

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 781-2014:

JAMES FENNER,	)	HRB Case No. 0131016154
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
CASCADE COUNTY	)	
MONTANA EXPO PARK,	)	
	)	
Respondent.	)	

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I. Procedure and Preliminary Matters

On May 6, 2013, James Fenner filed a complaint with the department’s Human Rights Bureau. Fenner alleged that Cascade County Montana Expo Park (“Expo Park”), discriminated against him in employment because of disability (anxiety disorder, depression) and retaliated against him for complaining about it. The Office of Administrative Hearings issued a notice of contested case hearing, assigning Terry Spear to preside, on October 25, 2013.

The contested case hearing proceeded on May 7-9, 12 and June 9, 2014, in Helena, Montana. Fenner attended with counsel, Donald Ford Jones, Hohenlohe Jones PLLP. Expo Park attended through its designated representative, Lisa Bracco, general manager, with counsel, Dee Ann Cooney, Cooney Law Firm, and Maureen H. Lennon, MACo Defense Services.

Appendix A lists the witnesses who testified, in the order in which they testified. Appendix B lists the exhibits admitted into evidence.

II. Issues

The primary issues in this case are whether Expo Park illegally discriminated or retaliated against Fenner, and if so, what remedies are appropriate. A full statement of the issues appears in the final prehearing order.

Based upon the evidence adduced, the arguments presented and the applicable law, the undersigned now makes the following findings of fact, reaches the following conclusions of law, and issues the following judgment.

### III. Findings of Fact

1. Charging Party James Fenner worked as a full time permanent laborer for Cascade County, at Respondent Cascade County Montana Expo Park (“Expo Park”), from June 13, 2012 through August 8, 2013. When he left Expo Park employment in August 2013, he was 27 years old. He had previously worked two different periods as a temporary laborer for Expo Park. Temporary laborers were also called “part time” employees, but sometimes they would work full work weeks and even some overtime. He first worked as a temporary employee during the State Fair, a major annual event at Expo Park, in July 2011. In October 2011, his supervisor, Rick Cole, called Fenner to see if he had found full time work, because another temporary laborer job with full time hours was available at Expo Park. Fenner started that work later that October.

2. As a youth, Fenner was a victim of sexual abuse by a family “friend.” Through adolescence and adult life, he has had difficulty trusting people. In middle school and high school, he was diagnosed with depression and anxiety disorder. As an adult, he was treated and is still being treated for symptoms of these mental conditions. One of his more recent health care professionals has also diagnosed him as suffering from Post Traumatic Stress Disorder. Fenner’s diagnosed conditions were and are mental impairments that substantially limit his major life activities, including thinking, sleeping, working and interacting with others. He has records of these impairments. His diagnosed conditions<sup>1</sup> often skew his perceptions of reality, so that he reacts inappropriately to the actual situation. The worse his emotional state, the more risk he faces of anxiety attacks.

3. Fenner’s treating health care professionals have often, but not always, prescribed medications to treat his mental conditions. The medications were often helpful, when Fenner could afford them. Sometimes Fenner has resorted to marijuana use, use of other people’s prescription drugs, abuse of his own prescription drugs or use of street drugs, to dull and to escape his feelings. Sometimes he felt that the substance abuse helped him function. While his substance abuse probably has sometimes taken the edge off of his feelings, it more likely than not has also exacerbated his impairments, so that he was actually less able to function. Fenner also has a fear of heights. Depending upon how he felt (his levels of depression and anxiety at the time), Fenner sometimes could work at heights (as he did at times

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<sup>1</sup> For a person with an anxiety disorder, times of sudden escalation of anxiety are sometimes called “anxiety attacks” or “panic attacks.” Fenner has had such sudden escalations, sometimes to the point that of being totally unable to function. Where relevant, the Hearing Officer will call such a sudden escalation of anxiety an “anxiety attack” and will describe its impact upon his capacity (i.e., unable to work, able to work with difficulty, etc.) in the particular situation, as shown by the evidence.

pertinent to this case, in mechanical lifts and up ladders and onto roofs). When his fear and depression escalated, his fear of heights could become so strong that it overwhelmed him and significantly diminished his ability to work at heights.

4. Prior to obtaining employment with Expo Park, Fenner had enrolled with the state Department of Public Health and Human Services' Montana Vocational Rehabilitation Programs (MVR). Fenner reported his mental conditions to MVR in the course of obtaining services.

5. Fenner reported to MVR that his mental conditions substantially limited his participation in effective job searching and his ability to interview successfully for jobs. This was often true, but sometimes Fenner did engage successfully in job searches and interviewed successfully for jobs. He also concealed his substance abuse from MVR, so that when MVR counselors attempted to help Fenner find work or improve his credentials with school or training, they did not know that his conditions were sometimes worsened by his substance abuse, decreasing his ability to participate in effective job searches, successful jobs interviews, successful courses of study or successful completion of training.

6. In addition to concealing facts pertinent to what MVR was attempting, Fenner actively provided false information to MVR. He told his first counselor, Tammy Hogan, that he was participating in mental health counseling through the City-County Health Department and was taking Zoloft and Buspar for depression and anxiety. Contrary to his representations to Hogan, Fenner was only participating sporadically in mental health counseling and was not consistently obtaining and taking his prescription medications.

7. Part of Fenner's problem with consistent use of his prescribed medications resulted from lack of money. Sometimes he could not afford his prescription drugs and did not have social services' assistance for those expenses. Whether or not he had prescription drugs he was using as directed, Fenner sometimes bought other drugs illegally, including other persons' prescription drugs, sometimes the same or similar drugs as those prescribed for him, but other times not.

8. MVR's counselors developed a plan to help Fenner pursue employment as a heavy equipment operator. Misti Hofland replaced Hogan as Fenner's MVR counselor in August 2011. Hofland and Fenner proceeded on a plan for him to enroll in a nine-month heavy equipment operator training program through the University of Montana College of Technology. However, Fenner discovered his girl friend was pregnant, and decided instead to work to try to help with his son's care. Instead of immediately reporting this change of his plans to MVR, Fenner told Hofland that he had applied for and had been denied admission to the program. He never actually

applied to U. M. College of Technology's heavy equipment operator training program while receiving services from MVR.

9. In October 2011, Fenner also reported to Hofland that he had been depressed because of his unsuccessful efforts to secure employment, indicating that he had struggled with completing applications and with participating in interviews. These reports were not the whole truth. Fenner had applied and interviewed on his own in July 2011 for his initial Expo Park temporary employee job, and had been rehired by Expo Park for a second temporary position in October 2011 without MVR's help. In this second temporary job, Fenner was now working 40 hours per week or more for Expo Park.

10. Some time after Fenner got his second temporary job with Expo Park in October 2011, he told MVR about it. MVR provided Fenner with funds to buy work clothing, which he did buy. However, during his employment at Expo Park, Fenner never requested and never authorized MVR to provide information to Expo Park. As a result, MVR never did provide information about Fenner to Expo Park, regarding either his conditions or the services MVR provided to him.

11. Fenner initially reported to Hofland that his coworkers were very supportive of him and were training him on equipment that would eventually help him obtain a permanent position at Expo Park.

12. While working the temporary laborer job in late 2011, Fenner mentioned to his supervisor, Rick Cole (as well as to other coworkers), that he was receiving vocational rehabilitation services. He told Cole and other workers that "Voc Rehab" had paid for his brand new work clothes. Co-worker Brandon Hassel actually gave Fenner a ride to get those clothes, and Hassel's impression was that Fenner got money from the state to buy his work clothes because his low income level made him eligible for assistance, an assumption that other coworkers more likely than not shared. The substantial and credible evidence of record also established that Fenner mentioned a few times, informally, in conversations with coworkers, that he sometimes became anxious. Some of his coworkers observed his anxiety in work settings. He did not give his employer any documented notice of his mental conditions or impairments, nor did he make any formal or informal request for accommodation during his temporary employment at Expo Park.

13. MVR closed its file on James Fenner on February 1, 2012 because he was now engaged in successful employment with Expo Park.

14. Fenner had some difficulties interacting with other workers at Expo Park. Sometimes he got along well with his coworkers, but sometimes not. Strong, loud "take charge" personalities were particularly difficult for him. Often he perceived

such persons as attacking and bullying him, even when that was not true. Fenner sometimes responded inappropriately to these perceived attacks.

15. While Fenner was working 40 hours in the temporary position in late 2011, his coworkers started calling him “Bob.” Fenner admitted that co-worker Jonathon Wegner was the person who started calling him “Bob,” and agreed that it was because there were either two or three Expo Park workers named “James.” “Bob” became Fenner’s nickname. Thereafter, around the beginning of 2012, “Bob” appeared on the work schedule for Fenner, and then it changed to “BOB,” which he thought looked like initials for some words. He decided he didn’t like it. He admitted, in his deposition, that he had never told the crew directly that he didn’t like it, but in March 2012, he went to Expo Park Manager Lisa Bracco and complained about being called “Bob” and “BOB.” Bracco told his coworkers to stop doing it. By the end of April 2012, they had stopped doing it, at first with a few lapses, and then entirely. Fenner was thereafter identified on the work schedule as “Fenner.” Fenner admitted that if he had complained about it sooner, it would have stopped sooner. The substantial and credible evidence of record did not establish that any of his coworkers meant to show dislike or scorn towards him through the use of this nickname. The substantial and credible evidence of record did not establish that “BOB” stood for any derogatory phrase aimed at Fenner. The substantial and credible evidence of record established that Expo Park responded properly and promptly to Fenner’s complaint regarding being called “Bob” or “BOB.”

16. Fenner wanted a permanent job at Expo Park, and during his tenure as a temporary worker this motivation helped him to stay focused and to perform his work successfully. He frequently expressed his ambition to get a permanent job. Several of the permanent workers, as well as his supervisor, Rick Cole, tried to help him. They took time to share their experiences carrying out some of the duties permanent workers had to perform. They encouraged and assisted Fenner in performing duties that were difficult for him, and prepped him on how particular machines were operated. Cole even shared with Fenner what questions were part of the application process for the permanent job, and how to answer some such questions. None of these methods of preparing to go through the application process were available to applicants who were not temporary workers for Expo Park when they sought permanent employment there, nor did Expo Park approve any of these methods for helping Fenner or any other temporary worker to do better during the application process.

17. In June 2012, Fenner applied for a permanent laborer position. Job duties included operating tractors, forklifts, trucks, bobcats, loaders and lawnmowers and performing general repairs, carpentry, welding and other maintenance and shop work.

18. Fenner overstated his experience and skills during the application process. Thanks to the assistance he had received from his coworkers, he had some knowledge about many of the job duties, he could credibly claim experience that he did not have performing work and operating machines. Fenner was unsure whether he had the requisite qualifications for the permanent laborer position, but he wanted the job, and with help from some of his coworkers, he did well enough in the application process so that Expo Park offered him the job in June 2012. He accepted. He became a permanent laborer for Expo Park, with a six month probationary period.

19. During the hiring process, Fenner did not provide Expo Park with any notice or any documented information that he suffered from depression and an anxiety disorder and that he had a fear of heights. Several coworkers noticed Fenner's fear of heights – before and after he became a permanent worker – but the substantial and credible evidence did not show that Fenner had explained to coworkers or disclosed at all to Expo Park management that he had diagnosed and documented depression and anxiety disorders, and that his fear of heights was powerful when he was anxious.<sup>2</sup>

20. Every permanent Expo Park laborer would sooner or later work shifts alone. As a result, every permanent Expo Park laborer needed to be at least minimally competent to address, alone, any situation that could arise at Expo Park, with only phone calls to coworkers<sup>3</sup> for suggestions and directions about how to solve a particular problem. Fenner knew this before he applied for the permanent job.

21. Fenner knew that he needed to train on much of the equipment and learn how to operate it. He knew he needed to get used to working at heights. He knew he also needed to learn how to do many of the job duties for the permanent laborer position. Fenner was competent doing janitorial and grounds keeping work. He did not have the skills and experience necessary to perform the other duties of the permanent laborer position without guidance and training. He was initially confident that he could do what he needed to do to be able to perform his duties as a permanent laborer.

