

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0101014509:

JOSHUA KREILAUS,)	Case No. 1361-2011
)	
Charging Party,)	
)	HEARING OFFICER DECISION;
vs.)	NOTICE OF ISSUANCE OF
)	HEARING OFFICER DECISION
COLORADO TUBULAR AZTEC PIPE, LLC,)	AND SEALING ORDER
)	
Respondent.)	

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I. Procedure and Preliminary Matters

Joshua Kreilaus filed a complaint with the Department of Labor and Industry on July 13, 2010. He alleged that Colorado Tubular Aztec Pipe, LLC (CTAP), discriminated against him because of disability (Post Traumatic Stress Disorder), when it subjected him to a hostile work environment, failed adequately to investigate his complaints of a hostile work environment and discrimination, took adverse employment action against him because he was disabled, and made unlawful medical inquires because of his disability. On February 18, 2011, the Department gave notice that Kreilaus' Complaint would proceed to a contested case hearing and appointed Terry Spear as the hearing officer.

The hearing convened in Glendive, Montana, October 31, 2011, through November 2, 2011. Kreilaus attended with counsel, Michele L. Braukmann and Ross McLinden of Moulton Bellingham PC. CTAP attended through its designated representatives, initially Daryl Heinz and subsequently, when he became unavailable, Michael (Stoney) McCarrell, each with CTAP's attorneys Leonard H. Smith and Christopher C. Stoneback of Crowley Fleck, PLLP.

Charging party Joshua Kreilaus, Dr. Joan Dickson, Daryl Heinz, Michael McCarrell, Rebekah (Beka) Kreilaus, Tony Gaylen Newnam and Charles Struckhoff testified under oath.

Exhibits 3-7, 10-22, 26, 29-40, 42-43, 46, 104, 106, 111, 126, 129, 131-32, 135-36, 138, 141-46 were admitted into evidence.

Upon the filing of the last reply brief, the case was deemed submitted for decision.

Having considered the evidence, the applicable authorities and the arguments, the Hearing Officer now issues this decision.

II. Issues

The issues in this case are (a) whether CTAP illegally discriminated against Kreilaus in employment, because of disability, which includes whether he, in fact and law, had a disability; (b) what reasonable measures the department should order to rectify any resulting harm; and (c) in addition to an order to refrain from such conduct, what additional affirmative relief the department should require to correct and prevent similar discriminatory and/or retaliatory practices.

A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. The charging party, Joshua Kreilaus is an individual who resides in Glendive, Montana. In 1995, Kreilaus had joined the National Guard. He spent seven years in the Guard before going on active duty in the United States Army, where he intended to make his career. He was deployed in Iraq from October 2004 to September 2005 as an infantryman. While in Iraq, Kreilaus and his comrades in arms participated in daily firefights and combat situations for well in excess of 200 consecutive days, during which he killed enemy combatants and also witnessed fellow soldiers and friends killed, including his direct military supervisor.¹

2. When Kreilaus deployed to Iraq, he left his wife, Rebekah Kreilaus, and their four children back home. While living with his family prior to being deployed, Kreilaus would regularly attend church, take his children to the park, and accompany his family to the grocery store. He would eat dinner at the table every night with his family, treat his wife with love and affection, and play with his children and participate in parenting them. He was a good husband and loving father.

3. After returning from Iraq, Kreilaus withdrew from his daily activities, from his wife, and from his children. He did not have any friends. He could not be in crowds or traffic without becoming agitated. He was unable to engage in normal activities with his family that he formerly enjoyed, such as going to the grocery store or shopping mall with them, or going for walks with them. He could not stand to sit at the dinner table with his family and eat a meal, because there was too much

¹ “Combat situations” included direct exchanges of fire, with various weapons, between soldiers and enemy combatants, but also included attacks by suicide bombing and attacks by ambush with various explosive devices. Kreilaus’ commander died in a suicide bombing of a mess hall, for one pertinent example.

activity around him for him to monitor everything and verify that it was safe. He could not readily drive, because his experiences with roadside bombs left him hyper-alert for possible sources of ambush by explosives.

4. Kreilaus' home life consisted of going into an extra bedroom in the house and "basically hid[ing] out." His children feared him, and his wife feared for him. Not only was he unable to participate in everyday life with his family, he also did not want his family to do so without him. His wife summarized that "[h]e wasn't Josh anymore."

5. Kreilaus' PTSD also substantially affected his ability to sleep. He could not relax his guard enough to sleep. If he finally did fall asleep, he could not stay asleep, experiencing intense nightmares, waking up with night sweats and adrenaline pumping, typically unable to go back to sleep.

6. Kreilaus did not want to seek help for these problems. He eventually saw a medical doctor who suggested counseling. He then visited a chaplain who suggested professional counseling. Kreilaus sought professional counseling while continuing to meet with a physician and a chaplain.

7. Kreilaus was diagnosed with Post Traumatic Stress Disorder (PTSD) and depression secondary to his PTSD. He was prescribed, and continues to use, medications for his PTSD. He continued and continues to see a counselor, a psychiatrist and a chaplain.

8. After evaluations by multiple psychiatrists and medical professionals and considerable testing, Kreilaus received a disability diagnosis of PTSD. He was already disqualified from combat assignments because of a mobility limiting knee injury sustained in combat. With his PTSD, he could not be deployed away from his medical and counseling support, and was therefore no longer qualified for any active duty. He was placed on temporary medical retirement. After further review a year later, he was placed on permanent medical retirement.

9. After being classified as disabled with PTSD by the military, Kreilaus was subjected to a second and independent extensive evaluation, by the United States' Department of Veteran Affairs ("the VA"). The VA found Kreilaus eligible to receive, and he began to receive and still receives, VA service-related disability benefits.

10. Kreilaus views his PTSD diagnosis and his resulting forced medical retirement as indications that he was not "good enough," that he "couldn't hack it." He still has difficulty accepting that he has problems for which he needs help, and he still has difficulty asking for help.

11. Medication that effectively eases the impact of PTSD is problematic. The efficacy of the available psychiatric drugs can differ from patient to patient, and can be only be verified for any particular patient through use over time. Which of the possible side effects any particular patient will experience is equally unpredictable. Kreilaus' doctors necessarily experimented with various medications, relying on Kreilaus' reports of how he felt, as well as his observed and reported behaviors, in deciding which drugs worked best for him and had the least debilitating side effects.

12. For Kreilaus, one of the most effective drugs has been and is Cymbalta. With appropriate daily doses of Cymbalta (which vary over time and circumstances), Kreilaus is better able to cope with his PTSD. With effective medication, he has resumed going out in public and eating dinner with his family, as he before could not. He does not need to isolate himself in his home so much. He still has difficulty dealing with crowds, but Cymbalta also helps him cope with driving in traffic, as well as with falling asleep and sleeping longer, with fewer nightmares. To qualify for use of Cymbalta through the VA, a patient must first have been medicated without success with more commonly used medications addressing PTSD. Kreilaus met this requirement.

13. Increased physical and emotional stress tend to exacerbate PTSD symptoms, so Kreilaus' treating health care professionals also provide him with medication (Ativan or Xanax), for use as needed, to reduce anxiety. He is not on a continuous prescription for such anti-anxiety drugs, because they are potentially very addictive. Used as prescribed, these anti-anxiety drugs have not interfered with Kreilaus' ability to operate motor vehicles and other machinery.

14. Kreilaus' psychiatrist, Dr. Joan Dickson, testified that without Cymbalta, Kreilaus would be unable to interact with others in any capacity, and would have no capacity to sleep normally. Even with the medication, Dr. Dickson testified that Kreilaus' PTSD significantly impaired his ability to interact with others and to sleep. Her testimony regarding his problems, the necessity for using medication, therapy and carefully monitoring, was credible.

15. PTSD includes an abnormally heightened alertness about potential dangers (hypervigilance). Kreilaus struggled and still struggles with hypervigilance. There is always the risk that the hypervigilant PTSD sufferer will perceive threats that do not exist and also may overreact to either real or perceived threats. For Kreilaus, as for many combat veterans, anger control issues are also a significant part of his PTSD. The combination of anger control issues and difficulties ascertaining the reality and degree of apparent threats and responding appropriately to apparently threatening stimuli, for veterans trained and experienced in rapid and lethal responses to life-threatening violence, is a serious problem. Dr. Dickson and Kreilaus both, in

understated fashions, testified about the work he must do to maintain his emotional stability under stress. Dr. Dickson has relied and still relies upon the accuracy and honesty of Kreilaus' reports about events in his daily life and about his feelings and reactions to those events. This Hearing Officer finds that the reliance of a trained professional upon the reports of Kreilaus about his condition and his situation lends credibility to his reports, in his testimony, of the events relevant to his claims herein.²

16. After his medical retirement from the U.S. Army, Kreilaus relocated to Glendive, Montana, to seek employment with the BNSF Railway Company. The pay and the longevity appealed to Kreilaus, who was looking for a new career to replace his military service and to support his family. A downturn in railroad hiring prevented him from embarking upon this career.

17. Kreilaus took a job with a company called Schlumberger, out of Baker, Montana. Kreilaus could not afford to relocate to Baker, so he commuted from Glendive every day, leaving home around 4:00 a.m. and returning around 10:00 p.m. Kreilaus was a field technician trainee and worked six days a week. Kreilaus worked daily with six or seven other workers, and they "all got along pretty well."

18. During his employment with Schlumberger, Kreilaus attended counseling sessions every other week for his PTSD. This was well known by his employer, and Kreilaus talked openly with both the employer and his colleagues about the fact that he had PTSD.

19. At some point in his employment with Schlumberger, Kreilaus began to have some concerns about safety issues. He was performing work that he was not licensed to do, which caused him some concern. His biggest worry, however, was his three-hour commute to and from work every day, which resulted in him having to drive at night and very early in the morning while very tired.

20. Kreilaus eventually chose to resign from Schlumberger after nine months because of his concern over the commute. Throughout his employment with Schlumberger, Kreilaus never received a single negative performance evaluation or write-up of any kind.

21. After leaving Schlumberger, Kreilaus began a new search for full-time employment. He eventually found it with the respondent, Colorado Tubular Aztec Pipe, LLC (CTAP).

² Dr. Dickson's testimony regarding what actually happened at work at CTAP is NOT evidence of what actually happened at work at CTAP. Her reliance upon Kreilaus, in general, as a reliable source for information about what actually was happening in his life, gives credence to his accounts of what was actually happening in his life.

22. CTAP is a Colorado Limited Liability Company that operates “yards” in which it receives, repairs, stores, sells and distributes and delivers circular pipe, or tubing, in various sizes, for use in the oil and gas extraction industries. It has yards in Colorado, Utah, North Dakota, and Montana. It has been operating for more than 25 years. It currently has more than one hundred employees, in a hierarchical management structure. Specifically, CTAP has managers at each of its yards (a yard supervisor) who reports to a regional manager, who in turn reports to a vice-president of operations, who in turn reports to the members (ownership) of the company. CTAP maintains a yard in Glendive, Montana.

