

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 450-2016

BRENT FLATOW, )  
)  
Charging Party, )  
) HEARING OFFICER DECISION  
vs. ) AND NOTICE OF ISSUANCE OF  
) ADMINISTRATIVE DECISION  
MARKLE'S HARDWARE, )  
)  
Respondent. )

\* \* \* \* \*

I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party Brent Flatow brought this complaint alleging his former employer, Markle's Hardware, discriminated against him on the basis of disability.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on June 14, and June 15, 2016 in Glasgow, Montana. Attorney Peter Michael Meloy represented Flatow. Attorney William J. Mattix represented Markle's Hardware.

Brent Flatow and Gloria Robertson testified on behalf of the charging party. The charging party called Drew Markle as an adverse witness in his case in chief. Tracy Meland, Michelle Wettstein and Linda Falkenstern testified on behalf of the respondent. Charging Party's Exhibits 1, 2, 5 through 9, 11, 12 and 13 were admitted. Respondent's Exhibits G, H and I were also admitted.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received on September 2, 2016. In its reply brief, Markle's Hardware requested the Hearing Officer take judicial notice of the fact that Flatow was eligible for health insurance through Valley View Home. Flatow requested additional time to file his

response, which was timely received on September 29, 2016. However, it is unnecessary to address the propriety of taking judicial notice of whether or not Flatow receives health insurance through his current employer due to the ultimate finding in this case.

Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

## II. ISSUES

1. Did Markle's Hardware discriminate against Brent Flatow on the basis of disability in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Markle's Hardware did illegally discriminate against Brent Flatow as alleged, what harm, if any, did he sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Markle's Hardware did illegally discriminate against Brent Flatow as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

## III. FINDINGS OF FACT

1. Markle's Hardware is a hardware store located in Glasgow, Montana. Markle's Hardware is owned and operated by Markle's, Inc. Drew Markle and his brother, Dirk Markle, own the store, which has been operated by their family for more than 100 years. Tr. 37:7-21.

2. Brent Flatow, at all times material to this case, was a resident of Glasgow.

3. Flatow has experienced seizures since he was approximately 16 years old. Tr. 143:19-21.

4. Flatow typically experiences petit mal seizures, which can last for several seconds. Flatow will "basically look off into space" for a brief time, during which he can hear what is going on but he cannot speak or respond. Flatow can typically return to whatever he was doing once the seizure ends. Tr. 144:24-145:7.

5. Flatow has not suffered a grand mal seizure since 2003. Tr. 144:22 - 144:11.

6. Stress is a trigger for his seizures. Tr. 163:16-24.

7. Flatow often does not recall having a seizure and information about his seizures has been gathered from other people. Tr. 163:2-15.

8. Flatow previously worked for Markle's Hardware during the summer of 1991 after finishing high school and just before starting college. Flatow worked in the shop assembling customer-purchased product. Flatow was not the manager of the department, and he was not required to do inventory, order product, prepare invoices, work the cash registers or mix paint. Tr. 165:24-167:18.

9. Flatow previously worked as a parts counterman for Newton Motors in Glasgow from 1994 to 1997. Tr. 121:2-21.

10. From 1997 to 2007, Flatow worked as a parts counterman and later as a parts manager for Chevrolet of Helena. Tr. 121:2-21. Flatow left his employment with Chevrolet of Helena due, in part, to the pressure to achieve certain sales goals and required quotas. 124:11-20; 159:20-160:16.

11. Flatow returned to Glasgow in 2007. Flatow worked briefly for a farm implements dealer and then as a convenience store clerk for approximately five years. Tr. 160:17-161:10.

12. Flatow worked as a parts manager for Northern Prairie Auto in Wolf Point, Montana beginning in 2013. Tr. 125:15-126:7. Flatow was promised the employer would arrange for his transportation to and from Wolf Point, which is approximately 50 miles from Glasgow. Flatow quickly encountered difficulties securing transportation and he was forced to leave his employment with Northern Prairie Auto. Tr. 128:10-13.

13. In August 2014, Flatow responded to a job posting at the Glasgow Job Service for an automotive department manager at Markle's Hardware. Tr. 129:13-20; 195:4-9.

14. Store Manager Tracy Meland and Assistant Store Manager Tom James interviewed Flatow for approximately 45 minutes. Tr. 131: 3-4; 165: 17-21; 195: 18-197:24. Meland and James advised Flatow that he would be required to be on his

feet for long periods, assist customers, work the cash registers when needed, do inventory, and do the ordering for the automotive department. Tr. 197:11-16. Meland believed Flatow could perform the job duties required of an automotive department manager based upon his past training and experience. Tr. 197:17-24.