22. The substantial and credible evidence of record showed that once Fenner actually began work as a permanent laborer he saw more clearly how much more was

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<sup>2</sup> Co-worker James McDermand, for example, testified that Fenner told him of his fear of heights and enlisted McDermand's aid in getting up on one of the high roofs at the fairgrounds, where work sometimes had to be done. With McDermand's help, Fenner was able to go up on the roof and come back down. Tr. III, 621:1-21. McDermand could have believed that Fenner had solved his fear of heights at work thereafter.

<sup>3</sup> Some experienced permanent laborers developed special expertise, in roofing, electrical work, etc. Knowing which co-worker to call for advice about a particular problem was also important.

expected of him. When Fenner was a temporary worker, there had been enough work to keep him busy for 40 hours a week, but he was not one of the permanent workers, the stalwarts, expected by Expo Park to be willing and able to handle any job that needed to be done. Temporary workers were typically assigned less challenging tasks when working by themselves, and were assigned to work with one or more of the experienced workers for more difficult work. Temporary workers were not expected to work shifts alone. Now Fenner was a permanent worker and was expected to handle any jobs that needed to be done, with only limited on-the-job training from his supervisor or his coworkers as might be necessary. Management and the other permanent workers expected Fenner to be able to perform his job, an expectation that began to wear at him.

23. Some of the permanent workers tried to help Fenner out with jobs that gave him problems. Fenner could sometimes accept that help. Whether he could accept the help or not depended upon his mental and emotional states. In this context of accepting coworker help, his mental and emotional states depended primarily on his fluctuating levels of anxiety and depression during each work day. How he felt when he arrived at work, his interactions with coworkers and his success or lack thereof in performing the job duties he faced that day, all influenced his emotional stability at work. His emotional stability at work could also be influenced by whether he was obtaining and regularly taking his prescribed medication as directed and whether he was or had recently been abusing medication, using marijuana and/or using other street drugs. Obviously, how he felt when he arrived at work could also be influenced by how comfortable his personal life was at the time, and whether he was involved with counselors or others who were helping him deal with his anxiety and depression. When his emotional stability was shaky, he was more likely to perceive efforts to help him as criticism and hostility, and to resist the help. His resistance sometimes was passive – not doing what was suggested or directed. Sometimes it was active – arguing about what should be done, complaining about the job, challenging the authority of the person trying to help him. More likely than not, Fenner was fearful of failure and began to view his employer and some of his coworkers as adversaries who unreasonably expected more from him than he could accomplish. He began to feel like a victim. The more he felt like a victim, the more hostility and criticism he perceived from his coworkers and the more defensive and afraid he became.

24. From the substantial and credible evidence, when Fenner was depressed or anxious, he tried to avoid challenging jobs in favor of tasks that he could do easily by himself. He sometimes sought out easier jobs and avoided work he was expected to do as a permanent laborer. Some of his coworkers became frustrated and unhappy with him because they saw him avoiding more difficult tasks. Thus, when Fenner

perceived criticism and hostility from some coworkers, he was often seeing reality quite clearly. Due to his mental conditions, his response to that reality was to avoid addressing it and to blame his coworkers and employer. Thus, when Rory Rust, for example, would tell Fenner that unless he learned to do the work that permanent workers did, his job might be in jeopardy, Fenner interpreted the comments as threats to arrange his firing, not as a legitimate concern that Fenner needed to learn the whole range of tasks involved in being a permanent Expo Park laborer.

25. Fenner often did complete tasks he was assigned – sometimes slowly and sometimes with assistance, but also sometimes on his own. A number of coworkers testified at hearing that Fenner performed the jobs he was assigned in an acceptable manner. Perhaps this was true when being slow or needing assistance did not create any problems. Perhaps the witnesses believed that Fenner’s completion of tasks with their help and/or encouragement meant that he now could perform the tasks by himself, but this was not true. Depending upon his mental state and upon which coworkers were present at a particular time, Fenner did better or did worse at performing the more challenging work tasks.

26. Charles Ed Herman, who typically goes by “Ed,” testified about working with Fenner just before what he believed was the 2012 Fair, in July 2012. This time frame would place that working day just a few weeks after Fenner had been hired as a permanent laborer. Herman observed Fenner’s fear of heights, but with Herman’s quiet encouragement, Fenner was able to complete his tasks, by himself in the bucket on the bucket truck, working at heights. Brandon Hassel had two experiences with Fenner working at heights, and testified that Fenner had to work more slowly, but was ultimately able to perform the tasks at hand.

27. On the whole, there was insufficient credible evidence to establish that Fenner ever had such a severe anxiety attack while working at heights on any of the equipment in Expo Park that he was unable to complete his work. At various times in this contested case proceeding, Fenner contended that there was such an episode, and that it was one of the reasons that Expo Park management knew or should have known he needed an accommodation. However, he did not prove any such episode during the hearing.

28. During his first six weeks or so of permanent work, until July 21, 2012, Fenner’s work was relatively uneventful. He was not disciplined and he did not have any anxiety attacks that conspicuously interfered with his job performance. When he was anxious, he was able to work through it. His struggles with some of the expected tasks for permanent workers had not led to confrontations or problems that caused closer scrutiny of his work. However, Fenner’s emotional condition had already deteriorated as a result of the higher expectations that he now sensed that he faced

daily as a permanent worker. Expo Park management had no idea that this was happening.

29. As already noted, to escape his depression and anxiety Fenner sometimes resorted to marijuana use, use of other people's prescription drugs, abuse of his own prescription drugs, or use of street drugs. Finding No. 3, pp. 2-3. Testifying at hearing, Fenner tried his best to avoid admitting his substance abuse while working at Expo Park, but eventually he did make that admission. The record is unclear about how many times Fenner was under the influence of drugs while working and what degrees of impairment may have resulted. Because the drug use sometimes exacerbated his impairments, it is more likely than not that some work performance problems resulted from his drug abuse as well as his mental conditions.

30. On July 21, 2012, Rory Rust was involved in the most dramatic of Fenner's difficulties at work. Rust sometimes assigned tasks to Fenner and to other workers and sometimes directed the work of his coworkers. Rust could be brusque and sometimes downright unpleasant in dealing with coworkers. Although he might sometimes have been reacting to coworkers he felt were not working well enough or fast enough, sometimes there was no work-related explanation for his harshness. Before and after Fenner became a permanent employee, Rust sometimes treated Fenner harshly. Some Expo Park coworkers thought that Rust was now being particularly harsh with Fenner, while others thought Rust was no more harsh with Fenner than with everybody else. Fenner began to see Rust as someone who was threatening to get him fired. Finding No. 24, pp. 7-8. Rust sometimes challenged Fenner with particular tasks that were expected of permanent workers but that Fenner was avoiding. Such "difficult" tasks for Fenner became more difficult for him to perform if his anxiety escalated into an anxiety attack. The presence of Rust, now feared by Fenner, tended to increase his anxiety, but neither Rust nor Expo Park management had notice from Fenner about this. Neither Rust nor Expo Park management could reasonably have known this.

31. On July 21, 2012, Fenner signed up on the job board to mow a back lot. Fenner then took a tractor to the back lot, where he expected to spend the work day mowing, a solitary and relatively simple task. Rust came to Fenner and directed him to help Brandon Hassel and Rust on rodeo set up. Rodeo set up was more efficient and quicker with more workers and was a duty largely performed by permanent workers, with temporary workers helping at times. It involved a scheduled event, and needed to be timely completed. Fenner had helped before on rodeo set up.

32. There was no evidence that mowing the back lot was a high priority task on July 21, 2012. It was just a routine job on the list posted for the day. Recruiting Fenner from mowing to help with rodeo set up was appropriate, but Fenner reacted

badly to it. He had wanted to be left alone to mow by himself that day, not to work with others, and especially not to work with Rust. As a result, Fenner was angry.

33. Rust was operating the forklift, with Fenner and Hassel taking the heavy panels and heavier gates off the forklift to assemble them into pens. While working, Fenner kept up a stream of complaints about any number of issues, including having to work the daily long hours for the Fair. As the work progressed, Fenner's demeanor and behavior rapidly became more volatile and erratic, and he began to suffer an anxiety attack.

34. Despite having worked on rodeo setup before, on July 21, 2012 Fenner became unable to do so. As he and Hassel moved panels into place, Fenner lifted each panel on the opposite side of the panel from Hassel. This made it more difficult for both Fenner and Hassel to lift and to move each hundred and fifty pound panel safely, because it required one of them to walk backwards. It was easier and safer for both men to lift on the same side of the panel, so that both could walk forward to haul the panel into place. With one of the panels, Fenner was walking backwards while holding up the opposite side of the panel from Hassel, and tripped in a gopher hole. He was not injured, but easily could have been.

35. Hassel told Fenner to get on the same side of the panel with him and walk forward, instead of picking up the opposite side and then walking backwards. He told Fenner that picking up the opposite side was making the job more difficult. In response, Fenner vented the anger his anxiety attack had amplified, arguing with Hassel. "You're not my boss. Why are you telling me what to do? Everything that I do, you're telling me that I'm doing it wrong." Tr. III, 763:3-5. Fenner continued to complain and to argue and became increasingly agitated.

36. The three men began to set the gates into the panels. The heavier gates had to be moved into place and then secured to the panels with wires. Rust got down off the forklift and helped. Fenner had secured gates to panels with wires before, but on July 21, 2012, he was unable to bend and cut the wire and then tie the gate to the panel with it. Rust reminded Fenner to bend the wire in half, to double it up. Fenner either could not or would not follow the simple directions Rust gave him. Instead, he handed the wire back to Rust. By this time Fenner was uncontrollably upset, in the grip of a rapidly escalating anxiety attack. Fenner began yelling at Rust in the same fashion he had yelled at Hassel, denying that Rust had any authority over him. In substance, Rust was trying to help Fenner by reminding him of how to handle the wire, in order to assist in the rodeo set up. Fenner was responding by screaming at Rust that Rust was not his boss. Rust walked away and got on the phone, consulting with supervisor Rick Cole. No threats had been made. No physical conflict had occurred. Neither Hassel nor Rust had harassed Fenner.

37. While Rust was calling Cole, at some distance away from where the set up work was taking place, Fenner began yelling at Hassel again, while Hassel was trying to set the gates by himself. Fenner then collapsed to his knees, sweating profusely, and began dry-heaving and crying. Since middle school, Fenner had a history of episodes of “spitting up” and manifesting a “bad gag reflex” when he had anxiety attacks. His anxiety attack and his anger exacerbated his difficulties on July 21, so that he went from resisting following his coworkers’ directions to being unable to perform tasks he knew how to do and then to being both hostile and helpless. Rust, though frustrated, had tried to help Fenner and to diffuse the situation. He had neither harassed nor bullied Fenner. Nonetheless, Fenner experienced everything Rust said and did that day as hostile and threatening, and his anger and anxiety spiraled out of control until he was incapable of working. Fenner could have called supervisor Cole himself, to complain about the situation. He did not do so, probably because he was so upset, but not because Rust or Hassel prevented him from calling Cole.

38. Rust returned, and told Fenner that he was being sent home. According to Hassel, Fenner had no way home and Rust drove him. While giving Fenner a ride home, Rust encouraged him to calm down and to relax – not to worry about the incident. He told Fenner that the matter was resolved and there would be no further repercussions.

39. Findings 30-38 are drawn largely from the testimony of Rust and of Hassel. Rust and Hassel gave consistent overlapping accounts about what happened on July 21, 2012. They were more credible than Fenner. There is no credible evidence that Rust or Hassel did anything improper or threatening towards Fenner that day.<sup>4</sup>

40. The credible and substantial evidence of record also proved that Expo Park laborers recognized Rust as a “lead man” and complied with his directions at work.<sup>5</sup> In his anxiety and anger on July 21, 2012, Fenner acted as if Rust was just

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<sup>4</sup> An extended comparison between Fenner’s written report of this incident and accounts of what he told the group investigating his complaint to Expo Park about the incident, and also between his hearing testimony about this incident and the testimony of the other two employees involved, appears in Appendix C to this decision.