23. Kreilaus applied to CTAP for a yard hand position that had an advertised wage of \$12 to \$15 per hour depending on experience. The description of the position he applied for had defined yard hand responsibilities (including loader operation), longevity in employment duration, and available benefits for Kreilaus. On his three job applications to CTAP, Kreilaus indicated that he had been employed with the military on active duty and was now medically retired from the military. All three job applications clearly stated his medical retirement.

24. Kreilaus interviewed with Michael (“Mike” or “Stoney”) McCarrell, CTAP’s Vice President of Operations, and Allen Frey, the yard supervisor. During his interview, Kreilaus said that he was interested in upward mobility and progression in pay because he could only support his family on \$12 per hour for a few months.

25. McCarrell told Kreilaus that he could easily and quickly make \$15 per hour, and that the way to do so was to do a good job as a yard hand, then train on a loader and become a loader operator. McCarrell told Kreilaus that CTAP was looking for a third loader operator and, if Kreilaus really worked at it, he could become a loader operator within six months. Kreilaus understood this to mean that, if he worked hard and learned what he needed to, he could be operating a loader around the six-month mark and could receive a pay raise to \$15 per hour.

26. McCarrell did not promise Kreilaus that he would become an operator within six months, and Kreilaus could not reasonably have understood McCarrell to have made any such promise. CTAP was working toward greater utilization of a second “overflow” yard in Glendive, which it expected would lead to greater need for loader operator and yard hand work. There were excellent prospects for rapid advancement, but no guarantees that the additional work would materialize, and no assurances that Kreilaus rather than other workers would reap the benefits of any additional work that did materialize.

27. It was important to Kreilaus to make \$15 per hour as soon as possible because he was trying to get off of the Social Security benefits he was currently

receiving. In fact, Kreilaus and his wife submitted all of the paperwork to SSI for reduction and, ultimately, termination of their SSI benefits, based upon the wages and benefits that Kreilaus would be working towards making at CTAP.

28. Kreilaus discussed his PTSD in his interview with McCarrell and Frey. Kreilaus told them he was attending counseling every two weeks for PTSD and that he would need time off to attend those appointments. Kreilaus informed McCarrell that he did not deal well with crowds, heavy traffic, or confrontation.

29. CTAP hired Kreilaus on February 9, 2010, as a yard hand in its pipe yard in Glendive, Montana, at an hourly rate of \$12.00. At the time Kreilaus was hired, yard hand benefits included health insurance for the employee, some dental coverage, but no vision coverage. Any coverage for dependents had to be paid for by the employee.

30. The evidence established that CTAP was on notice that Kreilaus had PTSD.

31. The only initial “accommodation” for his PTSD that Kreilaus requested, which did not actually amount to an accommodation, was the ability to attend medical appointments relating to his PTSD. CTAP did not hinder Kreilaus’ capacity to attend medical appointments in any way, but there is no evidence that doing so departed from or went beyond its standard practice for all employees.

32. For Kreilaus and his family, obtaining the job at CTAP meant a realistic opportunity for greater financial security with a long-term career for Kreilaus. His wife understood that this “was the job [in which he, Kreilaus] was going to retire, that he had found his niche and that [CTAP] was a good place to be.” Kreilaus was contemplating buying land in Glendive, now that he and his family would no longer need to move around like they had when he was in the military.

33. In addition to the counseling sessions Kreilaus attended every two weeks while at CTAP, Kreilaus continued to meet and continues to meet with Dr. Dickson every two months regarding his continued medication support.

34. CTAP offered Kreilaus the yard hard job immediately after the interview, contingent upon passing a drug test, which Kreilaus passed. Drug screening at CTAP is outlined in CTAP’s employment manual. CTAP does not test for anti-depressant or anti-anxiety medication, such as Cymbalta and Xanax. CTAP made no inquiry about medications that Kreilaus was taking, even though some loader operation was likely to be assigned within his job duties as a yard hand. After the interview, Frey showed Kreilaus around the yard, and Kreilaus again mentioned that he had PTSD.

35. When Kreilaus started his job with CTAP, he was given paper work to sign and return. One such document stated that his employment had a 90-day probationary period. Based upon the language of this document and conversations Kreilaus had with administrative staff, Kreilaus understood that he was on a 90-day probationary period at the start of his employment, during which CTAP asserted the right to terminate his employment at will.

36. When Kreilaus first contacted CTAP about the yard hand position, he was provided a Department of Labor & Industry Transcript for Job Order. The Job Order showed that yard hand duties included loading and unloading trucks and rail cars, general maintenance, and yard cleanup. Loader operator experience was preferred, but not required.

37. CTAP yard hand is an entry-level position, with essential duties including:

- Tallying inventories and providing tally results.
- Maintaining yard cleanliness and safety.
- Assisting in shop, where directed.
- Light maintenance of transportation resources.
- Loading and unloading trucks and rail cars, as directed.
- Working for improved customer relationships.

38. CTAP could assign yard hands other duties. Yard hands got their direction from their supervisor. They did whatever needed to be done. Yard hands, including Kreilaus, assisted in the shop as directed. Yard hands were candidates for loader operator training, as needed and appropriate.

39. Before Kreilaus had begun working at the overflow yard, he had started training to operate a loader. McCarrell trained Kreilaus how to operate a loader. Toward the end March 2010, Kreilaus had become proficient enough at operating a loader to do so on his own. He then began unloading train cars on the weekends.

40. Around this same time frame, CTAP also requested that Kreilaus perform some welding repairs as additional duties. Kreilaus had welding training and experience and was proud of his welding. He performed welding tasks for CTAP, including sometimes welding approximately two days per week. Kreilaus never requested release or relief from welding duties.

41. Kreilaus generally performed loader operations in CTAP's overflow yard on an intermittent as needed basis. CTAP had no permanent loader operator position for the overflow yard at the time of Kreilaus' employ.

42. A primary function of Kreilaus' loader operations was to move damaged pipe racks to the shop where he could perform welding work on them. Generally, as

Kreilaus understood, a yard hand was supposed to “be the legs of the loader operator.” The loader operator was in charge and directed the yard hand’s work.

43. Kreilaus reasonably expected that CTAP was going to open up a full-time position at the overflow yard, and that he and other workers were working there to prepare that yard.

44. At some point, probably in late March 2010, Kreilaus learned that CTAP was issuing a \$500.00 quarterly yard bonus to employees at the yard, and he understood that the only reason he did not receive this quarterly bonus was because he had not yet been there for six months.

45. In early April 2010, Kreilaus received written certification from CTAP that he was authorized to operate CTAP’s loaders. Kreilaus was told by CTAP’s supervisor (the supervisor who certified him on the loaders) that he was “good to go” on operating the loaders at the CTAP yards, which Kreilaus thereafter regularly did.

46. While working at CTAP, Kreilaus did not hide the fact that he had PTSD. He spoke with the other yard hands (David Sievers, Will Brown, and Josh Conrad) about it. He spoke to Tony Newnam (a loader operator) about his PTSD. He spoke regularly with Frey about the fact that he had PTSD and had to seek regular medical care for it.

47. In early April, Kreilaus tried to find out the specific date that he would be off probation. He needed new boots, which CTAP would pay for if he was off probation. He wanted to be able to use sick leave for his bi-monthly counseling sessions, and sick leave benefits were not provided until after the probationary period. He wanted to know when his other benefits started, including his dental benefits, because his daughter needed braces and other dental care.

48. Kreilaus first approached Frey, who told him that the probationary period was 90 days and that he should talk to Sarah Hallock, another CTAP employee. Hallock told Kreilaus the probationary period was 90 days but that she would confirm the actual day his probation concluded. The next day, Hallock gave Kreilaus an email stating his probationary period was 90 days, without confirming the date his probationary period would end.

49. Kreilaus intended to enroll in CTAP’s benefits once his probationary period was up. Specifically, he intended to enroll in the health, dental, and vision plans, as well as the profit-sharing plan provided by CTAP. Kreilaus continued his employment with the intention of enrolling in benefits and continuing his upward advancement when his probation was over.

50. During the first few months of Kreilaus' employment, other yard hands were hired. David Sievers, a cousin of another yard hand, Will Brown, was hired. Other employees worked at the yard, including Newnam, a yard hand and loader operator (who was hired a few months before Kreilaus was hired) and administrative personnel, including Sarah Hallock. As already noted, Frey was the Yard Supervisor, and McCarrell was the Vice President of Operations overseeing all of CTAP's yard locations, including the Glendive yard.

51. In mid to late March, Kreilaus began to have concerns about things that were going on at CTAP. He began to experience what he perceived as harassment and began to feel he was in a hostile work environment.

52. One of the issues that repeatedly arose and significantly affected Kreilaus' PTSD had to do with burning rubber. Brown and Sievers would burn rubber in burn barrels. Kreilaus had repeatedly asked them not to because it brought back horrific memories of his military time in Iraq. In Iraq, dead people, dead animals, trash, and dangerous items were often burned on the side of the road, and combat troops were especially aware of the pungent odor, the possibility of roadside bombs in these burn piles, and various other life-threatening issues. Having the rubber burned in the barrels at CTAP reminded Kreilaus of his active service duties, and it exacerbated his post-traumatic stress. Kreilaus offered to take on the extra job duties of disposing of the rubber himself. He asked Brown and Sievers to pile the rubber up off to the side, and he would later get rid of it in another manner.

53. In response to Kreilaus' complaints about the burning rubber, Kreilaus was told by Brown and Sievers that they would continue to burn rubber and that, for a combat veteran, he had a weak stomach. These employees even mocked Kreilaus by referring to him as a "little bitch" because he could not handle the smell of burning rubber.

54. The burning rubber exacerbated Kreilaus' PTSD to the point that his heart rate and breathing increased around the smell, he would feel an intense need to seek cover, and he would instinctually position himself so that he could see everything around him. He would come home frustrated, tense, and worried.

55. Kreilaus reported the problem to his supervisors but CTAP did not stop Brown and Sievers from burning rubber around Kreilaus.³

56. Brown and Sievers began to refer to Kreilaus (within his hearing but not necessarily to his face) as "GI Jane." Kreilaus was offended by these references,

³ CTAP eventually ceased burning rubber in the yard, for reasons unrelated to Kreilaus.

because of the mocking connotation, and because he takes great pride in his military service and the fact that he is a veteran of a foreign war. The degree of harassment escalated.

57. Kreilaus' ability to sleep began to deteriorate and his ability to interact with his family regressed. His wife described it as "he stopped sleeping and we stopped eating at the dinner table and we stopped going to the park and we just stopped."

58. Kreilaus' wife observed that he was particularly affected by the mocking comments, which he began reluctantly reporting to her, because it made him feel like a failure. It reminded him that, in his mind, he was not good enough to be in the military. The feelings of failure created as a result of the workplace environment at CTAP fueled his PTSD symptoms.

59. Kreilaus also felt threatened by various statements from Newnam, who assumed supervisory duties over the other yard hands when Frey was not immediately present. Newnam repeatedly referred to himself as "One Punch Tony," and told Kreilaus that "he did not want to piss the old man off." Newnam also told Kreilaus that disagreements between co-workers in the oil field (his previous employment position) used to be settled by going down to the coulee and fighting. Kreilaus reasonably experienced these statements as hostile and threatening.

