BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0111014970:

ADLENE HOPE IVERS,	)	Case No. 1143-2012
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE OF**
	)	**ADMINISTRATIVE DECISION**
BENEFIS HEALTHCARE,	)	
	)	
Respondent.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Charging Party Adlene Hope Ivers (Ivers) brought this complaint alleging that Benefis Healthcare (Benefis) discriminated against her on the basis of disability when it terminated her from employment after she exhausted her Family Medical Leave Act (FMLA) leave time.[1]

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Great Falls, Montana, on May 30 and 31, 2012. John Seidlitz, attorney at law, represented Ivers. David M. McLean, attorney at law, and Ryan Willmore, attorney at law, represented Benefis.

Ivers, Kim Shannon, Benefis activities coordinator, Becky Pugh, Benefis social services coordinator, Pam Blackwell, Benefis employee, Frank Soltys, executive director of Benefis senior services, and Virginia Gewald, Benefis employee benefits analyst, all testified under oath. Charging Party's Exhibits 2, 5 through 9, 10A, 10B, and 11 through 14, and Respondent's Exhibits 101 through 109 were admitted into the record by stipulation. In addition, the depositions of Shannon (Exhibit 15), Gewald (Exhibit 16), Pugh (Exhibit 17), Soltys (Exhibit 18), and Ivers (Exhibit 110) were admitted into evidence by stipulation.

[1] Ivers also filed a complaint with the Human Rights Bureau alleging retaliation under the Montana Human Rights Act. After the conclusion of the hearing but prior to any briefing, Ivers withdrew her retaliation claim leaving only her discrimination claim for determination.

The parties filed post-hearing briefs and the last brief was timely filed on August 17, 2012. Based on the evidence adduced at hearing and the arguments provided in closing briefing, the following findings of fact, conclusions of law, and hearing officer decision are made.

II. ISSUES

A complete statement of the issues in this case is set forth in the May 23, 2012 final pre-hearing order issued in this case. Those issues are incorporated into this decision by this reference.

III. FINDINGS OF FACT

1. At all times relevant to this matter, Ivers resided in Great Falls, Montana.

2. At all times relevant to this matter, respondent Benefis Healthcare was a Montana Corporation organized and authorized to do business in the State of Montana.

3. Ivers began her employment with respondent on September 2, 2008. Throughout her tenure at Benefis, she worked as an activities aide.

4. Ivers completed her probationary period.

5. Ivers signed and filed a Leave of Absence Application on December 16, 2010 and again on January 5, 2011 requesting leave under the Family Medical Leave Act (FMLA).

6. On January 5, 2011, Ivers' physician prepared a Physician or Practitioner Certification, which indicated: "Probable Duration of Condition (Return date): To be determined by response to treatment."

7. Ivers was employed at Benefis as an activities aide at the extended care center. Ivers' position was for 64 hours every pay period, or 32 hours per week. Her supervisor was Kim Shannon.

8. Ivers injured her shoulder at work on January 2, 2010.

9. On May 13, 2010, Ivers requested leave for shoulder surgery. Ivers' request was granted and she returned to work in July of 2010. During this leave, she was paid from her vacation pay.

10. Workers' compensation is a part of an employee's FMLA benefit, thus an employee may use FMLA for workers' compensation time off.

11. Benefis employees had the choice to either be paid from workers' compensation or elect FMLA and be paid from their short-term disability. It was generally more beneficial to the employee financially to elect payment from short-term disability.

12. Ivers elected to take FMLA for the time off from May 2010 to July 2010 and be paid from her short-term disability.

13. Ivers received training from Benefis regarding FMLA and was aware FMLA was a 12-week leave over a rolling 12-month period. Ivers also knew personal leave needed to be requested in advance, pursuant to Benefis' policy, as she had received training on Benefis' personnel policies and procedures.

14. Shannon took FMLA leave beginning in October 2010. She did not return until mid-January 2011. In her absence, Becky Pugh assumed the responsibilities of activities coordinator, becoming Ivers' direct supervisor during the time that Shannon was on leave.