<sup>5</sup> When Fenner testified that Rust harassed and intimidated him on a daily basis in September and October 2012, he readily acknowledged that Rust was his “lead man.” Tr. II, 372:7-14. However, regarding the July 21, 2012, incident, Fenner testified that Cascade County HR Director Stacey Bird was surprised, during her investigation into his rodeo set up complaint, that Rust was a lead man. Apparently Fenner was trying to justify his refusal on that date to follow Rust’s directions. However, finding out after the events of July 21, 2012, that the HR Director hadn’t known Rust was a lead man could not justify Fenner’s resistance to and resentment of Rust giving him directions on July 21, 2012.

another laborer. He resisted Rust's directions, became increasingly upset when Rust insisted he follow the directions and then ultimately collapsed in a severe anxiety attack. Rust was one of the coworkers who helped Fenner with his application and with preparation for his interview for the permanent job. Less than two months later, Fenner saw Rust as a sinister and hostile presence, looking for ways to harm him. Rust and Expo Park neither knew nor had any reason to know this.

41. Fenner was so angry over how he believed Rust and Hassel had treated him that on or about July 22, 2012, he made an internal complaint to the Cascade County Human Resources Department that he had been harassed by Rust and Hassel (primarily Rust), on July 21, 2012, and that Rust had been "rude" to him. Stacey Bird, County Human Resource Director investigated, interviewing the workers.

42. Some of Bird's investigation regarding Fenner's complaint about Rust occurred on July 24, 2012, in a meeting between Bird, Union Field Representative Brian Boland, Shop Steward Ed Herman and Fenner. More of it occurred in a subsequent "investigatory meeting" on July 27, 2012, staffed by Bird and Boland and another County employee, Linda Cargill. Boland took notes of what transpired on behalf of the Union. Cargill took notes on behalf of the County. During that meeting, Bird interviewed nine union members who worked for Expo Park – Ed Herman, Brandon Caldwell, Brandon Hassel, James McDermott, Scott Cornwell, Mel Brown, John Wegner, Rory Rust and James Fenner. Ex. 1, first three pages.

43. According to Bird, her investigation showed that some workers felt that Rust was harsh with Fenner, while other workers suggested that Fenner was not carrying his weight as a permanent employee, and would "disappear, take off, only wanted to clean the bathrooms." Tr. IV, 913:4-20. Bird's investigative conclusions were that Fenner's complaint was unsubstantiated, but that there was evidence that Fenner was not living up to job expectations. The evidence clearly demonstrates that Bird acted properly in broadening the investigation to include inquiry into Fenner's job performance, and that some of the other permanent laborers did report to Bird that Fenner was not pulling his weight as a permanent worker.

44. Bird testified that in her experience it was common that an investigation would lead to alternate issues that required their own inquiry. Whether it was common or not, Fenner's accusations referred to allegedly repeated episodes of rude, bullying and harassing incidents in which Rust allegedly criticized Fenner's work performance, not just the episode on July 21, 2012. Bird justifiably expanded her inquiries into Fenner's interactions with Rust and Fenner's work performance. Bird's developing concern about Fenner's capacity to do his job was legitimate, and not a retaliatory response to his internal complaint.

45. The record lacks substantial and credible evidence that Fenner provided any meaningful notice or information about his long-term anxiety disorder or his depression during either the investigation or the mediation between Rust and Fenner that followed Fenner's complaint. During the investigation, Fenner did tell Bird that he had an anxiety attack on July 21, 2012, but she, based upon her own experience, did not think he was making a request for disability accommodation, as her following testimony indicated:

Q During the investigation, did you hear anything about an anxiety disorder, about Mr. Fenner having an anxiety disorder?

A No.

Q What did you hear about any sort of issues that Mr. Fenner was having?

A What Mr. Fenner told me is he had had an anxiety attack.

Q And what did that mean to you?

A It just meant that whatever happened in the arena that day that, you know, caused him to become upset and was dry-heaving was something that occurred that day. I don't know what it was, but it didn't rise to the situation of saying, I have an anxiety disorder; which, in my mind, would have triggered a diagnosable situation from a medical professional. Then I would have expanded into looking into EEOC and finding out if there were special accommodations and going through all the medical doctors, having them provide information to us.

Q So are there certain red-flag words that you look for when dealing with employees?

A Yeah. A person saying, Well, I had an anxiety attack, that wasn't going to trigger anything for me personally, because I have had an anxiety attack. I wound up in the emergency room, thought I was having a heart attack. Just, you know, had some bad news, didn't react well, went in. They're like, No, it's an anxiety attack; take some ibuprofen, rest for a couple days. So based off of that I'm like, well, anybody could have an anxiety attack. Doesn't mean that you're disabled.

Q Was it your impression – Was he describing a lifelong problem to you?

A No.

- Q Did Mr. Fenner say anything about being in therapy?
- A He had mentioned or -- Well, let me clarify. I can't recall if he mentioned it or somebody else had mentioned it, but that there was counseling, and it was because of some domestic issues. So if we're looking at something that's occurring at home, isn't going to interfere with the work environment, I wasn't going to go any further into, you know, getting into details over personal stuff that didn't impact the work environment.

Tr. IV, 915:7-917:3.

46. Bird credibly testified that she would generally terminate the employment of a probationary employee with whom there were performance issues. Bird's testimony indicated that the reports that Fenner was not carrying his weight as a permanent employee provided enough information to let Fenner go during his probationary period. Bird did not want it to appear that Fenner was being fired as a result of the complaint he had filed, but that by itself did not lead to her decision to keep him on with Expo Park. Fenner had also done some good work as a temporary employee. Bird felt there was still a chance for Fenner, with additional training, to be successful. Instead of discharging Fenner, Bird decided to extend his probation from six months to nine months, and to develop a work improvement plan giving Fenner training to improve his performance in various work tasks, so he could take "tests" of his competence in those work tasks before the end of his extended probation. Ex. 2.

47. Bird considered this a win-win situation for all concerned. She thought that Fenner was happy about being able to keep his job and did not object to the extension of his probation. Since a union representative, Brian Boland, was involved in the investigation, and did not interpose any objections to the extension of Fenner's probation, Bird believed the chances of labor-management conflict over resolution of the current situation were virtually eliminated, since the union (through Boland) was satisfied with the county working with Fenner to improve his performance instead of letting him go immediately.

48. In an effort to resolve any problems between Rust and Fenner, Bird also included a mediation between them as part of the plan. Originally, the mediator was going to be an "outside" person, and the mediation would provide a forum for both men to discuss their perceived problems and issues with that outsider. Tr. IV, 932:14-933:6.

49. Bird subsequently unilaterally changed the mediation structure and acted as the mediator herself. She thought that the mediation was successful, with both

men participating and appearing satisfied at the end. She told them that either could request additional days of mediation if needed, and neither man did. Rust thought everything was resolved. Tr. IV, 876: 5-877:1-3, 933:19-934:18. Fenner testified at hearing that he was not allowed to participate effectively in the mediation. However, Fenner did not object at the time to closure of the mediation. He did not make any requests for further mediation. Apart from Fenner's after the fact testimony about not being allowed to participate effectively, there was no evidence that Bird did not fairly mediate between the two. There was also no evidence that Bird or other Expo Park management had any notice that Fenner was dissatisfied with the mediation.

50. Bird's decision to extend Fenner's probationary period instead of firing him also evidenced a lack of any discriminatory animus towards Fenner. Expo Park could have let Fenner go immediately, without any reason, since he was still on his six month probation.

51. Extending Fenner's six month probation was actually impossible under the applicable CBA. Nonetheless, all participants acted as if Expo Park could do so. Tr. IV, 928:4-5, 21-25, 929:1-5; Ex. 126.

52. The "work performance plan" was to be provided in writing to Fenner by August 17, 2012. Ex. 2. It actually issued on August 30, 2012, as a two page memo to Fenner from Bracco and Cole, listing 14 bullet points of proficiencies Fenner would have to demonstrate, each with a due date, from September 30, 2012 to January 31, 2013 ("2012" erroneously put in the memo for January 31 deadlines). Exhibit 6. Thereafter, Fenner added handwritten notes to his copy of Ex. 6, to verify that he was tested on three of the bullet points in October and November 2012, and "passed" all three – i.e., demonstrated proficiency on all three job tasks. Later still, Fenner added further notes to his copy of Ex. 6, indicating that Expo Park never tested him on five of the 14 bullet points of proficiencies – three were identified as "Never tested," one was identified as "Never tested on chemicals or MSDS?" and one was identified as "Not given enough hours to learn machines." A sixth bullet point of proficiencies was also identified as "Not given enough hours on all machines." But even later, he added additional notes regarding more testing, on January 24, 2013, "Retested Jan. 24, 2013, RC [Cole], RR [Rust]" or "Tested Jan. 24, 2013, RC, RR" Fenner was given no reasonable explanation of the rationale for retesting.

53. One of the three proficiencies Fenner reportedly passed testing on in October 2012 was also retested on January 24, 2013, according to Ex. 6. The other two proficiencies he reportedly passed according to Ex. 6 were not retested in the subsequent testing.

54. The bare bones of Ex. 6 consisted of descriptions of job tasks Fenner would have to learn and demonstrate that he could do. There were no specific requirements of how he would be trained or how it would be tested. There were deadlines for some of the proficiencies, but it remained unclear who would train Fenner and how and when that would occur. Rust, as well as Cole and perhaps some of the other permanent workers, continued to try to train Fenner. Fenner considered it harassment when Rust participated in it, and his fear and dislike of Rust continued to grow. He interpreted Rust's efforts to help as threats of discharge. Based upon his experience with Expo Park so far, Fenner did not again complain about Rust. The first time he complained about Rust, nothing had happened to Rust, but the employer had extended Fenner's probation and imposed the work improvement plan upon him. He feared another complaint would trigger more discipline or even discharge.

55. Based upon the substantial and credible evidence of record, Expo Park's efforts to provide Fenner with time and training to improve his job performance were sporadic and uncoordinated. There was neither rhyme nor reason to the training efforts, and the results of the testing were apparently decided subjectively by the testers, without explanation and with minimal documentation. This was largely the product of a change in HR Directors, with Bird leaving, and the subsequent HR Director not getting involved in Fenner's training. There is no evidence that Cole or Rust or other laborers who tried to train and/or test Fenner ever deliberately sabotaged the training or test sessions.

56. On January 21, 2013, Fenner sought care and counseling for his mental conditions, after a long hiatus. Ex. 50. Katie Brown, PA-C (Physician Assistant-Certified) saw him, diagnosed him and treated him for general anxiety disorder.

57. On January 24, 2013, Cole and Rust re-tested Fenner on (reportedly) everything listed in his work performance plan. This retesting was not something Cole and Rust decided to do on their own – it came from Expo Park management and Human Resources. Fenner was told he had to retake the tests because of some sort of a witness issue with the prior testing. From the evidence adduced, the training and testing, such as it was, involved brief, informal, spur of the moment sessions, poorly documented and apparently less than fully effective. Having to undergo what must have appeared to Fenner to be random training, testing and then retesting increased his anxiety level, thereby increasing his risk of debilitating anxiety attacks, and contributing to his need for the care and counseling for his mental conditions that he sought in January 2013. However, the evidence adduced did not establish that any of the training and testing was deliberately or maliciously mishandled out of retaliatory or discriminatory animus towards Fenner.

58. After the retesting on various work tasks on January 24, 2013 (Ex. 9 is dated January 25, 2013), Fenner's anxiety escalated into another severe attack and he abused one of his prescription drugs, trying to blot out his panic. Tr. II, 378:14-381:06. Fenner agreed, under oath, that while working as a permanent laborer at Expo Park, he was "using narcotics daily from January 2013" [Tr. II, 469:7-12], both before and after he left Expo Park in August 2013, until he illegally bought someone else's "whole prescription" of Suboxone and used it to gradually reduce his opiate use over approximately six weeks until he stopped altogether by October 16, 2013, after which he kept on using marijuana [Tr. II, 443:18-445:23].