15. Meland offered the job of automotive department manager to Flatow, which Flatow accepted.

16. On September 5, 2014, Flatow began working for Markle's Hardware. C.P. Ex. 1; Ex. 12.

17. Flatow knew or should have known based upon the job posting at the Job Service, his interview with Meland and James, and the final job offer that he was being hired to perform the duties of an automotive department manager.

18. Drew Markle was aware of Flatow's seizure condition at the time of hire. Tr. 15:3-5.

19. Markle's Hardware has an employee handbook, which sets forth its policies and procedures, as well as its expectations for employee's performance. C.P. Ex. 9.

20. New employees have a 180-day probationary period. The employee handbook provides, "If Markle's Inc. determines that the designated period does not allow sufficient time to thoroughly evaluate the employee's performance, the probationary period may be extended for a specific period." C.P. Ex. 9 p. 6.

21. Flatow's 180-day probationary period was set to end on or about March 5, 2015.

22. The employee handbook also outlines the progressive disciplinary process, which provides, "Disciplinary action may call for any of the following elements: verbal warnings, written warnings, suspension without pay or termination of employment. If any disciplinary action is required, the goal is to correct a problem early to the benefit of the employee and the company." C.P. Ex. 9 p. 22.

23. Flatow's job duties as an automotive department manager at Markle's Hardware included stocking shelves, rotating end caps, making sure items had price tags, dusting shelves, ordering new stock and helping other employees as needed.

Flatow's duties also included assisting customers, working at the cash registers, mixing paint and other duties as assigned. Tr.47:24-49:11.

24. Flatow generally worked 40 hours per week with an hourly wage of \$10.00. C.P. Ex. 1;12. Flatow became eligible for health insurance through Markle's Hardware in January 2015. The value of this benefit was \$436.84 per month. C.P. Ex. 13.

25. Markle's Hardware is arranged in departments, each of which has a manager. There is a shop area at the store where small engines are repaired and products such as barbeques and patio furniture are assembled by employees. Markle's Hardware cross-trains its employees so every employee is able to effectively work in every department. Markle's Hardware expects employees to assist one another and to accept assistance from each other. Tr. 39:1-25; 40:9-41:4.

26. Markle's Hardware has 12 full-time employees. Drew Markle acts as the store's general manager while Dirk Markle is responsible for the financial end of the business, including accounts payable and receivable and regulatory issues. Id.

27. Markle's Hardware cross-trains its employees so they are able to assist customers in any department at any time. All employees are expected to assist one another as needed and to be ready, willing and able to assist customers at all times. Tr. 41:5-42:16.

28. In October 2014, Flatow suffered a seizure at work that caused him to fall down a short flight of stairs leading to the shop area and hit a tool chest. Drew Markle and Meland observed Flatow on the ground, shaking, with his eyes rolled back in his head. Flatow did not recall the seizure and only recalled Meland standing over him asking him if he was okay. Tr. 15:21-16:24; 101:5-103:19; 209:24-211:17.

29. On November 21, 2014, Drew Markle met with Flatow to discuss concerns he had with Flatow's job performance. Those concerns included:

- Flatow providing a different level of customer service to those customers he knew than to those customers he was not familiar with. Tr. 50:3-51:20.
- Flatow greeting friends inside the store with, "Hey, asshole," or, "Hey, jackass." Tr. 52:12-25.
- Flatow keeping food or drink at the cash register despite there being a prohibition against such conduct. Tr. 53:1-21.

- Problems Flatow had with learning how to mix paint. Drew Markle and other employees had worked with Flatow on several occasions on how to mix paint. Drew Markle had created a worksheet for Flatow to use when mixing paint. Tr. 56:2-58:12.
- Issues Flatow had with correctly completing invoices, which resulted in items being billed under incorrect department numbers; inventory problems and sales records being incomplete or incorrect. Tr. 58:13-62.1.
- Situations Drew Markle had observed where Flatow refused offers of help from his co-workers. Tr. 62:2-24.

30. Drew Markle advised Flatow during the November 21, 2014 meeting that Flatow must improve his performance in the areas covered. Tr. 62:24-63:5. Drew Markle also directed Flatow to avoid doing any heavy lifting and to take breaks as needed due to discomfort Flatow had complained about related to his prosthetic leg. Tr. 53:22-56:1.

31. In January 2015, Drew Markle met with Flatow again to discuss ongoing performance issues. Tr. 64:7-12; C.P. Ex. 6. Drew Markle addressed concerns he had that Flatow continued having a difficult working relationship with his co-workers. Tr. 62:2-24. Drew Markle also addressed issues Flatow had with ordering for his department; scanning products, which resulted in customers being charged incorrectly for items purchased, as well as inventory issues; stocking and “facing” shelves; point-of-sale (POS) procedures; and inventory management. Tr. 65:16-70:22; 71:13-72:2; 72:3-10; 72:22-73:8; 73:9-23; 74:1-14; 74:15-25.

