BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0131016043:

MELISSA ANN ST. JAMES,	)	Case No. 218-2014
	)	
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	AND NOTICE OF ISSUANCE OF
WESTERN MONTANA MENTAL HEALTH CENTER,	)	ADMINISTRATIVE DECISION
	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

Melissa Ann St. James filed a complaint with the Department of Labor and Industry ("DLI") on January 28, 2013. She alleged that Western Montana Mental Health Center discriminated against her in employment because of disability by failing to provide a reasonable accommodation and by terminating her employment, in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.[1] On August 8, 2013, DLI, through its Office of Administrative Hearings ("OAH"), gave notice St. James' complaint would proceed to a contested case hearing and appointed Terry Spear as hearing officer.

The contested case hearing proceeded on January 16, 2014, and concluded on January 17, 2014, in Kalispell, Montana. St. James attended with her counsel, Timothy Baldwin, Lerner Law Firm and Stephanie M. Breck, Breck Law Office P.C.

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[1] At hearing, the Hearing Officer noted, without objection, that no retaliation claims were being prosecuted herein, based upon representations of counsel for St. James. "Transcript of Proceedings" (hereafter "Tr."), p. 7, lns. 4-13, as follows:

> Now, the final prehearing order issued on January 6, 2014, and I have a couple of corrections we need to make to that order. This is on the record now. It was off the record during the telephonic final prehearing conference ·which I don't believe I recorded.
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> The charging party confirmed that there is no retaliation claim here and this is limited to the discrimination claim and waived – or withdrew any retaliation claim.

No further mention of retaliation claims will be made in this decision.

The Center attended through a designated representative, Paul Meyer, with its counsel, Debra Parker, Parker Law Firm. Melissa St. James, Kathryn Henley and Colleen Johnson testified under oath.

Exhibits C (pp. 1-2)[redacted copies furnished by St. James' counsel after hearing], D (p. 1), E (pp. 1-2, 9, 14-17, 19), G (pp. 1-2, 4)[2], and H (pp. 1, 4, 13-16) were admitted into evidence. Exhibits F, 101-110[3] were admitted into evidence in their entireties. Exhibits A (one page in its entirety), D (p. 2) and E (pp. 3-8, 10-13) were admitted and then later withdrawn and are not part of the record. Exhibits B (pp. 1, 3-6), E (p. 18), G (p. 3) and H (pp. 2-3, 5-12, 17-18) were not offered and are not part of the record. Exhibit B, pages 2 and 7, were refused on hearsay objections – those two pages are part of the record but not part of the evidence available to be considered in deciding this case. St. James filed the last post-hearing argument, "Charging Party's Response to Post-Hearing Motions," on March 13, 2014.

II. Issues

The issue in this case is whether Western Montana Mental Health Center discriminated against Melissa St. James in employment because of disability by failing to provide a reasonable accommodation and by terminating her employment. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Western Montana Mental Health Center ("the Center") is a not-for-profit public benefit corporation without members. The Center operates facilities throughout Western Montana which provide a variety of services to clients who suffer from mental illness.

2. Melissa St. James was trained as a registered nurse at St.. Francis Hospital School of Nursing in Hartford, Connecticut. She held a registered nurse license in Connecticut from 1994 to 2009, obtained a Montana R.N. license in 2009, and maintained that license through the dates of hearing in this case.

3. The Center hired St. James on August 6, 2012 as a full-time psychiatric registered nurse, assigned to the Kalispell PACT program. During her interview for the position, St. James reported to the interviewers that she had multiple sclerosis ("MS"). She did not characterize it as a disability. Colleen Johnson, administrative

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[2] Exhibit G, pp. 1, 2 and 4 are now removed from evidence in accord with the "Orders on Motions" portion of this decision. They are retained in the record for any review.

[3] To avoid any confusion, Exhibit E, p. 9, was erroneously referenced as "Exhibit 109"at one point, Tr., p. 49, ln. 15. The letter confirming St. James' hire by the Center was actually Exhibit E, p. 9 (also called "Exhibit E9" or "Exhibit E-9" at various points in the transcript).

assistant and leader of the PACT team and Kathryn Henley, nurse practitioner and clinical supervisor of the PACT team,[4] interviewed St. James. After St. James disclosed her MS, the interviewers asked whether she could perform the essential functions of the job, and she told them that she definitely could, since she was currently well and her MS was not "flaring." Henley specifically asked St. James if she needed an accommodation, and she said she did not. The interviewers also asked St. James if she could lift up to 10 pounds and she said that she could. After the interview, the Center had good reason to believe, based on what St. James said, that she could perform all essential duties of the job she sought without accommodation, except perhaps when her MS "flared." St. James also affirmed in her job application that she could perform the essential functions of the job she sought.[5]

4. St. James alleged that her employer, the Center "knew of my MS upon hire and said they would be willing to accommodate my disability." "Verified Charge of Discrimination" January 24, 2013 (signed complaint filed with DLI, first page, "Particulars of the Charge," subparagraph D[6]). The Center did know that St. James had reported during her interview that she had MS. However, since during that interview St. James had denied any need for accommodation, the Center had no reason to start an interactive process to explore possible reasonable accommodations, and had not started such a process. Perhaps St. James concluded that reporting her MS to the Center meant that the Center knew she claimed to have a disability. She might have concluded, from the question about an accommodation, that the Center intended to accommodate any disability that might later arise from her reported MS during her employment. She had no valid reason to leap to either conclusion.