60. Kreilaus felt intimidated by Newnam's statements and conduct. At the same time, it is also reasonable to infer that Kreilaus was concerned that a physical confrontation with Newnam would trigger his combat responses, and that he might seriously injure Newnam. This intimidation and concern increased Kreilaus' stress at work and reduced his ability to cope with his PTSD.

61. Kreilaus felt especially intimidated because Newnam, with Brown and Sievers, seemed to have "ganged up on" him. The hostility and harassment continued to get worse over the course of Kreilaus' employment, even though he repeatedly raised these issues with his supervisors.

62. At the end of April 2010, a new Northern Regions Operations Manager, Daryl Heinz, came to work for CTAP. Heinz was hired by CTAP's managing partner. During the course of his hiring interview, Heinz was not asked about his knowledge of any workplace harassment or employee disabilities issues.

63. As Northern Regions Operations Manager, Heinz became responsible, at the end of April 2010, for operations in the CTAP yard in Glendive and in CTAP's yards in Ross and Bowman, North Dakota. Frey still ran the day-to-day operations of the Glendive yard. At that time, there was no individual assigned specifically to

manage the entire location, including dispatching, truck drivers, office people and all of the aspects of the location aside from day-to-day physical operations in the yard. Thus, Heinz became responsible for that oversight, immediately above Frey in the chain of command. He began to spend time at each of three sites for which he was responsible, beginning to learn the operations at each site. He was almost immediately confronted with the situation involving Kreilaus.

64. Kreilaus offered to work part-time until a permanent solution to the harassment and hostile work environment could be implemented. Kreilaus' offer to work part-time was, in his mind, a temporary way of removing himself from the harassment and hostile environment until Heinz could come up with a solution. CTAP told Kreilaus he could not work part-time.

65. Approximately two weeks after offering the temporary solution of working part-time to remove himself from the daily stress he was undergoing as a result of the actions of his coworkers, Kreilaus again was threatened by Newnam. Newnam pulled up in his loader in front of Kreilaus and started yelling down from his loader that he was tired of Kreilaus not doing his job and that Kreilaus needed to do what Newman told him.

66. Being yelled at by Newnam for not doing his job was very bothersome to Kreilaus because Frey had never told Kreilaus that he was not doing his job. In fact, Kreilaus had been told just the opposite. Kreilaus believed that he was advancing in his position. He was operating the loader on a regular basis, he was regularly working overtime hours, he had never received a critical performance review or write-up, and he had been routinely told by McCarrell and Frey that he was doing well.

67. Kreilaus also was concerned that Newnam seemed more and more insistent upon directly supervising his work. Newnam was one of the three individuals regularly involved in harassing conduct towards him. Being under Newnam's supervision and control was therefore threatening.

68. Kreilaus suggested to Newnam that they should both go speak to Frey about this issue. Shortly thereafter, Kreilaus and Newnam did, in fact, meet with Frey and Heinz. At that time, Heinz had been with CTAP for no more than a "couple of weeks."

69. In that meeting, Kreilaus again explained the harassment, intimidation, and hostile work environment that he was feeling, as well as explained this latest instance of Newnam verbally assaulting him. Kreilaus also again offered to temporarily work part time until a permanent solution to the harassment and hostile work environment could be found. CTAP again refused to allow Kreilaus to work part-time, even for a short while until a solution was found. CTAP did not offer an

alternative solution, other than that Kreilaus would just have to wait until he could run a loader full-time at the overflow yard. Kreilaus was told that, when Frey left the yard at the close of his day (which generally concluded around 2 p.m.), Newnam, the loader operator, would be directing the work of the yard hands.

70. Two days later at the overflow yard, Newnam again verbally attacked Kreilaus, who was operating a loader at the time. Newnam pulled up in his loader next to Kreilaus and began berating Kreilaus. After Kreilaus stated that he was just doing what he was told a few days ago, Newnam left and then returned a short while later. Newnam told Kreilaus that he had spoken with Frey, and that Kreilaus was to do as Newnam said. Newnam then again told Kreilaus he better not piss the old man off. In light of Newnam's previous statements about physically attacking those who did "piss off" the "old man," Kreilaus reasonably took this to be a thinly veiled threat. Kreilaus then parked his loader and returned to the main yard to seek clarification from Frey.

71. When Kreilaus tried to explain to Frey that issues with Newnam had not been resolved, Frey acted frustrated and simply told Kreilaus that, if he could not go and work with Newnam, he should just go home. Given this ultimatum, Kreilaus felt he had no other choice but to go home. He was fearful that the overflow yard was the perfect place for Newnam to try to carry out his threats of violence, because no one else was around to observe Newnam's conduct except sometimes the other two harassers.

72. Kreilaus had reached the point where he was afraid he would be physically assaulted if he returned to CTAP. The evidence is unclear regarding whether this was an objectively valid fear. The evidence is clear that it was a reasonable fear for Kreilaus, a combat veteran with PTSD, to feel in response to the unchecked behavior of Newnam, Brown and Sievers towards him.

73. This confrontation with Newnam exacerbated Kreilaus' PTSD to the point where he sought treatment from Dr. Dickson outside of his usual scheduled treatment. Kreilaus had himself identified that the Cymbalta was not helping him cope with the harassment and hostile work environment as much as he needed it to, in order to continue to do his job at CTAP. Kreilaus also was seeking guidance from Dr. Dickson on his best course of action in dealing with his PTSD symptoms in the context of what was occurring at CTAP.

74. In his emergency appointment with Dr. Dickson, Kreilaus spoke to her about the harassment and hostility, as well as the meeting with Heinz, Newnam, and himself. In response to the circumstances Kreilaus was facing, as well as the effect it was having on him, Dr. Dickson increased Kreilaus' daily Cymbalta dosage from 60

to 90 milligrams, gave Kreilaus a new prescription for Xanax for emergency relief, and instructed Kreilaus to not return to work that day in order to give his new medication time to take effect.

75. Based upon his doctor's advice, Kreilaus did not return to work the next day. Kreilaus' wife, Rebekah, who is very experienced in observing and coping with the effects of Kreilaus' PTSD, was so concerned by this latest incident at work and the increasing workplace harassment, that she decided she had to try to reach someone at CTAP for help on Kreilaus' behalf.

76. She took this action because Kreilaus reported to her that he kept going to his supervisors for help but was just not getting any help. At home, Kreilaus was regressing back to his post-Iraq days. He would call and speak with CTAP supervisors, after which his levels of distress were noticeably worse. Rebekah observed that her husband "wasn't functioning any more. And functioning, I mean eating and sleeping and interacting, he just wasn't."

77. Given Kreilaus' behavior at home, his wife went ahead and looked up the information in CTAP's Employee Handbook about how to report complaints of discrimination and harassment. She saw that CTAP identified an EEO officer, Charles Struckhoff.

78. Not long before Kreilaus came to be employed by CTAP, Struckhoff had appointed himself the EEO officer for CTAP simply because a consulting company had recommended that CTAP have an EEO officer. Struckhoff neither had nor had sought any training to become familiar with what an EEO officer did. He had no training regarding human resource issues or EEO issues. He had no training on how to deal with individuals with disabilities or workplace harassment. As far as Struckhoff knew, CTAP did not have had any policies or procedures in place on how to conduct investigations of harassment, hostile work environment, discrimination, intimidation, or threats.

79. Kreilaus' wife called Struckhoff to discuss what was occurring. Struckhoff returned the call and, first spoke with Kreilaus' wife, and then, ultimately spoke with Kreilaus. In her conversation with Struckhoff, Kreilaus' wife explained that Kreilaus was afraid to return to work at CTAP and also afraid to call Struckhoff because no other supervisor had taken action when Kreilaus tried to seek help from supervisors – in fact, it made things worse. Struckhoff said that was not tolerable and that people were not going to be threatened. To Rebekah, Struckhoff "seemed floored" as she was explaining to him what was going on with Kreilaus at CTAP. Struckhoff told her that Kreilaus would not be threatened anymore, that he would be safe at work, and that he would not get in trouble for her calling Struckhoff.

80. In his conversation with Struckhoff, Kreilaus recapitulated the hostile work environment, harassment and name calling. He recited that he had spoken to his supervisors and nothing had been done. Kreilaus also told Struckhoff that he had gone to see his doctor, and that he had been prescribed additional medication for his PTSD. Since Struckhoff was at an airport when he spoke to Kreilaus, he told Kreilaus he would follow up the next morning.

81. The next morning, on May 18, 2010, Struckhoff called Kreilaus. Kreilaus reiterated everything that had been going on at CTAP. Kreilaus further explained that he had reached a point where he was unable to continue to work in that environment and that his wife had reached out to Struckhoff as CTAP's EEO officer since Kreilaus' supervisors in Glendive would take no action.

82. After discussing the complaints at length, Struckhoff then inquired as to whether there were any other problems at the Glendive yard that Kreilaus had observed. In response, Kreilaus mentioned some suspected policy violations that he had witnessed. One of these policy violations included employees staying on the time clock even when they had gone home, and then later coming back and clocking out. This seemed to especially concern Struckhoff. Struckhoff then instructed Kreilaus to write him a letter first outlining these suspected policy violations followed by the threats and hostile work environment, so that the issues were detailed out in clear, chronological order for his review.

83. In that phone conversation, Struckhoff informed Kreilaus that he, Struckhoff, would arrange his schedule so he could come to Glendive personally to address these issues. Struckhoff then instructed Kreilaus not to return to work until instructed otherwise, to give him time to travel to Glendive and address the issues.

84. At the time of this conversation with Struckhoff, Kreilaus' sleep, social interactions, and daily working and living activities were being severely impacted by what was going on at CTAP. He was not sleeping, and when he was able to get a few minutes of sleep, the nightmares woke him up again. He was distancing himself from his family. He had regressed back to how he had been shortly after returning from Iraq. Kreilaus simply was not functioning anymore. His family could not even get him to come to the dinner table, and if he did, nobody could talk. He had returned to being, in substance, shut down, and he was off work and unable to do any productive work or life activities.

85. In response to Struckhoff's request that he do so, Kreilaus composed a very detailed and lengthy letter ("complaint letter") to Struckhoff outlining what Struckhoff had asked him to address – in the order Struckhoff requested. In his letter, Kreilaus specifically referred to Brown, Newnam, and Sievers by name, and he

specifically referenced the issues regarding the burning rubber, harassing comments, intimidation, Newnam's "one-punch Tony" and "don't piss the old man off" threats and the grouping together and ganging up Kreilaus felt he was receiving. He also specifically mentioned that he had PTSD, that he was a disabled veteran, and that he took medication daily and did not handle angry confrontation the same as most people. Kreilaus outlined the impact all of this had on him, regarding both his increased medication and the effects upon his job performance, family life, sleep and health.

86. At this time, Kreilaus trusted Struckhoff to come to Glendive and address the issues. Kreilaus was hopeful that things would be quickly addressed, and that he would be returning to work. He was looking forward to it.

