

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1849-2015:

WALTER FREUND,)	HRB Case No. 0141016947
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
NORTHWESTERN ENERGY,)	
a South Dakota corporation,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

On June 4, 2014, Walter “Wally” Freund filed a complaint with the Montana Human Rights Bureau (HRB) alleging his employer, NorthWestern Energy (NorthWestern), discriminated against him in employment on the basis of disability. On March 24, 2015, HRB certified the matter for contested case proceedings before the Office of Administrative Hearings. Hearing Officer Caroline A. Holien was appointed hearing officer in this matter.

On September 24, 2015, NorthWestern filed and served its motion for summary judgment on whether charging party Walter Freund suffered from a disability under the Montana Human Rights Act and on Freund’s reasonable accommodation claims. NorthWestern’s motion was denied in an order dated October 15, 2015.

Hearing Officer Holien convened a contested case hearing in this matter on October 19, 20, and 21, 2015 in Bozeman, Montana. Attorney Michael J. San Souci represented Freund. Attorney Harlan B. Krogh represented NorthWestern. The proceedings were attended by Freund and NorthWestern’s designated representatives, Jason Merkel, General Manager of Operations, and Pat Patterson, Division Operations Manager.

Freund and Kari Stormo Dolge attended and testified on the first day of the hearing; Mitch Wagner, Byron Perrenoud, Steve Marti, Heather Benn, Dr. Ann Adair, Heather Burns and Jim Yates were called and testified on the second day, and Pat Patterson, Dr. Jody Fink and Jason Merkel testified on the third day. Respondent NWE did not move for a directed verdict (or judgment as a matter of law) at the close of the Charging Party's case-in-chief. At the close of the proceedings, NorthWestern requested the Hearing Officer to reconsider its motion for summary judgment and, in particular, whether Freund's visual impairments sufficiently limited his work activity. As NorthWestern is the prevailing party in this matter, it is unnecessary to address its motion to reconsider.

Exhibits 1A-G, 2A-B, 4-7, 9, 10A-B, 11-14, 16, 17, 20-23, 104, 111, 119, 123, 126, 127, 129, 130, 134, 138, and 140-145 were admitted into the record.

Following the close of the evidentiary record, it was stipulated that the parties would submit their respective proposed findings of fact, conclusions of law and orders of relief and any objections and/or clarifications thereto. The last filing was timely received on January 15, 2016.

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:

Did NorthWestern Energy discriminate against Walter Freund on the basis of physical disability, in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

If NorthWestern Energy did illegally discriminate against Walter Freund as alleged, what harm, if any, did he sustain as a result and what reasonable measures should the department order to rectify such harm?

If NorthWestern Energy did illegally discriminate against Walter Freund 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. Walter "Wally" Freund has been a resident of Gallatin County at all times material to these matters.

2. Freund has worked for NorthWestern and its predecessor, Montana Power Co., for approximately 24 years.

3. NorthWestern is a regulated utility company that provides electrical and natural gas service to its customers in Montana and other areas. It is committed as a regulated utility to provide safe, reliable service at an affordable cost to its customers in its communities.

4. Freund's first job with Montana Power was as a garage man, working with the mechanic. Freund was promoted to mechanic approximately one year later.

5. Freund applied for and was accepted into the company's gas apprenticeship program approximately two years later. Freund subsequently became a journeyman pipefitter.

6. Freund applied for and was awarded one of two openings in Bozeman for a permanent Working Gas Foreman (WGF) position.

7. On October 8, 2015, NorthWestern classified Freund as a WGF.

8. The WGF position entails supervisory responsibility and accountability for projects, safety, overseeing and guiding crew members, and essentially serving as the lead man on the job site. The WGF decides when to move forward or when the job has been completed. The Working Gas Foreman has the authority to approve the work of the crew. The WGF is accountable for all work performed on the project.

9. The WGF is generally assigned the more difficult and technical jobs on a project because the WGF is considered to be the most experienced and skilled worker on the crew.

10. The WGF is required to ensure that a weld is done correctly. The WGF has the final say if there is a dispute over a weld. A journeyman welder cannot override the decision of a WGF.

11. The WGF can oversee projects that include plastic, steel or a combination of both. The amount of welding required of the WGF depends on the project assigned, including the size and nature of the project, and the experience of the WGF.

12. NorthWestern requires the WGF to be on call for emergency situations that may involve steel and welding. The WGF must also be available for overtime.