59. In February 2013, Expo Park tried to terminate Fenner's employment. Tr. II, 560:04-561:14. In her memo to Brian Hopkins (in the Cascade County Attorney's Office) on February 10, 2013, Expo Park General Manager Bracco reported that in the course of the work improvement plan Fenner had been "tested on several occasions on eleven individual tests," that he "was unable to pass the majority of the tests" and "the tests that he did pass were always with challenges and with extreme stress on his part." Ex. 10. No other Expo Park probationary employee had ever been required to participate in such testing. However, there was no evidence that any other Expo Park probationary employee had ever displayed the performance problems reported to management about Fenner.

60. Bracco's memo also stated that Fenner "cannot perform maintenance duties effectively or without extreme stress," "cannot be left at the facility alone to perform tasks" and, contrary to his representation during his interview that he could "perform all tasks . . . cannot perform maintenance duties during work hours." Id. The substantial and credible evidence of record supported Bracco's description of Fenner's performance level. However, after she sent the February 21, 2013, memo, both the County Attorney's Office and new HR Director, Dewey Goering (who started that job on February 25, 2013) advised that the Collective Bargaining Agreement with the union did not permit extension of Fenner's probationary period by Expo Park. Fenner, unbeknownst to Expo Park or Cascade County, had now completed his probationary period and was a permanent worker. No longer able to terminate Fenner's employment during his probationary period, Bracco dropped the immediate attempt to fire him.

61. In February 2013 Fenner suspected that Expo Park was about to fire him, and believed he was still under his extended probation, which caused him increased anxiety and depression. Tr. II, 381:07-22. Id. In late February or early March 2013, Fenner found out that his probationary period had actually ended in December 2012. Tr. II, 381:17-22. He was now past his probationary period and was a permanent Expo Park laborer.

62. Instead of being relieved at learning that he had survived probation and the “testing” and “retesting,” in early March 2013 Fenner contacted Goering to complain. Fenner told Goering how hurt and upset he was that he hadn’t been told sooner about the end of his probation, and he went on to express his concerns about a host of other things about Expo Park. Fenner described his outpouring of discontent as being like a “dam had been built up” inside him and that “everything came tumbling down” once he discovered that he had not been told the truth sooner about his probationary period. His outpouring to Goering worsened his anxiety and depression about his work situation, even though he was past his probation period.

63. In his outpouring to Goering, Fenner disclosed a number of past incidents at Expo Park. He told Goering that he had accepted coaching from an Expo Park supervisor regarding his application interview questions (which was improper). Rick Cole had provided such information to Fenner to help him do better during his interview. Fenner also told Goering about several Expo Park employees (Fenner being one of them) drinking beer on Expo Park premises while on duty (also improper). He told Goering about a sponsor logo t-shirt he was directed to wear for basketball tournament work, that was too small for him. He told Goering about Rust and some of Rust’s friends exercising “by running the bleachers” and interfering with the work he was doing at that location, with Rust directing him to go work elsewhere. This record is devoid of any explanation about how Fenner’s disclosures to Goering could possibly have improved Fenner’s work status, or supported his complaints of mistreatment. Cole helping Fenner could not possibly establish any harassment or hostility directed towards Fenner. Fenner’s report that he and other employees drank beer on duty could not possibly have improved how Expo Park viewed Fenner. Fenner, in hearing testimony, tried to explain that he hadn’t wanted to drink beer and had disapproved of his coworkers drinking it on duty because it could expose the county to liability and was wrong. His clumsy effort to blame peer pressure for his drinking that night was unconvincing. His coworkers did not force Fenner to drink beer with them, and his disclosure of this episode during his outpouring of discontent harmed his coworkers and Fenner himself. Fenner’s apparent belief that this was somehow another instance of mistreatment at the hands of his coworkers was ludicrous. Goering’s unchallenged testimony was that Fenner, in presenting his complaints, provided all of this information. Tr. IV, 795:13-21. Not surprisingly, Goering began to investigate several of these episodes, not as harassment of Fenner by other workers, but as violations of policy by several workers (including Fenner).

64. On Thursday, March 7, 2013, Fenner had an appointment with PA-C Brown. He told her that he was very depressed and vulnerable. He “became tearful” during the conversation. He told her he had just found out that Expo Park had tried to let him go in December, but “somebody” stepped in and prevented his discharge.

He reported that not being told that he may have been fired before Christmas “really hurts his feelings.” He told her that on the upcoming Saturday he was scheduled to work with “a gentleman who he does not get along with” and that he did not think he could go into work and perform his full duties on Saturday and preferred not to work that weekend. He reported that “they are looking for any little mistake” in order to fire him. Brown contacted a licensed clinical social worker (“LCSW”), Lori Pike, because the counselor that Fenner had been seeing occasionally was not readily available. Pike agreed to see Fenner on Saturday morning, March 9, 2013, two days later. Fenner also reported to Brown that he had not filled his prescription for Effexor for his depression and anxiety because “he did not think he needed it.” He did not disclose to Brown that he was using narcotics daily. His deteriorating mental state is clear in his remarkable statement that he did not think he needed his prescribed medication for depression and anxiety, and his concealment of his illegal drug use from his health care providers. It was downright unsafe for him to fail to fill his prescription, continue to use narcotics daily and continue to use marijuana, while struggling to perform his job duties. The use of marijuana and narcotics instead of his prescription more likely than not was a significant factor in his prediction that he would not be able to function at work on Saturday. In his meeting with Brown, Fenner denied any suicidal or homicidal thoughts, and reported that he would be much more stable when his work situation resolved. Ex. 54, p. 1. Brown also noted that Fenner “seems somewhat hostile at today’s meeting” and that he was tearful a second time when speaking about his work and possibly being let go.

65. Brown filled out a prescription slip with a medical excuse for Fenner to miss work, due to an “acute illness,” on March 7-11, 2013. Ex. 12. He took it to Expo Park on March 7, 2013, and presented it to the Human Resources people. He knew or reasonably should have known that he was supposed to notify his supervisor, but he made no attempt to notify Cole. Based upon the note, he was placed on vacation. Id. Cole knew nothing about this until after Fenner did not show up for work the next day, March 8, 2013. HR Director Goering was absent from his office on March 7, 2013. Goering saw the note on March 8, 2013. Goering testified at hearing that an employee who would be absent was responsible to notify his superior and that Fenner had admitted to Goering that he (Fenner) was wrong and should have notified Cole of his absence. Tr. IV, 798:18-800:22.

66. Lori Pike met with Fenner for the first time on Saturday, March 9, 2013, on the emergency referral from PA-C Brown. After seeing Fenner that one time, Pike wrote and sent a letter to Expo Park regarding Fenner on March 11, 2013. Ex. 117, first page; Tr 216:13-221:20. The only information Pike had about the work environment at Expo Park when she wrote that letter came from her one meeting with Fenner. In a short first paragraph of the one page letter, Pike described Fenner

as suffering from “anxiety and depressive symptoms.” There was no clear statement of any long term mental condition from which Fenner might be suffering. The second paragraph comprised fully half of the content of the letter and described in various terms Fenner’s anxiety and depressive symptoms as “related to workplace bullying and reported hostile work environment conditions.” The short third paragraph suggests that it might be in Fenner’s “best interests to take available leave at this time” and the equally short fourth paragraph concludes the letter with Pike “strongly” encouraging “a thorough investigation of employment practices and procedures at Mr. Fenner’s workplace as these reports [by Fenner] are in stark contrast to promoting a work environment of health and wellness.” Ex. 117, first page. It is apparent from the letter that Pike gave credence to Fenner’s reports of what had happened at work, and was acting as his advocate in his trouble with his employer. What the letter also demonstrates is that Pike did not provide Expo Park with notice that Fenner had any physical or mental long-term condition. Instead, her report was that Fenner reported that his treatment by the employer and his coworkers was the cause of his current emotional problems.

67. Pike was not a licensed addiction counselor. Nonetheless, she testified under oath that Fenner was not on drugs when she met with him on March 9, 2013. She testified that although she did not ask him if he was under the influence of any substances and had never before met him, she could tell from her experiences with other clients that he was not high at the time of that meeting. Fenner’s testimonial admission of daily narcotic use from January 13, 2013 until October 2013 showed that Pike did not assess accurately whether Fenner was using drugs when she saw him on March 9, 2013.

68. Fenner remained off work until late April 2013. On March 20, 2013, he contacted the Human Rights Bureau (“HRB”) and filed a discrimination complaint. A notice of his complaint was mailed to Expo Park on or about March 28, 2013.

69. While Fenner was on medical leave, he would go to the office at Expo Park to pick up his paychecks, and would at the same time check his mailbox or message folder at the office (“mailbox”). Fenner testified that on April 19, 2013, he had checked his mailbox and it was empty.

70. Fenner returned to work from his leave on Monday, April 22, 2013.<sup>6</sup> He was anxious about being back at work. At the end of that first day back, Fenner saw an Expo Park letterhead envelope in his mailbox, with his name handwritten upon it. Exhibit 34, first page. In the envelope was a printed document captioned a “Hurt

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<sup>6</sup> Fenner testified that he came back to work on Monday, April 23, 2013, Tr. II, 440:21-23, but Monday was actually April 22, 2013, as reference to any 2013 calendar will demonstrate.

Feelings Report.” Exhibit 34, second page. A true and complete copy of the Hurt Feelings Report appears as “Appendix D” to this decision. The Hurt Feelings Report was a crude satirical complaint form, written as if authored by a caricature of an Arnold Schwarzenegger character. Its only point was that complaining about hurt feelings at work was weak and unfitting for macho blue collar workers.

71. Originally, Brandon Hassel brought the Hurt Feelings Report to the Expo Park workplace in 2011, a year before Fenner had his first temporary job there. Tr. III, 770:1-24. Hassel had first seen the Hurt Feelings Report when he had worked in a steel factory in Lewistown some years before. That employer had a stack of copies of the Hurt Feelings Report on the front counter in the office, and someone had given him a copy. He described it as a “total joke. They said, ‘Well, here, if you feel bad you can fill out this.’ You know, and I enjoyed it. I laughed about it and I took it, and I just took it home with me.” Id. When he brought a copy to Expo Park in 2011, “all the guys, you know, they seen it and everybody laughed about it.”

72. Ed Herman happened to be present and observed Fenner when he opened the envelope. He testified that Fenner became angry and that “as he was leaving he said that was his golden ticket.” Herman had the impression that Fenner believed Rust had placed the Hurt Feelings Report in his folder. Tr. III, 610:17 - 611:3.

73. Fenner was also observed at work by other employees on April 22, 2013, after he read the “Hurt Feelings Report.” Rust (Ex. 15, first page) saw him. Administrative Assistant Laura Sullivan (Ex. 15, second page) and Fair Coordinator Kim Sayre (Ex. 15, third page) saw him in the administrative office, where Fenner made an angry complaint and demanded to see HR Director Goering about the “Hurt Feelings Report.” His supervisor, Rick Cole, saw him in the parking lot (Ex. 15, fourth and fifth pages), watched Fenner’s erratic driving and then endured his angry yelling. All these people who saw Fenner at work that day after he read the Hurt Feelings Report observed that he was angry. The women in the administrative office were afraid of him. He appeared enraged, not devastated, helpless or hurt.

74. During the time that Fenner was storming through the premises and before he eventually left, he did talk to Goering about the “Hurt Feelings Report.” Goering noted that Fenner was “pretty upset” about what Goering called “just a note . . . I guess somebody put it in there to jab at him.” Tr. IV, 802:12-18. Fenner asked Goering what he was going to do about it and Goering told him that Goering would look into it and find out what happened and that Expo Park would take corrective action. Id. at 18-21.

75. Remarkably, Fenner, after finding the Hurt Feelings Report in his mailbox, also went a local television station (KRTV) and “gave an interview” about receiving the Hurt Feelings Report. He testified he did this because he wanted publicity about

the way he was being treated, believing that the publicity would “back people off of me.” Tr. II, 551:9-552:4.

