BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0111014680:

ELISE BLAIS,	)	Case No. 1987-2011
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
KORMAN MARKETING GROUP,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Elise Blais filed a complaint with the Department of Labor and Industry on October 13, 2010, and an amended complaint on April 1, 2011, alleging that her employer, Korman Marketing Group ("KMG"), discriminated against her in employment because of her disability and retaliated against her for resisting that discrimination. On May 20, 2011, the department gave notice Blais' complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing officer.

The contested case hearing proceeded February 8-10, 2012, in Livingston, Montana. Blais attended with counsel, Michael J. San Souci. KMG attended through a designated representative, Dana Terry, its Human Resources Director, with counsel, Eric Nord. Elise Blais, Robert Fegan, Bonnie Lyytinen-Hale, Debbie Jackson and Dana Terry testified in person, Vonda J. Hotchkiss and Sue French testified by telephone, and the deposition testimony of Shannon Abraszek was received in evidence. The Hearing Officer admitted Exhibits 1-2, 4-31, 33, 35-36, 38-41, 44-56, 101-104, 106-111, 113-121, 123-133 and 135 into evidence, and refused Exhibits 42, 122 and 134. The Hearing Officer also denied Blais' post-hearing motion to add Exhibit 50a and admit it into evidence.

The parties filed post-hearing proposed decisions and briefs and the case was deemed submitted for decision.

II. Issues

The dispositive issue is whether KMG discriminated against Blais because of disability or retaliated against her for seeking accommodation for her disability. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Charging Party, Elise Blais is, and at all times herein mentioned was, a resident of the City of Livingston, Park County, Montana.

2. Her employer, Respondent Korman Marketing Group ("KMG") offered hospitality and marketing services for large corporations. Locally, it operated the Crazy Mountain Ranch, near Clyde Park, Montana. KMG did not own the ranch. The owner ultimately decided what services to provide guests, who came to the ranch in a reward program for Marlboro consumers, and KMG then implemented those decisions. KMG had ultimate responsibility for all hiring and employment-related decisions on the ranch, subject always to approval or direction from the owner, and the owner gave KMG the discretion and flexibility to structure and/or modify the relative demands and requirements of various jobs. KMG had done so on some occasions. The primary goal of the owner was to provide activities to engage and to entertain the guests during the entirety of their stay, from the time they arrived in buses at the ranch until the time they climbed back on the buses to ride to the airport to depart and travel back to their homes. KMG was responsible for accomplishing that goal, and engaged in an ongoing dialogue with the owner about possible changes in the guests' itinerary, additions of new activities or entertainments, changes or eliminations of existing activities or entertainments, etc.

3. KMG employees were given detailed scripts of how to interact with guests, from guest arrival through guest departure, including scripts of how to provide services to the guests during essentially all of the activities and entertainments available. Employees often worked as "teams" to provide the necessary services, and were trained for their assigned job duties. Employees also learned how to assist other "team member" employees over time, and cooperation and mutual assistance to keep the operation running smoothly were important parts of KMG's expectations of its employees. On a Montana wage scale, employees were paid well, whether seasonal or year-round. Performance raises were often given, and seasonal employees who performed well were rehired for subsequent seasons.

4. Blais originally saw an advertisement in a newspaper for a position with KMG in 2006, called up the company, and filed a job application. She began her training with KMG in December 2006 and began working for the company in

January 2007. Blais had an industrial injury in 2008. She continued to work for KMG after that injury.

5. Blais initially was employed by KMG as a Guest Experience Associate at the Crazy Mountain Ranch facility, where she had led tours to Yellowstone National Park. She was interviewed and hired by Chris Broell and the company's Director of Guest Services, Robert Fegan.

6. KMG considered Blais a good and reliable employee. From the date of her hiring, through 2009, she routinely received very positive performance evaluations, with corresponding "performance-based" pay increases.

7. In 2009, the tours to Yellowstone National Park were largely discontinued. The owner directed that KMG replace those tours with other outdoor activities centered on the premises of the ranch. In June 2009, Blais was reassigned new duties under the title of a position designated as Ranch Activities Host/Shuttle Driver. In addition to transporting guests, and attending to their needs, this position required active participation in staging and carrying out activities on the premises, which included lifting or moving heavy objects, including large ice chests, flats of bottled drinks and furniture, and setting up tents and transporting luggage – tasks Blais described as "much more" physically demanding than her previous job.

8. On July 28, 2009, Blais sustained another work-related injury, to her lower back, after squatting down to pick up a filled ice chest (she estimated it weighed at least 50-60 pounds) to hoist it into a vehicle.

9. Blais reported her back injury and tried to continue working, but was unable to continue to do the heavy lifting her job required. Another team member and co-worker, Amanda Opper, was willing and able to assist with lifting the ice chests and other heavy objects, while Blais continued to carry the lighter items such as the gear and snacks. Blais' direct supervisor, Mike Walters, was aware of this team assistance, and allowed it to continue. KMG management knew of this informal arrangement. Walter actually directed the teams to work in pairs, apparently to facilitate Opper's assistance of Blais. Ex. 7.

10. In early August of 2009 Blais was seen in the emergency room at the Livingston Healthcare facility, and was then examined by Dr. Hintze of Community Health Partners, who made an initial diagnosis of a sacrum muscle pull. Dr. Hintze expected this injury to heal, although she advised Blais to continue to avoid lifting heavy objects.

11. KMG had no obligation to accommodate Blais at this point, since she did not have a long-term or permanent physical impairment, and her immediate lifting

limitations were not substantially limiting the major life activity of working. At this time Blais, having suffered another industrial injury, began the process of receiving medical treatment and evaluation at the expense of her employer's workers' compensation insurer. The statutory responsibilities of that insurer and the statutory entitlements of Blais came into play, without regard to Montana disability discrimination law.

12. Dr. Hintze referred Blais to a local chiropractor, Dr. Dobelbower, for further treatment options. After examining her, Dr. Dobelbower referred Blais to Dr. Aylor, an orthopedic specialist. During this interim, it was recommended to Blais that she remain off work, at least until her follow-up examination with Dr. Aylor a few days later. Blais believes she missed only one day of work at this time.