5. During the application process and at her interview, St. James gave no observable indications of having any physical disability, impairment or condition. Neither Johnson nor Henley had any preconceived notion that MS was a disability in every situation. St. James herself assured the Center she could perform the essential functions of her job.

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[4] Johnson testified that Shirley Howell, who was at that time the director of the Center, was also present for the interview. No further evidence regarding Howell's presence was offered, and Howell did not testify, so her presence or absence remains uncertain.

[5] The application's question and answer (p. 3, "Supplemental Background Information," Question No. 3) created a double negative: "Is there any reason why you cannot perform the essential functions of the job you are applying for?" St. James checked the box for "NO," that there was no reason why she could not perform the essential functions of the job for which she applied, i.e. (without the double negative), she could perform the essential functions of the job for which she applied.

[6] Another copy of the complaint, received from St. James on January 31, 2013, bears the typed words, "/s/ Timothy Baldwin for complainant" on the signature line, and contains the exact same subparagraph. Neither complaint was verified, but no issue has been made of that lack.

6. The PACT (Program of Assertive Community Training) team provided services to severely disabled mentally ill clients likely to have been institutionalized without the services they received through PACT. Services include case management, medication management, and assistance with life skills and activities of daily living. It was critical that members of the PACT team showed up as scheduled to work, and actually did the work assigned to provide services to the clients. Ex. 103, pp. 21-22 (right side of second page and left side of third page of exhibit).

7. St. James' first day of work was August 20, 2012. Her annual wage was $46,675 per year, with benefits including dental, vision and medical insurance, sick leave and paid holiday leave. Her work week was Monday through Friday, and she was scheduled to work 40 hours each week.

8. On Saturday, November 24, 2012, during the weekend after Thanksgiving, St. James was in Spokane with family to celebrate her birthday. She started to have some difficulty with walking, which she considered indicative of the beginning of an MS flare. The next day, Sunday, November 25, 2012, she called Johnson to report that she would be off work getting treatment, in hopes of hastening her recovery from the flare so she could return to work as soon as possible. St. James did not work that entire week of Monday, November 26, through Friday, November 30, 2012. This was the first time she had reported to the Center that she was missing or had missed work because of her MS.

9. St. James testified that as she recuperated from the flare, by the end of the weekend of December 1 and 2, 2012, she was able to walk normally and function normally, so she was able to return to work on December 3, 2012. She provided documentation explaining her absence and verifying that she was able to return to work. She testified that she provided the Center with two notes (Ex. D, p. 1 – both notes scanned onto one sheet of paper) dated December 4, 2012, and a "Fitness for Duty Certification"[7] (Ex. 102) dated December 5, 2012.

10. Exhibit D, p. 1, consisted of scanned copies of two "Glacier Neuroscience and Spine" prescription slips, one above the other, with the scanned documents printed on a single piece of paper. Printed copies of the exhibit are hard to read, and the electronic copy, in Adobe, is clearer, so the contents of the exhibit will be described in detail. Both prescription slips were identical and appeared to be from a tear-off pad. At the top was had the address and phone number of Glacier

[7] Ex. 102 is the Center's copy of the "Fitness for Duty Certification." St. James' copy of the same document was Ex. D, p. 2. There may be references in the transcript to "Ex. D2," since counsel sometimes each used their own documents, and any such references are also to Ex. 102, the same document.

Neuroscience and Spine underneath the name, followed by the names of four practitioners, in smaller print. Beneath the name of each practitioner was what appeared to be that practitioner's Drug Enforcement Agency number. On the top slip, "Melissa St. James" was written upon the top slip, on the "name" line, "12-4-12" was written upon the date line, and the address line was left blank. Written within the space where a prescription would normally be written was: "Ms. St. James has a chronic medical condition that commonly causes flare ups that impair her neurological function & episodic profound fatigue that will require time off from work." Following was a signature of "Paul [last name illegible]" followed with an illegible scribble that could have been initials of a medical speciality. None of the four practitioners identified in the printed portion of the slip had a first name of "Paul." The name and date entries, and the signature at the bottom, were the same on the bottom slip. Handwritten in the prescription space was: "Please excuse Ms. St. James absence from work due to a flare of her medical condition which impeded her mobility & required active treatment from 11/26 thru 12/4/12." Colleen Johnson testified that she had seen the top slip, but denied seeing the bottom slip.

11. According to St. James, Ex. 102 was given to her, in blank, by Colleen Johnson, who instructed her to have it filled out and returned to the Center. Johnson testified that the blank form of Ex. 102 was an FMLA form that any employee could obtain and print out, but that it was not a form that a probationary employee needed to use in any instance and that she had not given the blank form to St. James and had not asked that it be completed by St. James' medical providers and returned. Johnson further testified that since St. James had voluntarily provided it, Johnson accepted it, and relied upon its contents regarding St. James' ability to return to work without limitations.