32. Markle’s Hardware runs a report every Monday, Wednesday, and Saturday, which includes an item’s SKU number; item description; location of the item; number of items on hand; number of items included on a future order; and how many items the program estimates are on hand. This report is essential to ensuring inventory for the store is correct. Tr. 65:16-70:22.

33. When product is delivered to the store, the department manager is required to review the order and make the necessary adjustments to inventory for the department. On Mondays, Flatow was responsible for reviewing the report and making any necessary corrections. On Wednesdays, Drew Markle or another employee would cover Flatow’s department. On one occasion, Drew Markle observed that the number of items on the shelf was incorrect; items were billed out wrong; and back stock was not being put on the floor despite more stock being ordered. Id.

34. Flatow's issues also included difficulty following POS procedures. Markle's Hardware runs a "whole ticket" system for customers who may have multiple purchases throughout the day such as a city, school district, and bigger businesses. The "whole ticket" system prevents the customer from receiving multiple invoices at the end of the month. Other employees often encountered difficulties with orders completed by Flatow, and the employees would be required to void the ticket and create a new one. Tr. 72:22-73:8; 73:9-23.

35. Drew Markle arranged for Flatow to work in a position where he could enter UPC codes, item descriptions, manufacturing numbers and other product information on a computer in Drew Markle's office. Flatow had difficulties performing these tasks and advised Drew Markle that he had a learning disability and would never be able to learn those tasks. Tr. 77:24-78:18; 79:16-21.

36. Flatow denied at hearing that he had a learning disability. Tr. 140:21-22.

37. Flatow continued having difficulties with his co-workers. Flatow regularly refused offers of help from his co-workers, particularly Michelle Wettstein and Linda Falkenstern, and would wait to talk to Meland or James.

38. Falkenstern has been the paint department manager for Markle's Hardware for approximately 20 years and has worked for the store for more than 32 years. 240:14-20. On those occasions when Falkenstern attempted to assist Flatow, he would either walk away or indicate he would wait for a member of management. Tr. 243:1-11; 243:19-25; 244:1-3. Flatow typically refused any offers of assistance from Falkenstern, whom he referred to as a "bear cat." Tr.139:11-13.

39. Wettstein has worked for Markle's Hardware off and on for approximately four years. Wettstein currently works as the housewares department manager. Tr. 131:3-4. Wettstein observed Flatow struggling with inventory, mixing paint, following through with customer service, and working the cash registers. Wettstein attempted to assist Flatow in learning how to perform his various duties, but he typically refused Wettstein's help and would wait for a manager. Tr. 234:4-25; 235:1-25; 236:1-25; 237:2-8. Wettstein complained to management about Flatow's unwillingness to accept her help or advice. Tr. 237:5-10.

40. Meland also observed Flatow charging items to the wrong person or to the wrong department, which caused inventory reports to be incorrect. Tr. 198:12-27; 19:1-5. Meland also observed Flatow rebuffing offers of help from his co-workers. Tr. 201:1-6; 19-25; 202:1.

41. On March 7, 2015, Drew Markle met with Flatow and another employee to discuss concerns he had with their job performance. Tr. 85:9-14. Both Flatow and the other employee were advised that they needed to improve their relationships with their co-workers; improve customer service; learn how to mix paint; and ensure they are correctly charging customers for purchased product. Id.; Tr.87:6-14; 87:15-88:6; 89:20-90:20; 88:7-89:19; 90:21-91:20; 91:21-92:11. Both Flatow and the other employee's probationary period was extended an additional 90 days. Tr.94:8-10.

42. On March 12, 2015, Flatow experienced three seizures within approximately one hour. Tr.95:10-100:6. Drew Markle observed the first seizure, which caused Flatow to slump and fall to the floor near the front counter. Flatow was unresponsive for several minutes. When he came to, Flatow asked for some water, went to the back room for a few minutes and then returned to work. Tr. 95:14-97:19. Flatow does not recall this seizure. Tr.146:9-18.

43. Flatow had a second seizure while working with customer Ellen Lloyd. Drew Markle came upon the two and noticed Lloyd had her arms around Flatow holding him up. Flatow was responsive by the time Drew Markle approached the two and quickly returned to work. Flatow does recall experiencing this seizure. Tr.95:22-99:18; 146:19-148:16.

44. Flatow had a third seizure while assisting a customer interested in purchasing a drill. Meland was assisting the customer selecting anchor bolts when he observed Flatow drop the drill and begin falling backwards into the shelving. Meland had to hold Flatow up to prevent him from falling. Tr. 211:18-212:10.