13. Blais was given work restrictions by her treating physicians at least as early as August 27, 2009, as a result of her injury. She continued to work, with the assistance of her co-workers until the middle of September 2009. The company's Timecard Reports verify that from September 1, 2009, through her follow-up exam on September 14, 2009, Blais was routinely able to work more than 8 hours per day – on most days, more than 11 hours.

14. Beginning August 31, 2009, Sue French was assigned to Blais' workers compensation case as the claim manager. French remained involved through May 27, 2011. French worked for S.I.S.R., which was a third party administrator for A.I.G., which may have been either the workers' compensation insurer for the ranch, or the adjusting agent for the ranch if it was self-insured for workers' compensation. In either case, French worked independently of KMG.

15. Julianne Hill was the nurse case manager for Blais. Hill worked for P.A.C.B.L.U., independently of KMG.

16. Blais had a doctor's appointment on September 15, 2009, after which her status was changed to temporarily totally disabled from work, a statutory classification of a worker with an industrial injury. A follow-up medical appointment was scheduled for September 23, 2009, because her doctor was puzzled by why certain movements caused her pain and others did not, and referred her to a specialist.

17. Although Blais was unaware of it at the time, when KMG learned that her status had changed to temporarily totally disabled under Workers' Compensation terminology, Director of Guest Services Fegan either directed or authorized removal of Blais from the schedule for the remainder of the season. The seasonal work season ended at KMG on or about October 25, 2009, 40 days later.

18. Director of Services Fegan testified that before removal of Blais from the schedule, he undoubtedly would have spoken with Terry, although he could not recall the substance of such discussions.

19. KMG had no obligation to accommodate Blais at this point, since she did not have a long-term or permanent physical impairment, even if her immediate lifting limits were substantially limiting the major life activity of working, which was not established by the mere fact that she had been taken off the schedule for her job of injury for the remainder of the season. Her entitlement to wage replacement benefits, under Montana Workers' Compensation laws, was operating, again without regard to Montana disability discrimination law.

20. Blais' work-related injury was eventually diagnosed as an L-5 disc rupture. Her treating physician, Dr. Aylor, initially limited her to lifting no more than 10 pounds at any given time; with no repetitive bending or twisting, nor pulling more than a weight of 15 pounds. This work release, with temporary restrictions, was issued by Dr. Aylor on September 23, 2009.

21. Blais returned to work on September 24, 2009, based upon her understanding that she was now released to work with essentially the same limitations she had been working under before September 15, 2009. The evidence does not establish whether she consulted with Dr. Aylor about returning to the particular job, with the "team assistance" on heavy lifting that had been informally provided before, or simply relied upon the general limitations Dr. Aylor gave to her. After she had commenced work that day, she was told to go home, because she had been taken off the work schedule. KMG provided her with transportation home, and Walters apologized for not letting her know sooner that she was off the schedule.

22. That evening Terry called Blais and instructed her not to return to the ranch, saying that she (Terry) would contact Blais when work was available. That contact was not made during the remainder of the seasonal work season.

23. Again, KMG had no obligation to accommodate Blais at this point, because she was still under temporary limitations while her injury was being treated, for an uncertain period of time, and therefore did not suffer from a disability under Montana disability discrimination law.

24. Blais was losing confidence in Dr. Aylor, and consulted a neurosurgeon and spine specialist, Dr. Meyer, at Northern Rockies Neurosurgeons. Dr. Meyer advised her that her injury would likely recur and she could save herself a great deal of pain and injury if she had a microdiscectomy. Blais was not due to return to work with KMG until the following year. She apparently believed that she would be ready to return to work when KMG again had work for her.

25. Blais had back surgery on November 9, 2009. She did not immediately notify KMG about the surgery.

26. On or about November 17, 2009, Bonnie Lyytinen-Hale (a/k/a Bonnie Hale) became involved in Blais' case. Hale is a self employed certified rehabilitation counselor who works primarily with injured workers in the workers compensation arena. She became involved in Blais' case because, under Montana Workers' Compensation law, an independent certified rehabilitation counselor is necessary, at the workers' compensation insurer's expense, to evaluate return to work options under certain circumstances. In Blais' case, Hale was asked to do a job analysis for Blais' job of injury and then proceed to complete an Employability and Wage Loss Analysis to determine Blais' ability to return to work.

27. Blais was represented by legal counsel by the time Hale became involved. Blais' attorney told Hale that all communication involving Blais should go through him. This complicated Hale's tasks and slowed completion of her work.

28. Retention of legal counsel also affected French's interaction with Blais. French, like Hale, could not contact or speak with Blais directly.

29. After her surgery, Blais did not get appointments for evaluation of her physical abilities until January and February 2010. A time of injury job analysis was done for Blais in January 2010.

30. At some point during her recuperation, Blais told Hale about the cooperative arrangement at work that had allowed Blais to continue to do her job, with help, in August and early September. On February 2, 2010, Hale sent an email to Human Resources Director Terry and inquired if the physical demands of the time-of-injury job could continue to be modified or restructured so that any lifting more than 20 lbs. would be delegated to other employees. Hale went on to ask, in the same email, whether, in the alternative, the company would consider Blais for alternate positions that would be available for the new season.

31. On February 26, 2010, Dr. Meyer issued a post-surgical report, indicating that he wanted Blais to continue with physical therapy for another two weeks and to keep her activity limited, in the interim, to a weight limit of 20 pounds. At this time, Blais had not been released to return to work at KMG in any position, and therefore was not, for purposes of disability accommodation, an otherwise qualified worker who might or might not be able to perform the essential duties of her job, with or without an accommodation.