87. Struckhoff, however, never came to Glendive. In fact, Struckhoff never spoke with Kreilaus again.

88. Instead, Heinz requested that Kreilaus come meet with Frey and him a day or two later, on May 20, 2010. In that meeting, Heinz (who had a copy of Kreilaus' complaint letter) focused solely on discussing the suspected policy violations with Kreilaus. There was no discussion of Kreilaus' PTSD or the harassment he had been experiencing.

89. Heinz indicated that he would be doing an investigation of the policy violations and Struckhoff would come to Glendive to look into the harassment issues. Heinz also informed Kreilaus that he would be placed on paid leave until further notice or the completion of investigation. Kreilaus had concerns about being placed on paid leave because he would only get paid for 40 hours per week when he customarily worked a significant amount of overtime each week, which greatly increased his paychecks. Kreilaus also questioned why he was the one being placed on leave when he was not the one that was being investigated for wrong-doing.

90. In a follow-up phone call about being on leave, Heinz told Kreilaus that although CTAP was willing to return him to work, "returning to work would only add fuel to the fire." Kreilaus now became concerned about the confidentiality of his complaints, as well as more fearful of further harassment and intimidation.

91. The next time anyone from CTAP talked to Kreilaus was in a follow-up meeting with Heinz and McCarrell a week later, on May 27, 2010. Kreilaus went to the meeting with the understanding that Heinz and McCarrell would be discussing the outcome of the policy portion of the investigation. Kreilaus did not have any information about what CTAP was doing to address his complaints of workplace harassment and intimidation, but he continued to trust that Struckhoff would come to Glendive to address the problems. In the week's time between this meeting and

the last, no one from CTAP talked to Kreilaus, his wife, or his doctor about the workplace harassment issues identified in his complaint letter.

92. In the May 27th meeting, CTAP gave Kreilaus an investigation summary letter. Kreilaus learned at this meeting that Heinz had conducted the one and only investigation done regarding his harassment and hostile work environment claims.

93. Heinz had no formal training on the Americans with Disability Act (ADA), in its original or amended forms, nor on the Montana Human Rights Act. He had no experience or knowledge on how to conduct an investigation of alleged harassment, discrimination or hostile work environment.

94. In his investigation, Heinz did not make any inquiries of any employees regarding the acts alleged by Kreilaus to constituted harassment and a hostile work environment. Heinz did not consider how Kreilaus might have interpreted what was going on at CTAP. Heinz did not consider, nor make into inquiry about, nor obtain any information regarding, Kreilaus' PTSD or even PTSD in general. In the investigation summary letter, CTAP (Heinz) concluded that Kreilaus was not subject either to harassment or to a hostile work environment because the acts he had complained of were not intended to be hostile or threatening. The sole basis for this conclusion appears to have been the statements of the harassers that they never intended to be hostile or threatening.

95. CTAP also gave Kreilaus a letter indicating that it was treating Kreilaus' complaint letter as a request for accommodation under the ADA. Kreilaus explained that the only request for accommodation he had made simply involved stopping the harassment and hostile work environment, but in this "accommodation letter," CTAP requested "all medical documentation that [Kreilaus] had that discuss[ed] [his] diagnosis or identified any limitations that it placed on his ability to work in [his] present position." CTAP further requested Kreilaus to "bring documentation of the medications he [had been] prescribed or [were] taking for [PTSD], and the impact those medications could have on his ability to . . . perform his job" Having ignored his PTSD in its investigation of Kreilaus' allegations of harassment, CTAP was now treating his PTSD as a basis upon which to question whether he could do the job he had been doing.

96. Kreilaus was concerned about CTAP's request for all of his medical information because of its broad scope. His medical documentation related to his PTSD stretched back years, and moreover, his medical documentation included highly personal and private information, not just related to his PTSD, but to other medical conditions. Kreilaus was concerned about making this information available in a widespread manner to CTAP. Because of his concern, Kreilaus looked up the

information for the Job Accommodations Network (JAN), and he called JAN. A JAN representative told Kreilaus that what CTAP was doing did not sound right and advised him to call the Montana Human Rights Bureau (MHRB). Kreilaus did, and MHRB told Kreilaus that, rather than producing all of his medical records, he should request from CTAP a list of essential job duties for his doctor to analyze and determine if he could perform them with or without an accommodation.

97. Thereafter, Kreilaus called Heinz and told Heinz that MHRB had advised him he did not need to turn over his all of his medical records. Kreilaus then told Heinz he would, instead, need a list of essential job duties to take to his doctor. Prior to Kreilaus requesting a list of essential job duties, Kreilaus had never been given any sort of written job duties from CTAP. Heinz then emailed Kreilaus an essential “job duties list,” which Kreilaus took to Dr. Dickson. This job duties list indicated that operating a loader was an essential function of a yard hand. It did not indicate that welding was an essential function of being a yard hand. Dr. Dickson completed the list indicating that Kreilaus could perform all of the job duties without reasonable accommodation, assuming a non-hostile, non-threatening environment.

98. Kreilaus returned the completed job duties list to Heinz, along with a letter from Dr. Dickson outlining Kreilaus’ prescriptions and what they were meant to treat. Not long thereafter, Heinz told Kreilaus that CTAP could not track down Alprazolam on Web M.D., and therefore, Kreilaus’ doctor would need to provide the trade names of his medications. Consequently, Kreilaus provided Heinz a second letter from Dr. Dickson with the trade names of the medications.

99. After the exchange of Dr. Dickson’s second letter, Kreilaus and Heinz met again. Heinz told Kreilaus that CTAP had taken Dr. Dickson’s notes to mean that Kreilaus could not operate a loader with his medication (specifically Alprazolam). CTAP made this determination without speaking with Dr. Dickson or asking Kreilaus if it could speak with Dr. Dickson. CTAP did not consult with its own physician, and CTAP did not ask Kreilaus if he would go see a physician or medical care provider of its own choosing.

100. Heinz then asked Kreilaus if he would be willing to sign a form stating he would not take Alprazolam on the job, and if that if Kreilaus was unwilling to sign such a form, Kreilaus would need to inform Heinz if he took the medication and, if so, not come to work if Heinz was not around. Kreilaus was concerned about this restriction, as Heinz was often not at the Glendive yard, since he traveled to many other yards for his position as Northern Regions Operations Manager. Kreilaus was also concerned about being asked to report his medication taking on a daily basis, as Dr. Dickson had clearly stated that there was no concern over Kreilaus operating a loader because of his medication. Kreilaus expressed these concerns to Heinz.

101. Notwithstanding Dr. Dickson's lack of concern about Kreilaus operating a loader with his medication, Heinz told Kreilaus that CTAP would find Kreilaus some other job to do. Heinz indicated that this would likely be a welding position. Kreilaus expressed concern over taking a welding position because it had not formerly existed as an actual position, and Heinz could not identify any potential for upward mobility. CTAP did not address these concerns. Instead, on June 24, 2010, Heinz met with Kreilaus and presented him with a return to work letter.

102. The return to work letter stated that CTAP was treating Kreilaus' complaint letter as a request for accommodation of his PTSD under the ADA. CTAP acknowledged in this letter that Kreilaus had previously indicated that his work environment was exacerbating his PTSD and that he needed to see his doctor to deal with the issues at work. CTAP further stated in this letter that in order to address Kreilaus' doctor's concerns CTAP was defining Kreilaus' work duties and responsibilities. CTAP referred to this change in work duties and responsibilities as a change in position.

103. CTAP further required Kreilaus not to take any prescription medications on the job without first notifying his supervisor. CTAP justified this requirement as stemming from Kreilaus' doctor's release. This was untrue.

104. CTAP also indicated that it was extending Kreilaus' probationary period for a period of six months from his return. Kreilaus had already completed a 90-day probationary period (as he reasonably understood it to be) with CTAP. CTAP was actually requiring him to complete a new probationary period, as if he were a new hire.

105. CTAP further indicated that it would give Kreilaus the primary responsibility of welding. There had not previously been a job at the CTAP facility in Glendive with a primary responsibility of welding.

106. CTAP indicated that this change in position would not affect Kreilaus' advancement prospects, but when Kreilaus inquired about his advancement prospects in his welding position, CTAP could not explain to Kreilaus how he could advance from a welding position. This was particularly troubling, since CTAP now refused to allow Kreilaus to operate a loader, even though Kreilaus was certified to do so, and his physician had no concerns about him operating a loader.

107. Kreilaus expressed disagreement with the letter. Specifically, Kreilaus asked why he could not return to the position and duties he had prior to his complaint letter, including loader operation and yard hand duties. Heinz told him "not a soul in the yard would work with" him, confirming that his harassers now knew that he had not only complained about the harassment but reported other

activities that seemed to him to be violations of CTAP policies. Kreilaus asked about why he was having his probationary period extended, when in fact, he was already off probation by then. Kreilaus also inquired about this new probationary period because, if it meant he would now have different job, Kreilaus wondered if he needed to get a new job duties list for Dr. Dickson to review. Heinz indicated that he would review the letter, or perhaps Kreilaus' concerns, and meet with him again.

108. The next day, Heinz and Kreilaus met again. This time, CTAP's attorney was present. CTAP presented Kreilaus a revised version of the return to work letter. None of the revisions addressed Kreilaus' concerns. In some respects, this version was more adverse than the original letter. This version did not say that Kreilaus' ability to advance would be unaffected by taking a welding position. It instead stated that Kreilaus' ability to advance would not be affected by his recent leave, which did not address his advancement potential from the welder position.

109. On the face of this particular change, since CTAP removed the statement that his ability to advance would not be affected by taking a welding position, a reasonable person could conclude or at the very least, suspect that advancement prospects were worsened by being assigned to the welding position.

110. This latest version of the return to work letter still required Kreilaus not to take Alprazolam without first notifying his supervisor. It still indicated that CTAP was extending Kreilaus' probationary period for a period of six months from his return.

111. Kreilaus again questioned the return to work letter, but CTAP merely responded that it was legally responsible to provide Kreilaus a position, nothing more. It had done so; and therefore, it was Kreilaus' choice to either accept that position or quit.

112. Kreilaus signed the June 25, 2010, return to work letter, acknowledging receipt of it. He also indicated that he would return to work. He did so because he felt he was left with no other choice. After reflecting further upon his choices, Kreilaus decided to resign. On June 30, 2010, Kreilaus submitted his resignation letter to CTAP.

113. Based upon the substantial and credible expert and lay testimony of record, at all pertinent times, Kreilaus was a person with a condition (PTSD) that substantially limited one or more of his major life activities, including but not limited to his work, his social interactions with others, his family relationships, his marital relationship and his ability to engage in day-to-day self-maintenance (shopping, navigating around his community, sleeping, etc.). Without counseling and medication support, he was severely limited. With counseling and medication

support, he was still substantially limited, as evidenced by his loss of a career in the military, by his declining ability to function in all of the listed major life activities when subjected to harassment in his workplace at CTAP and by his ultimate forced resignation from CTAP because his employer failed and refused to prevent the continued harassment by fellow workers.