15. Ivers requested leave on December 11, 2010 because she felt weak and dizzy; however, she did not know what was wrong. Ivers signed and filed a Leave of Absence Application on December 16, 2010 and again on January 5, 2011 requesting leave under the Family Medical Leave Act ("FMLA").

16. The Leave of Absence Application provides the following language: "I UNDERSTAND THAT IF I DO NOT RETURN FROM MY LEAVE OF ABSENCE AT THE EXPIRATION OF THIS LEAVE, UNLESS AN EXTENSION HAS BEEN APPROVED IN ADVANCE, MY EMPLOYMENT MAY BE TERMINATED." Based upon the language in the application and Benefis' policies, Ivers should have known she could be terminated if her FMLA leave ran out.

17. Benefis provided Ivers with leave beginning in December 2010. Once FMLA leave was provided, Ivers never provided Benefis any documentation or communication from her physician allowing her to return to work.

18. On January 5, 2011, Ivers' physician prepared a Physician or Practitioner Certification, which indicated: "Probable Duration of Condition (Return Date): To be determined by response to treatment." As the January 5, 2011 certification indicated, Ivers was not able to perform work of any kind and was not able to

perform the functions of her position. Ivers did not know when she would be able to return to work.

19. Benefis attempted to determine the length of leave Ivers would require before she was able to return to work, but neither Ivers nor her medical providers could identify a time period.

20. During her leave, Ivers would occasionally contact Pugh to ask about how much FMLA time she had left. Pugh did not know and did not keep track of Ivers' FMLA hours. Pugh told Ivers to contact Gewald about the amount of FMLA time she had remaining. Pugh never told Ivers that she would have her job waiting for her when she returned from her leave. Pugh did, however, tell Ivers on several occasions that she hoped Ivers felt better.

21. Ivers' continuing absence created staffing problems for Benefis because Benefis "never knew whether [Ivers] was going to be able to come in or not." Pugh deposition, page 31, lines 1 through 9. Benefis had to use other activity staff members to cover Ivers' absences as the activities for the residents were an integral part of the services Benefis offered its residents in the extended care center.

22. On January 24, 2011, Ivers' FMLA leave expired. Benefis could no longer wait for Ivers to return from her leave and pursuant to Benefis policy, discharge was appropriate. As a result, Gewald consulted with Soltys, Pugh, and Shannon to determine how to proceed. At this point, neither Ivers nor her physicians could provide a date by which she would be released back to work. Soltys, Pugh, Shannon, and Gewald were aware of this fact. In addition, Soltys, Pugh, and Shannon were aware that Benefis needed to immediately fill the activities aide position in order to meet the needs of the residents. Because (1) Ivers was not released to perform work of any kind when her FMLA leave expired, (2) her leave was indefinite according to her medical providers, and (3) Benefis needed to fill her position in order to make sure that residents' needs were met, Soltys, Pugh, and Shannon agreed that Ivers' employment should be terminated as her FMLA leave had expired.

23. At the time Ivers' employment ended, Benefis only had the January 5, 2011 Physician or Practitioner Certification Form to rely on. That medical documentation provided no return date, and demonstrated Ivers was not able to perform work of any kind nor able to perform the functions of her position.

24. On January 27, 2011, Gewald telephoned Ivers to inform her that her FMLA leave had expired and that Ivers was being discharged. During that conversation, Ivers reiterated that she was not sure when she would be able to return to work. Ivers had not been released to work yet and Gewald still had no idea

whether Ivers would be returning to work "in one week or in one year." Gewald deposition, page 28, lines 24 through 25.

25. On January 27, 2011, Gewald sent Ivers a letter indicating her employment was terminated effective January 24, 2011 because her FMLA ended and she was not able to return to full duty from her FMLA leave.