32. Under Montana Workers' Compensation Law, an important milepost in an injured worker's recovery is "Maximum Medical Improvement," or "MMI." Up

until that point, whether the worker is considered partially or totally "disabled," the "disability" (using the word as it applies in Workers' Compensation law) is temporary. Once the injured worker has reached MMI, the degree of lost ability to work can be quantified as "permanent" and the entitlement to lost wages benefits may be calculated under Workers' Compensation law. The distinction is of great significance for the injured worker and the workers' compensation insurer. On the other hand, vocational rehabilitation providers like Hale often encourage employers to consider allowing the injured worker to return to work (with medical approval, of course) in modified jobs or alternate lighter duty jobs even before MMI is achieved. When such an early return to work is effectuated, it is critical to reevaluate the situation after each medical appointment to identify any changes in the employee's medical limitations, and to confirm that their job tasks remain within their capabilities, in order to minimize any risk of further injury. However, it is not the case that, in every instance, the limitations resulting from the industrial injury of a worker released for work before MMI are, by reason of that release, automatically considered an impairment for purposes of disability discrimination law. Since Blais had not yet been released for work, now just more than three months after her surgery, she was currently temporarily incapacitated from working her job of injury for an uncertain period of time, and therefore still did not suffer from a disability under disability discrimination law.

33. Although she had not reached MMI, Blais's physicians released her to return to work in March 2010, with lifting limitations, no repetitive bending or twisting, and no extended periods of sitting or standing (with a need to change positions approximately every 30 minutes). By reason of this release, Blais could and did seek to return to work.

34. Following communications between Terry and Hale and French and Blais' workers' compensation attorney, in early April 2010, Terry offered Blais a modified light-duty, part-time position, designated as "Fleet Assistant," which involved administrative or clerical assistance with fleet management at the ranch, for 20 to 25 hours a week. Hale advised Terry of Blais' current light duty physical limitations and restrictions to return to work, which according to Hale included lifting no more than 20 pounds, no prolonged sitting and no driving of a tour bus.

35. KMG still had no obligation to accommodate Blais, under Montana disability law, since although she had specific limitations, those limitations were still temporary, and she did not have a long-term or permanent physical impairment substantially limiting the major life activity of working. This particular arrangement was made in the context of workers' compensation law and customary practices.

36. From its inception, this new job specifically included some driving of fleet vehicles, to and from the ranch to Bozeman (approximated in evidence as 55 miles for a round trip between the ranch and the location of the maintenance provider in or near Bozeman. Bonnie Hale knew this. Sue French knew this. Dana Terry knew this. Justin Stalpes, Blais' workers' compensation attorney, knew this. Blais knew this.

37. Terry and Blais also discussed her need for training on Microsoft programs used at the ranch. During this conversation, Terry assured Blais that she would receive the necessary Microsoft training sessions, at the company's Bozeman office. Terry further advised Blais that her new supervisor would be Shannon Abraszek, the Ranch Schedule Planner, and that she was to assist Abraszek with fleet management and administration.

38. Blais' rate of pay in this new modified, light-duty, part-time position was $3.50 per hour less than her pre-injury position. Blais accepted the job. The difference between her previous wage and her wage in this new job could have made a difference in her workers' compensation wage replacement payments, but the evidence does not address any such difference.

39. This Fleet Assistant position was created because the owner of the ranch had given KMG a new contract, to take over management of the fleet of vehicles owned and operated by the ranch. Maintenance of those vehicles was now part of KMG's responsibilities. Handling the ranch's vehicle fleet was new to KMG, so it did not have any historical or practical experience with handling the fleet. Just as handling the vehicle fleet was new to KMG, so too was the Fleet Assistant position.

40. The function of the fleet vehicles was to be working and available for use transporting guests during their visits to the ranch. Manifestly, the largest demand for the Fleet Assistant to move vehicles on and off the ranch for maintenance would arise at the beginning of the season, before the guests arrived, to assure that all fleet vehicles were ready for use when the guests arrived. While the guests were on the ranch, very little movement of vehicles on and off the premises for maintenance would be possible. Terry testified that in defining the traveling portion of the Fleet Assistant job description, KMG later provided evidence (testimony) that it intended that driving would require 10% of the working time over the lifetime (the season) of the position.

41. The job description, prepared by KMG with input from Hale and French, specified 10% travel, adding that the "[d]istance traveled will be from Clyde Park to Livingston and Clyde Park to Bozeman." As written, this provision appeared to mean that travel ("driving," "moving vehicles") would be 10% of the daily duties, in

the same way that working while standing and walking for up to 4 hours, or lifting up to 20 pounds occasionally, were daily duties. For purposes of evaluating the ability of a worker with medical limitations on sitting (whether driving or otherwise), a job description that defined driving responsibilities as a percentage of the work over a longer period of time than one work day, so that the limitation would not apply on a daily basis, would be worse than useless – it could be actively misleading and expose a worker with daily limitations on sitting to risks of serious injury in the job. There is no evidence demonstrating that KMG deliberately misstated the amount of daily travel that might be involved in this new job within KMG's new responsibility for operating and maintaining the fleet.

42. Abraszek did not consider herself Blais' supervisor, per se, but understood that she would be directing Blais' day-to-day job activities. She understood also that the "Fleet Assistant" position might prove to be a permanent job for Blais, and that whether it was permanent or temporary, it was available for her to work while she recuperated. Abraszek never actually saw the "Fleet Assistant" job description, before or while Blais was working the job. She did understand that Blais could only sit for a limited period of time before she would need a break. Since the Fleet Assistant job did not involve any heavy lifting, this was not an issue for Abraszek. She and Blais agreed that Blais could take breaks while driving vehicles on and off the premises for maintenance. Abraszek was not aware that Blais' job description included a limitation upon the amount of time spent driving. Abraszek and Blais also had an agreement that Blais would let Abraszek know about any pain Blais was having at work, and that Abraszek would assume, if Blais was not reporting any pain, that she was "doing okay."

43. Blais' first day of work as Fleet Assistant was April 5, 2010. KMG worked around Blais' doctors' appointments and physical therapy schedule. Blais told Abraszek what days she could work so that her schedule could be set around her appointments with doctors and physical therapy. If Blais did not have a doctor's appointment or a physical therapy appointment, then she had a standard shift that lasted roughly from 8:00 a.m. to 4:30 p.m.

44. Blais learned that she had started her new job as Fleet Assistant during the busiest time of year, when all of the vehicles needed maintenance and had to be moved to Bozeman and then back after maintenance was completed, and all of the vehicle maintenance had to be finished before the guests started arriving in May.