45. Meland directed Flatow to go to the back room after the seizure had ended. Tr.212:11-19.

46. Flatow does not recall experiencing the third seizure. Tr.181:17-182:6.

47. Drew Markle drove Flatow home that day. 100:8-13. Flatow informed Drew Markle that stress was a trigger for his seizures. 103:23-104:5.

48. Drew Markle was concerned about Flatow's seizures and his ability to handle the stress that occurs during the busy season of March through August. Tr. 104:6-20.

49. Drew Markle told Flatow that the job would become more stressful with spring coming and he was not sure the job was a good fit for Flatow. Drew Markle told Flatow that he had not yet made a decision about Flatow's job at Markle's Hardware. Tr.104:1-15.

50. Flatow worked the day of Friday, March 13, 2015, without incident and was not scheduled to work again until Monday, March 16, 2015. CP Ex. 12.

51. During the weekend of March 14, 2015, Drew Markle met an attorney at the grocery store who had conducted the stock sale that resulted in Drew Markle and his brother assuming control of Markle's Hardware. Drew Markle asked the attorney in a casual conversation about the potential liability if Flatow were to have a seizure while at work and injure a customer. Drew Markle was advised that the business would be liable in such a situation. Tr.104:25-105:23.

52. Drew Markle had not yet made any decision regarding whether or not to terminate Flatow at the time of his conversation with his attorney friend. Tr. 105:24-106:2.

53. On March 16, 2015, Drew Markle arrived at work and learned from Dirk Markle that there were three new invoices created by Flatow that contained errors. Tr.106:3-8.

54. Drew Markle met with Meland and James and showed them the invoices. Drew Markle asked if either had seen any improvement in Flatow's performance. Both Meland and James denied seeing any improvement. Both Meland and James also indicated they thought Flatow should not be allowed to continue in the employment when asked directly by Drew Markle. Tr.106:3-18; 107-23-108:23.

55. On March 16, 2015, Drew Markle discharged Flatow. Tr. 35:25-36:2. Flatow's Payroll Status Change form showed he was discharged with the notation, "let go[sic] to seizures and other reasons." Meland signed the Payroll Status Change form. CP Ex. 1.

56. Flatow mowed lawns in and around Glasgow for Charles Rice after being discharged by Markle's Hardware. Flatow suffered a seizure while operating a lawn tractor, which caused Rice to end his employment out of concern for Flatow's safety. Tr.190:10-191:5.

57. From August 2014 through February 15, 2015, Flatow worked for Soma Dis Deli in Glasgow. Tr. 154:2-155:3. Flatow's total earnings from this employment was \$5,918.16. Tr.155:1-3.

58. Flatow is currently working at Valley View Home in Glasgow. Flatow has worked there since June 7, 2016. Flatow works an average of 30 hours per week with an hourly wage of \$10.00. Tr.191:6-20.

59. Flatow is a qualified individual with a disability as defined under the Montana Human Rights Act.

60. The decision of Markle's Hardware to discharge Flatow was based, in part, upon his disability. However, it was not the motivating factor in its decision, which was based in larger part on Flatow not performing his job duties to the expectation of the employer.

#### IV. OPINION<sup>1</sup>

Montana law prohibits discrimination in employment because of physical or mental disability. Mont. Code Ann. §49-2-303(1)(a). An individual has a physical disability when he or she has a physical impairment that substantially limits one or more major life activities, a record of such an impairment, or a condition regarded by the employer as being such an impairment. Mont. Code Ann. §49-2-101(19)(a)(I) through (a)(iii). Discrimination based on physical disability includes failure to make a reasonable accommodation required by an otherwise qualified person who has a physical disability. An accommodation that would require an undue hardship is not a reasonable accommodation. Mont. Code Ann. §49-2-101(19)(b). 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.

A. Flatow has proven a prima facie case of discrimination.

To establish a prima facie case of discrimination, Flatow must show that (a) he belonged to a protected class; (b) he was otherwise qualified for continued employment; and (c) Markle's Hardware denied him continued employment because of a disability. Mont. Code Ann. §49-2-303(1)(a); Admin. R. Mont. 24.9.610(2)(a).

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<sup>1</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Hoffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

In essence, Flatow must show that (a) he is a qualified individual with a disability or impairment; (b) the employer was aware of his disability or impairment; and (c) the employer failed to reasonably accommodate the disability or impairment. See generally, *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7<sup>th</sup> Cir. 2005)(citing *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7<sup>th</sup> Cir. 2001)).

- I. Flatow has proven he is a qualified individual with a physical disability as defined under the MHRA.