13. A WGF must be weld certified under the Department of Transportation's (DOT) rules regarding Qualified Operators.

14. NorthWestern has in place an Operator Qualification (OQ) Plan. The purpose of the OQ Plan is to meet the minimum requirements of 49 C.F.R. 192, Sub. N, which "outlines qualification of individuals performing identified covered tasks while operating and maintaining pipeline facilities and have the ability to recognize and react appropriately to abnormal operating conditions that may indicate a dangerous situation or a condition exceeding design limits."

15. The OQ Plan also "outlines the requirements for evaluating the qualifications of individuals performing certain operating and maintenance tasks on NorthWestern's natural gas transmission and distribution pipelines systems and facilities, including covered propane systems.

16. The OQ Plan requires a qualified person to have the training and knowledge to recognize abnormal operation conditions and to have the ability and authority to react to those conditions. The OQ also provides that non-qualified individuals cannot perform welding.

17. Welding is an essential function of the WGF position due to the position's supervisory duties, as well as the likelihood that the WGF will be called upon to perform welding in an emergency situation and the specialized nature of welding in general.

18. Qualified means "that an individual has been evaluated and can perform assigned covered tasks and recognize and react to abnormal operating conditions." Being qualified is having the skill and responsibility to make the decision whether a weld is sufficient, whether each layer of the weld was done properly and whether it needs to be repaired or removed from the system.

19. NorthWestern must take into consideration OQ regulations when assigning crews so the qualified operator is able to do the required work.

20. Freund was aware of and understood that welding was a function required of the WGF and that he was required to be weld certified. Freund was typically the only certified welder on his crew. Freund performed welding, albeit on an

intermittent basis, throughout his employment as a WGF. Freund was also aware and understood his work as a WGF was covered under NorthWestern's OQ Plan.

21. As a WGF, Freund not only oversaw steel crews, but he also oversaw combo crews and plastics crews.

22. Freund was regularly rated as meeting or exceeding expectations in his annual performance appraisals. Freund was generally lauded for his leadership skills as a foreman and his unwavering commitment to identifying and rectifying safety issues. Freund's last available performance review, issued in 2012, provided in relevant part:

Wally does a good job [of] making sure everyone understands the job from beginning to the end. He will take the time to explain any situation and will work with anyone if they have any questions. ... Wally has made it a point to follow Northwestern Energy's safety rules. He has done a very good job identifying safety issues and taking the necessary steps [to] avoid problems.

Freund's contributions to the company's success included his having been appointed to, and serving on, NWE's Division Safety Committee, as well as serving as a valued mentor in the development of its Apprentice Training Program.

23. Welding is a unique and specialized skill that requires an individual to have a good deal of training and experience. Welding is not a duty required of a broad class of positions within NorthWestern's operations due to the highly specialized nature of the function and the extensive training required for an individual to be sufficiently proficient.

24. Welders are required to wear welding hoods. Many welders use welding hoods that are equipped with an auto-darkening system, which darkens the welding mask whenever the welder strikes an arc to begin a weld. The welding flash and the auto-darkening system can create visual problems for any welder but particularly so for those welders who have visual impairments.

25. Many welders use "cheaters" or reading glasses while welding.

26. The annual weld certification tests take place in a shop and not in the field. The conditions in the shop are optimal in that the test taker is not subject to inclement weather, poor lighting, or cramped and awkward settings where welding may be required.

27. Freund failed the weld certification tests offered in 2011 and 2012. Freund was allowed to re-take the tests, which he ultimately passed. There was no substantial and credible evidence offered at hearing showing Freund's failure to pass the tests in 2011 and 2012 was due to his vision problems.

28. In early 2012, Freund notified his supervisor, Mark Halle, who was formerly the Gas Operations Supervisor - Bozeman, that he was experiencing problems with his vision and he was intending to see an optometrist.

29. Freund told Halle that he wished "to opt out of welding because [he] was having problems with [his] vision." Halle encouraged Freund to take the test and reminded him of NorthWestern's expectation that its foremen be weld certified.

30. Freund also spoke with Pat Patterson, Manager of Operations, about his vision problems in 2012. Patterson encouraged Freund to take the weld certification test and reminded him that NorthWestern expected its WGF's to maintain their weld certification.

31. During this period, Freund was diagnosed with Presbyopia, which affects an individual's ability to focus at near range. Freund has also been diagnosed with Amblyopia, which causes one eye to be weaker than the other due to a misalignment of the eyes; Hyperopia or farsightedness; and double vision. Freund's vision issues are permanent and his vision will continue to deteriorate over time.

32. Freund had a pair of eyeglasses made that he attempted to use as a magnifier under his welding hood. Freund was also prescribed corrective lenses with prisms that he regularly wore due to the weakness in his left eye. The prisms help to realign the eyes in an effort to make them focus together to make a single image. Freund's prescription glasses assist him in being able to read in low light but do not aid him in focusing at close range when trying to weld in changing conditions.