45. Prior to April 19, 2010, during the first two weeks that Blais worked as the Fleet Assistant, the new job was problem-free. It quickly became clear that Blais did need some training on the computer work that was part of the job, as had been contemplated before she took the job, but although the computer training courses she

was to attend were cancelled three times, Abraszek did not see the computer training need as a serious problem.

46. During her first two weeks, Blais worked approximately 70 hours over the course of nine days, more hours than contemplated in the job offer. On 6 of her work days, she moved fleet vehicles to Bozeman, a 2 to 2 ½ hour round trip, over twice 10% of her work day, to get there and back. Blais did not report any back pain to Abraszek, nor did Blais report that the driving demands were too much for her to handle.

47. On April 19, 2010, at some point in the morning, Abraszek told Blais that she needed to drive two vehicles to Bozeman that day. Blais initially thought that another employee (Roy Davis) would be driving one of the vehicles and that she would drive the other vehicle, the method that had been used before April 19, 2010, when two vehicles had to go to Bozeman on the same day, but Abraszek told Blais she had to make both trips. Blais responded that she would need her breaks and perhaps more breaks, and that even with them she did not think she could do the second trip. Abraszek insisted that Blais would have to make both trips.[1] Blais then told Abraszek that she was already in pain from doing her job duties, and that it was driving and sitting that was causing her pain.

48. Abraszek responded that 80% of the job required driving, and that Blais could go home. Blais, surprised, completed the paperwork she had started before being told about two vehicles to drive to Bozeman, and then she went home, as directed.

49. After she left work, Terry called her, and directed her not to come back to the ranch until KMG called her back.

50. KMG still had no obligation under Montana discrimination law to accommodate Blais at this point. She still did not have a long-term or permanent physical impairment substantially limiting a major life activity. She was still healing

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[1] Blais testified that Abraszek told Blais she couldn't take breaks because there wasn't time to take breaks and complete both trips to Bozeman. Abraszek denied any clear recollection of the conversations about the two trips to Bozeman that day. Blais; counsel argued that this reason for denying Blais her breaks was illogical, since a morning conversation about 2 trips to Bozeman left plenty of time to complete the first round-trip and the ranch to Bozeman leg of the second trip before the business providing the maintenance would have closed. Although the argument is logical, Blais' account of her conversation with Abraszek is not credible [see Finding 51]. The substantial and credible evidence did not prove that the employer ever tried to limit Blais' breaks during the proposed two trips to Bozeman that day, only that the employer did require the two trips in that one day. Thus, there can be no issue about whether any such unproven limit upon breaks was imposed on a pretextual basis.

after her surgery, and her medical providers had not determined what her final condition, with any limitations, was going to be. KMG had other incentives to work with Blais. Vocational rehabilitation providers attest almost uniformly that early return to work enhances the injured worker's chances of a return to full employment and thereby reduces the employer's costs for industrial injury expenses as well as restoring to the employer an already trained and experienced worker. It had no duty to engage in the interactive accommodation process with her at this time.

51. Blais at hearing denied that she was already in pain on April 19, 2010, when she argued with Abraszek about making two trips to Bozeman, and, indeed, testified at hearing that had she been able to take her usual breaks, she could have made both trips. The problem with this testimony is that it was not just Abraszek who reported that Blais had said that on April 19, 2010, that she was in pain caused by her job. On May 13, 2010, Hale emailed Human Resources Director Terry that Blais, around May 11, 2010, had reported to Hale that her pain on April 19, 2010, was from "overall driving and sitting," that "with primarily sitting throughout the day she has noticed low back pain and associated leg symptoms." Hale added that Blais reported that "She does best with standing activities. She thought the position you had for her would be perfect because of the variety of tasks. She said she was stopping to take breaks from driving but that did not seem to alleviate the symptoms." Ex. 25, first page, 5/13/2010 email, Hale to Terry. Hale, whose mission at the time was to get Blais back to work in a job that she could successfully perform without pain problems or risk of further injury, had no motive to distort or skew Blais' reports of how she felt and what it seemed to her was causing her feelings. Of all the participants in this convoluted process, the vocational rehabilitation specialist would have the very least bias or incentive for twisting the truth, under these peculiar circumstances. Blais had also reported to one of her own health care providers, on April 21, 2010, that she was still "not working due to back pain." Ex. 129.

52. It is more likely than not that Blais was in pain, which she believed resulted from her work activities, on April 19, 2010. It is more likely than not that Blais reported that pain to Abraszek and that Abraszek sent her home because of that report. It is more likely than not that Terry then decided not to return Blais to work in the Fleet Assistant job. That decision was based upon an interactive process appropriate for a worker returning to work after an industrial injury [see Finding 32]. That decision by Terry, on behalf of KMG, may have resulted in her receipt of additional temporary total disability benefits under workers' compensation law.

53. KMG still had no obligation under Montana discrimination law to accommodate Blais at this point. She still did not have a long-term or permanent physical impairment substantially limiting a major life activity.

54. In May 2010, Blais had a functional capacity test or examination ("FCE"). KMG thereafter did not contact Blais regarding the Fleet Assistant job (which remained open for "months" after April 19, 2010, according to Abraszek), or any alternative positions that might have been available or suitable for Blais. No new positions were identified to Hale that might be possible placements for Blais. KMG consistently reported to Hale that it had no jobs open within Blais' limitations. It is often common practice for workers' compensation insurers and rehabilitation professionals to encourage employers to create short-term light duty positions for workers with industrial injuries, so that the workers can return to work sooner. Whether to create such opportunities for injured workers is at the discretion of the employer.

55. On or about July 1, 2010, Blais received a written notice, bearing the date of June 30, 2010, of the impending cancellation of her health insurance, and her right to elect COBRA continuation coverage, which expressly identified the "Qualifying Event" (the curious legalese for the event that triggered the COBRA notice) as "termination." Human Resources Director Terry attempted to explain, in her testimony, how the "termination" referenced in the June 30, 2010, COBRA notice could result from Blais' "inactive" status, but Blais had been "inactive" on prior occasions – including the discontinuance of her previous position in late September of 2009 – without such a "termination." Neither side ultimately provided satisfactory evidence of how Blais' work status (injured, not yet returned to work, still apparently on workers' compensation benefits) interacted with COBRA law regarding cancellation or change of health insurance status and the right to elect coverage under COBRA.