114. In his resignation letter, Kreilaus detailed his reasons for feeling forced to resign. His resignation letter explicitly stated that he was resigning under duress, that CTAP's actions were discriminatory and unlawful, and that those actions seemed meant to punish him. He reported back to CTAP what he had been told – that he could not return to his original job because CTAP would not or could not prevent further harassment and threats. He noted that Struckhoff had failed to come to Glendive and find out what was really going on.

115. Kreilaus questioned the confidentiality of CTAP's process, and noted that the lack of confidentiality had compounded the original issues he identified. Kreilaus stated that he would merely be returning to a hostile work environment where he would be segregated and unable to obtain fair treatment. Kreilaus concluding by providing current contact information. CTAP did not contact him.

116. CTAP justified requiring Kreilaus to become a welder because after requiring him to take a leave of absence, CTAP had replaced him with Will Brown. Also, Kreilaus lost his operator trainee status while on leave. But for CTAP's decision to place him on leave, neither event need have occurred.

117. CTAP justified requiring Kreilaus to report his use of medication and removing him from loader operation because Dr. Dickson said Kreilaus' medications impaired his decision making and coordination. Dr. Dickson did not make such a statement. Indeed, Dr. Dickson endorsed Kreilaus' ability to perform his duties as an employee of CTAP, so long as he could avail himself of his supportive counseling and medication and he was protected from work-place harassment. In light of her information, CTAP had no basis in fact for pursuing concerns about his medication, and no medical basis to change his job duties or to require him to report his use of medication to his supervisor(s) at work.

118. Kreilaus was otherwise qualified to return to his job of hire. The only "accommodations" he needed or sought were access to his counseling and medication and protection from workplace harassment. When CTAP presented the ultimatum that he could return to the modified welder job, with a new probation period, with no assurances of either advancement at work or protection from harassment, and with his medication use to be reported to his employer, it effectively denied him both "accommodations," without any nondiscriminatory legitimate business reasons.

119. Kreilaus' reasonable recovery for his lost earnings from CTAP extends for four calendar years from the date of his resignation.

120. A few months after resigning from CTAP, Kreilaus found employment as a light duty mechanic and shop laborer at Gibbs Equipment in Glendive, commencing on October 9, 2010. His wage of \$7.35 per hour was substantially less than what he was earning at CTAP, there was no expectation of bonuses, nor were any benefits available. This was the first position Kreilaus was able to find in the limited Glendive job market at that time. Kreilaus has worked there ever since, and is also attending college, which he began in the Fall Semester 2011. Kreilaus is trying to achieve professional advancement in a manner that will allow him to provide for his family long-term, since he lost his ability for advancement, benefits, and long-term wages and employment at CTAP. Presently, Kreilaus works 20 to 25 hours per week at Gibbs and attends Dawson Community as a full-time student.

121. Had CTAP protected Kreilaus from work-place harassment and continued to employ him in his original job, without requiring that he report his medication use to his supervisors, he might have been earning \$15.00 per hour by the end of his first year, but he did not establish that it was more likely than not that he would have obtained that raise. Part of the nature of Kreilaus' disability is that life events can impinge upon his precariously balanced medication assisted stability. For him, to a greater extent than for persons who do not suffer from PTSD, the future is fraught with uncertainty. It would be unduly speculative to project a raise in pay at CTAP to \$15.00 per hour effective February 9, 2011, for calculating damages. On the other hand, including \$500.00 quarterly bonuses, commencing on the first October 2010 pay date, is reasonable, given the nature of CTAP's business in the economy of eastern Montana and western Dakota from late 2010 to the present, and Kreilaus' history of satisfactory performance when not subjected to harassment. His lost earnings are based upon his average earnings, including overtime.

122. P-368, Exhibit 42, indicates that Kreilaus earned a total of \$11,947.72 working for CTAP. This particular paysheet, for pay date July 16, 2010, accurately reflects the actual total he earned at CTAP, beginning February 9, 2010, through June 30, 2010, a total of 20 weeks, although the pay sheets in Exhibit 42 are incomplete, with the particulars in four weeks' of records missing (2 pay sheets, for pay dates March 26 and April 9, 2010).

123. Kreilaus' weekly average pay from CTAP was 597.39 (\$11,947.72 divided by 20). For the July 16, 2010 pay date (the first pay date after his resignation that included time lost because he resigned), Kreilaus lost the wages he would otherwise have earned for July 1-10, 2010 (71.4% of the pay period, which ended on July 10, 2010), in an amount of \$853.07 (71.4% of \$597.39 times 2).

Thereafter, his net wage loss was \$1,194.78 (\$597.39 times 2) on each successive pay date (with an additional \$500.00 bonus on the first pay date in each calendar quarter), minus any earnings he received after the preceding pay date up to the current pay date.

124. Kreilaus' earnings from Gibbs totaled \$8,893.51 for pay dates (two weeks apart) from October 13, 2010, through September 30, 2011. Kreilaus commenced work for Gibbs on October 9, 2010, and the last working day covered in his September 30, 2011, check was September 24, 2011, so he had been employed for 350 days with Gibbs, which is 50 weeks. His average weekly wage with Gibbs was 177.87, with average pay day gross earnings of 355.74. Gibbs, like CTAP, pays every two weeks.

125. Simple annual interest accrued at 10%, from each CTAP pay date to the date of this decision, on the net wage loss incurred on each pay date. July 16, 2010, through May 25, 2012, is exactly 97 weeks (679 days). Weekly 10% annual simple interest is .001918 per week (.1 divided by 52.143). Interest to date of decision is the total of the amounts of net wage loss incurred upon each pay date times the number of weeks from that specific pay date to the date of this decision times .001918.

126. Kreilaus did not suffer additional pre-decision lost earnings for the week between May 18, 2012, through the date of this decision. The next pay date for CTAP will not arrive until June 1, 2012, so that Kreilaus will not suffer the loss of use of his earnings for the last week before this decision until after this decision has issued.

127. Wage loss and prejudgment interest calculations appear in Table "A" to this decision (in its original spread sheet format, which is also in the Hearings Bureau electronic directory for this case as "Kreilaus v CTAP Table A2.xlsx"), which are also incorporated here. These numbers are supported by credible and substantial evidence of record. To the date of this decision, Kreilaus' wage losses total \$46,617.16, and his prejudgment interest thereupon totals \$4,478.45.

CTAP Payday	CTAP Lost Wages, Ex. 42	Gibbs Earned Wages, Ex. 37	Pay Date Net Loss	# of Weeks	Total Interest .001918 per week
07-16-10	853.07	-0-	853.07	97	158.96
07-30-10	1194.78	-0-	1194.78	95	217.68
08-13-10	1194.78	-0-	1194.78	93	213.10
08-27-10	1194.78	-0-	1194.78	91	208.51
09-10-10	1194.78	-0-	1194.78	89	203.93
09-24-10	1194.78	-0-	1194.78	87	199.35
10-08-10	1194.78	-0-	1194.78	85	194.77
10-22-10	1194.78	102.90	1091.88	83	173.80
11-05-10	1194.78	441.00	753.78	81	117.09
11-19-10	1194.78	429.98	764.80	79	115.87
12-03-10	1194.78	380.36	814.42	77	120.27

CTAP Payday	CTAP Lost Wages, Ex. 42	Gibbs Earned Wages, Ex. 37	Pay Date Net Loss	# of Weeks	Total Interest .001918 per week
12-17-10	1194.78	365.66	829.12	75	119.26
12-31-10	1194.78	402.41	792.37	73	110.93
01-14-11*	1694.78	396.90	1297.88	71	176.73
01-28-11	1194.78	437.33	757.45	69	100.23
02-11-11	1194.78	374.85	819.93	67	105.36
02-25-11	1194.78	325.24	869.54	65	108.39
03-11-11	1194.78	338.10	856.68	63	103.51
03-25-11	1194.78	378.53	816.25	61	95.49
04-08-11*	1694.78	352.80	1341.92	59	151.85
04-22-11	1194.78	279.30	915.48	57	100.08
05-06-11	1194.78	395.06	799.72	55	84.35
05-20-11	1194.78	404.25	790.53	53	80.35
06-03-11	1194.78	358.31	836.47	51	81.81
06-17-11	1194.78	367.50	827.28	49	77.74
07-01-11	1194.78	323.40	871.38	47	78.54
07-15-11*	1694.78	352.80	1341.98	45	115.81
07-29-11	1194.78	354.64	840.14	43	69.28
08-12-11	1194.78	332.59	862.19	41	67.79
08-26-11	1194.78	356.48	838.30	39	62.70
09-09-11	1194.78	336.26	858.52	37	60.92
09-23-11	1194.78	169.05	1025.73	35	68.85
10-07-11*	1694.78	137.81	1556.97	33	98.54
10-21-11	1194.78	355.74	839.04	31	49.88
11-04-11	1194.78	355.74	839.04	29	46.66
11-18-11	1194.78	355.74	839.04	27	43.45
12-02-11	1194.78	355.74	839.04	25	40.23
12-16-11	1194.78	355.74	839.04	23	37.01
12-30-11	1194.78	355.74	839.04	21	33.79
01-13-12*	1694.78	355.74	1339.04	19	48.79
01-27-12	1194.78	355.74	839.04	17	27.36
02-10-12	1194.78	355.74	839.04	15	24.14
02-24-12	1194.78	355.74	839.04	13	20.92
03-09-12	1194.78	355.74	839.04	11	17.70
03-23-12	1194.78	355.74	839.04	9	14.48
04-06-12*	1694.78	355.74	1339.04	7	17.98
04-20-12	1194.78	355.74	839.04	5	8.05
05-04-12	1194.78	355.74	839.04	3	4.83
05-18-12	1194.78	355.74	839.04	1	1.61
*Includes \$500.00 quarterly bonus.					
Totals	\$61,202.51	\$14,585.35	\$46,617.16		\$4,478.45
		<u>Wage Loss \$46,617.16</u>	<u>Prejudg. Int. \$4,478.45</u>		

128. Hereafter, every two weeks, commencing on June 1, 2012, CTAP owes Kreilaus the sum of \$839.04, as wage loss replacement payments for which CTAP is liable, after credit for wages earned through other employment. For the first payment in July 2012 and 2013, October 2012 and 2013, January 2013 and 2014 and April 2013 and 2014, an additional \$500.00 is added, so that each of those payments will be for \$1,339.04. The last and 55th such payment hereafter comes due on June 27, 2014. CTAP may elect either to treat the payments as wages, and make appropriate deductions in which case it must also make the appropriate deposits and payments so that withholding is accompanied by submission of the monies to the

appropriate government entities, and none of the money withheld is retained by CTAP. Otherwise, CTAP may use a 1099 to document its payments.

129. Kreilaus has not proved actual losses suffered, due to loss of benefits with CTAP, with sufficient specificity to support an award for such losses.

130. Being forced to resign at CTAP had a substantial impact on Kreilaus. Part of that impact was simply his own sense of failure in his new civilian career, superimposed upon and aggravating the sense of responsibility he already felt and still feels for being unable to continue in his military career. He is very well aware that his inability to continue at CTAP changed his family's future plans and caused his family financial hardship. He is also very well aware of the emotional turmoil and pain his family has suffered as a result of his difficulties dealing with his flaring PTSD as his career at CTAP came apart. Thus, he is not only feeling his own pain, he also feeling (and feeling responsible for) his family's pain.

