, expressing the unanimous view of the court, wrote:

> Returning to the action before us, the question under Lingle is whether respondent's state-law wrongful-discharge claims are independent of the CBA. Petitioners argue that resort to the CBA is necessary to determine whether respondent, in fact, was discharged. This argument is foreclosed by Lingle itself. Lingle teaches that the issue to be decided in this action -- whether the employer's actions make out the element of discharge under Hawaii law -- is a "purely factual question." 486 U.S. at 407.
>
> Nor are we persuaded by petitioners' contention that the state tort claims require a determination whether the discharge, if any, was justified by respondent's failure to sign the maintenance record, as the CBA required him to do. Although such a determination would be required with regard to respondent's separate allegation of discharge in violation of the CBA, the District Court dismissed that count as preempted by the RLA, and respondent does not challenge that dismissal. The state tort claims, by contrast, require only the purely factual inquiry into any retaliatory motive of the employer.
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> Accordingly, we agree with the Supreme Court of Hawaii that respondent's claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment.

Montana has considered when state law discrimination claims are preempted by federal labor law. Pike v. B.N. Ry. Co., 273 Mont. 390; 903 P.2d 1352 (1995); Foster v. Albertson's Inc., 254 Mont. 117, 835 P.2d 720 (1992); see also Mountain States T&T Co. v. Commissioner of Labor and Industry, 187 Mont. 22, 608 P.2d 1047 (1979).

Mountain States predated both Lingle and Hawaiian Airlines, but the Montana Supreme Court decision is consistent with those later decisions. In Mountain States, an employee of the phone company who was a member of a collective bargaining unit that had an existing CBA brought a maternity leave discrimination claim against the employer.[4] She alleged that denial of paid maternity leave violated the Montana Act. The phone company pled preemption, on both Employee Retirement Income Security Act of 1974 (ERISA) and federal labor law bases. The district court agreed about ERISA preemption and dismissed her case, without reaching the federal labor law preemption issue.

The Montana Supreme Court reversed and reinstated her case. After ruling that ERISA did not preempt the Montana Maternity Leave Act, our Court did reach the federal labor law preemption argument, and expressly rejected it, because, among other reasons, Congress did not manifest any intention for federal labor law, any more than ERISA, to reach and control uniquely personal rights (including rights regarding maternity leave) as opposed to employment issues common to the entirety of the bargaining unit. Mountain States at 1061.

In Foster, at 125-27, the Montana Supreme Court discussed how its own previous decisions regarding preemption were no longer viable after Lingle:

> The appellant asserts that Brinkman is no longer viable as a standard for §301 preemption in light of the United States Supreme Court's decision in Lingle v. Norge Division of Magic Chef, Inc. (1988), 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410. We agree.
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> In Lingle, the issue presented was whether an Illinois employee covered by a collective bargaining agreement that provided a remedy for discharge without just cause could enforce her state-law remedy for retaliatory discharge for filing a workers' compensation claim. After Lingle's action was removed to federal court on the basis of diversity jurisdiction, the federal

[4] At that time, the Montana Maternity Leave Act was codified in Title 39. It has since been incorporated into the Montana Human Rights Act. Mont. Code Ann. §§49-2-310 and 311.

district court dismissed her state-law claim based on §301 preemption. It concluded that the retaliatory discharge claim was "inextricably intertwined" with the provision in the collective bargaining agreement which prohibited discharge without just cause. Lingle, 486 U.S. at 402, 108 S.Ct. at 1879. The Seventh Circuit Court of Appeals agreed that the state-law claim was preempted by §301, concluding that the disposition of the retaliatory discharge claim involved the same factual analysis as the contractual determination under the collective bargaining agreement of whether Lingle was discharged for just cause. Lingle, 486 U.S. at 402, 108 S.Ct. at 1879.

The Supreme Court reversed the Court of Appeals' decision, stating:

> We agree with the court's explanation that the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause. But we disagree with the court's conclusion that such parallelism renders the state- law analysis dependent upon the contractual analysis.... §301 pre-emption merely ensures that federal law will be the basis for interpreting collective- bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.
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> Lingle, 486 U.S. at 408-09, 108 S.Ct. at 1883.