56. Following her receipt of this notice, which she feared meant that her employment with KMG had been terminated, Blais called Terry about her continued job status. In this July 1, 2010, telephone conversation, Terry told Blais that there were no other job openings for which she could qualify, but that she would contact Blais if a light duty position became available. She then directed Blais to contact Leyna Tran, the company's Benefits Coordinator at its Texas headquarters, with any other questions she may have concerning the health insurance and COBRA issues.

57. On July 8, 2010, Sue French emailed Dana Terry a copy of the FCE results regarding Blais. Ex. 30. On July 12, 2010, Terry emailed an inquiry to Hale, explaining that Terry had received the FCE results but was "struggling to interpret exactly what [Blais] can and cannot do." Terry proposed that she and Hale meet with Gary Lusin, Advanced Performance and Rehabilitation Services, to ensure that Terry understood what Blais could and couldn't do. Hale responded that same day

that she would "check with Gary and get back to you," noting that she thought Lusin was on vacation until the following week.

58. On July 14, 2010, Hale emailed Terry that Lusin was on vacation until July 19 and that Hale would check on Lusin's schedule the following week.

59. Blais contacted Leyna Tran on July 23, 2010, at KMG's Dallas headquarters, about her job status. Tran did not satisfy Blais' concerns about her job status, and referred Blais to Cindy Williams, the company's Senior HR Director. Blais was connected to Williams, with whom she discussed her situation and asked Williams to confirm her job status. Williams said she would have to "look into it," but that she would follow-up with Blais once she had obtained more information.

60. Blais next contacted Terry again, in late July 2010, about her job status, with no response. Blais followed up with more calls on August 9, 2010, again attempting to reach Terry to discuss her job prospects, at which time she left a message.

61. On August 11, 2010, Terry emailed Hale, who had not followed up on her July 14, 2010, email, and asked for confirmation of when they could meet with Gary Lusin.

62. On August 12, 2010, Hale responded to Terry regarding the meaning of the FCE, with an email that commenced with the comment, "I met with Gary yesterday. He is wondering what your specific questions were." Hale followed the comment with a fairly detailed three paragraph explanation of what the FCE meant, and what level of work activities Blais, whose overall work capacity was defined as "light duty" by the FCE, could do. In the fourth paragraph Hale commented that from her discussions with Terry, Hale understood that "all positions at the ranch are medium to heavy duty and the jobs are not modifiable, therefore it does not appear there is a position at the ranch." Hale then concluded that she was unsure what KMG had available for office positions. Ex. 31. Blais had still not reached MMI, and was thus still seeking work consistent with her temporary limitations, which might change. The workers' compensation interactive process between Hale and Terry was not subject to disability law analyses, because Blais still did not have a long-term or permanent physical impairment substantially limiting a major life activity.

63. KMG did not, from April 19, 2010, through the end of that calendar year, identify any prospective jobs, modified or otherwise, that might be possible for Blais to perform, and never invited or encouraged Blais, directly or through Hale, to make any formal job applications.

64. Hearing nothing further from Williams or Terry since July 2010, in October 2010, Blais again endeavored to contact Terry concerning her job prospects. She was informed by office staff that Terry was on a leave of absence and was unavailable until mid-November. KMG's office staff could not answer any of Blais' questions regarding her employment status and/or whether or not she might still be considered employed or employable by the company.

65. Blais again contacted Leyna Tran at KMG's Texas headquarters about her job status. Tran again could not confirm her status one way or the other, and advised Blais again to contact the Senior HR Director, Cindy Williams. Blais was unable to reach Williams, and left a message once again asking that Williams either call or email her, as previously promised, to confirm her job status. She received no subsequent response from Williams or anyone else in KMG management.

66. On October 13, 2010, Blais filed her charge with the Montana Human Rights Bureau (HRB), maintaining that KMG had discriminated against her based upon her disability; that it had unfairly terminated her employment and failed to reasonably accommodate her and/or consider her for other job openings and, consequently, that it had failed to engage in the requisite interactive process.

67. Blais' health care professionals determined that she had reached MMI on November 12, 2010. At this point, Blais was confirmed, medically, as having a long-term or permanent physical impairment. That impairment did substantially limit her in the major life activity of working, since the limitations she had precluded her working in most of the jobs she had held, including all of the jobs she had held with KMG, at least without some kind of accommodation for her limitations.

68. Blais never wrote to KMG concerning any claim of discrimination before filing her complaint with HRB. Thus, KMG was not specifically notified, prior to her complaint, that Blais felt it was discriminating against her in employment because of disability. However, KMG is charged with knowledge of the law, and in this case, KMG was interacting with Hale and several other professionals, who were asking it to find a way to put Blais back to work. Blais also was directly contacting KMG about returning to work.

69. Immediately before and after Blais reached MMI, KMG was actively advertising to fill front desk positions at its Montana location. Exhibits 33, 36 and 38-39. Despite Blais' and Hale's follow-up inquiries about her job status, as well as about any modified or lighter duty positions that might have been available, she had received no specific notification of any of the front desk position openings. Terry, on behalf of KMG, viewed those jobs as including some heavy lifting within their essential job duties, and did not identify those jobs to Blais or Hale. Before this case

proceeded to the contested case hearing stage, KMG had never engaged in an interactive process, consistent with Montana disability law, with Blais about those jobs. The workers' compensation law interactive process between Hale and Terry had simply consisted of Hale asking if there were any jobs that Blais might do, either with or without modifications, and Terry responding that there were no such light duty jobs.

70. During the course of Hale's communications with Terry about returning Blais to work for KMG in some appropriate position, modified or not, KMG never advised her of openings for Front Desk Agent. Although there may have been other positions, (such as Photo-Sharing/Upload and, at least in 2011, Branding Experience Coordinator), the only positions for which openings were definitely available beginning in 2010 were Front Desk Agent positions. Other positions for which Blais believed she was qualified and capable – such as "Motel Manager" and "Graphic Artist/Typesetter" – seemed potentially quite similar, in terms of relative job duties and functions, to these KMG positions.