131. His wife credibly described the emotional battles in which her husband, Kreilaus, is engaged, stating under oath that he "struggles to make it every day. He's struggling to interact. He's struggling to feel good enough about himself. He's struggling to know he's not GI Jane and he's not a failure." She went on to testify that, because of what happened at CTAP, "it's almost like becoming a single parent in a house with another parent that they're not able to interact." She testified credibly that she has to reassure their children that it is okay to talk to their dad. She described the overall impact of CTAP's actions toward Kreilaus as "A mini Iraq."

132. For the emotional distress he has suffered, is suffering and very likely will continue to suffer as a direct result of CTAP's discriminatory conduct, Kreilaus is entitled to recover, immediately, the sum of \$75,000.00.

133. In addition to enjoining further failure to police and prevent harassment of disabled co-workers by CTAP employees at the Glendive site, the department should mandate appropriate training of CTAP management employees situated or to be situated in Montana, with training regarding prevention of disability discrimination at work (including PTSD discrimination, at the election of the department), with not less than 8 hours of initial training, and subsequent annual training of at least 2 hours for employees who already have received the initial training and are still situated in or returning to Montana for CTAP employment. It is unrealistic and unduly burdensome to require CTAP to train all Montana employees about disability discrimination, but appropriate to require training of Montana management personnel. Management personnel should be trained to recognize complaints of harassment based upon disability, whether the harassing employees' animus stems from knowledge of the specific disability or simply from a

feeling that the target employee is somehow different, and management personnel should be trained to investigate such complaints, verify any such harassment and take effective action to end it.

IV. Opinion⁴

Montana law prohibits discrimination in a term, condition, or privilege of employment because of mental disability. Mont. Code Ann. § 49-2-303(1)(a). Terms, conditions or privileges of employment subject to this prohibition include hiring, promotion, upgrading, transfer, layoff, discipline, discharge, right to return from layoff, job assignments, job classifications, position descriptions and lines of progression. Admin. R. Mont. 24.9.604(2)(b) and (d). That same rule gives examples of practices which may constitute unlawful employment discrimination, including denying, qualifying, or limiting a term, condition, or privilege of employment because of a person's membership in a protected class, 24.9.604(3)(a), subjecting a person to harassment in the workplace because of that person's membership in a protected class, 24.9.604(3)(b) and segregating or classifying a person in a way that adversely affects employment status or opportunities because of membership in a protected class, 24.9.604(3)(d).

In terms of being a member of a protected class, the evidence is clear that Kreilaus suffers from PTSD, and that his PTSD does constitute a physical or mental impairment that substantially limits one or more of his major life activities. Kreilaus lost his military career because of his PTSD. He remains dependent upon both counseling and medication to sustain him in his efforts to live a normal life, despite his PTSD, at home, at work and in society at large. He has more than once been unable to continue to work, unable to interact normally with his family, and unable to pursue an independent lifestyle in society because of his PTSD. His PTSD has substantially limited his ability to work, to sleep, to interact with others, to communicate, and to cope with stress and tension in his life. He has proved that he suffers from a disability, pursuant to Mont. Code Ann. §49-2-101(19).

Kreilaus also presented evidence from which the trier of fact could infer that adverse action against him was because of his membership in a protected class, in this instance, because of his disability. Admin. R. Mont. 24.9.610(2). Kreilaus credibly testified that he was subjected to harassment by three fellow employees because of the behavioral and emotional manifestations of his PTSD, that he repeatedly complained to his employer, and that no action was taken to protect him from the harassment. It is not relevant whether the harassing employees knew that he suffered

⁴ 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.

from a disability. The substantial and credible evidence of record established that more likely than not, signs and symptoms of Kreilaus' PTSD elicited hostility and harassment from the three fellow employees, whether they knew what it was or not.

In addition, Kreilaus presented evidence that when his wife took his complaint through the proper channels and beyond local management, the employer didn't bother to conduct any meaningful investigation of his complaints of harassment. Instead, his employer made Kreilaus the target of its investigation. His medication use was investigated without good cause, his loader operating work was taken away from him without any valid basis, he was transferred into a job from which his chances of advancement were limited or entirely absent, and he was specifically told that the employer would not return him to his original position because it either could not or at least would not protect him from his fellow employees. On this record, it is beyond dispute that Kreilaus was subjected to adverse employment actions by CTAP.

CTAP essentially conceded that Kreilaus, aside from his problems with fellow employees, was a good employee. Kreilaus proved that he was an otherwise qualified individual with a disability.

None of the employees who harassed Kreilaus were subjected to any meaningful investigations or sanctions. Their disingenuous insistence that they didn't intend to harass him was taken at face value, without any inquiry into their actual treatment of Kreilaus. For an easy example, when Newnam again berated Kreilaus in the overflow yard, launching once more into his threatening routine as "One Punch Tony," and Kreilaus again went to management about the bullying, Frey sent Kreilaus home because he couldn't work with Newnam. No consideration was given to whether Kreilaus was accurately reporting how he was being treated, or to whether the real issue was not resistance to supervision, but to bullying.

In this case, the culpable acts of continuing discrimination in the work place primarily took the form of CTAP's failure to undertake a serious and adequate investigation. Had it done so, it would have found ample grounds to discipline the three co-employees harassing Kreilaus. CTAP could have protected Kreilaus, who it asserts was a valuable employee, and followed the law, by verifying Kreilaus' complaints, directing the three employees to stop their harassment and then following through to assure that they did stop the harassment.

The Montana Supreme Court has addressed how to determine if a work environment is hostile or abusive.

In *Beaver*, we relied in part upon *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295, in

which the U.S. Supreme Court concluded that the correct legal standard to be applied in determining whether an environment is “hostile” or “abusive” is to view the totality of the circumstances. These circumstances may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is also relevant in determining whether the employee actually found the environment abusive. *Beaver*, ¶42 (quoting *Harris*, 510 U.S. at 23, 114 S. Ct. at 371, 126 L. Ed. 2d at 302-03).

Benjamin v. Anderson, ¶53, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Although *Benjamin* involved sexual harassment, physical threats and intimidation directed toward a PTSD sufferer can have the same kind of abusive and hostile impact upon a work environment as sexual harassment.

“The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified.” *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001). By doing so, “the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace.” *Id.*

In determining whether an employer's response to an employee's hostile work environment claim was sufficiently prompt and adequate, factors to be considered are whether the employer investigated the alleged acts of harassment, the type of investigation conducted, post-investigation remedial steps taken, whether the employer had grievance procedures and policies against discrimination in place, and whether harassment ended after remedial measures were actually taken. See *Giordano v. William Paterson Coll. of New Jersey*, 804 F. Supp. 637 (D.N.J. 1992). Obviously, an adequate response to justified complaints of harassment requires “permanent remedial steps . . . once [the employer] has completed its investigation.” *Swenson* at 1192.

CTAP's response to Kreilaus' hostile work environment claim was woefully inadequate. CTAP did not investigate the alleged harassment, did not take proper remedial steps and did not even have policies and procedures in place to address a hostile work environment claim. CTAP generally conducted an illusory investigation through untrained and inexperienced employees. CTAP is liable to Kreilaus because it failed adequately to investigate his complaints.

In deciding that CTAP illegally discriminated against Kreilaus, there is one very critical credibility determination, and that involves the credibility of Joshua Kreilaus himself. CTAP has challenged Kreilaus' credibility, presenting one of the alleged harassers as a witness who denied Kreilaus' allegations and in raising, in multiple ways, the question of whether Kreilaus, with his PTSD, is a reliable witness.

Both methods of challenging Kreilaus' credibility are legitimate defense tactics, and both were undertaken with precision and skill. However, the evidence in this case ultimately supports Kreilaus' credibility.

This was not the first nor the last job Kreilaus has held since his forced retirement from the military. He held a position before going to work for CTAP and has held another position since resigning his job with CTAP. Neither with Schlumberger (before CTAP) nor with Gibbs Equipment (after CTAP) did Kreilaus experience the medical and personal difficulties engendered by his experiences working for CTAP. The contrast between his level of functioning during those other two jobs and his deteriorating level of functioning while working for CTAP is dramatic.

None of the three jobs appear to involve strictly white collar work environs. All of the three jobs involve blue collar environments in which some roughness of interaction between employees is likely to be common. Yet, in two of the three jobs, Kreilaus maintained his level of functioning, at work, in his family and in his thoughts and feelings. On the face of the evidence, something about the work environment at CTAP eroded his ability to function, at work, at home and in his thoughts and feelings.

The only reasonable inference from the evidence is that the significant difference about the work environment at CTAP was that three of Kreilaus' fellow employees targeted him for harassment because of his disability, and CTAP management failed and refused to take any action to protect him from that harassment.

The content and tone of Dr. Joan Dickson's testimony made it apparent that she believed Kreilaus' accounts of harassment. However, Dr. Dickson had no first-hand knowledge of what actually transpired at CTAP. In addition, it is more likely than not that her treatment of Kreilaus would have been the same whether his condition was deteriorating because of actual harassment at work or whether his deteriorating condition led him to a delusional belief that he was being harassed at work. Thus, her readily apparent faith in his accounts of harassment was not determinative of the facts at issue. The critical point was that, in three different work environments, only at CTAP did Kreilaus' condition deteriorate.

Anything is possible. Perhaps the medication and counseling Kreilaus received simply stopped being effective while he worked at CTAP, for no discernable reason, and he experienced harassment that actually was not happening. Perhaps once he resigned from CTAP, the medication and counseling again became effective, perhaps because of changes in his medication and counseling regimes. However, the substantial and credible evidence of record supports the inference that Kreilaus responded differently to the environment at CTAP because it was actively hostile toward him due to his PTSD, and that now, free of that actively hostile environment, he is headed back towards the level of functioning that he had achieved before that hostile environment overpowered his recovery.

The evidence does not clearly show why the three employees commenced and continued their campaign of harassment against Kreilaus. It could have been because one of them was competing with Kreilaus for a soon-to-open loader operator position. One of the three actually did take the loader operator trainee work that Kreilaus had been doing after he was placed on leave, so this may have been at least part of the motivation for the harassment.

It would be a sad commentary upon the lack of common decency among at least some of the workers in CTAP's Glendive operation if these three ordinary workers found it necessary to target a combat veteran with PTSD for harassment simply because he seemed an easy target, or because something about him was "different" in a vulnerable way, but there may be no other answer.

Whatever the reason for the harassment, CTAP left investigation of Kreilaus' harassment complaint in the hands of a new management employee, Heinz, who lacked the knowledge, experience and training to undertake that investigation. CTAP was on notice that Kreilaus suffered from PTSD. CTAP was on notice that Kreilaus' ability to perform his work duties was being impacted by the hostile actions of his co-workers. CTAP had an obligation to protect all of its workers from a hostile environment. As sad as it is to presume that these three ganged up on Kreilaus just because they could, it is even sadder still to see CTAP, a multi-state employer, behave as if it was clueless about its responsibilities to regulate the conduct of its workers so as to prevent such harassment.