76. Goering found out that James McDermid, a co-worker, put the Hurt Feelings Report in Fenner’s folder. McDermid found it “on the table” in the break room, “thought it was pretty funny” and decided to put it in Fenner’s mailbox, thinking that “he’ll find it, you know, the next day and ha, ha, we’ll all get a laugh and that will be the end of that.” Tr. III, 623:10 - 624:22. There is no credible evidence that McDermid intended to upset Fenner by putting the copy in Fenner’s mailbox. Fenner called Goering that evening about the “Hurt Feelings Report.” Goering told him that the individual who put the envelope in his mailbox had been identified and “was being taken care of appropriately.” Fenner did not know what Expo Park had or would do to address the Hurt Feelings Report being put in his mailbox. He decided that his employer had not and would not do enough to vindicate his anger, outrage and anxiety about the episode. Goering also told Fenner during that phone call that Bracco wanted to talk to him about his own behavior on April 22, 2013. Fenner did not return to work at Expo Park for the rest of that week.

77. Expo Park issued a minor reprimand to McDermid. Hassel was not disciplined for having brought the letter to the workplace over a year before, at a time when Fenner was not even employed there. Based upon the facts of record, Expo Park’s response to the first Hurt Feelings Report episode was reasonable and appropriate.

78. On April 26, 2013, Goering called Fenner to come to the office, although Fenner was not working that day. Fenner came in, and received an “Employee Disciplinary Report” for five actions that he allegedly committed in the previous several months. Goering, Lisa Bracco and Jay Reardon (a union representative) were present for this meeting. Ex. 17, Tr II, 407:19-409:22, 562:18-579:15.

79. The first reason for disciplining Fenner this time was that Fenner had accepted coaching from an Expo Park supervisor regarding his interview questions. Ex. 17. This was true. Fenner had told Goering that Cole had provided such help.

80. The second reason for disciplining Fenner this time was that Fenner and several other employees were drinking beer on duty on Expo Park premises. Ex. 17. As already noted, this was true and it was Fenner who told Goering about the beer drinking episode.

81. The third reason for disciplining Fenner this time was that Fenner was asked by Rust, on February 22, 2013, to wear a t-shirt showing a logo of a sponsor of the event (basketball tournament) at Expo Park. Fenner had been angry about Rust requiring him to wear the t-shirt. He testified that he had dressed for that day

consistently with the posted directions and did not want to change his apparel. At the time, he insisted that the t-shirt was too small and wouldn't fit. He was ordered to try to stretch the t-shirt to fit. He left with the t-shirt and then returned after a brief interval. The t-shirt now had two large tears in it, which Fenner reported had occurred while he was trying to stretch it, so that now he could not possibly wear the torn t-shirt. The disciplinary report stated that Expo Park management believed Fenner had ripped it on purpose. Ex. 17. The torn t-shirt is in evidence. Depo. Ex. 60, at the back of the Deposition of James Fenner. It is torn from both sides of the neck opening, directly through the heavier border forming the "crew" type neck and on out through the fabric that would cover the shoulders, to the sleeve seams between the torso portion of the t-shirt and the two short sleeves. The Hearing Officer cannot picture any fashion of trying to make the t-shirt fit, including stretching it on a chair, as Fenner said he tried to do, that could have accidentally torn the neck and the tops of both shoulders of the garment in this extraordinary fashion. Additionally, Goering testified that Fenner said the t-shirt had ripped while he was trying to put it on, and there was no apparent way the t-shirt could have been ripped as it was from trying to put it on.

82. The fourth reason to discipline Fenner was his failure to notify his supervisor that he would not be coming to work on March 8, 2013. Fenner actually was at the workplace on March 8, 2013 – he went in to pick up a check. Tr. II, 391:2-23, but he failed to notify Rick Cole, either on March 7 when he brought in his medical excuse for missing work the next day, or when he came in on March 8 and picked up a check, that he would not be working on March 8. In his testimony, Fenner said that he thought HR, to whom he brought his medical excuse on March 7, would notify his superiors about his absence. Fenner did not elaborate about why he thought that. HR Director Goering testified that the employee was responsible to notify his superior, and that Fenner had admitted to Goering that he (Fenner) was wrong and should have notified Cole of his absence.

83. The fifth reason to discipline Fenner was a complaint by a young female Expo Park employee that on March 8, 2013, Fenner made inappropriate and suggestive comments to her, at an Expo Park event that he attended and at which she was working. She claimed the comments created an offensive working environment. Ex. 17, Tr II, 416:18-418:19, 562:18-579:15. Fenner testified that he told her how pretty she was, that if he didn't have a girlfriend and kids that he would be "hot after her" and that as he left he said "bye" and then said "or should I say beautiful" and walked out. Id. He testified that she gave him her phone number and that if he had known his comments were unwelcome he would have apologized. Id. His surprise at her complaint seemed genuine. There is no evidence that Expo Park management solicited, instigated or choreographed the young woman's complaint. It speaks

volumes about Fenner's grasp of reality that he would obtain a phone number from a young woman he thought he had charmed, and then, to his surprise, she would file a complaint that he had created an offensive work environment for her.

84. The disciplinary report (Ex. 17) was prepared and signed by Lisa Bracco and the discipline was imposed upon Fenner after he was given an opportunity, on April 26, 2013, to respond to or to explain his behavior in any of the five incidents. Obviously, Expo Park already had his "side of the story" for the first three bases for discipline – he was the source of the information for two of the three incidents and he was present and involved in the t-shirt incident. It is unclear how much Fenner said, on April 26, 2013, of what he testified about the five incidents at hearing. Clearly he had the opportunity to respond. There no evidence that the union representative (Jay Reardon) present during the administration of discipline raised an objection to the discipline based upon the lack of an opportunity for Fenner to respond before the discipline was administered.

85. After receiving this disciplinary report, Fenner went back on medical leave. When he eventually returned to work in May, Fenner felt ostracized by his coworkers. He also interpreted all of Rust's "smirks" and "little cute smiles" as further harassment and intimidation. E.g., Tr 419:9-21. Of course, by his own admission he was still using narcotics daily, which could have continued to skew his perceptions.

86. MVR reopened Fenner's file on May 15, 2013. This would not have happened except upon Fenner's request.

87. More likely than not, whatever Fenner's perceptions, in May 2013 he actually was treated more distantly by many of his coworkers. He had informed management about misconduct by his supervisor and by several of his coworkers. At least one of his coworkers, and quite possibly several more, were subjected to discipline as a result of investigations of the information Fenner provided to management. Fenner must have been at least a likely candidate as the source of the information about the various incidents. Thus, more likely than not, Fenner was now less popular than he had been when he was an enthusiastic temporary worker who wanted very much to become one of the "stalwarts." His declining popularity with his coworkers did not result from his disabilities, but because he was at the very least suspected of being the source of reports to management that got several of his coworkers in trouble. More likely than not, his declining popularity was also because he had never stopped (when working) trying to avoid working with some of his coworkers, and picking simple tasks to do by himself when he could.

88. Fenner testified that in mid-July 2013 he found more copies of the Hurt Feelings Report in the Expo Park break room and immediately brought the "stack" of

copies to the HR director's attention, asking that they be removed. There is no corroboration that Fenner actually made this report to H.R. Director Goering. If he did, there was no evidence of any basis on which to impose a duty on Expo Park to take any action in response to Fenner's report. The evidence does not indicate how any such "stack" of reports ever ended up in the break room. There was no evidence of record that the copies of the Hurt Feelings Report in the break room were in any way directed at Fenner, and no evidence of who brought these copies to the workplace. According to Fenner's account, the "stack" was now out of the break room and into Goering's hands.

89. Fenner also testified that "a couple of days before the white board incident," [July 18, 2013, cf. Finding No. 91, *infra*.] he saw McDermand and Rust at opposite ends of a table in the break room, both laughing, and he looked to see what they were laughing about and saw a Hurt Feelings Report on the table. Fenner immediately assumed they were laughing about the Hurt Feelings Report and him, and went and asked Kim Sayre, in the office, "to go grab it off the desk from them," which he testified she did, telling them the document was "inappropriate for the workplace." He testified that he then "called Dewey, I remember, asking him if he could do something about it, and he said -- you know, he asked me about what the situation was. I told him. He said, Well, did James McDermand have something to do with it? I said, No, but it was on the table in front of him and Rory and they were laughing about it. He said he'd certainly be able to see what's going on and do something about it, and that was the last that I had heard about the Hurt Feelings Report." Tr. II, 425:1-426:14. Again, if this was a third incident with the Hurt Feelings Report (perhaps this testimony is about the same incident as described in Finding No. 89, *supra*), there again was no evidence of who brought the report to the workplace and no evidence that it was directed at Fenner. Thus, Expo Park was again justified in not taking any disciplinary action regarding this appearance of the report, if this was another appearance of the report and if Fenner gave notice to management of this appearance.

90. On July 18, 2013, Fenner saw crude comments written on a white board in the employee break room, which he thought were hostile, derogatory and directed at him. Ex. 28. Tr. II, 426:15-427:14. The words said, verbatim:

**WORK HARD  
QUIT BITCHEN  
HANDLE YOUR SHIT  
TAKE CRITICISM  
ADMIT YOUR [sic] WRONG  
BE A MAN YOU  
PUSSY**

Fenner's conclusion that this written message was directed specifically at him caused him increased anxiety.

91. Hassel testified that a part-time employee wrote the words on the board. Hassel identified it as some sort of colloquial wisdom, called "the five steps to be a man" and testified that he had seen it before and heard about it before, and that he did not think it was aimed towards Fenner. Tr. III, 775:19-776:10. Rust testified that he and several other workers saw it on the white board and left it there because "there was no reason to erase it." He denied leaving it on the board for Fenner to see. Tr. IV, 880:11-881:20. Dewey Goering testified that the individual who wrote the message on the white board was identified and disciplined, because the message was inappropriate for the workplace. Tr. IV, 816:2-817:4. There is no evidence of any corroboration of Fenner's conclusion that the message was directed towards him.

92. Answering a series of questions from his attorney, Fenner testified about the next disturbing events at work after the white board incident and up to the day that he actually left his job on August 6, 2013. According to Fenner, Rick Cole did not schedule him to work Saturday the next week after the white board incident, so he had only four work days. When Fenner came in to work on Monday of the next week, after not coming to work on Saturday, Cole told him that he needed to fill out a time slip for the office for missing Saturday. Fenner said he went to the break room to grab a time slip, and saw a stack of 200 or 300 Hurt Feelings Reports. He testified that he picked up the stack, "immediately got extremely pissed off," and went in to Cole's office, saying to Cole, "What the fuck is this? What are these?" Fenner stated that he then threw the entire stack at Cole and told him he needed "to fucking figure it out." Fenner testified that he also told Goering about this incident. After talking to Goering and going back to work, according to Fenner, "Rick pulls up to me and says, 'You have to prove it, James. You have to prove it.' And I said, 'Prove it? Prove what?' He said, 'You have to prove that the Hurt Feelings Report came from Rory or James McDermand.' I said, 'Well, isn't the Hurt Feelings Report being in front of them proof enough that it came from them?' And he said, 'No; you need to prove it, and unless you can prove it, it's not your problem.'" Tr. II, 427:15-429:7.

93. Co-worker Brandon Caldwell testified that he saw a copy of the Hurt Feelings Report in the employee break room one time, at about the same time as he became aware that Fenner had received a copy and had taken it immediately to the office. Tr. I., 45:25-47:10 and 56:11-57:1. James McDermand admitted acting alone and putting the Hurt Feelings Report in an envelope and placing it in Fenner's mailbox, as a joke. Tr. III, 635:19-638:4. He testified that he saw a copy of the Hurt Feelings Report in the break room twice – once when he picked it up and put it in Fenner's mailbox, and one other time, and he denied having anything to do with the

report being in the break room a second time. He denied ever seeing a stack of Hurt Feelings Report copies in the break room. Tr. III, 645:22-646:7. Brandon Hassel also denied ever seeing a stack of copies of the Hurt Feelings Report that was two or three inches high. Tr. III, 777:2-4.