71. At the time the front desk agent position was advertised, Blais was restricted with respect to her lifting requirements. Blais could not perform the lifting requirements for the Guest Services agent position within her medical limitations. Unless those lifting requirements could be met by someone else, Blais could not perform the job duties, and the evidence did not establish that those lifting requirements could be performed by someone else in every instance.

72. A critical function of every job at the ranch was to go to any lengths necessary to assure and to increase guest satisfaction. KMG engaged in an ongoing dialogue with the owner about how better to achieve that primary goal. Jobs were modified, created and eliminated in light of that primary goal. One of the reasons the Fleet Assistant position stayed open for months after KMG removed Blais from it was the ongoing dialogue between KMG and the owner about whether, after all, to keep the fleet maintenance and operation duties in KMG's hands after the 2010 season. It was possible to keep that position empty while the dialogue proceeded because the heaviest demands for the Fleet Assistant came in the beginning and end of the season, when virtually the entire fleet needed at least preventive maintenance, but nonetheless, the time spent reconsidering KMG's responsibility for operation of the fleet is indicative of the importance to the owner of continuous examination of whether every job duty best furthered guest satisfaction.

73. For KMG, tasked with maximizing guest satisfaction in all possible ways, the evidence at hearing did not establish that a co-employee could be made immediately available to perform heavy lifting requirements involving guests. Most heavy lifting required of the front desk agent position involved guests, and most of

that heavy lifting was lifting of guest luggage. Guest luggage handling occurred most frequently when new groups of guests arrived and when departing groups of guests left. However, putting three or more "most of the time"s together approaches the 10% driving requirement ("over the season") for the Fleet Assistant position. Blais could not be safely assigned a job in which "most of the time" she could stay within her medical limitations. Reasonable accommodation for Blais had to assure that she would be able to stay within her limitations100% of the time. In the front desk agent job, if a guest needed heavy lifting, that heavy lifting had to be done immediately, and KMG could not assure immediate assistance for Blais without assigning another worker the duty of dropping other work and immediately coming to Blais' assistance at any time. That was not reasonable.

74. Perhaps it could have been possible to cajole delivery persons to carry packages beyond the front desk to some storage spot within the premises. Blais suggested this as part of an accommodation, but there was no proof that all delivery persons who might bring heavy packages to the premises worked for employers who would allow that "extra mile" work. Blais also asserted that the front desk agent could direct another employee to carry heavy packages from the front desk to where they might need to go, but no proof of any such authority vested in that position was presented.

75. KMG did not engage in a full interactive process with Blais. However, there is no evidence that she could have performed the essential job duties of the front desk agent position, with or without a reasonable accommodation. Therefore, she suffered no actual wage losses as a result of the failure to engage in the full interactive process of accommodation with her.

76. While she remained unemployed by KMG, during late 2010, and much of 2011, Blais actively sought other employment opportunities, which included her experience in the tourism/guide industry and in graphic design. Her failure to find a new position away from KMG corroborated the substantial impart her physical limitations had upon the her major life activity of working..

77. KMG found a position for Blais beginning in August 2011 and she now works for KMG again, as the "Branding Experience Coordinator," a light duty position. It is more likely than not that, other than in failing and refusing to engage in a full interactive process with Blais after she reached MMI, until the opening of the position in which Blais was then employed, KMG did not illegally discriminate against her in employment.

78. Blais did suffer emotional distress due to KMG's refusal to engage in the full interactive process of accommodation with her. Her financial situation, and the

unemployment that caused that financial situation, both caused her the major portion of her emotional distress, but the feeling she had that KMG was not listening to her, was not interested in putting her back to work, and was trying to be done with her, also caused some additional emotional distress.

79. Emotional distress without financial loss is, nonetheless, emotional distress. The only emotional distress for which Blais can recover is emotional distress that resulted from KMG's failure and refusal to engage in the full interactive process of accommodation with Blais, from November 2010 until KMG began the process of considering Blais for the Branding Experience Coordinator position, offering her the position and then training her and putting in that position. Setting aside all the emotional distress and upset resulting from what Blais failed to prove were additional illegal acts by KMG, the emotional distress due to KMG's failure and refusal to engage in the full interactive process of accommodation with Blais, from November 2010 until KMG commenced the process with the Branding Experience Coordinator position, caused her harm for which she is entitled to recover the sum of $3,000.00.

80. Blais is not entitled to recover prejudgment interest for her emotional distress, which was not lost earnings or any other kind of loss capable of being made certain by calculation.

81. The substantial and credible evidence of record does not establish that it is more likely than not that KMG ever retaliated against Blais for her efforts to obtain an accommodation in her employment.

82. The Department must order KMG to refrain from future failure to discharge its duty to engage in the interactive accommodation process required with an employee with a disability seeking accommodation, and should further order KMG to obtain training of its management personnel regarding the interactive accommodation process.

IV. Opinion[2]

Montana law prohibits employment discrimination based on disability, when the essential tasks of the job do not require a distinction based on that disability. Mont. Code Ann. § 49-2-303(1)(a). Disability discrimination includes removing an employee from active working status because of disability, without first making inquiry to determine whether a reasonable accommodation is appropriate for an employee who seeks to continue working despite a disability. An accommodation is not reasonable if it involves undue hardship to the employer or danger to the health

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

or safety of the claimant, or anyone else. Mont. Code Ann. § 49-2-101(19)(b). An employer has a legal duty to make independent inquiry regarding accommodation before discharging the employee due to danger to that employee's health or safety. Reeves v. Dairy Queen 1998 MT 13, ¶¶ 42-43, 287 Mont. 196, 953 P.2d 703.

To establish disability discrimination in employment, Blais must show that (1) she had a disability; (2) she was otherwise qualified to retain her job or to begin work in another (open) job and was capable of doing the job with an accommodation; and (3) that KMG discharged her from her job or refused to consider her for another job for which she was qualified, because of her disability. Reeves at ¶ 21; citing Hafner v. Conoco, Inc. (1994), 268 Mont. 396, 886 P.2d 947, 950; see also Mont. Code Ann. §§ 49-4-101 and 49-2-303(1)(a).