12. Ex. 102, a "Fitness for Duty Certification," bearing the Center's name at the top and a further label "Family and Medical Leave Act" underneath the Center's name, consists of a consent by the employee (signed by St. James) for the employer to have a healthcare provider (presumably of the employer's choice) contact the employee's healthcare provider who completed the bottom of the certification, for purposes of clarification related to the "serious health condition" identified in the certification. From the signature, the healthcare provider who completed the bottom of the certification appears to have been one of the four practitioners whose printed names were on the top of Ex. D, p. 1, at Glacier Neuroscience and Spine, although this is not certain, since the signature is only partially legible and the name is not printed anywhere on the certification. The only information provided by the certification is that St. James is certified as fit to return to full time work duties without limitations, and that the practitioner who signed the certification is located at 200 Commons Way in Kalispell, the address of Glacier Neuroscience and Spine,

and the practitioner's type of practice or specialty is "Neuro." There is no information of any kind about the condition which caused St. James' absence from work the entire week of November 26-30, 2012.

13. St. James agreed in her testimony regarding the hiring interview that she had not asked for any accommodation during that interview. St. James also had stated in her signed discovery requests that she did not make a specific request for accommodation during her employment with the Center. Remarkably, while being cross-examined by counsel for the Center, St. James was asked the following question, and gave the following answer, under oath: "Q. The truth is, Ms. St. James, during the entire time that you worked at the Mental Health Center for the PACT team you did not make a specific request for an accommodation, did you? A. That's untrue." Tr., p. 171, lns. 11-15. Nowhere in the transcript can the Hearing Officer find any testimony about when, where and to whom St. James ever made this alleged specific request for an accommodation.

14. St. James also insisted, in the same portion of her testimony, that she "absolutely did" refer to MS as a disability, in talking with both Colleen Johnson and Grace Johnston, calling them "the case managers" and saying that "I was very open about the fact that I was disabled." Tr., p. 173, lns. 3-13. Immediately following that exchange, St. James also denied that she had "admitted . . . that MS is not always disabling." Tr., p. 173, lns. 14-16. Counsel followed up by pointing out to her another discovery response in which she had described MS as an "often disabling disease," and asking her, "which means it's not always disabling, is it?" Tr., pp. 173, ln. 17 through 174, ln. 9. After her counsel's objection was overruled, St. James answered, "It's always disabling in some form or another." Tr., p. 174, lns. 16-17. Yet, as already noted above, St. James had assured the Center that she could do her job and did not require an accommodation, and later gave the Center a return to work slip (Ex. 102) that certified that she could return to work with no limitations. Far from being "very open" about her alleged disability, St. James during employment with the Center had indicated that she had MS, but had provided absolutely no medical information whatsoever about her MS, not even a medical verification of her diagnosis.

15. These were not superficial inconsistencies – they dealt with the key issue in this case. St. James made far too many seriously inconsistent statements under oath to have any credibility.

16. By the end of the week of Monday through Friday, December 3-7, 2012, and perhaps even earlier, during her absence, the Center had received informal anecdotal suggestions from St. James that her absence had been due to her MS. The Center had no actual medical documentation that St. James had MS. St. James still

had not requested any accommodation from the Center, and thus the Center still had not commenced any interactive process with St. James, such as requesting medical documentation to verify and to specify the nature of her condition and the extent of her limitations.

17. On the other hand, by December 7, 2012, in less than four months of employment commencing on August 20, 2012, St. James, working as a probationary employee, had missed work an unusually high number of hours. Ex. 105. She was absent during the entire 40-hour work week of September 17-21, 2012, for reasons unrelated to any physical or mental condition of hers that might be a disability. She was absent 8 hours during the work week of October 1-5, 2012, with no indication the absence involved any physical or mental condition that might be a disability. She was absent 2 hours during the work week of October 29-November 2, 2012, with no indication the absence involved any physical or mental condition that might be a disability. She was absent 8 hours during the week of November 5-November 9, 2012, with no indication the absence involved any physical or mental condition that might be a disability. She was absent for 16 hours (holiday hours used) during the week of November 19-23, 2012, which on its face was not related to any possible disability. St. James never reported to the Center that any of these absences were related to her MS. She offered no evidence at hearing that any of these absences were related to her MS.

18. On the face of the Center's records, for the fourteen weeks she worked before the week of November 26-30, 2012, she had worked 486 hours and been absent for 74 hours, none of which were related to her MS. She was averaging, as a probationary employee in a full-time psychiatric registered nurse position, almost 5.3 hours off work per week. That would amount to more than six weeks of absences, during a forty-eight or fifty week work year.

19. St. James acknowledged that the Center placed a high value on attendance. Tr., p. 193, ln. 24 through Tr., p. 194, ln. 3. The PACT program served population of severely disabled, mentally ill clients whose needs had to be met. Employee absences stressed the rest of the staff. Tr., p. 246, ln. 21 through Tr., p. 247, ln. 19, because failure to meet client needs could be dangerous to the client's well-being.