To qualify as a member of a protected class under the MHRA, Flatow must show he has a “physical disability” within the meaning of the MHRA. The statute defines “physical or mental disability” as an impairment that substantially limits one or more of a person’s major life activities or is regarded by the employer as such an impairment. Mont. Code Ann. § 49-2-101(19)(a). “A person is substantially limited if he or she experiences difficulty in securing, retaining, or advancing in employment.” *Martinell v. Montana Power Company*, 68 Mont. 292, 310, 886 P.2d 421, 432 (1994) (citation omitted). Whether a particular impairment is a disability under the MHRA requires a factual determination, made on a case-by-case basis. *Reeves v. Dairy Queen*, ¶26, 1998 MT 13, 287 Mont. 196, 953 P.2d 703. In making that factual determination, it is a matter of law that work is a major life activity. *Walker v. Montana Power Company*, 278 Mont. 344, 348, 924 P.2d 1339, 1342 (1999), *Martinell*, 68 Mont. 292, 304, 886 P.2d 421, 428.

It is well settled that epilepsy constitutes a disability under the Americans with Disabilities Act (ADA)<sup>2</sup>. See, e.g., 29 C.F.R. 1615.103(1)(ii) (including epilepsy in the definition of "physical or mental impairment"); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999) (using epilepsy as an example of a condition that is included in the definition).<sup>3</sup> Therefore, Flatow has shown that he belongs to a protected class under the MHRA based upon not only his having a condition that constitutes a disability under the ADA, but being regarded as having such a condition by Markle’s Hardware. The next issue is whether Flatow was qualified for the position of automotive department manager.

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<sup>2</sup> Flatow was referred to as having a seizure condition at hearing and a review of the transcript shows the term epilepsy was never used. However, Flatow indicated in his opening brief he has suffered from epilepsy since he was in high school. It is, therefore, presumed that Flatow has epilepsy.

<sup>3</sup> The Montana Supreme Court regularly looks to federal statutes and regulations when interpreting provisions of the MHRA. See *McDonald v. Dept. of Environmental Quality*, 2009 MT 209, 351 Mont. 243, 214 P.3d 749, P 39 n. 8 (at 764); *BNSF Ry. Co. v. Feit*, ¶ 15, 2012 MT 147, 365 Mont. 359, 281 P.3d 225.

A person with a disability is qualified to hold an employment position if the person can perform the essential job functions of that position with or without a reasonable accommodation. Admin. R. Mont. 24.9.606(2). *McDonald v. Dept. Of Environmental Quality*, 214 P.3d 749, ¶40; Mont. Code Ann. § 49-2-303(1)(a).

The preponderance of the evidence shows Flatow had the skills, experience and education necessary to perform the job duties required of an automotive department manager at Markle's Hardware. While Drew Markle and other employees clearly had concerns about Flatow's job performance, there was no evidence offered showing Flatow was not qualified or was unable to perform his assigned duties. Therefore, Flatow has shown he is a qualified individual with a disability.

2. Flatow has proven by direct evidence that Markle's Hardware unlawfully discriminated against him due to his disability.

Disability discrimination claims are generally evaluated using the three-part test for federal discrimination claims set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The McDonnell Douglas test implements a burden-shifting regime that first requires the plaintiff bears the burden of establishing her prima facie case of discrimination, from which arises a rebuttable presumption of discrimination; the burden then shifts to the employer to provide a "legitimate, nondiscriminatory reason" for the adverse employment action; and the burden then shifts back to the plaintiff to provide evidence that the employer's stated reason for the adverse action was pretextual. *Id.* The McDonnell Douglas test "reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially." *Id.* at 354.

The Montana Supreme Court has held the McDonnell Douglas test is unnecessary in those rare cases where a plaintiff presents direct evidence of discrimination.

The [McDonnell Douglas] test is inappropriate for cases in which the employer acknowledges that it relied upon the plaintiff's handicap in making its employment decision. The McDonnell Douglas burden shifting approach is unnecessary because the issue of the employer's intent, the issue for which McDonnell Douglas was designed, has been admitted by the defendant in such cases, and the plaintiff has direct evidence of discrimination on the basis of his or her disability.

*Reeves v. Dairy Queen, Inc.*, 1998 MT 13, 287 Mont. 196, 953 P.2d 703.

This approach is outlined in Admin. R. Mont 24.9.611(1), which provides in part, "When the charging party proves that the respondent engaged in unlawful discrimination or illegal retaliation but the respondent proves the same action would have been taken in the absence of the unlawful discrimination or illegal retaliation, the case is a mixed motive case."

"Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659 (9th Cir. 2002). Direct evidence typically "consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer." *Coghlan v. American Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005).

Flatow has proven discriminatory intent on the part of Markle's Hardware through direct evidence. The proverbial smoking gun is found in Flatow's Exhibit One - the Payroll Status Change form in which Flatow's reason for change is marked as "discharge" with the notation, "let go [sic] to seizures and other reasons." C.P. Ex. 1. Flatow contends his disability was the only or, at the very least, the primary reason for his discharge. Markle's Hardware concedes Flatow's disability was a consideration but argues the primary or motivating factor in its decision to discharge Flatow was his substandard job performance.