For some of the time after her injury, Blais failed to prove that she suffered from a disability. Disability is an impairment that substantially limits one or more major life activities. Mont. Code Ann. § 49-2-101(19)(a). Whether an impairment exists and whether an impairment resulting from a particular condition is a disability under Montana law are fact questions, decided on a case-by-case basis. E.g., Reeves, op. cit.

Work is a major life activity. Walker v. Montana Power Company (1999), 278 Mont. 344, 924 P.2d 1339; Martinell v. Montana Power Company (1994), 68 Mont. 292, 886 P.2d 421. A substantial limitation upon performance of work means the individual is unable to perform a class of jobs or a broad range of jobs as compared to an "average" person with comparable training, skills and abilities. 29 C.F.R. 1630.2(j)(3).

Federal regulations note that temporary, non-chronic limitations "are usually not disabilities." 29 C.F.R., Part 1630 App., §1630.2(j) (emphasis added). Many jurisdictions have ruled various kinds of temporary conditions – from pregnancy-related limitations to carpal tunnel syndrome – are not disabilities. Each case turns on its own facts. Adamson v. Pondera County (1999), HRC Nos. 9501006838 & 9601007417, pp. 4-5, including cases cited at footnote 2. Montana follows the federal interpretation (and decisions from other jurisdictions) that temporary impairment <u>can</u> be a substantial limitation to working when it interferes for a long enough time so that the worker has trouble securing, retaining or advancing in employment. Reeves, op. cit., ¶29-29; Martinell, supra. The Montana Supreme Court in Martinell approved an analysis that "transitory and insubstantial" conditions were not disabilities. Id. at 429-30. Martinell's conditions, in contrast to such transitory and insubstantial conditions, did constitute a disability, because they had lasted for two years and had cost her potential promotions and her job. Id. at 430.

Montana looks at the facts of each particular case to apply the state's disability discrimination laws. Butterfield v. Sidney Pub. Sch., 2001 MT 177, 306 Mont. 179, 32 P.3d 1243; Adamson, op. cit. In Butterfield, the Supreme Court relied upon the underlying facts of limitations in a broad category of work and reinstated a department decision finding disability, which the Commission had overturned. In Adamson, the Commission adopted the hearing examiner's proposed decision finding no disability, based upon the temporary nature of the limitations. Both cases illustrate that a claimant must prove substantial limitation by both severity and duration, and that the sufficiency of that proof is a fact question.

It should also be noted that this particular case arose when a worker with a compensable industrial injury also filed a discrimination case, invoking two very different kinds of law to apply to the developing situation between the worker and her employer. She ultimately went back to work with the employer, but pursued both her Workers' Compensation claims and her Human Rights claims, as is her right. However, at the intersection between these two kinds of claims, two very different views of what "disability" entails collide.

With regard to KMG removing Blais from the schedule for the last 40 days of the seasonal employment schedule in September-October 2009, and thereafter until her surgery in November 2009, her counsel established that KMG had not first taken a number of steps that might ordinarily be appropriate in addressing accommodations for an employee with a long-term disability, such as identifying her precise job-related limitations or considering possible accommodations with which she might perform the essential functions of her job, or ascertaining her potential accommodation preferences. However, as of September 15, 2009, Blais was not able to work at all, according to her treating physician. With slightly less than six weeks left for her seasonal employment and no certainty about when or whether she would again be released to work, KMG had no duty to take those steps, because at that point, Blais was off work due to pain problems that her doctor wanted to evaluate (to determine the origin of the pain and to treat it). She was not suffering from a long-term or permanent limitation in her ability to work. This was a temporary condition, of uncertain duration, and at that point it was not a disability. Adamson, pp. 4-7. Since it was not a disability, Blais has no claim under Montana anti-discrimination law for an alleged adverse action taken then because of her temporary condition. Her (at that point) temporary limitations due to her industrial injury were still being evaluated by her physicians, who took her off work, to evaluate the nature and extent of her temporary limitations, then released her to work within her temporary limitations, as assigned, with no certainty how long those limitations would last.

With regard to KMG failing and refusing to engage in an interactive process and failing and refusing to offer any positions of employment to Blais from her November 2009 surgery until she was released to return to work (with limitations) in March 2010, since Blaise was not released to work she was not a qualified worker, for purposes of disability discrimination law.

With regard to KMG failing and refusing to engage in an interactive process and failing and refusing to offer Blais any employment positions from March to November 2010, during which period her physician had released her to return to work with limitations in her activities, but she had not reached MMI. Blais still had temporary limitations, as she continued to heal from her industrial injury and surgery (and perhaps some complications therefrom). Worker's compensation looks with favor upon an employer who can and will find a light duty temporary position for such a worker. Montana disability discrimination law does not consider the worker disabled when the condition is not yet permanent or long-term because the healing period has not been completed, as already discussed.

It was not until MMI was reached, and Blais' limitations were established as permanent, that Blais had a disability resulting from permanent or long-term impairment that substantially limited her ability to engage in the major life activity of working. Her ability to work was obviously substantially limited before she reached MMI, after she was released to work within temporary limitations in March 2010, but during that time, the limitation did not result from a permanent or long-term impairment.

In November 2010, when she reached MMI, Blais had permanent or at the very least long-term limitations that precluded her from working in most of the jobs she had ever held. Thereafter, KMG did not engage in the full interactive process with Blais involving some quasi-clerical job openings, specifically the front desk agent position, to ascertain whether a reasonable accommodation was appropriate for this employee who sought to continue working despite the disability that she now had. KMG had already told Hale that it had no light-duty jobs, and perhaps thought it had no obligation to go further. But under Montana discrimination law, it did, in November 2010 and thereafter, have the obligation to go further and engage in the interactive process. Simply saying, "We have no light duty jobs" did not suffice.

As already noted, an accommodation is not reasonable if it involves undue hardship to the employer or danger to the health or safety of the claimant (or anyone else). In the front desk agent position, Blais would have needed immediate assistance with heavy lifting. Providing such assistance involved an undue hardship to KMG of making another employee immediately available to assist with heavy lifting. Absent immediate assistance by another employee, Blais would be forced to do the heavy

lifting for a guest. Thus, had KMG engaged in the interactive process, it is more likely than not that no reasonable accommodation could have been provided for the front desk agent position. KMG's failure and refusal to engage in the interactive process did not cause Blais any loss of wages.