33. Dr. Jodi Fink is Freund's optometrist. Dr. Fink considers Freund's vision problems to be worse than the general population. In Dr. Fink's medical opinion, she believes there is a difference between Freund testing or looking at an eye chart under static or optimal conditions as compared to his ability to weld in tight spaces. Dr. Fink testified that "[s]traight-ahead is your best vision. If you are in a tight situation where you have to work above your head or at an angle, you can get misaligned out of that channel and it would make it more difficult to find a clear image." Dr. Fink further opined that the reading glasses Freund uses under the welding hood along with the magnifying lens on the hood itself would make it difficult for him to clearly

focus outside of a certain range anytime he would have to move or reposition his head while welding.

34. Dr. Fink does not believe Freund is a candidate for any type of corrective surgery. The only viable option for Freund, according to Dr. Fink, is to use multiple pairs of glasses with various magnifying strengths at intervals out to approximately one arms length to have clear vision. This option is not viable for Freund due to the physical constraints one encounters while welding in the field.

35. Freund had difficulty achieving proper focus with the welding hood's built-in magnifier while wearing his regular bifocals with prisms. Even when using his specially made eyeglasses in combination with the hood magnifier, Freund struggled with achieving clear enough vision to be able to safely complete the weld. Freund attempted to use magnifiers with various levels of magnification but continued to struggle with achieving clear vision on a regular basis.

36. On February 1, 2013, Freund sent an email to Heather Burns, NorthWestern's Director of Human Resources, in which he made a formal request for accommodation.

37. Prior to sending this email, Freund spoke with IBEW union representative Chuck Dixon about the possibility of pursuing a grievance provided for under Section 15.00 of the NWE-IBEW Collective Bargaining Agreement (CBA). Dixon advised Freund to pursue his request directly with the company rather than filing a grievance.

38. In his February 1, 2013 email to Burns, Freund asked to "explore feasible options for accommodating my situation . . .". Freund explained that he was having "challenges maintaining a clear line of sight inside the welding hood while wearing bifocal lenses." Freund formally requested to be excused from welding with assistance on an as-needed basis.

39. Freund was contacted by Tom Alexander, NorthWestern's Human Resources Generalist, shortly after sending his email to Burns. Alexander informed Freund that his request had been received and that someone would be meeting with him in the coming days.

40. NorthWestern began the process of validating Freund's job description after receiving Freund's accommodation request. NorthWestern typically validates or updates the job description for any individual requesting accommodation to ensure the essential job functions are correct.

41. On February 14, 2013, Freund met with Alexander; Michele Black, Leave Administrator; and Peggy Lowney, Director of Compensation and Benefits. The meeting was intended for the parties to understand Freund's situation, analyze what limitations he may have, discuss what accommodations may be available and to explain the process to Freund.

42. NorthWestern granted Freund a temporary accommodation relieving him of his welding responsibilities based upon his stated safety concerns. NorthWestern allowed Freund to continue under the WGF classification with the same rate of pay.

43. On February 19, 2013, a follow-up meeting was held with Freund, Patterson, Alexander, Black, and Lowney all in attendance. Freund was advised that he was not considered certified to weld on NorthWestern's gas system based upon his refusal to take the weld certification test. Freund was informed that he was being reassigned to a plastics crew. Freund was also informed that his construction/weld truck would be reassigned to a certified welder "...for the purposes of: [e]nsuring that a certified welder is on the truck and is able to perform emergency response work; [a]llowing the weld equipment to be utilized by the company to perform day-to-day welding work from this truck; [and] [a]ligning the appropriate skill sets with the required work for scheduling purposes."

44. On February 20, 2013, Halle informed Freund that he was being removed from the gas construction crew. Freund was subsequently reassigned to a combo service crew, which works on projects involving both metal and plastic. Freund continued to receive his regular WGF rate of pay.

45. On February 22, 2013, Freund sent an email to Alexander outlining concerns he had regarding NorthWestern's handling of his accommodation request. Freund noted that Steve Marti, who had been the WGF for Livingston, had been excused from having to re-certify or to weld and welders from Bozeman had been sent to Livingston to perform welding tasks; that on February 11, 2013, another Bozeman gas construction crew had been assigned three welders while Freund's request for welder assistance had been denied; that Bozeman welders had been sent out to Livingston to assist Marti on February 19, and February 20, 2013 and another welder had been assigned to clean the shop. Freund also reported Halle had confided in him that he felt Freund was being discriminated against in connection with his accommodation request.