94. HR Director Dewey Goering tried and failed to verify Fenner's report that there were "Hurt Feelings Reports" "all over the place" in Expo Park's facilities.

Q Okay. After the Hurt Feelings Report came to light, did you receive other complaints from Mr. Fenner about the Hurt Feelings Report?

A There was one later on. I believe Mr. Fenner had contacted someone, one of my staff, and I'm not sure, it was either Michelle Telarak or Vicki Clark in the HR office. I had come in and they had stated that he [Fenner] found the Hurt Feelings Reports all over the place, they were just everywhere.

Q Uh-huh.

A So I again contacted a few individuals over there. I contacted Lisa, I contacted Rick Cole, I contacted Kim Sayre, and I contacted Claree Kelly, the accountant, to see what was going on, if these things were all over the place. And they – I received reports back that they could not find any.

Tr. IV, 814:24-815:14.

95. Fenner testified that he had given his notice that he would be quitting on the day that he saw the white board message at work. He said that notice was that he would work until the end of September 2013, to help cover the Fair (July 26 through August 3, 2013) and to "get a little cushion to be financially stable." Tr. II, 429:8-24. He then described the events of his last day at work, which was less than three weeks later and immediately after the end of the Fair:

Q. So August 6th comes, you quit. And what's going on in your mind?

A Well, I show up to work that day, and I, you know, started working a little bit. And I look up and I see Jim Nichols, a part-time employee, on the forklift. And it starts going through my head like, if I had to get certified on a forklift, what right does a part-time person or, you know, was he even certified to be on that forklift?

Q What's going on, though? This is your last day?

A Yeah. And I'm looking and I'm thinking double standard.

I'm thinking, Yeah, well, if I had to be tested and had to have forklift certification, why didn't a part-timer on a forklift not require a forklift certification to be on there and running it? And also, I thought – you know, I looked at it and I was like, That's a liability and a half.

Q So you left work that last day. And then what's going on in your life?

A Then I went – I think I went to Katie's office, told her that I had – I had went up to Lisa's office, told her that Jim was on the forklift. She said, You need to tell Rick about that problem. I said, Yeah, I've told Rick several times about issues like this, you know, liabilities with people sheets not having driver's licenses driving the vehicles, people not being certified on the forklifts. And I was walking out of there, and she says, Well, you just need to tell Rick. And I said, Yeah, yeah, Rick knows. And then I got outside and I continued to work for five minutes, and I seen –

Q I asked you what happened afterwards. We don't –

A Okay. I went to Katie. I told her – I told her what happened, I quit my job. After that I – after that doctor's appointment I went and started abusing heavily.

Q Abusing what?

A Prescription pain medications, marijuana, to try to just dole [verbatim].

Q Why did you wait until August 6th to quit?

A You know, I -- financially, I wanted money to have a cushion. And, you know, my drug problem had gotten so bad to the point where I, I realized it was a problem. I had issues that I -- You know, I shouldn't have turned to drugs to try to numb, numb this pain and deal with it. And that day I just said enough was enough and I couldn't take it anymore.

Tr. II, 429:25-431:23.

96. When asked by counsel for Expo Park how Fenner knew that temporary employee Jim Nichols wasn't certified and didn't have a driver's license, Fenner first offered a confused and incredible attempt to show that he knew Nichols was not certified:

Q Well, just strike that question. You gave an example of -- that the day you quit you were very angry about Jim Nichols and the forklift.

A Yeah. He didn't have a driver's license. He wasn't certified.

Q How do you know any of that?

A Because he's a part-timer.

Q How do you know anything about that?

A Because he never – he never took – when we were given the forklift training, he never – with multiple people, he never was involved in the certification process when he worked there.

Q So you're assuming that.

A I'm assuming that, I guess.

Tr. 472:23-473:12. Aside from Fenner's statements, there is no evidence of record regarding whether Nichols did or didn't have a forklift certification.

97. When counsel tried to continue to grill Fenner about the certification issue, Fenner changed the subject and presented a story (unsubstantiated by any other witness or evidence) about how he knew Nichols did not have a driver's license – because he sold Nichols a vehicle and Nichols used an identification card instead of a driver's license when they were getting the title notarized.

Q You have no idea what his certification is –

A I know for a fact he don't have a driver's license.

Q How do you know for a fact?

A Because I sold him my pickup truck because he had lost his apartment. And so when we went to go get the title notarized, he only had an identification card. And regardless, I wasn't going to deny him to buy my pickup truck, because he needed a place to sleep. So I knew he didn't have a driver's license.

Tr. II, 473: 13-24.

98. Asked why he cared about Nichols being on a forklift, Fenner's response was unrelated with it being a "liability and a half" for Expo Park, one of reasons he initially cited for his concern (Tr. II, 430:16-17). Instead, Fenner's only reason for reacting to Nichols operating a forklift was that Fenner felt Nichols should not be on a forklift until he endured what Fenner felt he had endured.

Q And again, why would this be a concern of yours in terms of what he's doing for the County?

A Because if I had to go through a certification process, I feel that everyone should have to go through a certification process. It shouldn't be limited to, to just, you know, certain people.

Tr. II, 473:25-474:6. There is considerable irony in Fenner's insistence, at several points during his testimony, that he wanted to work more varied and difficult jobs and advance in his career, but Expo Park prevented him from doing so. The

substantial and credible evidence of record indicated that he shied away from more varied and difficult jobs, and tried to hide out and work alone on simple tasks he had already mastered.

99. Fenner left his job with Expo Park because the employer did not disclose to Fenner that it had disciplined other employees for their conduct (which it properly concealed from Fenner, to protect other employees privacy). Fenner concluded that Expo Park had refused to discharge or otherwise discipline other employees. Fenner apparently felt he needed to verify that other employees were given sufficiently severe punishments for conduct that Fenner insisted impacted him emotionally because of his depression and anxiety. In other words, whenever Fenner felt bad about something that occurred at work, which he subjectively interpreted as caused by hostile action towards him by one or more other workers, Fenner believed his employer had an obligation to take severe disciplinary action against whatever other employees Fenner identified as being responsible for his emotional reactions and to let Fenner know about it. If Fenner was unaware of any such disciplinary action, he assumed none had been taken.

100. Fenner did not prove by a preponderance of the evidence that Expo Park discriminated against him because of disability or retaliated against him for resisting disability discrimination and/or complaining of such discrimination.

#### IV. Discussion<sup>7</sup>

The Montana Human Rights Act (“HRA”) prohibits employers from discriminating against a person in a term, condition, or privilege of employment because of disability. Mont. Code Ann. § 49-2-303(1)(a). Disability is a physical or mental impairment that substantially limits one or more of a person’s major life activities. Mont. Code Ann. § 49-2-101(19)(a)(i). Work is a major life activity. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 304, 886 P.2d 421, 428; see also *McDonald v. Dept. of Env. Quality*, ¶139, 2009 MT 209, 351 Mont. 243, 214 P.3d 749. 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

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<sup>7</sup> Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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). Discrimination because of disability also includes failure to make reasonable accommodations requested by an otherwise qualified person with a disability. See McDonald at ¶40; Mont. Code Ann. § 49-2-101(19)(b).

A. Expo Park Never Denied Fenner a Reasonable Accommodation to Which He Was Entitled as an Otherwise Qualified Person with a Disability.

The initial inquiry is whether charging party James Fenner was an otherwise qualified person with a disability. Based on the substantial and credible evidence of record, Fenner's anxiety and depression did cause behavior that substantially limited his ability to work. Thus, these long-term mental conditions, whether or not PTSD was a component in them, constituted an impairment that substantially limited his ability to work – a disability.

A person with a disability is qualified to hold an employment position if he can perform the essential job functions of that position with or without a reasonable accommodation. Admin. R. Mont. 24.9.606(2). Fenner had the burden to prove he could perform the essential job functions for his position (with or without a reasonable accommodation), as part of his burden to prove that he was a qualified person. *Heiat v. East. Mont. College* (1996), 275 Mont. 322, 327, 912 P.2d 787, 791.

Fenner was hired by Expo Park, twice as a temporary worker who actually worked a permanent schedule, and then as a permanent worker. Ordinarily, this would be sufficient evidence on its face to establish that he could perform the essential job functions of his position. In this case, however, Expo Park responded with evidence that Fenner was coached by his coworkers so that he was able to present himself, in the hiring process, as more qualified than he actually was. Expo Park also presented substantial and credible evidence that Fenner was not “doing okay” as a permanent laborer, and that indeed he sometimes was incapable of doing his work. His difficulties performing his duties appeared not later than the second month of his permanent employment. Substantial and credible evidence also showed that during the last six months of his employment, his substance abuse more likely than not contributed significantly to his difficulties working. Thus, it cannot be said that Fenner ever actually performed satisfactorily as a permanent worker, with or without a reasonable accommodation.

The pertinent facts in this case are in sharp contrast to the pertinent facts presented in *Miller v. Kalispell School District* (3/31/08), Case No. 231-2008, HRB No. 0071012259, in which Miller worked for the District as a full time teacher

for one school year without an accommodation, for the next five school years as a full time teacher with a schedule consistent with his requests regarding timing of assigned classes and travel between different schools in the district, etc., then for the following school year with a schedule again consistent with the previous five years, but with the parties disputing what scheduling parameters were appropriate for his limitations. Miller thus worked for the district for seven years, in at least five of which he had performed the requisite job duties with an accommodation and for in the other two had performed the requisite job duties without an accommodation. Clearly, Miller was qualified to hold an employment position because he did perform the essential job functions of that position, with or without a reasonable accommodation, for seven years. The evidence does not establish that Fenner ever adequately performed the requisite job duties for his permanent position.

Now, when a person with 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 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 (9<sup>th</sup> Cir. 2001)(applying the law of the state of Washington, but Montana law should reach the same result). The problem in this case is that Fenner did not prove he ever gave sufficient notice to Expo Park that he had a disability, because his own testimony to that effect was not credible.

This Hearing Officer did not find Fenner a credible witness, because of his demeanor, because of the internal contradictions in his testimony and because his testimony was rarely corroborated and any corroboration for his testimony was disputed and doubtful. Fenner very likely believed what he said when he testified, but even his own prior statements indicated his grave difficulty with distinguishing between what actually happened and how he felt about what happened.

Fenner testified that copies of the Hurt Feelings Report repeatedly showed up at work, and that at least once and probably twice there was a stack of several hundred copies. Nobody else testified to seeing such a stack. The second time Fenner complained to HR about "Hurt Feelings Reports" at work, HR staff told Goering that Fenner asserted he "found the Hurt Feelings Reports all over the place, they were just everywhere," but when Goering called people working where Fenner said the reports were "just everywhere," no copies could be found. Finding No. 94.

The direct testimony of one witness, including a party, on any fact at issue can be sufficient if the fact finder believes that testimony. Mont. Code Ann. § 26-1-301; *O'Langan v. First State Bank of Hilger* (1921), 59 Mont. 190, 196 Pac. 149. Aside

from Fenner's own testimony of how he was treated by his employer, there is conflicting testimony about whether he was doing his job and about whether the employer was mistreating him or at least letting some coworkers mistreat him. Unless Fenner's own testimony was credible, he did not marshal enough evidence to make it more likely than not that he was subjected to discrimination and retaliation. His testimony was not credible.

Fenner testified that he told Stacey Bird about his anxiety attacks, his medication and his past treatment for anxiety and depression. Brian Boland's testimony could be interpreted to provide some support to Fenner's account, even though Boland's testimony was unclear. But Stacey Bird's testimony had far greater credibility. Bird testified that Fenner told her about having one anxiety attack (during the rodeo set up incident) and referred to receiving counseling in the context of a domestic dispute that led to legal intervention. Bird analogized Fenner's anxiety attack with an anxiety attack she had that took her to the emergency room (where she was sedated, reassured and released), and credibly testified that she did not consider it to be any kind of work-related impairment. She avoided inquiry into a domestic incident with no apparent connection to work, for privacy reasons. Fenner's testimony about the detailed and specific information he claimed to have provided to Bird was not credibly corroborated and was inconsistent with some of his other testimony about who he told at Expo Park about his mental conditions. Bird's testimony was credible and consistent with her practices as a human resources specialist.