The Supreme Court noted that to prove retaliatory discharge under Illinois law Lingle had to show (1) that she was discharged, and (2) that the employer's motive in discharging her was to deter her from exercising her rights under the state workers' compensation laws or to interfere with her exercise of those rights. Lingle, 486 U.S. at 407, 108 S.Ct. at 1882. It held that the claim was not preempted by §301, concluding:

> Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-

> bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge, [citation omitted]; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for §301 pre-emption purposes: resolution of the state-law claim does not require construing the collective- bargaining agreement.
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> Lingle, 486 U.S. at 407, 108 S.Ct. at 1882.

Finally, the Supreme Court noted in Lingle that there was nothing novel in its recognition in that case that substantive rights in a labor relations context can exist without the necessity of interpreting collective bargaining agreements. Lingle, 486 U.S. at 411, 108 S.Ct. at 1884. Discussing antidiscrimination laws in particular, the Supreme Court stated that:

> The operation of the antidiscrimination laws does, however, illustrate the relevant point for §301 preemption analysis that the mere fact that a broad contractual protection against discriminatory--or retaliatory--discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence . . . of the state-law violation dependent upon the terms of the private contract.
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> Lingle, 486 U.S. at 412-13, 108 S.Ct. at 1885.

Lingle holds that a state-law claim is preempted by §301 only where its resolution requires construing the collective bargaining agreement. This is true even if the state-law analysis involves the same factual considerations as the contractual determination under the collective bargaining agreement of whether the employee was discharged for just cause. Thus, our decision in Brinkman is overruled to the extent that it holds that a state-law claim is preempted merely because resolution of such a claim requires the same analysis of the facts as the contractual determination of just cause under the collective bargaining agreement.

. . . .

> The appellant's wrongful discharge claim comprised Count VII of her complaint. In this count, the appellant incorporated by reference the specific allegations of Count I, including those of sexual harassment and sex discrimination. The appellant asserted that she was discharged in retaliation for resisting Engle's alleged sexual harassment activities.
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> . . . . Sexual harassment is against public policy. Drinkwalter, 225 Mont. at 384, 732 P.2d at 1338 (citing Holien v. Sears, Roebuck and Co. (1984), 298 Or. 76, 689 P.2d 1292 and Chamberlin v. 101 Realty, Inc. (D.N.H.1985), 626 F.Supp. 865).
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> To prove retaliatory discharge, the appellant would have to show that (1) she was discharged, (2) she was subjected to sexual harassment during the course of employment, and (3) her employer's motivation in discharging her was to retaliate for her resistance to those sexual harassment activities. Holien, 689 P.2d at 1300. As in Lingle, each of these purely factual questions, including the respondents' defense against the claim, pertains to the conduct of the appellant and the conduct and motivation of the respondents. While the factual inquiry may parallel that of the contractual determination of just cause, it does not turn on the meaning of any term of the collective bargaining agreement. Thus, the appellant's wrongful discharge claim is independent of the collective bargaining agreement for purposes of §301 preemption. Consequently, the District Court incorrectly concluded that the appellant's wrongful discharge claim was preempted by § 301.

Along very similar lines, in Pike, the sole issue on appeal was whether Kathryn Pike's state law and federal law claims of sex discrimination against her employer, BNSF, were preempted by the Railway Labor Act (RLA). The gist of the Pike decision appears on 903 P.2d at 1352:

> Accordingly, if Pike's sex discrimination claims are properly categorized as a "minor" dispute, and thus subject to the mandatory arbitration provisions of the RLA, then the District Court was correct in its conclusion that it did not have subject matter jurisdiction over her lawsuit. However, our review of

> federal case authority, and most recently, the United States Supreme Court's decision in Hawaiian Airlines, leads us to conclude Pike's sex discrimination claims are not properly classified as either a "minor" or "major" dispute which are preempted by the RLA. Rather, we agree with Pike that her state law and federal rights to be free from unlawful sex discrimination are independent of the collective bargaining agreement, derive from statute, and cannot be bargained away as part of a collective bargaining agreement. Thus, her claims are not preempted by the RLA.

