

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

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MITCHELL REINHARDT,  
Charging Party/Appellant,

HRB CASE NO. 0071012381

-v-

REMAND ORDER

BNSF RAILWAY COMPANY,  
Respondent/Appellee.

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Charging Party, Mitchell Reinhardt, filed a complaint with the Department of Labor and Industry (Department), which alleged unlawful discrimination in employment on the basis of age and disability. Following an informal investigation, the Department determined that a preponderance of the evidence supported Reinhardt's allegations. The case went before the Hearings Bureau of the Department of Labor and Industry, which held a contested case hearing, pursuant to § 49-2-505, MCA. The hearings officer issued a Decision on November 24, 2009, which was affirmed by the Montana Human Rights Commission (Commission) on April 27, 2010. Charging Party petitioned the First Judicial District Court for judicial review, and the matter was removed to federal court by Respondent BNSF Railway Company. On February 6, 2012, the United States District Court for the District of Montana reversed the Commission and remanded the matter for further proceedings. On February 27, 2012, the Commission entered an Order to Remand the case to the Hearings Bureau of the Department of Labor and Industry to revisit the issue of the liability of Respondent in light of the legal analysis appropriate to a case of direct evidence of discrimination. The hearings officer's Decision on Remand was issued on March 11, 2013, and concluded that unlawful motive played no role in the decision of BNSF Railway Company to terminate the employment of Mitchell Reinhardt. Reinhardt again filed an appeal with the Commission.

The Commission considered the matter on September 19, 2013. Peter Michael Meloy, attorney, appeared and presented oral argument on behalf of Reinhardt. Dennis Nettiksimmons, attorney, appeared and presented oral argument on behalf of BNSF Railway Company.

### **STANDARD OF REVIEW**

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. *Admin. Rule of Mont. 24.9.123(4)*. A factual finding is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the Commission with a definite and firm conviction that a mistake has been made. *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, 198 P.3<sup>rd</sup> 284. The Commission reviews conclusions of law to determine whether the hearing officer's interpretation and application of the law is correct. *See, Denke*, ¶ 39.

### **DISCUSSION**

After careful consideration of the complete record and the argument presented by the parties, the Commission determines that the hearing officer failed to conduct a full legal analysis of the direct evidence of discrimination in BNSF Railway Company's decision to terminate Reinhardt's employment. The legal framework for analysis set out by Opinion & Order of the United States District Court on February 6, 2012, requires more than a determination that BNSF did not act with discriminatory animus.

It is an unlawful discriminatory practice for an employer to refuse employment to a person or discriminate against a person in a term, condition, or privilege of employment because of age or a physical disability when the reasonable demands of the position do not require an age

or physical disability distinction. *Section 49-2-303(1)(a), MCA*. “Physical or mental disability” means (i) a physical or mental impairment that substantially limits one or more of a person’s major life activities; (ii) a record of such an impairment; or (iii) a condition regarded as such an impairment. *Mont. Code Ann. § 49-2-101(19)(a), MCA*.

Reinhardt and BNSF Railway Company concur that the company terminated Reinhardt’s employment because BNSF determined that Reinhardt was unable to fulfill the essential functions of his position as a conductor-in-training in a safe manner. The hearing officer determined that a preponderance of the evidence indicated that Reinhardt did not self-identify a physical impairment, had no record of impairment, and BNSF did not regard Reinhardt as a person with an impairment. *Decision on Remand, p. 17*. The Commission does not concur with this determination.

A review of the hearing officer’s findings of fact shows that, while the employer may not have exhibited discriminatory animus, BNSF nevertheless based its decision to terminate Reinhardt’s employment on the assessments offered by various BNSF employees that Reinhardt may be too old for the position, sometimes walked in an unstable manner, and moved as if he were recovering from a stroke. *Decision on Remand, Findings Nos. 19, 20, 22, 24, 28, 29, 30, 32, 34, 41*. Ultimately, BNSF determined that Reinhardt exhibited certain physical limitations that prevented Reinhardt from safely performing some essential job tasks.

On judicial review of this case, the United States District Court determined, “[t]he evidence clearly shows that BNSF personnel judged Reinhardt to be physically incapable and possibly too old to perform his job adequately or safely, and for these reasons his employment was terminated.” *Opinion & Order, p. 9*. Based on the hearing officer’s findings and the District Court’s evaluation of the evidence, the Commission determines that BNSF regarded Reinhardt as physically limited in the performance of the major life activity of work. Therefore, the Commission concludes that BNSF regarded Reinhardt as physically disabled.