Without credible testimony of notice to the employer, the documents provided to the employer from the professionals with whom Fenner dealt are the best evidence of the information Expo Park management had about Fenner having some mental conditions that might relate to his work performance. Those documents did not provide a basis to find that Expo Park management knew or reasonably should have known during Fenner's employment that he might have disabilities for which he might need accommodation.

In civil cases, a preponderance of the evidence is sufficient to establish the truth of any fact at issue. Mont. Code Ann. §26-1-403(1). When the record contains conflicting evidence of what is true, the fact finder decides credibility and weight of the evidence. *Stewart v. Fisher* (1989), 235 Mont. 432, 767 P.2d 1321, 1323; *Wheeler v. City of Bozeman* (1989), 232 Mont. 433, 757 P.2d 345, 347; *Anderson v. Jacqueth* (1983), 205 Mont. 493, 668 P.2d 1063, 1064. In this regard, the standard for deciding facts remains the preponderance of evidence standard. Cf., *Pannoni v. Bd. of Trustees*, ¶73, 2004 MT 130, 321 Mont. 311, 90 P.3d 438, (Cotter, dissenting) (defining the preponderance standard as "more likely than not").

The department follows the Montana Rules of Evidence in making contested case fact determinations. “Notice of Hearing,” October 25, 2013, p. 2; see also Admin. R. Mont. 24.8.704 and 24.8.746. Applying those Rules, the evidentiary framework for department discrimination cases is the same as that applicable in District Court civil trials. The burden of producing evidence is initially upon the party who would lose if neither side produced any evidence; thereafter, the burden of producing evidence shifts to the party against whom a finding would issue if no further evidence was produced. Mont. Code Ann. § 26-1-401. In discrimination cases, as in most civil cases, the ultimate burden of persuasion always rests upon the party advancing the particular claim or defense. *Id.*; *Heiat v. Eastern Mont. College* (1996), 275 Mont. 322, 912 P.2d 787, 791, citing *Texas Dpt. Com. Aff. v. Burdine*, (1981), 450 U.S. 248, 253; *Taliaferro v. State* (1988), 235 Mont. 23, 764 P.2d 860, 862; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 818.

Mont. Code Ann. §26-1-302, provides, in pertinent parts:

A witness is presumed to speak the truth. The jury or the court in absence of the jury is the exclusive judge of his credibility. This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness' testimony; such matters include but are not limited to:

. . . .

- (7) inconsistent statements of the witness;
- (8) an admission of untruthfulness by the witness;
- (9) Other evidence contradicting the witness' testimony.

Mont. Code Ann. §26-1-303(3) provides:

A witness false in one part of his testimony is to be distrusted in other.

The Hearing Officer must agree with the characterization of Fenner’s lack of credibility made by Expo Park and well-supported in its reply brief:

The evidence in the record is replete with Fenner’s inconsistent, exaggerated and untruthful statements:

Fenner filed a Complaint with Cascade County Human Resources on July 22, 2012, stating that Rory Rust was harassing him by being rude. (Tr. I, 113:4-7, 911:4-10.)

In support of this allegation, he complained that Rust had harassed and bullied by taking him home after his outburst at the rodeo grounds and telling him to cool down, calm down and relax and the [sic] nothing was going to happen. Fenner defined this

as bullying [sic]<sup>8</sup> (Tr. II, 546: 18-24). This is not what Fenner alleged in his Contentions reflected in the Final Pre-trial Order.

There, Fenner alleged Rust forced him to practice riding the man lift, would not allow him to stop, even though Fenner was hyperventilating and vomiting and was amused by Fenner's distress. (Final Pretrial Order, Charging Party Contentions ¶¶4-5.) However, Fenner admitted during testimony that this outrageous allegation was neither documented by him anywhere nor discussed as part of the investigation of his complaint to Human Resources. (Tr. II, 481:14-25- 482:1.)

Fenner testified that part of his complaint of discrimination is that Rust did not have authority to send him home when he became incapable of work and that he (Fenner) did not get to talk to his supervisor, Rick Cole, before being taken home by Rust. (Tr. II, 482:20-23.) However, he also testified that he had a cell phone, knew Cole's number and could have called Cole if he had wanted but didn't because "I didn't know what he'd say to me." (Tr. II, 483:11-25.)

Further, the record reflects that Fenner either misstated events or outright lied to rehab counselors, mental health counselors and medical providers. (Tr. I, 195:2-22; II, 247:2-15, Tr. II, 523:15-25; Tr. II, 524:2-13, Tr. II, 530:2-12, Tr. II, 542:8-25; Tr. II, 543:1-2, Tr. II, 247:2-15, Tr. II, 548:2-5.)

"Cascade County's Reply to Charging Party's Post-Hearing Brief" pp. 34-35 (August 29,2014)

Fenner withheld potentially pertinent information from his medical providers about his drug abuse, at times when he was reporting that essentially all of his current emotional difficulties were the result of what he alleged to be an extremely hostile and vengeful work place. From middle to late January 2013 on, at least until after he left his job with Expo Park, Fenner admitted that he was using narcotics daily and multiple drugs frequently. He continued to try to minimize his usage, but his denials that his medical providers accurately reported what he told them is simply incredible:

Q Doesn't being on drugs at work, isn't that a concern?

A Yeah, it was. And that's initially – when I gained full time, I was – I was expecting a drug test, because this is a \$15-an-hour job, 14, 15. And, you know, usually when you start new employment,

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<sup>8</sup> "Bullying" was the intended word.

especially with a county or a government entity, drug testing is accompanied with it.

Q But why is the County's liability your concern? Why does that drive you to do the things that you do?

A Safety sometimes was my concern, was the thing. Safety and liability.

Q Both of those things.

A Yeah.

Q But you were still -- well, you were using narcotics daily --

A Yeah.

Q -- at least from what you've admitted from January 2013.

A Correct.

Q And the records say you were using up to eight pills a day. From January 2013 on, you were using --

A I'd strongly disagree with that. That guy isn't my -- wasn't my primary doctor, he isn't my therapist, and he might have misinterpreted some of the things I said. But I certainly did not tell him that I was abusing eight pills a day from January 24th on.

Q Okay. So when you go into the Benefis Hospital with threats of suicide --

A Correct.

Q -- the doctor wrote: He quit using opiates at age 22 but continued smoking marijuana. In January of this year he began taking about eight pills a day, whatever he could get, Lortabs, Oxycodone, and any other thing he could do as a way to deal with the stress of his job. He began using them orally. You're saying that's a mistake?

A Yeah. Because he asked at the time how many I was using at that time. He didn't specify month per month, you know, how it led up to it. You know, he just said, you know, How many today are you using? And I told him, you know, what my --

Q Well, his record says you'd said January of this year.

A And if I said that, it was because maybe he asked me -- maybe that was when did I start using again, and that was January 24th.

Q You made the exact same statement to the -- at intake at the Rocky Mountain Treatment Center, though, did you not?

A Correct. I think I -- I don't -- I haven't really seen it, but --

Q Well, the intake said: Opiate first used 19 until 22, then quit until January 2013; about eight pills a day, whatever he could get, Lortabs, Oxycodone, or anything else, orally or snorting. So you're saying that there is yet another medical provider who is mistaken?

A Well, because they ask you at the time how many are you abusing at this moment and you tell them, you know, that's how many I'm abusing at this time. They didn't specify, you know, hey, how did it start out, how did it progress, how did it –

Q But you would agree with me that that's not what these notes say, right?

A I haven't seen those notes.

Q Well, here, you can see it right now.

A Okay.

Q This is Exhibit 120, page 2.

A Opiate first used 19 until 22, then -- Yeah. Again, they must have misunderstood me, because I think that was --

Q And I would refer you, then, to Exhibit 68 [also Exhibit 119, p. 13]. Would you read that section?

A Since January of this year he'd been taking about eight pills a day, whatever he could get, Lortabs, Oxycodone, any other things that he could do as a way to deal with his job. He began taking them orally and a friend convinced him to crush them up and snort them.

Q Okay. So both of those documents generated by providers from whom you were seeking help say the same thing, true? True?

A True. True.

Q All right. Well, you admit, though, that you were doing drugs from January on, true?

A January 24th on.

Q At least since January 24th on.

A Correct. True.

Q Okay. And you admit that it was Spice, marijuana, hydrocodone, Percocet, and OxyContin, right?

A I named some of the drugs that I had been taking after the 24th or whatever. A lot of it was codeine, because I had those leftover prescriptions, and then it manifested into other medications. Mainly the week of Fair, I remember that's when I was going off getting whatever I could and . . . .

Tr. II, 468:17-472:18

The most unusual aspect of this lack of credibility is that Fenner appeared so invested in his view of himself as a victim that he sometimes seemed, from his demeanor and tone of voice, to believe he was telling the truth when he actually was presenting patent untruths and concealing pertinent facts. Confronted with his

inconsistent statements and omissions, he had to admit some things and try unsuccessfully to explain others. Ultimately, Fenner’s testimony established that, more likely than not, his recollection and testimony about how much marijuana and how many pills he was taking at any given time was not reliable, but was never an overstatement of how much he was using. Likewise, because he so often contradicted other eyewitness testimony about events at work, it became clear (more likely than not) that Fenner had grave difficulty accurately stating what actually had happened and equally grave difficulty separating his feelings from his remembrance of what had happened. Fenner displayed a strong tendency to reframe reality when he spoke, to conform reality with his belief that he was always the victim. He was generally untrustworthy as a source of information about what had actually happened.

In one respect he was credible. Fenner’s testimonial demeanor and affect, as well as the content of his testimony, together with the other evidence of record, convinced this Hearing Officer that he did suffer from multiple emotional disorders that together left him with a mental impairment<sup>9</sup> that substantially limited him in various major life activities including work. He clearly has experienced multiple instances of emotional trauma, including some physical trauma, that either caused or intensified his impairment. Unfortunately, perhaps in part because of his impairments, perhaps because of his continued drug use, or perhaps for entirely different reasons, Fenner was unreliable as a source of credible evidence about what happened at his employment. He is not necessarily a liar – it seems more likely that he often is unable to discern what is true and what is not. This strengthens his evidence that he, indeed, has a disability. At the same time, it completely undercuts his testimony that he was the target of illegal disability discrimination.

“An applicant or employee does not have to specifically request a ‘reasonable accommodation,’ but must only let the employer know that some adjustment or change is needed to do a job because of the limitations caused by a disability.” EEOC, Title I Tech. Assistance Manual, at § 3.6; see also *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc) (employee need not mention “ADA” or “reasonable accommodation”), vacated on other grounds, 535 U.S. 391 (2002). In July 2012, Fenner mentioned to Stacey Bird having an anxiety attack and he also referred to counseling in the context of domestic and legal problems. That was not a clear communication that Fenner wanted some adjustment or change in his job duties, because of disability, so he could do his job. It was instead a demand that the

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<sup>9</sup> Fenner’s impairment sometimes generated physical problems – the exaggerated gag reflex, sweating, etc. that sometimes came with his anxiety attacks – but there is no reason to struggle with semantics. The impairment was real, whether it was entirely mental or both mental and physical.

employer should punish his coworkers for Fenner's breakdown at work, even though there was little to no evidence that they had done anything wrong.

On March 11, 2013, Fenner's counselor, Lori Pike, sent a letter to Expo Park regarding his disability and need for accommodation. Ex. 117. She described Fenner as suffering from "anxiety and depressive symptoms," but made no clear statement of any long term mental condition from which Fenner might be suffering. She stated that Fenner "displayed severe emotional distress related to workplace humiliation and apparent job sabotage riddled with ongoing destructive innuendoes and harassment." This is a serious accusation about what was happening at work, but "emotional distress" is not a diagnostic clinical condition. Pike requested that Expo Park conduct a "thorough investigation of employment practices and procedures at Mr. Fenner's workplace," which was not a request for accommodation of any kind for Fenner.