One key factor in the Pike decision was that the case arose in the context of a CBA which did not address resolution of statutory rights (discrimination) claims nor apply the Federal Arbitration Act to such claims. Pike at 1356. On the present record, that is equally true in the present case.

A second key factor in Pike was that resolution of disputes under the CBA would be by effectuation of the intent of the parties to the CBA (the employer and the union) by interpretation of CBA in light of the "various needs of the employer and the union, rather than in accordance with the law of the land [citation omitted]. Accordingly, the tension between contractual and statutory objectives remains." Thus, the public policy objectives of the anti-discrimination law at issue would not be primary. Pike at 1357. That also is true here.

Finally, the Montana Supreme Court, still citing federal cases and interpreting them in light of Hawaiian Airlines, noted that the reservation of "minor" disputes contemplated by the RLA, involved those disputes grounded in the collective bargaining agreement, involving interpretation or application of existing labor agreements and suitable for resolution through arbitration, did not include "causes of action to enforce rights and obligations that exist independently of the collective bargaining agreement. [Citations omitted.] Substantive protections provided by state law, independent of whatever labor agreement might govern, are not preempted by the RLA." Pike at 1358.

In light of the Montana Supreme Court decisions interpreting and applying Lingle and Hawaiian Airlines, this Hearing Officer would like to rule that Green's MHRA claims herein are not preempted by the RLA. However, in the course of applying Montana law regarding disability discrimination in employment to this case, the analysis reaches a point where recourse to the governing labor agreement, the CBA, is necessary.

The Hearing Officer can decide (and has decided) that selection of the incumbent over Green would have been made even if Green was interviewed and even without any discriminatory animus that may exist, because of the factors favoring the incumbent. Thus, on the question of whether rejecting Green for an interview was discriminatory, probably the best outcome Green could get on his discrimination claim would be a mixed motive decision, which would not entitle him to any recovery. Laudert, op. cit.

However, to resolve whether Glover was right or wrong about Green's ineligibility requires an interpretation of the CBA, on an issue that it directly addresses – eligibility to bid or apply for a job covered by the CBA. Could Green apply for the Safety Assistant job, as he claims? The behavior of the BNSF employees who assisted him suggests that he could. BMWED insists, that, as Glover testified, an employee who had not marked up or bid into a job could not apply for the Safety Assistant job.

If Glover, with his experience and knowledge, rejected Green as ineligible even though Green was eligible, that would be strong evidence that the eligibility defense was a pretext for of a discriminatory animus toward Green because of his physical limitation. If he was eligible for an interview, then unless and until he was selected for the job and presented to BNSF for the job, nobody had the right to make inquiries, let alone decisions, based upon his medical status.

On the other hand, if Green was not eligible, then BMWED was entitled to refuse to interview, and his discrimination claim would fail, in its entirety. Thus, deciding whether BMWED discriminated against Green at the only point in the process when it could possibly have discriminated against him, in deciding not to let him interview, would require the Hearing Officer to interpret and apply the CBA.

There is some irony in this ruling. The department's Hearing Officers hear and issue recommended decisions on collective bargaining cases under Montana's Collective Bargaining laws, involving public employees of the state and its various subdivisions, under Title 39, Mont. Code Ann. Nonetheless, the jurisdiction of this Hearing Officer, under the Montana Human Rights Act, does not extend to interpretations of CBAs between private employers (including railroads) and the exclusive bargaining agents of their employees, in circumstances where such interpretations are to be decided by federal law. Therefore, this case must be dismissed.

V. Conclusions of Law

1. Department jurisdiction, under Mont. Code Ann. §49-2-512(1), is preempted because resolution of this claim is "substantially dependent" on an

analysis of the Collective Bargaining Agreement between the BMWED and BNSF, and therefore this case must be dismissed. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 423 (1988).

VI. Order

1. The complaint of Paul Green is dismissed.

Dated: December 6, 2011.

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

* * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Elizabeth J. Honaker, Honaker Law Firm, attorney for Paul Green and Mark D. Parker, Parker Heitz & Cosgrove, PLLC, attorney for the Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters:

The decision of the Hearing 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 Kathy Helland
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. Contact Tamara Newby, (406) 444-3870 immediately to confirm status of the existing transcription of the record. The original transcript is not in the contested case file.