46. Marti was previously classified as a WGF until 2007 when he opted to resign from the WGF position and to continue working for NorthWestern as a

journeyman. Marti's decision to resign the WGF position was not related to a desire to stop welding. Marti continued to be weld certified until 2009.

47. The Collective Bargaining Agreement (CBA) between Northwestern and the International Brotherhood of Electrical Workers (IBEW) Local Union 44 specifically requires NorthWestern to have a WGF employed at Livingston, Lewistown and Havre.

48. NorthWestern hired Ian DeRudder in 2010 and Brett Maykuth in 2012 as permanent employees assigned to Livingston in an effort to rebuild the Livingston crew with qualified welders.

49. Marti was the lone NorthWestern employee in Livingston starting in 2008 and continuing until DeRudder was hired in 2010. As a result, Marti acted as the WGF despite his journeyman classification.

50. Marti has been required to act as a foreman when NorthWestern sends additional crews to the Livingston area. When working as a foreman, Marti is paid "out of class" under the CBA. Marti continues being classified as a journeyman when he is working "out of class." When Marti is not working "out of class," he is paid a journeyman wages and earns holiday time, vacation and PTO under a journeyman classification.

51. Marti's situation is different from Freund's in that he was not provided welding assistance as requested by Freund. Marti acts as the foreman out of necessity and is not classified as a WGF.

52. There is no disparity in NorthWestern's treatment of Marti and Freund.

53. On February 26, 2013, NorthWestern completed its validation of the WGF job description.

54. The job description for the WGF provides, "The [WGF] performs and supervises natural gas distribution maintenance, construction, and repair. This position is also responsible for responding to natural gas emergencies, performing service work and working on an after-hour call obligation."

55. The job description for the WGF provides a WGF must be at least a journeyman who is weld certified.

56. The WGF job description also outlines “Essential Duties and Responsibilities.” Those duties include: “[e]xecutes planned pipe system layout, installation, or repair, according to specifications. . .[r]esponds to and takes appropriate steps to address gas emergencies, including reported leaks, fires and explosions and natural disasters as necessary. . .[c]onstructs and repairs/replaces gas system components by either welding, threading or fusing plastic, and fittings and components.”

57. The WGF job description also outlines vision requirements, which include, “[c]lose vision (clear vision at 20 inches or less); [d]istance vision (clear vision at 20 feet or more); [d]epth perception (three-dimensional vision, ability to judge distances and spatial relationships); and [a]bility to adjust focus (ability to adjust the eye to bring an objection into sharp focus).”

58. There is also a section of the WGF job description entitled, “CERTIFICATES, LICENSES, REGISTRATIONS, ENDORSEMENTS,” which lists DOT Operation Qualification (OQ) company standard Category IV, and Plastic, Steel, and Tapping Endorsements, which generally refers to the OQ Plan’s requirement that welding be performed by a qualified person, meaning a weld certified employee.

59. On March 1, 2013, Burns sent Freund an email assuring him that NorthWestern was committed to engaging in the “interactive process, in good faith and in compliance with the provisions of the [ADAAA], to explore reasonable accommodation options.” This assurance was prefaced with the caution that “employees requesting accommodations must be able to perform the essential functions of their position with [or] without a reasonable accommodation.” Burns also advised Freund that an internal investigation would be conducted regarding his allegations.

60. Burns assigned Human Resources Generalist Jen Rangitsch to investigate Freund’s allegations of inequities in NorthWestern’s treatment of his accommodation request. Rangitsch ultimately concluded that no illegal discrimination or retaliation had occurred.

61. In June 2013, Burns assigned Human Resources Generalist Kari Stormo Dolge to review Freund’s accommodation request.

62. Stormo Dolge has extensive training in handling ADAA and employee leave issues. Stormo Dolge has handled approximately 58 ADA-related cases for

NorthWestern. Stormo Dolge is generally considered to have a deeper understanding of disability issues than other Human Resource Generalists working for NorthWestern.

63. On June 21, 2013, Stormo Dolge contacted Freund and questioned him about his request to be excused from welding and his concerns that Marti, who he believed to have similar vision problems, was excused from welding.

64. Stormo Dolge came to understand that Marti's situation was as a result of the CBA. Stormo Dolge did not further investigate Marti's situation.

65. On September 3, 2013, Freund was called into a meeting with Patterson. Stormo Dolge also participated in the meeting via conference call. Stormo Dolge mentioned the possibility in the event of a "worst-case scenario" that Freund could "go on short-term disability and roll into long-term disability." Stormo Dolge explained to Freund that she offered that solution as a type of safety net in a worst-case scenario. Stormo Dolge advised Freund that she would be sending him additional paperwork, including a new provider form that was to be completed by Freund's optometrist. It was clearly understood at the end of the meeting that Freund was not interested in pursuing short-term or long-term disability.