Fenner's argument that his "anxiety symptoms were obvious to those who interacted with him" was not helpful. First, whatever his "anxiety symptoms" might have meant, the substantial and credible evidence at hearing established that some of his coworkers noticed he was sometimes afraid, but that office personnel and management personnel saw him being angry, not afraid. It was no substantial and credible evidence that it "was common knowledge at Expo Park that Fenner was fearful working at heights and many times he had suffered several severe anxiety attacks while at work." There was evidence that one time at work (during the rodeo set up) Fenner was unable to continue working when an anxiety attack incapacitated him. This was a far cry from proving that "it would be virtually impossible for someone who knew Fenner or spent any significant time with him to be unaware of his disability."

Barnett, *supra*, and *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d. Cir. 2008) both find that an employer has a duty to commence the interactive process of accommodation if it knew or had reason to know that the employee had a disability that affected his ability to perform the job, even if the employee did not ask for any accommodation. Fenner did not prove that Expo Park knew or had reason to know that he had a disability that affected his ability to perform his job. He did not have to prove that he was absolutely incapable of performing his job without an accommodation. See, *McDonald* at ¶¶45 and 47. He did have to prove that without an accommodation he at least could not work in reasonable comfort. Cf. *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 546 (7<sup>th</sup> Cir. 1995). In this case, Expo Park did take actions to change coworkers' behaviors in several respects, but Fenner's mental condition continued to deteriorate, until in early August seeing a temporary worker running a forklift at work was enough to trigger his

immediate resignation from his permanent job. Reasonable persons no doubt agree that employees have the right not to be singled out, embarrassed and humiliated by an employer because of disability. *EEOC v. MCI Telecom. Corp.*, 993 F.Supp. 726, 730 (D. Ariz. 1998). But what was Expo Park supposed to do about the Hurt Feelings Report that was originally brought to the premises before Fenner had ever worked there, and that the employer could only find on the premises one or two times, and never in huge numbers? The worker who put it in Fenner's mailbox as a "joke" was punished. What further could Expo Park reasonably do to address Fenner's unsupported certainty that Rust and McDermand were plotting to drive him away from work with endless copies of the Hurt Feelings Report? Was there a reasonable basis for suspending or firing McDermand for putting the Hurt Feelings Report in Fenner's mailbox? Where is the evidence that McDermand knew anything about Fenner's disabilities?

For an employee who could perform her job, but whose ability to do so was substantially limited by pain which could have been minimized through an accommodation, an employer would have a duty to attempt accommodation. *Martinell* at 305, 886 P.2d at 429. But how many workers would Expo Park have had to fire before Fenner might have stopped finding endless insults and threats in the conduct of coworkers who just wanted him to do his job? Is an accommodation required for a worker who has mental and emotional conditions that do limit his ability to work, but who is also illegally using drugs and abusing his own prescription drugs, further limiting his ability to work? What did Fenner actually prove to his employer, when his own perceptions and testimony were largely unreliable?

Ending this section where it began, one of the essential elements of entitlement to accommodation is being a person with a disability who is qualified to hold an employment position because of ability to perform the essential job functions of the position with or without reasonable accommodation. Admin. R. Mont. 24.9.606(2). In this case, there is virtually no evidence that James Fenner was ever able to perform the essential job functions of a permanent laborer at Expo Park. He got the job because coworkers coached him so he could present himself to the employer as far more qualified than he ever actually was. Despite the training and testing of Fenner, haphazard as it was, there is really no credible evidence that he ever was able to perform the essential job functions of the permanent laborer position.

**B. Fenner Did Not Prove That Expo Park Created a Hostile Work Environment Such That His Leaving Work Constituted a Constructive Discharge.**

The substantial and credible evidence at hearing did not prove that Expo Park forced Fenner to terminate his employment because of his disability. The factual and legal question was whether, under the totality of the circumstances, the work environment was so intolerable that Fenner had no reasonable alternative but to quit.

Martinell at 314-19, 886 P.2d at 435-38. Fenner certainly believed that he had endured months of being harassed, intimidated, and treated unfairly by Expo Park. In briefing, Fenner argued that the evidence of this harassment, intimidation and unfair treatment included the admission of Expo Park General Manager Lisa Bracco, at hearing, that the Hurt Feelings Report was funny:

Q Do you remember telling Sam Mahlum as well as me that you think this [Ex. 34, second page, Hurt Feelings Report] is funny?

A I did. I think that the mentality in the maintenance area, that they meant it to be funny.

Q But you also told me that you thought it was funny, correct?

A I did at that time.

Q And you've also told Sam Mahlum, the HRB investigator, you thought this was funny, right?

A Correct.

Tr. II, 560:19-561:3. In the context of the testimony, Bracco clearly meant that she believed that the report was intended to be funny, not hostile, by the employees who used it. In short, Bracco was not suggesting that she thought that Fenner's anger and anxiety at seeing the Hurt Feelings Report was amusing. She was testifying only that the use of the report was intended to be humorous and was not intended to cause Fenner pain.

In order to make out a claim of hostile work environment harassment, James Fenner must prove: (1) he is a member of a protected class, (2) he was subjected to harassment because of his membership in a protected class, (3) the harassment was unwelcome, and (4) the harassment was so severe or pervasive that it altered the conditions of his employment and created an abusive working environment. See *Campbell v. Garden City Plumb. & Heat.*, ¶¶15-19, 2004 MT 213, 322 Mont. 434, 97 P.2d 546. The employee must show both that he perceived the work environment to be hostile and abusive, and that a reasonable person in his shoes would also have perceived the environment to be hostile and abusive. *Id.* at ¶19.

In determining whether the employer's conduct is sufficiently severe or pervasive to create a hostile work environment, it is necessary to consider the totality of circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance; and its effect on the employee's psychological well being. *Stringer-Altmaier v. Haffner*, ¶21, 2006 MT 129, 332 Mont. 293, 138 P.3d 419 (quoting *Harris v. Forklift Sys., Inc.*,

510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295, 302-03 (1993)).<sup>10</sup> Although these factors are to be considered in evaluating the totality of the circumstances, Fenner is not required to prove each of these factors. “The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct.” See *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 872 (9th Cir. 2001). Thus, conduct that is not especially severe can create a hostile work environment if it is frequent and pervasive. Similarly, if the conduct is severe enough, it can create a hostile work environment even if it is infrequent.

Fenner is clearly a person with a disability, but his evidence of harassment and intimidation is simply too subjective, with too little corroboration, to establish a hostile work environment. His evidence of the frequency of alleged discriminatory and retaliatory conduct is likewise too subjective, with too little corroboration. Given Fenner’s unstable mental state, his reports of what he perceived are not reliable. The limited corroboration from other witnesses is not enough to establish a hostile work environment that would render his decision reasonable to leave work for once and for all because he saw a temporary worker running a forklift.

Chronologically, it may be a stretch, but Fenner may be right in asserting that after each time he complained, he was subjected to discipline. The problem is that each time he was disciplined, Expo Park established a legitimate business reason for the discipline. The investigation that led to the five-part written counseling Fenner received after he filed his Human Rights Complaint was undertaken by Goering before Fenner had even filed his Human Rights Complaint, after Fenner’s outpouring of discontent in early March 2013. Although in his mind, he was never due any discipline, and he could therefore continue to believe that he was an innocent victim, the substantial and credible evidence does not support his belief that he was an innocent victim, and does not support his claims of a hostile work environment.

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<sup>10</sup> So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, *Meritor*, supra, at 67, there is no need for it also to be psychologically injurious.

This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises, nor specifically address the Equal Employment Opportunity Commission's new regulations on this subject, see 58 Fed. Reg. 51266 (1993) (proposed 29 CFR §§ 1609.1, 1609.2); see also 29 CFR §1604.11 (1993). But we can say that whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These 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, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

### C. Fenner Did Not Prove Retaliation.

Pursuant to Montana Code Ann. §49-2- 301, it is unlawful to take adverse action against an individual because he “filed a complaint, testified, assisted or participated in any manner in an investigation or proceeding under this chapter.” Under Admin. R. Mont. 24.9.602(b) and (c), “protected activity” means the exercise of rights under the Human Rights Act or Governmental Code of Fair Practices and may include opposing any unlawful act or practice and filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the Act or Code.

Since Fenner did not prove he was subjected to any illegal discrimination, he never was opposing any unlawful act or practice. Further, the only disciplinary actions taken against him after he filed his discrimination complaint was the written counseling of April 26, 2013, and all five incidents covered by the written counseling were proper subjects of discipline covered by an investigation that began before the employer received notice that Fenner had filed his HRB complaint. Although Fenner made a prima facie case of retaliation, since his complaint was filed and notice had been given to the employer of that complaint before the discipline was administered, Expo Park also established justifiable business reasons for imposing the written counseling for all five incidents, thereby articulating a “legitimate, nondiscriminatory reason” for giving Fenner the written counseling. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677-78 (1973).

To prove that the written counseling was actually retaliatory and that the five reasons for discipline were actual pretextual would require Fenner to produce evidence that Expo Park treated the complainant differently from similarly situated employees or that Expo Park's explanation for the adverse action is not believable. See EEOC Compliance Manual, Retaliation, Section § 8-II.E.2. Pretext can also be shown if Expo Park subjected Fenner's work performance to heightened scrutiny after he engaged in protected activity. See, e.g., *Hossaini v. Western Missouri Med. Cent.*, 97 F.3d 1085 (8th Cir. 1996) (reasonable person could infer that employer's explanation for plaintiff's discharge was pretextual where employer launched investigation into allegedly improper conduct by plaintiff shortly after she engaged in protected activity).

There is no evidence of any similarly situated employees subjected to different treatment. All five reasons for discipline were supported with credible and substantial evidence. The only discipline imposed was written counseling. Thus, even though the discipline came on the heels of Fenner’s complaint, it was for valid reasons, and amounted to minor discipline only, and the investigation that led to it was begun before the protected activity. Fenner did not prove pretext.

#### D. Conclusion

Fenner's claims failed because of failures of his proof.

Fenner failed to prove that his employer refused to accommodate his disability. Fenner has a disability due to his mental conditions. However, his employer, with the information it actually had about Fenner's conditions (which was little to no information) and with the facts it could develop about what happened in the several incidents at work, behaved reasonably in each instance. In every instance, Fenner failed to prove that his employer knew or reasonably should have known that his difficulties resulted from his disability and yet refused to take appropriate action. Indeed, Fenner did not prove his difficulties did result from his disabilities apart from his illegal drug use, and failed to prove that he was an otherwise qualified person with a disability.

Fenner likewise failed to prove that the employer created such a hostile environment such that it was reasonable for him to leave his employment, so that he was constructively discharged.

Fenner likewise failed to prove that his employer retaliated against him because of his HRB complaint. The only disciplinary action taken against Fenner after Expo Park received notice of that complaint was amply justified, consisted of only written counseling, and the investigation was commenced before Fenner's complaint was filed.

#### V. Conclusions of Law

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

2. James Fenner failed to prove that Cascade County Expo Park discriminated against him illegally because of disability and retaliated against him for participating in a Human Rights complaint against his employer. Mont. Code Ann. §§49-2-303(1) and 301. For purposes of § 49-2-505(8), MCA, Cascade County Expo Park is the prevailing party.

#### VI. Order

1. Judgment is granted in favor of Cascade County Expo Park and against James Fenner. Fenner's complaint is dismissed with prejudice as lacking merit. Orders sealing portions of the record remain in full force and effect.

Dated: April 20, 2015

/s/ TERRY SPEAR  
Terry Spear, Hearing Officer  
Office of Administrative Hearings

\* \* \* \* \*

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Donald Ford Jones, Hohenlohe Jones PLLP, attorney for James Fenner, and Dee Ann Cooney, Cooney Law Firm, and Maureen H. Lennon, MACo Defense Services, attorneys for Cascade County Montana Expo Park:

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 Office of Administrative Hearings, as can be done in District Court pursuant to the Rules.

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

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

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document was, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows, as well as by email to the indicated email address(es):

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Signed this 20th day of April, 2015.

/s/ SANDRA PAGE

Legal Secretary  
Office of Administrative Hearings,  
Montana Department of Labor and Industry