That lack of an adequate response to Kreilaus' complaints renders CTAP liable in this case.

In a number of respects, the investigation itself discriminated against Kreilaus. CTAP's reassignment of Kreilaus was an adverse action against him that came out of the investigation. Contrary to counsel's argument, there is no substantial and credible evidence that the newly coined welding job enhanced Kreilaus' advancement

prospects, either for wages or promotions. The substantial and credible evidence indicated that his prospects for either kind of advancement were prejudiced when CTAP shuffled him into the welding job.

CTAP's counsel argued ably that there actually was no express statement that new hires like Kreilaus had a 90-day probationary period, and thus it really was a statutory 6-month period. However able the argument, there was substantial and credible evidence of record that Kreilaus had an initial 90-day probationary period. Retroactive definition of that "90-day" period as only applying to qualification for some benefits, but not to completion of the probationary period, is a creative argument, but in this case it lacks supporting facts. Even if CTAP's version of the facts regarding the probationary period had prevailed, which it did not, extending the period further was still an adverse action, and the evidence shows that CTAP assigned Kreilaus to a new probationary period of six months in his new position.

Kreilaus' reports of what he considered improper conduct by his co-employees, which Struckhoff invited, were investigated in a way that specifically implicated Kreilaus as the reporting employee. Management then used resentments of the other employees as another justification for removing Kreilaus from yard hand work.

There is no evidence that Heinz, Frey, McCarrell or Struckhoff harbored any personal animus towards Kreilaus. There is clear and convincing evidence that none of them took any effective action to verify the harassment, to stop the harassment or to protect Kreilaus from further harassment. The harassment somehow failed to register with any of them (except for Struckhoff, initially, who then disappeared from the investigation process⁵). An employer with repeated notice of illegal harassment has a duty to find out whether it is happening and to end it if it is. CTAP utterly failed to perform any part of that duty. In the final analysis, CTAP management's lack of personal animus is irrelevant. The inconsistencies, contradictions, and shifting bases for CTAP's explanations of its actions, when those actions were so incredibly inept and off-point, rendered the explanations unworthy of belief.

One of the most glaring examples of the inept investigation was CTAP's sudden concern with Kreilaus' prescription medication. Under federal law, the statutory "prohibition against discrimination . . . shall include medical examinations and inquiries." 42 U.S.C. § 12112(d)(1). There is no reason Montana would not follow the exact same approach. An employer is prohibited from "requir[ing] medical examinations or mak[ing] inquiries of employees for the purposes of determining whether an employee has a physical or mental disability or to determine the nature or

⁵ Checking with Heinz, who was not qualified to conduct the investigation, about what the investigation was revealing does not at all count as remaining involved in the investigation.

severity of a disability unless the examination or inquiry was job-related and consistent with business necessity.” Admin. R. Mont. 24.9.607(1). This prohibition logically extends to inquiries about prescription medication, absent a job-related basis for the inquiry.

CTAP discriminated against Kreilaus when it inquired into his disability and the severity of his disability, without any reason to do so since he had been successfully performing his job and had medical clearance to continue to do so (free of harassment). CTAP ultimately required him to produce medical records and to inform CTAP whenever he used medication for his disability. This was required with no basis in job performance whatsoever, and without any proof of a justifiable factual basis for making the inquiries.

Kreilaus’ doctor certainly did not provide a basis for CTAP’s sudden interest and concern in his medications. CTAP did not choose to have a medical provider of its choice verify whether there was a basis for such interest and concern. Yet, CTAP vigorously pursued its interest and concern. It appears a clear-cut case of attacking the complaining person without first undertaking serious inquiry into the existence of the harassment, which is disability discrimination. E.g., *Stringer-Altmaier v. Haffner*, 2006 MT 129, 332 Mont. 293, 138 P.3d 419.

B. DEFENSES

To the extent not specifically addressed elsewhere, the Hearing Officer has determined that CTAP’s defenses, although ably presented and argued, failed in their entirety, and that Kreilaus has proved his case and established his damages as found herein.

C. DAMAGES

The relief the Department may award to a charging party subjected to illegal discrimination includes any reasonable measures to rectify any resulting harm he suffered. Mont. Code Ann. § 49-2-506(1)(b). Damage awards for illegal discrimination under Montana law should, within reason, make the victims whole. See, *P. W. Berry Co., Inc. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989), noting that once the victim has established the amount of back pay lost because of the illegal discrimination, the burden is upon the employer to establish that a lesser amount is proper, because, for example, the victim would have been unavailable for employment due to nondiscriminatory reasons “and therefore would not have been able to earn the amounts claimed in any event.” Citing *A. Larson*, 2 Empl. Discr. (1988 ed.) §55.37(a)(iii); and *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975); *Dolan v. S.D. No. 10*, 195 Mont. 340, 636 P.2d 825 (1981). The harm that Kreilaus suffered includes wages and bonuses lost to the date of this decision

(back pay), prejudgment interest on those losses, future lost wages and bonuses (front pay), and emotional distress, all resulting from illegal disability discrimination by CTAP.

1. Back Pay

By proving that CTAP discriminated against him, Kreilaus established an entitlement to recover his lost earnings, including bonuses. Albermarle Paper Co.. Kreilaus must prove the amount of wages that he lost, but not with unrealistic exactitude. *Horn v. Duke Homes*, 755 F.2nd 599, 607 (7th Cir. 1985). Here, Kreilaus established his lost earnings for the time up through the decision, his “back pay,” and is entitled to recover that amount at once. He did not prove the value of the alleged loss of fringe benefits, except for his quarterly bonuses. Without better proof of the amount involved, it is impossible to award damages for such a loss.

2. Prejudgment Interest

Prejudgment interest on lost wages and fringe benefits is a proper part of Kreilaus’ award of damages. *P. W. Berry Co., Inc.*; see also, *Foss v. J.B. Junk* (1987), HRC Case No. SE84-2345. Calculation of prejudgment interest is proper based on the elapsed time without the lost earnings from the date it would have been paid times the appropriate rate of interest through the decision date. E.g., *Reed v. Mineta* (10th Cir. 2006), 438 F.3d 1063. For lost wages, ten percent (10%) per annum simple interest is appropriate, the statutory rate for tort losses that are capable of being made certain by calculation. Mont. Code Ann. §27-1-210(1).

3. Front Pay

Front pay is an amount granted for probable future losses in earnings, bonuses, and benefits to make the victim of discrimination whole when reinstatement is not feasible. *Sellers v. Delgado Community College*, 839 F.2nd 1132 (5th Cir. 1988). Front pay is a temporary measure until the charging party can reestablish his position in the job market. *Shore v. Federal Exp. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985). Here, front pay is appropriate because Kreilaus resigned under duress. Reinstatement is neither possible nor appropriate in this case, because Kreilaus’ ability to set aside the past and try to work for CTAP again is so limited by his PTSD, given the treatment he received from CTAP, that there clearly is a barrier to his returning to work, at least as prohibitive as actual hostility or antagonism between the parties. E.g., *Cassino v. Reichhold Chem., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987).

The further into the future one projects, the less certain it is that the projections will be valid. Montana law gives weight to this concern about long-range prognostication of future wage loss. In the Montana Wrongful Discharge from

Employment Act, recovery of lost wages and fringe benefits is for a maximum of four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). There is no explicit comparable statutory limitation for future lost wages in Human Rights Act cases, but clearly the legislature wants future lost wages awards to be carefully considered before extending them far into the future. The Human Rights Act's authorization for the department to require any reasonable measure to rectify harm resulting from illegal retaliation has led, in a number of cases, to limiting long-term recovery of lost wages to not more than four years of lost wages after separation from employment. Houle v. Great Falls Native Amer. Ctr., H.R. No. 0009008915 etc. (6/12/00); Wombold v. Cascade School District No. 3, H.R. No. 0021010078/79 (7/18/03); Chebul v. Mont. Stan./Lee News., H.R. No. 0061011788, Case 114-2007 (3/15/07); Trumble v. Glacier Well Serv., H.R. No. 0081012948, Case No. 923-2009 (8/18/10); Stearns v. Family Serv., Inc., H.R. No. 0109014463, Case No. 1210-2011 (7/22/11).

“Not more than four years” does not suggest an automatic award of four years of lost wages in every case. However, even though Kreilaus' work performance, before he was impacted by the harassment from which his employer failed and refused to protect him, was good, the difficulties he has had and will have finding a comparable position to the position he lost at CTAP entitles him to recover lost future wages (front pay) from the time of this decision to June 27, 2014. Recovery of lost wages for this time period is reasonable and is supported by the evidence.

4a. Mitigation

Kreilaus must make reasonable efforts to mitigate harm from discrimination by seeking other employment. Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982). CTAP had the burden of proving, by a preponderance of the evidence, that Kreilaus was not reasonably diligent in mitigating his damages, in this instance, his lost wages. P. W. Berry Co., Inc., 779 P.2d at 523.

The requirement is not that Kreilaus exhaustively seek out all possible employment opportunities. He must only be reasonable in pursuing offers of work. Here, due to his debilitating emotional condition following his job with CTAP, there was a reasonable delay in Kreilaus' return to work. Kreilaus eventually found and commenced work in a steady job (but at significantly less pay, on a part time basis), even though he need not have done so. See Ford Motor Co., 458 U.S. at 231. Kreilaus then reasonably decided to pursue higher education to reestablish his ability to earn the wages he commanded at CTAP. As a result, Kreilaus has and will continue to suffer wage losses which are reasonable under the circumstances. Kreilaus has reasonably mitigated his damages.

4b. Retirement and/or Disability Benefits Are Not Properly Treated as an “Offset” to the Damage Award against CTAP

There is no offset for unemployment insurance benefits received against wage loss recovery resulting from illegal discrimination. *Vortex Fishing Sys. Inc. v. Foss*, ¶ 28, 2001 MT 312, 308 Mont. 3, 38 P.3d 836. There should likewise be no wage loss recovery in the present case. It beggars the imagination to decide that Social Security and/or military retirement benefits, which Kreilaus receives because of the injuries he suffered in defense of his country, should offset losses he suffered for a very different reason – because of CTAP’s illegal discrimination against him, when he was trying to get off of the benefit entitlements and be self-supporting. The losses CTAP caused resulted from its disability discrimination, not from Kreilaus’ PTSD. But for that illegal disability discrimination, Kreilaus would have replaced some of his benefit entitlements with wages earned from CTAP. CTAP should be and is liable for those losses. Any recoupment accrues in favor of the retirement and/or disability benefit entities who paid Kreilaus and supported his family when CTAP’s illegal conduct prevented him from being self-supporting. The losses are simply not for the same harm, and CTAP is not entitled to any offset. It is for another tribunal to address any questions about reimbursement to the retirement and/or benefit entities who paid Kreilaus for periods of time during which he is now recovering for earnings lost due to CTAP’s discrimination.