Counsel has ably argued the applicability of two different analyses used in direct evidence cases. Flatow urges the hearing officer to apply the analysis employed by the Montana Supreme Court in *Reeves*, where the court considered the use of direct evidence in cases in ". . . which the parties do not dispute the reason for the employer's action, but only whether such action is illegal discrimination." *Id.* at ¶16. The court announced:

Assuming that the plaintiff in such a case is in fact statutorily "disabled," the determinative disputed issue in the case will not be the employer's "intent," but instead in most cases will be whether the employee is "otherwise qualified," with or without reasonable accommodation, to perform the job, a factual dispute capable of resolution through traditional methods of proof.

*Id.* (citations omitted).

The court went on to hold:

At trial, if the plaintiff has established a prima facie case of unlawful discrimination with direct evidence, the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief.

Id. at ¶17 (citations omitted).

Markle's Hardware counters that such an analysis is inappropriate when, in a case such as this, ". . .there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989). Markle's Hardware contends the appropriate analysis is that which is used for "mixed motive" cases and was outlined by the U.S. Supreme Court in Price Waterhouse. A plurality of the Court held the plaintiff must prove that an illegitimate factor had a "motivating" or "substantial" role in the employment decision. Price Waterhouse, 490 U.S. at 258 (opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.); Id. at 259 (White, J., concurring) (quoting Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)); Price Waterhouse, 490 U.S. at 261-62 (O'Connor, J., concurring).

If the plaintiff proves the illegitimate factor played such a role, the employee has proven the employer's decision was made at least in part "because of" the illegitimate factor. If the employee makes such a showing, he or she can only succeed if the employer cannot prove its "affirmative defense. . .that it would have reached the same decision. . ."even in the absence of the "impermissible factor." Price Waterhouse, 490 U.S. at 246 (opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.); 244-45 (opinion of Brennan, Marshall, Blackmun, and Stevens, JJ.); 259 (White, J., concurring) and 276-77 (O'Connor, J., concurring).

The Montana Supreme Court considered both the Reeves analysis and the Price Waterhouse analysis in *Laudert v. Richland County Sheriff's Dep't.* (2000), 301 Mont. 114, 7 P.3d 386 and adopted the Price Waterhouse analysis for "mixed motive" cases. The court found a "mixed motive" analysis applies when the charging party produces direct evidence that an unlawful consideration played a motivating role in the employer's decision and the parties do not agree on the reason for the challenged action. Id. at 122.

In this case, the burden shifting approach of McDonnell Douglas is “inappropriate and unduly confusing” due to the direct evidence of the discriminatory intent of Markle’s Hardware. See *Laudert*, 301 Mont. 114, 120 citing *Reeves* at ¶15. Further, the *Reeves* approach is inappropriate because the parties do not agree on the reason for Flatow’s discharge. See *Id.* at 391 citing *Reeves* at ¶16. Therefore, the determinative issue in this case, as it was in *Laudert*, is why Markle’s Hardware discharged Flatow. Therefore, the appropriate analysis is that which was announced in *Price Waterhouse* and adopted by the Montana Supreme Court in *Laudert*.

- B. Markle’s Hardware has proven it would have terminated Flatow for job performance issues even without consideration of his disability.

The issue is now whether Markle’s Hardware can prove by a preponderance of the evidence that it would have acted in the same fashion without any consideration of Flatow’s disability. Admin. R. Mont. 24.9.611; See also *Price Waterhouse*, 490 U.S. at 242. The Court in *Price Waterhouse* noted, “The employer. . . must show that its legitimate reason, standing alone, would have induced it to make the same decision.” *Id.* at 252. The Court reasoned:

As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, proving ‘that the same decision would have been justified . . . is not the same as proving that the same decision would have been made’. An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason.

*Id.* (citations omitted).

Markle’s Hardware presented a litany of issues with Flatow’s performance, which included problems completing inventory; customer service issues; difficult working relationships with co-workers; problems learning how to mix paint; and issues such as using his personal cell phone on the sales floor and keeping drinks at the cash register.

Flatow conceded having some issues with inventory and learning how to mix paint but argued he had not received adequate training in those areas. Flatow also conceded Drew Markle had occasionally talked to him about performance issues but denied ever knowing his employment was in jeopardy.

The parties offered conflicting testimony regarding the issues Markle's Hardware raised regarding Flatow's performance. A credibility determination is required.