66. On September 23, 2013, Stormo Dolge faxed the provider form, as well as a copy of the WGF job description to Freund, which he then turned over to Dr. Fink.

67. Dr. Fink completed the forms after consulting with Freund and with the understanding that Freund no longer wished to weld.

68. On October 18, 2013, Freund returned the completed forms to NorthWestern's Human Resources department. Dr. Fink noted on the form that "presbyopia is correctable with glasses however progressive lenses require certain head positioning. This is difficult when the patient has a welding hood on for he is unable to see clearly through his progressive prescription lenses at near." Ex. 10B.

69. On December 20, 2013, Freund was called to a meeting with Patterson. Stormo Dolge attended the meeting via conference call. Freund was advised that NorthWestern could not grant his accommodation request and his request had officially been denied. Freund was given two options: (1) take the welding certification test and, if he passed, he would be returned to the WGF position or (2) if he did not re-certify, his temporary position would be changed to a permanent accommodation and he would become a journeyman gasman. As a journeyman

gasman, Freund's wages would be "frozen" at their current level until journeyman wages caught up to Freund's current pay rate. Freund's request for time to consider the situation before making a decision was granted.

70. On January 16, 2014, Freund notified Stormo Dolge that he did not think he could safely act as a welder due to his vision problems. Freund told Stormo Dolge that he thought NorthWestern was discriminating against him. Stormo Dolge offered to revisit the accommodation options if and when new tools or equipment became available. Freund was subsequently reclassified as a journeyman pursuant to the CBA and his wages were frozen.

71. On February 11, 2014, NorthWestern posted the WGF - Bozeman Division position. The position was ultimately filled on March 8, 2014 by an existing NorthWestern employee.

72. Freund has regularly worked as a foreman on the combo crew since his temporary accommodation was granted. NorthWestern considers Freund to be working "out of class," which means he receives the pay of a foreman while holding the official title of journeyman gasman.

73. Freund's vision issues do not substantially impair one or more life activities. Therefore, Freund is not a disabled individual under the MHRA.

74. Even if Freund was determined to be a disabled individual under the MHRA, he would not be otherwise qualified for the WGF position based upon his choice not to take and pass the welding certification test in February 2013.

75. NorthWestern did not discriminate against Freund on the basis of disability by failing to provide him with a reasonable accommodation.

IV. OPINION¹

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)

¹ 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.

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.

Disability discrimination claims are analyzed using a burden-shifting approach. *Heiat v. Eastern Montana College*, 272 Mont. 322, 328; 912 P.2d 787 (1996) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256; 101 S.Ct. 1089 (1981)). See also, *Martinez v. Yellowstone County*, 192 Mont. 42, 626 P.2d 242 (1981). Under this burden shifting analysis, Freund must first demonstrate a prima facie case of discrimination by showing that (a) he belonged to a protected class; (b) he was otherwise qualified for continued employment; and (c) NorthWestern denied him continued employment because of a disability. Mont. Code Ann. §49-2-303(1)(a); Admin. R. Mont. 24.9.610(2)(a). In essence, Freund 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 (7th Cir. 2005)(citing *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001)).

If Freund proves a prima facie case of discrimination by a preponderance of the evidence, the burden shifts to NorthWestern to articulate a legitimate, non-discriminatory reason for its alleged failure to accommodate him. *Heiat*, 275 Mont. at 328. The burden then shifts to Freund to establish “by a preponderance of the evidence that the legitimate reasons offered by [NorthWestern] were not its true reasons, but were a pretext for discrimination.” *Id.*; Admin. R. Mont. 24.9.610(3). At all times, Freund retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. *Heiat*, 912 P.2d at 792.

A. Freund Is Not Disabled As Defined Under The Montana Human Rights Act.

To qualify as a member of a protected class under the MHRA, Freund must prove 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). 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 v. Montana Power Company*, 68 Mont. 292, 304, 886 P.2d 421, 428 (1994).

I. Freund Was Not Substantially Limited In A Major Life Activity.

Freund argues he was substantially limited in the major life activity of work due to his vision issues, including specifically presbyopia. NorthWestern argues Freund was not substantially limited in any major life activity and points to Freund's ability to continue working as a journeyman and to enjoy other personal pursuits.