26. Ivers did not ask for any accommodation and did not request to take any personal leave that she might have accrued.

27. Ivers exhausted her FMLA leave prior to being terminated. Ivers did not provide Benefis with a release to return to work prior to or after her employment was terminated. Ivers was released to work effective February 9, 2011.

28. At no time during her employment did Ivers make any request of Benefis for reasonable accommodation in her employment situation.

29. Ivers never asked for additional leave prior to her termination. Ivers never requested personal leave and never discussed personal leave with Virginia Gewald. Personal leave was not guaranteed at the expiration of FMLA.

30. Ivers was discharged from her employment with Benefis based on legitimate, non-discriminatory business reasons. Discrimination played no role in Benefis' decision to discharge Ivers.

31. After being discharged, Ivers did not apply for re-employment prior to the time that her position was filled in April 2011. Indeed, on March 10, 2011, when asked on an unemployment insurance benefits questionnaire whether she had applied for re-employment at Benefis, Ivers responded "No! I was terminated, why would they hire me back to the same or a different job." Exhibit 108.

32. Ivers has failed to persuade the trier of fact that Benefis' legitimate non-discriminatory reasons for discharging her were pretext for discrimination.

IV. OPINION[2]

Ivers argues that Benefis discriminated against her based on her injury by discharging her. Ivers has not argued that she requested any accommodation for her injury. Instead, her argument is strictly relegated to her contention that the

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

discharge itself evidences discrimination. Benefis argues that no discrimination occurred and Benefis was simply following its policy that any person who exhausts FMLA leave time and who cannot return to work must be discharged.

Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of disability commits an unlawful discriminatory practice. When there is no direct evidence of discrimination, the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *Heiat v. Eastern Montana College,* 275 Mont. 322, 912 P.2d 787 (1996). The parties to this matter agree that Ivers' matter is an indirect evidence case that is guided by the principles articulated in *McDonnell Douglas*.

McDonnell Douglas applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, 7 P.3d 386. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, *et seq.*, mirrors the Montana Human Rights Act prohibitions against discrimination. *E.g., Has The Pipe v. Park County*, 2005 ML 1044, ¶ 66. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Benefis has conceded that Ivers has made out a *prima facie* case. As such, under the *McDonnell Douglas* standard, the burden shifts to Benefis which must offer evidence that is sufficient, if believed, to support a finding that its decision to discharge Ivers was based on a factor other than her disability. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07, (1993); *Heiat,* 275 Mont. *at* 328, 912 P.2d *at* 791 (*quoting Texas. Dept. of Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981)). If Benefis carries that burden, Ivers must then "prove by a preponderance of the evidence that the legitimate reasons offered by [Benefis] were not its true reasons, but were a pretext for discrimination." *Id.*; Admin. R. Mont. 24.9.610(3). Ivers, however, at all times retains the burden of persuading the trier of fact that she has been the victim of discrimination. *St. Mary's Honor Center*, 509 U.S. at 507; *Heiat,* 912 P.2d at 792.

Benefis has demonstrated legitimate business reasons for its action of discharging Ivers. Ivers ran out of FMLA leave time and could not provide the employer with any indication of when she would be able to return to work. Benefis had to fill Ivers' position because the function she performed for Benefis was an integral part of Benefis' services to the residents and the continued strain upon provision of services created an undue hardship upon Benefis. Benefis has thus met its burden of showing lawful reasons for discharging Ivers.

As Benefis has met its burden of proof, the pendulum swings back to Ivers to show that Benefis' reasons are mere pretext. "[A] reason cannot be proved to be a '*pretext for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Heiat at* 328, 912 P.2d *at* 791 (*quoting St. Mary's Honor Center at* 515) (emphasis added). *See also Vortex Fishing Sys, Inc. v. Foss*, ¶ 15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has 'use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices.'" *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (*quoting Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982)). "An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action." *Cellini v. Harcourt Brace & Co.*, 51 F. Supp.2d 1028, 1040 (S.D. Cal. 1999) (*citing Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991)). *See also, Pollard v. Rea Magnet Wire Co,.* 824 F.2d 557, 560 (7th Cir. 1987) (noting that a reason honestly described but poorly founded is not pretext that shows discrimination and that no matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII does not interfere unless the employment decision emanates from discrimination). Where a charging party's evidence of pretense is strictly circumstantial, he or she "must produce 'specific, substantial evidence of pretext'" in order to prevail. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (*quoting Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). *See also Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1066 (9th Cir. 2004).