It is important to reiterate that the parties do not dispute that BNSF Railway Company terminated Reinhardt's employment because BNSF believed Reinhardt to have a physical impairment that gave rise to safety and performance issues. Consequently, the Commission determines that Reinhardt's termination from employment constitutes direct evidence of discrimination on the basis of disability and possibly age. As the United States District Court pointed out, "[i]n direct evidence cases in which both parties agree on the employer's articulated reason for terminating the plaintiff, the only issue to be decided is whether the employer's action is illegal." *Opinion & Order*, p. 13.

Unlawful discrimination based on physical disability includes "the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability." *Section 49-2-101(19)(b), MCA; accord Admin. Rule Mont. 24.9.604(3)(c), 24.9.606(1)(a)*. A person with a physical disability is qualified to hold an employment position "if the person can perform the essential functions of the job with or without a reasonable accommodation" for the person's disability. *Admin. Rule Mont. 24.9.606(2)*. Accordingly, an employer has a duty to provide a reasonable accommodation to a person with a physical disability if, with such accommodation, the person could perform the job's essential functions. *McDonald v. DEQ*, 2009 MT 209, ¶ 40, 351 Mont. 243 (citing *Pannoni v. Browning School District*, 2004 MT 130, ¶ 27, 321 Mont. 311); *Admin. Rule Mont. 24.9.606(2)*. An accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation. *Mont. Code Ann. § 49-2-101(19)(b), MCA*. The duty to make reasonable accommodations is an essential part of Montana's anti-discrimination statutes. *Hafner v. Conoco, Inc.*, 1999 MT 68, ¶ 36, 293 Mont. 512, 293 Mont. 542, 977 P.2d 330.

Rather than engage in the mandatory interactive process and identify potential accommodations that would have allowed Reinhardt to safely carry out the functions of a railway conductor, BNSF summarily terminated Reinhardt's employment on November 10, 2006.

In Montana, an employer is required to investigate potential accommodations that would allow a disabled employee to perform the essential functions of the job. *Admin. Rule Mont. 24.9.606(1)*. The duty to investigate an appropriate and reasonable accommodation rests with the employer when an employee is not informed prior to termination that the employee's disability posed a threat to continued employment. *Reeves v. Dairy Queen, Inc.* 1998 MT 13, ¶43, 953 P.2d 703. Moreover, when an employer defends the termination of an employee with a physical disability on the grounds that an accommodation for that person would endanger human health or safety, the employer's failure to independently assess whether the accommodation would create a reasonable probability of substantial harm creates a disputable presumption that the employer's justification is a pretext for discrimination on the basis of disability. *Admin. Rule Mont. 24.9.606(7)*. An employer is required to conduct an independent assessment of the probability and severity of potential injury resulting from the identified accommodation, taking into account all relevant information regarding the work and medical history of the person with the disability, before terminating an employee. *Admin. Rule Mont. 24.9.606(8)*.

While the hearing officer thoroughly explored whether discriminatory intent on the basis of age or disability motivated BNSF, the Commission observes that the hearing officer ignored the legal liability of BNSF for the company's decision to terminate Reinhardt's employment without investigating what reasonable accommodations might be available to assist Reinhardt and without conducting an independent assessment of the potential for injury resulting from those accommodations.

Therefore, the Commission remands this matter for further proceedings, based upon direct evidence of discrimination, for a determination of the legal liability of BNSF Railway

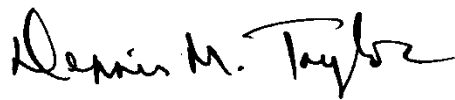
Company stemming from the termination of the employment of Mitchell Reinhardt in the absence of the employer's engagement in the interactive process for the purpose of identifying reasonable accommodations that would have allowed Reinhardt to safely perform the essential functions of the conductor job and the employer's failure to conduct an independent assessment of the probability and severity of injury likely to have resulted from the identified accommodations.

### **ORDER**

IT IS HEREBY ORDERED, that the hearing officer's Decision on Remand is REVERSED and REMANDED to the Hearings Bureau for further proceedings consistent with this Order. The Commission directs the hearing officer to determine the liability of BNSF Railway Company for the termination of Mitchell Reinhardt's employment in light of the direct evidence of discrimination and the employer's failure to comply with Montana law prohibiting discrimination in employment on the basis of age or disability.

IT IS FURTHER ORDERED, that the hearing officer determine appropriate damages and affirmative relief, in accordance with Mont. Code Ann. § 49-2-506. The hearing officer shall have discretion to conduct any additional fact finding deemed necessary.

DATED this 26<sup>th</sup> day of September, 2013.



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Dennis M. Taylor, Chair  
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 26<sup>th</sup> day of September, 2013.

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