20. In addition, St. James knew that she was expected to bill 115 hours a month (hours for which her employer could receive payments supporting the Center). She had not met this expectation at any time during her employment.

21. Before St. James' absence due to her reported MS flare, Kathryn Henley, during her tenure (which extended to the end of October 2012), had already expressed concerns about St. James' performance, and not just regarding her

attendance. Henley, a psychiatric nurse practitioner, was St. James' clinical supervisor. Henley's concerns with St. James' job performance included a general lack of focus and omissions in her medical charting. Henley had to remind St. James to timely document client medication. Tr., p. 225, ln. 18 through p. 226, ln. 1. Henley spoke to St. James about that concern. Tr., p. 227, ln. 22 through p. 228, ln. 16.

22. At one point, Henley felt the need to double-check St. James' work when it involved client medications. This was not something Henley needed to do for other staff nurses. Tr., p. 230, ln. 23 through p. 231, p. 7.

23. Henley noticed that St. James frequently made personal telephone calls while at work. Tr., p. 225, ln. 18 through p. 226, ln. 1. Johnson also noticed that St. James spent a significant amount of work time on her telephone texting or talking to family members. Tr., p. 279, lns. 13-23.

24. Henley spoke to St. James about how to improve her performance. Tr., p. 239, lns 9-16. As St. James' clinical supervisor, Henley observed that St. James was not picking up the job as readily as other probationary registered nurses Henley had supervised. Tr., p. 227, lns 2-10, p. 230, lns. 10-16.

25. By October, Henley began to doubt whether St. James was on track to continue past her probationary period. Tr., p. 229, lns. 19-25.

26. Registered nurses on the PACT staff were expected to handle four case management clients. St. James was never able to undertake more than two case management clients at one time.

27. Also, an unusually high number of case management clients complained to Johnson about St. James. Johnson had more complaints about St. James from clients than she had about other case managers. Tr., p. 262, ln 5 through p. 263, line 8; p. 280, lns. 13-19; p. 316, lns. 4-12. St. James also complained about two of her clients, and requested that at least one of the two be removed from her case load, a request that Johnson honored. Tr., p. 263, lns. 9-15.

28. Johnson had told St. James at the beginning of her employment to come to Johnson when St. James was ready to start developing treatment plans for her case management clients. St. James never did consult with Johnson about treatment plans, but also never did complete the treatment plans for her case management clients. Tr., p. 264:15-25.

29. Johnson noticed enough overall examples of St. James' performance issues that Johnson began to be concerned for the safety of St. James' case management clients. Tr., p. 277, ln. 23 through p. 278, ln. 25. Johnson concluded that St. James

was not performing as expected for a registered nurse with 18 years of experience. Tr., p. 279, lns. 1-23. Among many other failures, Johnson also noted that St. James borrowed prescription medications from one client to give them to another, without immediately documenting the transaction.

30. Johnson talked to St. James about her performance issues. She never told St. James directly that she was performing poorly, but she kept pointing out the issues St. James needed to address. Since this was during St. James probationary period, there was no counseling, no documentation of problems, no formal or even informal warnings. Johnson had no reason to treat St. James like a full-time permanent employee, in deciding whether to end the employment relationship before the conclusion of the probationary period. Ex. 106 included a typed summary, dated December 6, 2012, by Colleen Johnson, of the problems she was experiencing with St. James, and an e-mail, dated December 7, 2012, from Grace Johnston, regarding problems she was having with her co-worker, St. James. St. James denied that she was ever given any negative feedback on her performance, but, once more, her credibility was damaged by her many inconsistent statements. It is more likely than not that St. James was made aware, in October and November, and then again during the week of December 3-7, 2012, of the shortcomings in her performance, even though they were not presented to her as performance failures, but rather as things she needed to pay attention to doing better.

31. After she missed work the week of November 26-30, 2012, St. James worked 4.5 days on the week of December 3-7, 2012. St. James' husband called Colleen Johnson at home on Sunday evening, December 9, 2012 to report that St. James was not planning to come to work the following week, with no explanation. In response to Johnson's question about whether St. James was sick, the answer was a flat "yes" with no further comment. Tr., p. 269, ln. 15 through p. 271, line 22; Exhibit 105.

32. Ultimately, Johnson terminated St. James' employment for a combination of job related issues including poor attendance, failure to meet minimum productivity expectations, failure to complete treatment plans for clients, inability to handle a full case management load, failure to handle simple responsibilities, and spending too much time on her telephone on personal and family matters. However, because she was still a probationary employee, the discharge letter of December 11, 2012, , Ex. E, p. 19, sent during St. James' absence commencing on December 10, 2012, simply stated that St. James had not been a "good job fit."

33. The Center's new hires are probationary status employees for six months, during which time they can be terminated for any reason or no reason. After

successful completion of the probationary period, they become regular status employees. Exhibit 103.