In an effort to demonstrate pretext, Ivers cites two reasons which she believes demonstrate pretext. The first is her contention that she applied for re-employment in February and March, 2011. The second is her assertion that the lapse in time between her discharge and the hire of a new employee to fill her position in April 2011 undercuts the urgency Benefis claims compelled in part its decision to discharge Ivers. The factual predicate does not exist to find that Ivers reapplied in February 2011 for her position. Had she done so, facing the loss of unemployment benefits, she would have almost certainly answered her March 7, 2011 unemployment questionnaire regarding her application in the affirmative. Instead, she answered the question with an emphatic "No." Ivers did not reapply for employment at Benefis as she claimed at hearing.

As to the second reason for pretext suggested by Ivers, the argument is not sufficiently persuasive to meet Ivers' burden. A barely two month hiring process to fill the position does not seem so inordinately long that it undercuts the legitimacy of Benefis' concern that the position be filled. A two month period is far more definite than the unknown and at the time of discharge unknowable period of recovery Ivers

might face. Moreover, a two month hiring process does nothing to unseat the hearing officer's conviction that it was not discrimination that caused Benefis to release Ivers. Benefis released Ivers because Ivers' FMLA leave had been all used up and she still could not return to work and there was no indication that she would be able to return to work in the future. Discrimination played no part in the decision. Considered in the context of the evidence presented before this tribunal, the hearing officer does not find that the two month time frame between Ivers' discharge and the hire of a new person for the position demonstrates pretext.

Ivers has also argued for the first time in her closing brief that Benefis failed to accommodate her disability. The hearing officer does not agree with this assessment for two reasons. First, there simply is no evidence that Ivers sought any type of accommodation from her employer. She never sought personal leave time and Ivers has cited no case law to support her premise that the employer must be omniscient and provide a reasonable accommodation where none is requested nor otherwise readily apparent to the employer.

More importantly, as the respondent correctly points out, the duty to accommodate does not require an employer "to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence." *Pannoni v. Board of Trustees*, 240 MT 130, ¶29, 321 Mont. 311, 90 P.3d 438. Stated differently, the problem with Ivers' argument is that Ivers, because of her inability to carry out any functions of her job, was not an otherwise qualified individual for whom a reasonable accommodation was required. This is because at the time of her discharge, Ivers could not perform any of the essential functions of her job due to her injury and neither she nor anyone at Benefis had any way to ascertain when she would be able to return to her work. *Pannoni*, ¶33. Ivers bore the burden of proof in this case to show that she could perform the essential functions of her job either with or without an accommodation. *Pannoni*, ¶33. The decision as to whether a person is a qualified individual is made at the time of the employment decision. *Pannoni*, ¶29. Ivers has not proffered any evidence to show that in fact at the time of the discharge she was an otherwise qualified individual. There simply is no evidence upon which the hearing officer can find that any accommodation was ever requested or that Ivers was a qualified individual such that an accommodation was required. Ivers' claim fails under the facts found in this case.

V. CONCLUSIONS OF LAW

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

2. Benefis' decision to discharge Ivers was not undertaken to discriminate against Ivers on the basis of disability.

3. As Ivers has not proven discrimination, her claim for damages is moot.

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

VI. ORDER

Based upon the foregoing, judgment is entered in favor of Benefis and Ivers' complaint is dismissed.

Dated: October 18, 2012

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: John E. Seidlitz, Jr., attorney for Adlene Hope Ivers, and David M. McLean and Ryan C. Willmore, attorneys for Benefis Healthcare:

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 original transcript is in the contested case file.***