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). “[P]rior case law directs us to use federal interpretations as guidance, without confining our review to authority in place on the date the MHRA was first enacted. *Hafner v. Conoco, Inc.*, 268 Mont. 396, 402, 886 P.2d 947, 951 1994 (stating the MHRA is "patterned after" federal law and referencing federal case law decided after the passage of the MHRA); citation omitted. Our use of contemporaneous federal interpretations is therefore appropriate as it fulfills the legislature's directive that Montana law be interpreted consistently with federal discrimination laws." *BNSF Ry. Co. v. Feit*, ¶ 15, 2012 MT 147, 365 Mont. 359, 281 P.3d 225.

Congress passed the ADA Amendments Act (ADAAA) in 2008 in response to what Congress saw as an overly narrow view by the courts as to what constitutes a disability under the ADA. The ADAAA and the regulations adopted by the Equal Employment Opportunities Commission (EEOC) interpreting the ADAAA make clear that the term "disability" should have a broad interpretation and not so narrowly construed as to improperly exclude employees from protection. Courts have been directed to focus more on whether the employer has met its obligations under the law rather than focusing primarily on whether or not someone has a disability. See §1630.2(j)(1)(vi) and corresponding Appendix section.

The ADAAA provides, “[t]he term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. Substantially limits ‘is not meant to be a demanding standard’.” 29 C.F.R. § 1630.2(j)(1)(I). The ADAA further provides an impairment “need not

prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section. ” 29 C.F.R. § 1630.2(j)(3)(ii). “The court’s focus should be on “whether [employers] have complied with their obligations and whether discrimination has occurred, not [on] whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis. 29 C.F.R. § 1630(j)(2)(iii).

The Montana Supreme Court followed this more expansive view of “substantially limits” in *Welch v. Holcim, Inc.*, 373 Mont. 181, 316 P.3d 823 (Mont. 2014). In *Welch*, the court found, “[t]o qualify as substantially limited in the major life activity of work, a person must be “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.” *Welch* 373 Mont. at 187, 316 P.3d at 828; quoting *Butterfield v. Sidney Public Schools*, 2001 MT 177, ¶ 21; 306 Mont. 179; 32 P.3d 1243, ¶ 21.

It is undisputed Freund’s vision issues affect his ability to focus on nearby objects; causes him to experience double vision while driving at night; and causes him difficulty while reading in low light. Freund also has problems with his peripheral vision and focusing from side-to-side resulting in double vision which requires him to “consciously turn [his] head to avoid that.” Freund testified he has been unable to achieve clear vision while welding since approximately 2011 or 2012. Freund has tried using a special set of glasses while welding, as well as the magnifier in the welding hood itself, without success. Freund’s use of special glasses and magnifiers has not improved his ability to achieve clear vision while welding in the field.

Dr. Jodi Fink, who has been Freund’s optometrist for approximately three years, described Freund as having “some presbyopia.” Dr. Fink testified Freund could see clearly at all ranges with the use of corrective lenses. However, Dr. Fink stressed that Freund was unique in that his job required the use of a welding hood, which would make it more difficult for Freund to clearly focus on nearby objects. Dr. Fink testified with progressive lenses, which had been prescribed to Freund, Freund would be able have clear vision when looking straight ahead at a fixed distance but working with objects above his head or in difficult conditions would be more problematic. Dr. Fink testified Freund would have to use various lenses of differing magnification in order to be able to weld safely. Dr. Fink conceded that, while it would be difficult for Freund to see at times, it would not be impossible with the use of corrective lenses. Dr. Fink testified that, in her opinion, Freund’s vision made it more difficult for him

to perform daily activities such as driving and reading and the welding duties required of him at work when compared to the general population.

Freund conceded his vision issues have not prevented him from engaging in leisure activities such as shooting, fishing, hunting, skiing, woodworking, or snowmobiling. Freund produced no evidence that he is limited in the major life activities of caring for himself, performing manual tasks, walking, hearing, speaking, breathing or learning. Freund continues to work for NorthWestern under the journeyman classification but has frequently worked out of class as a foreman when called upon to by the company. There was no evidence suggesting Freund has been unable to work on or supervise the plastics or combo crew due to his vision issues.

Freund has not shown his vision issues substantially limit his ability to perform the major life activity of working. In order to do so, Freund would have to show that he is “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” Butterfield, 2001 MT 177, ¶ 21; 306 Mont. 179, 183; 32 P.3d 1243, 1246 ¶ 21; 29 C.F.R. §1630.2(j)(3)(I).