IV. Discussion[8]

1. The Applicable Initial Burden of Proof and the Failure to Meet It

Montana law prohibits employment discrimination based upon physical or mental disability. Mont. Code Ann. §§49-2-303(a). The provisions of the Montana Human Rights Act that prohibit discrimination mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in McDonnell Douglas.[9] See, e.g., H.A.I. v. Rasmussen, 258 Mont. 367, 852 P.2d 628 (1993); Crockett v. City of Billings, 234 Mont. 87; 761 P.2d 813 (1988); Johnson v. Bozeman Sch. Dist., 226 Mont. 134, 734 P.2d 209 (1987); European Health Spa v. H.R.C., 212 Mont. 319, 687 P.2d 1029 (1984); Martinez v. Yellowstone Co. Welf. Dept., 192 Mont. 42, 626 P.2d 242 (1981). Obviously, if a direct evidence case is presented, the McDonnell Douglas analysis is inapplicable. Laudert v. Richland County Sheriff's Dept., ¶¶22-24, 2000 MT 218, 301 Mont. 114, 7 P.3d 386; clarifying Reeves v. Dairy Queen, Inc., 1998 MT 13, 287 Mont. 196, 953 P.2d 703. But this is not a direct evidence case.

St. James' testified about verbal assaults she said Colleen Johnson and Grace Johnston inflicted upon her in a meeting on December 6, 2012, about "abuse of sick leave" and "taking advantage of" her MS (with Grace Johnston allegedly questioning whether the absence during the week of Nov. 26-30, 2012 even "looked like" MS). St. James also testified that she told the Center she was disabled by her MS, although what she said (and to whom) that constituted this alleged notice is less than clear. Perhaps she meant that the informal conversations with other personnel from the Center at random encounters during the time that she was off work that Nov. 26-30 week constituted the notice. These conversations were not adequate notice of disability, especially with no medical verification that she even had MS. As the findings stated, St. James contradicted herself too many times in her testimony, and in the most critical portions of it, to have any credibility in the absence of at least some corroborating evidence. A fact finder may properly find that the presumption for speaking the truth has been overcome where there is evidence that a witness has made inconsistent statements. Mont. Code Ann. § 26-1-302. Thus, since there is no

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[8] 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.

[9] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

credible direct evidence of a discriminatory motive for the discharge, this is an indirect evidence case.

A physical disability means a physical impairment that substantially limits one or more major life activities, a record of such impairment, or a condition regarded by the employer as such impairment. Mont. Code Ann. § 49-2-101(19) MCA. The determination of whether impairment resulting from illness is a disability under the Montana Human Rights Act requires a factual determination, made on a case-by-case basis. Reeves, ¶28, op. cit. For employment contexts, a substantial limit upon the performance of work means the individual is unable to perform a class of jobs or a broad range of jobs as compared to an "average" person with comparable training, skills and abilities. 29 C.F.R. 1630.2(j)(3). There is a problem in this case with this initial proof requirement. St. James did not prove that she has a physical impairment that substantially limited one or more major life activities, a record of such an impairment or a condition regarded by the employer as such an impairment.

This fundamental fact question is unique to the peculiar facts of this case. Melissa St. James testified that she suffers from MS. The credible evidence also supported findings that she told the employer she suffered from MS when she interviewed for the job, but also that she did not need an accommodation and could perform all of the physical requirements of her job. This evidence does not establish that any medical confirmation of the MS had been given to the employer, let alone any documentation of a long-term problem that might be a disability.

Now, when a person who may have a disability requests an accommodation, or the employer has notice that such a person may need an accommodation, even if the person has not requested it, the employer may need to ask more questions. Notice of an employee or potential employee's disability does trigger the employer's obligation to make an inquiry, without the need for an employee accommodation request. Downey v. Crowley Marine Services, 236 F.3d 1019, 1022 (9th Cir. 2001)(applying the law of the state of Washington, but Montana law should reach the same result).

In this case, St. James told the Center she had MS and that she did not need an accommodation and that she could perform all the duties of the job for which she was applying. Nothing in that communication gave the Center any notice that it needed to make further inquiry. The Center was required to make reasonable attempts through an interactive process to accommodate reported or otherwise reasonably apparent disabilities, Admin. R. Mont. 24.9.606(1)(a), but an employer is not required to be omniscient. On these facts, the Center did not know and did not have reason to believe that St. James was disabled. Not only was it logically impossible that the Center discharged St. James on the basis of a disability, the Center had no duty to inquire further about St. James' conditions.

Because of what St. James had told the Center, the Center never asked her for any medical information about her MS. And, as the record makes abundantly clear, she certainly did not provide any medical documentation about her condition. Alas, that situation never changed during her employment. At hearing, St. Clair offered some of her medical records, without any foundation, and argued that the records were admissible as statements of then existing condition (or perhaps as statements for purposes of medical diagnosis), under Mont. R. Ev., Rule 803(3) and (4). In an admissible medical record, the hearsay within hearsay of the patient's reports to the treating professional can be offered under any number of theories (including the two advanced by St. James), but when St. James offered these documents, there was no authentication and no foundation at all, nothing but two pages of a PDF file (or, in the alternative, two printed sheets of paper), with no testimony to establish that they were what they purported to be. Neither exception applied.