However, the failure and refusal to engage in the interactive process did breach KMG's legal duty to make that independent inquiry regarding accommodation before deciding that Blais could not be rehired into that position. Failure to do so caused Blais emotional distress.

Emotional distress is compensable under the Montana Human Rights Act. Vainio v. Brookshire (1993), 258 Mont. 273, 852 P.2d 596. Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm, including emotional distress, due to violation of such a fundamental human right. Johnson v. Hale (9th Cir. 1994), 13 F.3d 1351; Vainio, p. 16, ftnt. 12; Campbell v. Choteau Bar and Steak House (3/9/93), HRC#8901003828.

KMG interposed two defenses to emotional distress damages. First, it moved to strike and disregard Blais' testimony about her emotional distress (from all factors, not just from the failure and refusal to engage in an interactive accommodation process after Blais reached MMI), because Blais failed and refused to respond to discovery requests about treatment for emotional distress. Because the only emotional distress recovery to which Blais is entitled is that caused by the refusal, after Blais reached MMI, to engage in the interactive accommodation process, that motion is denied. Had Blais prevailed on the entirety of her accommodation claims, applying to periods before she reached MMI (approximately 1 year after her surgery), the Hearing Officer might have been more favorably disposed toward striking Blais' testimony on emotional distress. Instead, the Hearing Officer has considered her testimony as the only evidence of all her alleged emotional distress, shaping her award to match the small portion of that alleged distress that could have resulted from the breach of duty to engage in the interactive process of accommodation.

Second KMG argued that emotional distress damages are covered by Workers' Compensation law. Perhaps that may be true in other jurisdictions, but Montana law makes it clear that the only damages available to a worker injured in an industrial accident, paid by the insurer for the employer, are lost income compensation (in a prescribed biweekly amount based upon varying portions of the wages earned at the time of the injury, over varying amounts of time), and payment of medical expenses. It is further clear that Blais' claims herein are not for damages due to her industrial injury but for damages resulting from KMG's illegal disability discrimination after her

industrial injury on July 28, 2009. Her receipt of workers' compensation benefits for her July 2009 industrial injury does not at all preclude her recovery of appropriate damages for emotional distress resulting from KMG's failure and refusal to engage in an interactive accommodation process after she reached MMI from her industrial injury in November 2010.

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

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

In this case, as in Johnson v. Hale and Foss, the evidence regarding the illegal acts (here, failure and refusal to engage in the interactive accommodation process) and Blais' testimony about her emotional distress, as well as her demeanor, establish a basis for an award of damages for that emotional distress. The evidence of emotional distress here is comparable to those cases. $3,000.00 is an appropriate recovery, averaging the $2,500.00 awarded in Foss and the $3,500.00 awarded in Johnson.

Pre-judgment interest on lost income is a proper part of the department's award of damages. P. W. Berry, Inc., op. cit., 779 P.2d at 523; Foss v. J.B. Junk, HRC Case No. SE84-2345 (1987). Emotional distress damages are not lost income, and are not losses capable of being made certain by calculation, under the terms of Mont. Code Ann. § 27-1-210. Blais is not entitled to any pre-judgment interest on the award for the compensable emotional distress that she suffered.

Since Blais did not prove any retaliatory acts by KMG, she cannot recover for the alleged retaliation she failed to prove.

V. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. §49-2-509(7).

2. Korman Marketing Group engaged in disability discrimination when, beginning in November 2010, it failed and refused to enter into an interactive accommodation process with Elise Blais to ascertain whether she was an otherwise qualified person, with or without a reasonable accommodation, to work for KMG in, specifically, front desk agent positions at the Montana ranch operated by KMG, until KMG commenced such a process with Blais that led to hiring her as the Branding Experience Coordinator in August 2011. Blais did not prove that had KMG engaged in the appropriate interactive accommodation process, it could have employed her without undue hardship before her rehire by KMG in August 2011. Therefore, KMG did not engage in any other disability discrimination against Blais. Blais did not prove that KMG retaliated against her in violation of the Montana Human Rights Act. Mont. Code Ann. §§49-2-101(19)(a) and (b); 49-2-301 and 49-2-303(a).

3. KMG is liable to Blais for $3,000.00, the amount that will rectify the harm she suffered from the emotional distress resulting from the failure to engage in the interactive accommodation process during the time specified. In addition, the Department must order KMG to refrain from engaging in the discriminatory conduct found and to engage in training of its management employees regarding the interactive accommodation process. Mont. Code Ann. §49-2-506(1)(a) and (b).

VI. Order

1. Judgment is found in favor of Elise Blais and against Korman Marketing Group on the charge that KMG failed and refused, during late 2010 until it actually commenced that process and, as a result, hired Blais as the Branding Experience Coordinator in August 2011, to enter into an interactive accommodation process with Blais to ascertain whether she was an otherwise qualified person, with or without a reasonable accommodation, to work for KMG. Judgment is found in favor of Korman Marketing Group and against Elise Blaise on all other charges of disability discrimination in employment and retaliation under the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.

2. Korman Marketing Group is ordered immediately to pay to Elise Blais the sum of $3,000.00, to rectify the harm she suffered from the emotional distress resulting from KMG's failure to engage in the interactive accommodation process

from November 2010 until it commenced that process and, as a result, hired Blais as the Branding Experience Coordinator in August 2011. Post judgment interest accrues on this amount as a matter of law.

3. Effective immediately, Korman Marketing Group is ordered to refrain from any future failure to engage in the interactive accommodation process with any person with a disability otherwise qualified to work, with or without an accommodation, for KMG.

4. Within 30 days after this judgment, Korman Marketing Group is ordered to arrange, for its management personnel at the ranch it operates in Montana, training of at least 4 hours duration, approved by the Department's Human Rights Bureau, regarding the proper interactive accommodation process to utilize in compliance with Paragraph 3 herein.

Dated: September 24, 2012

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Elise Blais, Charging Party, and her attorney, Michael J. San Souci; and Korman Marketing Group, Respondent, and their attorney, Eric Nord:

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 Marieke Beck
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 appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense.

BLAIS.HOD.TSP