Drew Markle testified he addressed performance concerns with Flatow on several occasions, after which he saw little to no improvement in his performance. In support of Drew Markle's testimony, notes prepared at or near the time of meetings held on November 21, 2014; January 2015; and March 7, 2015 were offered and admitted as C.P. Exhibits 5 through 8. Drew Markle testified it was his regular practice to prepare notes regarding employee meetings at or near the time of the meeting. There was no allegation the notes were altered or that the notes were not sufficiently reliable. The notes, in addition to the sworn testimony of Meland, Wettstein and Falkenstern, make the testimony of Drew Markle more credible than the vague denials offered by Flatow that he was not aware the employer considered his job performance unsatisfactory or that his employment was in jeopardy.

Flatow argues Markle's Hardware did not have a legitimate business reason for his discharge as the reasons offered would not stand up to scrutiny under the Wrongful Discharge in Employment Act (WDEA). The WDEA provides the exclusive remedy for a wrongful discharge from employment. Mont. Code Ann. § 39-2-902. However, the WDEA does not apply to a discharge "that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that . . . prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds." Mont. Code Ann. § 39-2-912(1). Flatow offered no authority for the proposition that a reason offered for an adverse employment action in a human rights matter must satisfy the standard used in an action under the WDEA. Further, given the exclusivity of the remedies available under the WDEA and the MHRA, the hearing officer is not persuaded the standards outlined under the WDEA apply in a contested case hearing involving a claim of discrimination.

Flatow also argued that Markle's Hardware has failed in its affirmative defense based upon its failure to follow its progressive disciplinary process. The progressive disciplinary process provides, "Disciplinary action may call for any of the following

elements: verbal warnings, written warnings, suspension without pay or termination of employment. If any disciplinary action is required, the goal is to correct a problem early to the benefit of the employee and the company.” C.P. Ex. 9 p. 22 (emphasis added). While Flatow received no written warnings and was never suspended without pay, the preponderance of the evidence shows he received several oral warnings that his performance was unacceptable. Given the policy offers no hard and fast rules as to the progressive nature of the policy, it cannot be said that Markle’s Hardware fails in its affirmative defense due to a failure to adhere to its own policy.

The preponderance of the evidence shows Flatow had a series of performance issues that resulted in several oral warnings as well as the extension of his probationary period. Those issues were brought to Flatow’s attention several times throughout his employment. There is no evidence to suggest Flatow’s performance issues were related to his seizure condition. Markle’s Hardware has shown it had legitimate and sufficient reasons to discharge Flatow due to continuing performance issues. Therefore, the next issue is whether Markle’s Hardware was motivated by issues with Flatow’s job performance at the time it made the decision to discharge Flatow.

Drew Markle was aware of Flatow’s seizure condition at the time of hire and had personally observed Flatow experiencing a seizure while at work at least twice. Other employees and a few customers had also observed Flatow experiencing seizures while at work. However, the decision to discharge Flatow was not made at the time of the first seizure or even the final seizure, but only after Drew Markle was presented with three new invoices completed incorrectly by Flatow. While Flatow’s seizure condition may have been a factor in the decision to discharge him, the preponderance of the evidence shows his unsatisfactory job performance was the primary motivating factor in the decision of Markle’s Hardware to discharge Flatow.

Further, it seems unlikely that Drew Markle would be motivated by a discriminatory animus based upon disability only a few months after hiring Flatow when making the decision to discharge Flatow. In *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-271 (9th Cir. Cal. 1996), the court denied a terminated employee’s claim of sex discrimination and disability discrimination finding a strong inference arose that there was no discriminatory motive where the same actor was responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time. In *Bradley*, as in this case, the plaintiff worked for the employer for approximately one year and had a series of performance and other issues that led to the extension of her probationary period and ultimately her termination.

Flatow points to the conversation Drew Markle had with an attorney friend at the local grocery store the weekend before his termination as evidence that his disability was Drew Markle's primary motivation when terminating his employment. Flatow specifically argues that when an employer defends a disability claim based upon an assertion that the adverse action was taken out of concern for the health and safety of the employee and others, the employer is under a duty to perform an independent assessment. Flatow notes the court's ruling in *Reeves* that the employer has an affirmative duty to conduct an independent assessment of the risk of substantial harm. *Reeves*, ¶42.

Admin. R. Mont. 24.9.606(7),(8) provides:

(7) If an employer defends an adverse employment action against a person with a physical or mental disability on the grounds that an accommodation would endanger the health or safety of a person, the employer's failure to independently assess whether the accommodation would create a reasonable probability of substantial harm will create a disputable presumption that the employer's justification is a pretext for discrimination on the basis of disability.

(8) Independent assessment of the risk of substantial harm is evaluation by the employer of the probability and severity of potential injury in the circumstances, taking into account all relevant information regarding the work and medical history of the person with the disability before taking the adverse employment action in question.