The prescription slips (Ex. D, p. 1) and the fitness certification (Ex. 102) that were admitted into evidence contained no statement that St. James had MS, and indeed, no identification of any kind of any condition beyond a statement that she had a "chronic medical condition." With Ex. 102 certifying that she was fit to return to work without limitations, there was still nothing to prompt the Center to make any further inquiry.

This was an unfortunate situation. It was made worse by St. James' difficulties being consistent in her testimony. The record lacks any basis upon which the Center could reasonably been required to make any inquiries.

Under McDonnell Douglas, 411 U.S. at 802, at the first tier, a person alleging discrimination must demonstrate a prima facie case of discrimination. In this case, the prima facie case means proof (adjusting the elements to the facts here) that: (1) St. James is a member of a protected class [a person with a physical impairment that substantially limits one or more major life activities, a record of such impairment, or a condition regarded by the employer as such impairment; (2) that the Center hired her for a job that she could perform when she commenced it and performed it adequately until her MS flared and (3) that the Center, with notice of her disability and the potential need for accommodation, did not commence an interactive process with her, instead discharging her.

St. James did not establish her prima facie case. The record even now has no competent evidence of her physical condition. She has never proved that she suffers from MS. The Hearing Officer is not suggesting that she made the whole thing up. But without medical confirmation that she had MS and that there was an ongoing problem after her absence during the work week of November 26-30, 2012, the Center was under no obligation to address her MS. St. James testified that she was very open about her

MS. Perhaps she believes she was, but in terms of providing confirmatory evidence of her condition, she was anything but open. She did not prove a single one of the elements of her prima facie case, and the employer never got any direct medical confirmation that she suffered from MS.

It would be grossly unfair and a denial of due process to relieve St. James of the burden of actually proving the elements of a prima facie case. The Center had no basis on which to open an interactive process with this probationary employee, and no notice of any disability related problems in performing her job, except minimal informal notice regarding the week of November 26-30, 2012, with a release to work without limitation provided the very next week after that absence. The evidence to establish the elements of the first tier of McDonnell Douglas is simply not there.

2. The Evidence at the Second Tier, Had It Been Reached, Would Have Exonerated the Center

Had St. James presented a prima facie case, the burden would then have shifted to the Center to "articulate some legitimate, nondiscriminatory reason" for the adverse treatment of St. James. McDonnell Douglas, 411 U.S. at 802. The Center would only have had the burden to show, through competent evidence, that it had a legitimate nondiscriminatory reason for discharging St. James. Crockett supra, 761 P.^{2d} at 817. The Center would face the duty to satisfy this second tier of proof under McDonnell Douglas for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 67 L.Ed.^{2d} 207 (1981). A defendant thus only need raise a genuine issue of fact by clearly and specifically articulating a legitimate reason for the rejection of an applicant. Johnson, op. cit., 134 Mont. at 140, 734 P.^{2d} at 212.

The legitimate business reason was established with substantial and convincing evidence. During her probationary period, St. James had too many absent hours from work and a number of performance problems. There is simply no evidence at all that any of these legitimate business reasons for letting St. James go before the end of her probationary period had any linkage to her MS.

Suppose, for the sake of the analysis, that St. James' testimony of the verbal attacks upon her by her supervisor and another employee (Johnston) had been credible. The timing of that meeting, on December 6, 2012, according to St. James could have

raised some questions about the employer's motivation for her subsequent discharge. The surprise and shock she testified to would then offer an explanation for her disappearance from work the next week, December 10-14, 2012, but her discharge letter issued on December 11, 2012, based, according to Johnson's documentation and testimony, on absences and performance problems that predated the MS flare and the missed work on November 26-30, 2012.

In short, had St. James proved her prima facie case and been credible in testifying about the December 6, 2012, meeting, the Center would still have carried its burden of proving that it had a legitimate, non-discriminatory reason for letting her go on December 11, 2012.

Given the strength of that evidence, and the weaknesses of the case presented by St. James, the record lacks credible evidence of pretext, at the third tier of McDonnell Douglas.

3. But What About "Regarded As" or "Record of" Disability Discrimination?

St. James did not prove that she had an impairment that substantially limited a major life activity, within the meaning of Mont. Code Ann § 49-2-101(19)(a)(i). But she still could be entitled to protection under the Human Rights Act if the Center regarded her as disabled because of her MS. Mont. Code Ann. § 49-2-101(19)(a)(iii); Welch v. Holcim, Inc., ¶28, 2014 MT 1, __ Mont. __, 316 P.^{3d} 823. However, as noted above, there was no substantial credible evidence that the Center's supervisory employees knew or believed that St. James had a disability within the meaning of the Human Rights Act. On this record, St. James had never provided documentation to the Center. Her employer had no confirmation that St. James had a record of an impairment that substantially limited a major life activity, so she did not prove that the Center could have taken adverse action against her prohibited by Mont. Code Ann § 49-2-101(19)(a)(ii).