5. Emotional Distress

The law requires any reasonable measure to rectify any harm, pecuniary or otherwise, to victims of discrimination. Mont. Code Ann. § 49-2-506(1)(b). The department has the clear power and duty to award money for proven emotional distress. *Vainio v. Brookshire* (1993), 258 Mont 273, 852 P.2nd 596, 601. Damages in discrimination cases are broadly available precisely to rectify all harm suffered. *P. W. Berry, Inc.*, supra. “Compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances.” *Benjamin v. Anderson* (2005), 327 Mont. 173, 112 P.3d 1039. “The standard for emotional distress awards under the Human Rights Act derives from . . . federal case law.” *Trumble v. Glacier Well Services, Inc.*, H.R.B. No. 0081012948, Case No. 923-2009 (2009). “Because of the broad remunerative purpose of . . . civil rights laws, the tort standard for awarding damages should not be applied to civil rights actions.” *Id.* (citations omitted) (internal quotations omitted).

The extreme and prolonged nature of violations of the MHRA, as well as the severity of the emotional distress which was caused by the violations, are factors to determine the amount of an emotional distress award. *Wilson v. Catholic Diocese*, Case Nos. 0049011055-0049011010 (2006). Here, the evidence is overwhelming in

establishing a prolonged course of action by CTAP to discriminate against Kreilaus. Kreilaus first complained about harassment, intimidations and acts constituting discrimination and a hostile work environment in as early as March 2010. For the next three months, Kreilaus was subjected to worse and worse treatment until it finally reached the point that he could no longer take it. Unfortunately, the damage had already been done. By the time he resigned under duress, Kreilaus had shut down from life. Only recently are Kreilaus and his family slowly returning to the lives they had before CTAP. The significant severity of the emotional distress suffered by Kreilaus over the time of discrimination by CTAP demands a substantial monetary award to make him whole.

D. AFFIRMATIVE RELIEF

Upon a finding of illegal discrimination, the law requires an order imposing affirmative relief that enjoins any further discriminatory acts, and the Department may further prescribe any appropriate conditions on the respondent's future conduct relevant to the discrimination found and require a report on the manner of compliance. Mont. Code Ann. § 49-2-506(1)(a) through (c). Requiring adoption and compliance with a written policy for disability discrimination law training for management employees responsible for operations at Montana sites is appropriate.

V. Conclusions of Law

1. The Department has jurisdiction over the claims of discrimination made by Kreilaus against CTAP. Mont. Code Ann. §49-2-512(1).

2. CTAP illegally discriminated against Kreilaus in employment when it failed and refused to prevent some of its employees from subjecting him to a hostile work environment because of his disability, to such an extent that he reasonably resigned from his employment. Mont. Code Ann. §49-2-303(a).

3. CTAP is liable to Kreilaus for his net wages lost (gross wages lost less wages earned in other employment), from the date of his resignation for four years thereafter, for a total amount (including bonuses) of \$94,764.36, together with an award for emotional distress in the amount of \$75,000.00. Lump sum payment of the net lost wages past due on the date of judgment (\$46,617.16) plus prejudgment interest on past due amount (\$4,478.45), plus the entire emotional distress award, means judgment for an immediate amount of \$126,095.61. Hereafter, for the remainder of the four years, as further net lost wages come due with the biweekly pay date method used during Kreilaus' employment, payment by CTAP of each two week amount is due on each successive pay date, commencing on Friday, June 1, 2012, and continuing every other Friday until the last Friday in June 2014, for a total in biweekly payments for future lost wages of \$48,147.20. The precise amounts and

dates are set forth in the findings of fact herein and awarded in the order below. Mont. Code Ann. §49-2-506(1)(a) and (b).

VI. Order

1. Judgment is granted in favor of Joshua Kreilaus and against Colorado Tubular Aztec Pipe, LLC, on Kreilaus' charges of illegal disability discrimination in employment against him, as alleged in his complaint and stated in the final prehearing order herein.

2. Colorado Tubular Aztec Pipe, LLC, is ordered immediately to pay to Joshua Kreilaus the sum of \$126,095.61, representing \$46,617.16 in lost wages to date, \$4,478.45 for prejudgment interest on the lost wages to date, and \$75,000.00 for emotional distress. Hereafter, every other Friday, commencing on June 1, 2012, Colorado Tubular Aztec Pipe, LLC, must pay to Joshua Kreilaus the sum of \$839.04, for continuing wage loss for the previous Colorado Tubular Aztec Pipe, LLC, pay period. For the first payment in July 2012 and 2013, October 2012 and 2013, January 2013 and 2014 and April 2013 and 2014, an additional \$500.00 is added, so that each of those payments will be for \$1,339.04. The last and 55th such payment must be made on June 27, 2014. Colorado Tubular Aztec Pipe, LLC, may, to the extent consistent with applicable state and federal laws, either subject these biweekly payments to withholding and issue appropriate withholding statements (making the appropriate payments to the various entities entitled to receive the amounts withheld), or issue 1099s to document its periodic payments to Joshua Kreilaus, for tax reporting purposes. Post judgment interest accrues, by operation of law, on any amounts ordered in this judgement which are not paid when due in accord with the express terms of this judgment.

3. The department permanently enjoins Colorado Tubular Aztec Pipe, LLC, from discriminating against any person with a disability by failing to prevent its employees from subjecting such a person to a hostile work environment because of the disability, as required by law.

4. Within 20 days of this order, Colorado Tubular Aztec Pipe, LLC, shall (1) consult with the department's Human Rights Bureau (HRB) and identify its current management employees with responsibility for operations at any Montana locations and identify appropriate disability discrimination training for said employees that meets the approval of HRB, thereafter providing that training at its expense at the earliest availability of the training, and thereafter annually for then current management employees with responsibility for operations at any Montana locations, keeping records to verify its continuing compliance with this judgment; (2) prepare and provide to HRB for its review policies and notices regarding disability

accommodation, thereafter adopting the policies and posting the notices, with such revisions or additions as HRB may direct, and (3) provide to HRB any reports HRB requires (at the time or times it requires them) on Colorado Tubular Aztec Pipe, LLC's compliance with this paragraph of this order.

SEALING ORDER

5. CTAP's sealed in camera production pursuant to the July 28, 2011, order requiring that production, remains sealed. All exhibits and all testimony offered into evidence at the contested case hearing are in the public record. Parties can submit copies of pages of exhibits, with information therein which is not properly accessible to the public: redacted, at any time before appeal of this decision, with the page(s) to be removed and substituted clearly identified thereupon.

Dated: May 25, 2012.

Terry Spear, Hearing Officer
Montana Department of Labor and Industry

TABLE "A" on page 39, immediately following, is an electronic pdf document titled "Kreilaus v CTAP Table A2" (converted from Excel), both of which are contained in the Hearings Bureau secure electronic directory of this case, the content of which is duplicated in Finding 127.

CTAP pay dates	KRETLAUS		TABLE A			Interest Per Week		
	Lost Wages	Gibbs Wages	Net Loss	# of Weeks				
7/16/2010	853.07	0	853.07	97	\$	158.69	Order Date	5/25/2012
7/30/2010	1194.78	0	1194.78	95	\$	217.68		
8/13/2010	1194.78	0	1194.78	93	\$	213.10	Weekly Interest	0.001918
8/27/2010	1194.78	0	1194.78	91	\$	208.51		
9/10/2010	1194.78	0	1194.78	89	\$	203.93	Annual Interest	10%
9/24/2010	1194.78	0	1194.78	87	\$	199.35		
10/8/2010	1194.78	0	1194.78	85	\$	194.77		
10/22/2010	1194.78	102.9	1091.88	83	\$	173.80		
11/5/2010	1194.78	441	753.78	81	\$	117.09		
11/19/2010	1194.78	429.98	764.8	79	\$	115.87		
12/3/2010	1194.78	380.36	814.42	77	\$	120.27		
12/17/2010	1194.78	365.66	829.12	75	\$	119.26		
12/31/2010	1194.78	402.41	792.37	73	\$	110.93		
1/14/2011	1694.78	396.9	1297.88	71	\$	176.73		
1/28/2011	1194.78	437.33	757.45	69	\$	100.23		
2/11/2011	1194.78	374.85	819.93	67	\$	105.36		
2/25/2011	1194.78	325.24	869.54	65	\$	108.39		
3/11/2011	1194.78	338.1	856.68	63	\$	103.51		
3/25/2011	1194.78	378.53	816.25	61	\$	95.49		
4/8/2011	1694.78	352.8	1341.98	59	\$	151.85		
4/22/2011	1194.78	279.3	915.48	57	\$	100.08		
5/6/2011	1194.78	395.06	799.72	55	\$	84.35		
5/20/2011	1194.78	404.25	790.53	53	\$	80.35		
6/3/2011	1194.78	358.31	836.47	51	\$	81.81		
6/17/2011	1194.78	367.5	827.28	49	\$	77.74		
7/1/2011	1194.78	323.4	871.38	47	\$	78.54		
7/15/2011	1694.78	352.8	1341.98	45	\$	115.81		
7/29/2011	1194.78	354.64	840.14	43	\$	69.28		
8/12/2011	1194.78	332.59	862.19	41	\$	67.79		
8/26/2011	1194.78	356.48	838.3	39	\$	62.70		
9/9/2011	1194.78	336.26	858.52	37	\$	60.92		
9/23/2011	1194.78	169.05	1025.73	35	\$	68.85		
10/7/2011	1694.78	137.81	1556.97	33	\$	98.54		
10/21/2011	1194.78	355.74	839.04	31	\$	49.88		
11/4/2011	1194.78	355.74	839.04	29	\$	46.66		
11/18/2011	1194.78	355.74	839.04	27	\$	43.45		
12/2/2011	1194.78	355.74	839.04	25	\$	40.23		
12/16/2011	1194.78	355.74	839.04	23	\$	37.01		
12/30/2011	1194.78	355.74	839.04	21	\$	33.79		
1/13/2012	1694.78	355.74	1339.04	19	\$	48.79		
1/27/2012	1194.78	355.74	839.04	17	\$	27.36		
2/10/2012	1194.78	355.74	839.04	15	\$	24.14		
2/24/2012	1194.78	355.74	839.04	13	\$	20.92		
3/9/2012	1194.78	355.74	839.04	11	\$	17.70		
3/23/2012	1194.78	355.74	839.04	9	\$	14.48		
4/6/2012	1694.78	355.74	1339.04	7	\$	17.98		
4/20/2012	1194.78	355.74	839.04	5	\$	8.05		
5/4/2012	1194.78	355.74	839.04	3	\$	4.83		
5/18/2012	1194.78	355.74	839.04	1	\$	1.61		
Totals	\$ 61,202.51	\$ 14,585.35	\$ 46,617.16		\$	4,478.45		

* * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Michele L. Braukmann and Ross McLinden of Moulton Bellingham PC., attorneys for Joshua Kreilaus, and Leonard H. Smith and Christopher C. Stoneback of Crowley Fleck, PLLP, attorneys for Colorado Tubular Aztec Pipe, LLC:

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) and (d).

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, Bureau Chief, 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.

Dated: May 25, 2012.

/s/ TERRY SPEAR

Terry Spear, Hearing Officer
Montana Department of Labor and Industry

KREILAUS.HOD.TSP