Freund offered no evidence showing he is unable to perform either a class of jobs or a broad range of jobs due to his vision issues. Rather, the evidence shows clearly that Freund has been able to continue working as a journeyman for NorthWestern and, at times, work as a foreman of the plastics and combo crews without issues. In fact, Freund’s argument throughout this case has been that he is able to perform all duties required of the WGF except for welding. As the court found in Butterfield, the inability to perform a single, particular job does not constitute a substantial imitation in the major life activity of working. *Id.*

Freund has not shown his was substantially limited in one or more major life activities and thus does not belong to a protected class under Mont. Code Ann. § 49-2-101(19)(a)(I). Therefore, Freund has failed to meet his burden of demonstrating he is disabled within the meaning of the MHRA.

2. NorthWestern Did Not Regard Freund as Disabled.

Freund may also be able to prove his prima facie case by showing NorthWestern regarding him as being disabled. In order to show that he is disabled under the “regarded as” definition of physical disability, Freund must establish NorthWestern regarded him “as handicapped in his ability to work by finding [his] impairment to foreclose generally the type of employment involved.” *Hafner v.*

Conoco, 268 Mont. 396, 402, 886 P.2d 947, 951 (1994), citing *Forrisi v. Brown*, 794 F.2d 931, 934 (4th cir. 1986). Freund can only make this showing if he can produce evidence that NorthWestern refused to allow him to continue working because it believed that he was “restricted in basic job functions.” *Butterfield*, 2001 MT at ¶ 32; 306 Mont. 179; 32 P.3d 1243, ¶ 32.

The “regarded as” prong of the disability definition was not specifically argued by either party. However, it is important to note Freund cannot prove his prima facie case under the “regarded as” definition of disability under the MHRA.

The evidence clearly shows NorthWestern did not regard Freund as being disabled before or after his accommodation request. Freund was allowed to continue working as a journeyman and has frequently been called upon to serve as a foreman of the plastics and combo crew. There was no evidence offered by either party showing that NorthWestern regarded Freund as being disabled. Accordingly, Freund cannot meet his burden of demonstrating that he was “regarded as” disabled within the meaning of the MHRA. Mont. Code Ann. §49-2-101(19)(a)(iii).

B. Freund Was Not An Otherwise Qualified Employee.

Even if Freund was found to be a disabled individual under the MHRA, he has failed to show he is otherwise qualified for the WGF position. 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).

Determining whether an individual is “qualified” entails a two-step inquiry. The first step is to determine whether the person with the disability or impairment possesses the requisite background, work experience, skill, training, good judgment and other job-related requirements.” Second, the disabled individual is “otherwise qualified” if he is qualified for a position but, because of an impairment, he needs an accommodation to perform an essential function. 42 U.S.C. §12111(8).

Freund clearly possesses the requisite background, work experience, skill, training, and good judgment for the WGF position. However, his failure to take and pass the weld certification test in February 2013 renders him unqualified for the WGF position.

A WGF must be weld certified in order for NorthWestern to be in compliance with DOT rules regarding Qualified Operators. In other words, NorthWestern is required to have a qualified welder in charge of the crew. This requirement is set forth in NorthWestern's OQ Plan, which is designed to meet the minimum requirements of federal regulations governing a publicly regulated utility. NorthWestern's OQ Plan requires welding to be performed by only Qualified Individuals. "Qualified" is defined to mean "that an individual has been evaluated and can: perform assigned covered tasks and recognize and react to abnormal operating conditions." The OQ Plan further provides a qualified person must have the training and knowledge to recognize abnormal operating conditions and have the ability and authority to react under various conditions. While Freund may well have the training and knowledge to act as a welder, the fact remains he has not been evaluated as required and does not hold the necessary weld certification. Without the weld certification, Freund would not be able to have the final say of whether a weld was good or bad when another welder was involved. Without this authority, Freund would be unable to perform all of the functions necessary for a WGF. Therefore, Freund has failed to show he is a qualified individual based upon his decision to not take the weld certification test. Without the weld certification, Freund is not qualified to serve as the WGF.

I. Welding Is An Essential Function of the WGF Position.

Freund argues welding is not an essential function of the WGF position as it accounted for less than 10% of his actual job duties. NorthWestern concedes Freund was called upon to weld only on an intermittent basis but points to the requirement that the WGF be able to supervise and certify welding is completed satisfactorily on any job. NorthWestern also points to the possibility that Freund, as a WGF, may be called upon to weld in an emergency situation.

In determining whether a task or duty is an essential function, the ADA provides:

consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8).

A job function may be considered essential for any of several reasons including, but not limited to, the following:

(1) the function may be essential because the reason the position exists is to perform that function; (2) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and /or (3) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise of ability to perform the particular function.