4. Admission of Exhibit 105

The admission of Exhibit 105 into evidence was hotly contested. Tr., pp. 256, ln. 4 through 259, ln. 9. The Center's counsel struggled to lay a foundation for the exhibit, questioning the witness, Colleen Johnson. It became clear to the Hearing Officer that although Johnson recognized what the document was and who had produced it, she had not seen this particular printed page before. Finally, to conclude the process and move on, the Hearing Officer asked Johnson the foundational question necessary to rule on admission and ruled after hearing the answer:

> MR. SPEAR: Let me just -- I think it's pretty easy -- well, I don't know if it is or not. I'm going to ask the straight ahead question. You have 105 in front of you.

If you were still working as the PACT supervisor and this report was in front of you, would you rely upon it as accurate?
THE WITNESS: Yes.
MR. SPEAR: Admitted.

Tr., p. 259, lines 2-10.

Records of a regularly conducted activity, including data compilations, in any form, made at or near the time of the events, kept in the course of a regularly conducted business activity, and if it was the regular practice to make the data compilation, according to a qualified witness, are admissible even though the records are hearsay, unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. Mont. R. Ev., Rule 803(6). Johnson had already testified that Ex. 105 was a print-out of data generated by a computer at the Center, based on time records employees turned in, and the information in Ex. 105 was the type of information that the Center tracked for every employee. Johnson also had testified that although she had not seen the information in the format of Ex. 105 before, if she needed to check someone's performance (in terms of hours worked and hours absent per week), she would have no record of that herself but would call human resources or payroll to generate a form such as Ex. 105 for the information, and would expect to get a form like Ex. 105. Tr., p. 257, ln. 13 through p. 258, ln. 6. The only aspect of the "records of a regularly conducted activity" her testimony had not covered was the reliability of the information. That was of some importance, since St. James had denied missing some of the hours that Ex. 105 showed she had missed. So, when counsel for the Center again offered Ex. 105 and counsel for St. James again objected, the Hearing Officer asked the witness whether she would, under the circumstances she had described, have relied upon Ex. 105.

At that point, the Hearing Officer did not know what Johnson was going to say. She could have said, "yes," as she did, and she could just as easily have said, "no." Asking the question was not favoring either side, it was simply gathering the last fact necessary either to admit the document or to refuse it. When Johnson testified that she would have relied upon the document, its accuracy, as a matter of the Center's normal business practice, was established, and Ex. 105 could be properly admitted.

V. Orders on Post Hearing Motions

1. The Center's Motion to Strike or Refuse St. James' Provisionally Admitted Exhibit G, pp. 1, 2 and 4

During the contested case hearing St. James offered Exhibit G, pp. 1, 2 and 4, often referenced in the transcript as "G1, G2 and G4." The Center objected on grounds of self-serving, hearsay and relevance. All three pages were provisionally admitted over

objections, subject to St. James' ability to make a connection in subsequent testimony to establish relevance.

Exhibit G, pp. 1, 2 and 4, are copies of items St. James posted on her Facebook site.[10] Transcript 102, 8:2-8. She offered them as evidence supporting her claim that Colleen Johnson and Grace Johnston approached St. James about her travel during sick time and used her Facebook posts against her. Tr., p. 104, lns. 18-21. St. James' counsel represented that there would be evidence that Colleen Johnson and Grace Johnston "thought that she was lying against her condition and thus abusing her MS. They refer to the Facebook post." Tr., p. 104, lns. 22-24. Counsel for St. James represented that he would present evidence that Johnson and Johnston did that. Tr., p. 105, lns. 1-3. Based upon that representation, Exhibit G, pp. 1 and 4, were admitted provisionally, subject to that connection being made in the record. Tr., p. 105, lns. 6-22. Exhibit G, p.2, was admitted subject to that same connection being made in the record. Tr., p. 118, ln. 10 through p. 119, ln. 24.

St. James testified that Grace Johnston was her friend on Facebook and that they communicated with each other on Facebook. Grace Johnston did not testify.

St. James then testified that after she returned from her November 26 through December 1 sick leave, Colleen Johnson called St. James into her office ("before morning meeting") and asked St. James to explain her trip to Spokane and trip to Missoula that some of her coworkers apparently believed had occurred while St. James was on sick leave. St. James testified that Johnson told her the coworkers had reported seeing about the trips on St. James' Facebook postings. Tr., p. 121, lns. 13-24. St. James' entire testimony about what she said to Johnson follows:

> A. I explained to her that Spokane was on the Saturday prior to my being out during my Thanksgiving break and weekend where I was not scheduled to work, and that I was having some difficulty walking at that time.
>
> And that the other date was Wednesday, the 28th, and that was when my husband had to get some supplies and I went with him.

Tr., p. 122, lns. 2-9.

In St. James' additional testimony about what Johnson said to her during that meeting, she noted that Johnson's demeanor was "calm." Tr., p. 125, ln. 3 through

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[10] The Hearing Officer takes administrative notice that Facebook is a social utility that allows people to "post," on their particular site, pictures, videos, text messages, etc., so that friends and others who work, study and live around them (or across the world, for that matter) can access these postings.

p. 126, ln. 9. Although the date of this conversation is unclear, this testimony flowed eventually into testimony about delivering Ex. D, p. 1, the prescription pad notes, dated December 4, 2012. St. James' testimony is clear that this conversation about Facebook and travel during her leave time occurred the same day that she delivered Ex. D, p. 1 to the Center. However, St. James testified that she turned in the prescription pad notes, "both of them," on December 3, 2014, the day before the date upon which both notes were supposedly signed. Tr., pp. 124, ln. 4 through 125, ln. 2. This is inherently incredible, and was never explained.