The failure to provide a reasonable accommodation to a qualified individual with a disability can constitute discrimination under the MHRA and the ADA. See Mont. Code Ann. §49-2-101(19)(b) and 42 U.S.C. § 12112(b)(5)(A). Once an employee requests an accommodation, "the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation." *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010); *Zivkovic*, 302 F.3d at 1089. This interactive process requires: "(1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective." *UPS Supply*, 620 F.3d at 1110-11.

An employer who fails to engage in the interactive process in good faith faces "liability for the remedies imposed by the statute if a reasonable accommodation

would have been possible." *Humphrey v. Mem'l Hosp. Ass'n*, 239 F.3d 1128, 1137-38 (9th Cir. 2001); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000) (en banc); *EEOC v. Creative Networks, LLC*, 912 F.Supp.2d 828, 837 (D. Ariz. 2012). A party that fails to communicate, by way of initiation or response, may . . . be acting in bad faith." *Beck v. Univ. of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). Generally, a disabled employee has the burden of proposing a reasonable accommodation. See *Humphrey* 239 F.3d at 1138.

It should be noted that Markle's Hardware has not specifically pleaded a safety defense in its post-hearing briefing. It should also be noted that Flatow never requested an accommodation for his seizure condition; nor was there any evidence offered that the employer regarded Flatow as being unable to perform his job duties without an accommodation on account of his seizure condition.

There was no evidence offered contradicting Drew Markle's sworn testimony that he had not yet made a decision regarding Flatow's employment at the time of his grocery store conversation with his attorney friend and did not make such a decision until he received three incorrect invoices and spoke with Meland and James. The preponderance of the evidence shows Flatow's poor job performance was the primary and motivating factor in the decision of Markle's Hardware to terminate Flatow's employment. Markle's Hardware has met its burden of showing that its decision to discharge Flatow would have been made in the absence of any concerns regarding Flatow's seizure condition.

C. Flatow is not entitled to monetary damages in this "mixed motive" case.

Administrative Rules of Montana 24.9.611 provides in part:

In a mixed motive case, the commission will order respondent to refrain from the discriminatory conduct and may impose other conditions to minimize future violations, but the commission will not issue an order awarding compensation for harm to the charging party caused by an adverse action that would have been taken by the respondent regardless of an unlawful discriminatory or retaliatory motive.

The idea of "mixed motive" cases serves solely the public interest. The complainant receives no recovery. The determination that a discriminatory motive played a part in the decision mandates affirmative relief under the MHRA to prevent future discriminatory action by the respondent. For Flatow, the "mixed motive" decision accords him neither relief nor complete vindication. In the interest of the

public, Markle's Hardware must not discriminate in the future. However, Flatow is not entitled to an order awarding compensation for harm that resulted from the adverse employment action in accordance with Admin. R. Mont. 24.9.611.

## V. CONCLUSIONS OF LAW

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

2. Markle's Hardware illegally discriminated against Brent Flatow based upon disability. §49-2-303, MCA.. Flatow is the prevailing party in this "mixed motive" case.

3. Flatow is not entitled to an order awarding compensation for harm that resulted from the adverse employment action in accordance Admin. R. Mont. 24.9.611.

4. The circumstances of the illegal discrimination mandate particularized affirmative relief. Admin. R. Mont. 24.9.611.

## VI. ORDER

1. Judgment is awarded in favor of Brent Flatow and Markle's Hardware in the matter of Flatow's complaint that Markle's Hardware illegally discriminated against him on the basis of disability. Mont. Code Ann. § 49-2-303. Because Markle's Hardware proved a legitimate business reason for its actions, no damages are awarded, since the same result would have occurred without the unlawful employment action.

2. Markle's Hardware is ordered hereafter not to take adverse employment action against any employee because of physical disability, without first engaging in the requisite full interactive accommodation process.

3. Within six months of this decision, Markle's Hardware must commence training of its owners and members of management regarding disability discrimination law and the proper accommodation process involved, and adopt policies requiring such training, as directed by the Human Rights Bureau, with the Bureau to set the frequency of the recurrent training. In the alternative, Markle's Hardware must consult with the Human Rights Bureau within 60 days of the date of this decision and arrange for a review of its policies and procedures and implement

any policies or training regarding disability discrimination in employment and the interactive accommodation process that the Human Rights Bureau may recommend as appropriate.

4. Markle's Hardware is ordered not to violate any of the rights of its employees as protected under the Montana Human Rights Act.

DATED: this 7th day of November, 2016.

/s/ CAROLINE A. HOLIEN  
Caroline A. Holien, Hearing Officer  
Office of Administrative Hearings  
Montana Department of Labor and Industry

\* \* \* \* \*

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Brent Flatow, Charging Party, and his attorney, Peter Michael Meloy; and Markle's Hardware, Respondent, and its attorney, William J. Mattix:

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. For copies of the original transcript, please contact Baldwin Court Reporting.