Other than St. James, the only witnesses who testified at the hearing were Colleen Johnson and Kathryn Henley. Counsel for St. James did not ask witnesses Johnson or Henley any questions about Exhibits G1, G2 or G4. There is no evidence in the record to establish that either of St. James' supervisors had ever seen or heard of G1, G2 or G4, and it is not possible that those exhibits are relevant to facts or matters at issue in this case.

Relevant evidence is defined as evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would have been without the evidence. Mont. R. Ev. 401. Absent any attempt by St. James to introduce evidence that her supervisors had seen or heard of Exhibits G1, G2 or G4 while St. James worked at the Center, they are not relevant exhibits and should be removed from the record. Her testimony was not that her supervisors has seen her Facebook postings, but that her supervisors said that her co-workers has reported her trips based upon her Facebook postings.

Removing the exhibits from the record does not change, one way or the other, the value of St. James' testimony about the ugly meeting with Johnson and Johnston (and one other person) on December 6, 2012. The Hearing Officer did not find it credible, in the face of the categorical denials of Johnson that there ever was such a meeting. That credibility determination has nothing to do with Exhibits G1, G2 and G4. They are removed from the record because they were of no use in deciding any issues in this case. St. James' testimony about the December 6, 2012, meeting was not strengthened or weakened by looking at the exhibits, which offered nothing of relevance. Looking at the exhibits did not help the Hearing Officer by proving either St. James' condition or the allegedly hostile treatment she claimed she received December 6, 2012,[11] and added nothing of usefulness to the record.

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[11] Colleen Johnson testified that she held a meeting (the date of which she did not recall) with St. James, Grace Johnston and the nurse practitioner who had replaced Henley, to address some conflict between St. James and Johnston, apparently relating to Johnston feeling she was doing too much of what she thought was St. James' work. Tr., p. 272, ln. 18 through p. 274, ln. 11. However, this testimony could not be linked to December 6, 2012, or any other date, with any certainty.

2. Motion to Strike Sealed Portion of the Transcript

At St. James' request, a portion of the transcript was provisionally sealed for reasons of privacy. The subject of the testimony was discussion between St. James and Grace Johnston at an in-patient psychiatric treatment facility months before St. James began working at the Center. Neither St. James nor Grace Johnston was employed by the Center at the time. Once St. James began working at the Center, Grace Johnston was a co-worker. St. James did not offer the testimony to show the truth of what she and Grace Johnston had discussed. Transcript 35:9-10, 36:23-25.

St. James did not call Grace Johnston as a witness at the hearing. St. James testified to matters which she believed Johnston knew about even though the information had not come to Johnston from St. James. Transcript 41:11-13. That testimony goes to state of mind and should be struck from the record.

St. James also testified about specific discussions she had with Johnston several months before St. James came to work at the Center. If not offered to prove the truth of what was said, the conversations cannot be relevant to any facts at issue in this case. If, on the other hand, St. James expected the Hearing Officer to rely on her testimony as to the substance of those discussions, the testimony was hearsay with regard to what Johnston said, and still should be struck from the record.

At the conclusion of the sealed portion of the transcript, the hearing officer took the Center's motion to strike under advisement on grounds that he did not know whether a connection would be made until he heard the rest of the testimony. Tr., p. 45, lns. 3-10.

Grace Johnston's name came up a number of times later in the hearing, but the alleged conversations between St. James and Grace Johnston in the sealed portion of the transcript did not come up. St. James claimed she would link her testimony about alleged discussions with Johnston months before either worked at the Center with what the Center knew about St. James' medical condition or need for treatment. Tr. 38, p. 38, ns. 7-9. She did not make such a link. The sealed portion of the transcript is struck from the evidentiary record as irrelevant hearsay. Mont. R. Ev. 401, 401, 802. It remains part of the record for any appeal or review.

VI. Conclusions of Law

1. The Department of Labor and Industry's Office of Administrative Hearings has jurisdiction over the case. Mont. Code Ann. § 49-2-512(1).

2. Melissa Ann St. James did not prove that the Western Montana Mental Health Center illegally discriminated against her in employment because of disability, in

violation of Mont. Code Ann. § 49-2-303(1)(a), and her complaint against the Center should be dismissed in its entirety, without remedy or award on her behalf.

VI. Order

1. Judgment is found in favor of the Western Montana Mental Health Clinic and against Melissa Ann St. James on the charges that Western Montana Mental Health Center discriminated against her in employment because of disability by failing to provide a reasonable accommodation and by terminating her employment, in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.

2. The complaint of Melissa Ann St. James is dismissed in its entirety, without remedy or award on her behalf.

Dated: September 4, 2014.

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Timothy Baldwin and Stephanie Breck, attorneys for Melissa Ann St. James; and Debra Parker, attorney for Western Montana Mental Health Center:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Marieke Beck, Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The transcript is in the contested case file.