29 C.F.R. § 1630.2(n)(2).

Evidence of whether a particular function is essential includes but is not limited to:

(1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past incumbents of the job; and/or the current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

The ADA requires that in assessing a position's essential functions, 'consideration shall be given to the employer's judgment as to what functions of a job are essential,' including any written descriptions prepared before advertising or interviewing applicants for the job. (Citation omitted). Such evidence, however, is not conclusory: 'an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.' *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 863-64 (9th Cir. 2009).

Consequently, a distinction must be made between the requirements of a given position and the essential functions of that position. *Coneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318, 329 (3rd Cir. 2003). "Whether a particular function is essential is a factual determination that must be made on a case-by-case basis." *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 279 (3rd Cir. 2001 (quoting EEOC Interpretive Guidance on Title I of the ADA, 29 C.F.R. pt. 1630, App. 1630.2(n)). It

follows that none of the factors, nor any of the evidentiary examples alone are necessarily dispositive.” *Id.*

In this case, the evidence shows NorthWestern considered welding to be an essential function of the WGF position based upon not only the terms of the CBA but also its requirement that the WGF submit to and pass an annual weld certification test. The weld certification requirement has been in place for the entirety of Freund’s employment as a WGF and is included in the WGF job description. While the amount of time Freund spent on welding was negligible at best, the fact remains the WGF is required to be weld certified. The consequence of Freund working as a WGF without the weld certification would be that NorthWestern would not be in compliance with its OQ Plan and consequently out of compliance with the federal regulations governing a publicly regulated utility.

Other factors that support a finding that welding is an essential function of the WGF is the fact that welding is a highly specialized function that can only be performed by those individuals who have the necessary training and experience. For example, at the time of Freund’s accommodation request, NorthWestern employed five welders in the Bozeman region and those welders were assigned to different crews as needed. Clearly, the task of welding is not easily assigned to other employees and the WGF is required to be able to weld if the need should ever arise. It makes little sense that NorthWestern would have an individual on a crew designated as a WGF who was unable or unwilling to perform welding duties.

The preponderance of the evidence shows welding is an essential function of the WGF position. The evidence further shows that the weld certification is a necessary requirement of the WGF position. Freund cannot perform the essential function of welding as a WGF with or without an accommodation without this weld certification.

C. NorthWestern Did Not Fail to Accommodate Freund.

Assuming Freund had proved a prima facie case of either being disabled or being perceived as disabled by his employer and he were otherwise qualified, the question then becomes one of whether NorthWestern unreasonably failed to accommodate him. Freund must demonstrate NorthWestern failed to provide an accommodation. Mont. Code Ann. §49-2-101(15)(b)(providing that “[discrimination based on, because of, or on the grounds of physical...disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person”).

1. NorthWestern Engaged in the Interactive Process.

“The duty to launch the interactive process to search for a reasonable accommodation is triggered by a request for an accommodation. *Louisege v. Akzo Nobel Inc.*, 178 F.3d 731, 736 (5th cir. 1999), citing *Taylor v. Principal Finance Group*, 93 F.3d 155, 165 (5th Cir. 1996). This, in turn, requires that the employer meet with the employee, request information about the condition and what limitations the employee has, ask the employee what he specifically wants, show some sign of having considered his request and offer and discuss available alternatives when the request appears too burdensome. See *McDonald v. Dept. of Environ. Quality*, 214 P.3d at ¶80.

Consequently, the duty to investigate any potential available accommodations arises prior to and must be thoroughly considered before, the employer takes an adverse action, and where an employer fails to make the type of independent assessment required, a disputable presumption arises that its justification - be it alleged undue burden, safety concerns or otherwise - is a pretext for discrimination on the basis of disability. See *Hafner v. Conoco, inc.*, 977 P.2d 339, citing ARM 24.9.606(7).

NorthWestern met with Freund shortly after receiving his accommodation request and spoke with him several times to ascertain what specifically he considered to be his limitations and what accommodation he was seeking. NorthWestern expended considerable time and resources in investigating allegations made regarding his perception that he was being treated differently than other NorthWestern employees and that he was being retaliated against for his accommodation request. NorthWestern called upon the extensive background and experience of Stormo Dolge in evaluating Freund’s accommodation request and researching what accommodations may be available. The evidence shows NorthWestern’s final decision that Freund either take and pass the weld certification test and remain a WGF or that Freund give up the WGF position and continue as a journeyman was not taken lightly or without consideration. NorthWestern fulfilled its obligation of engaging in the interactive process upon receiving Freund’s accommodation request. Freund has failed to show NorthWestern’s decision not to implement his accommodation request was a pretext for discrimination.

2. Freund’s requested accommodation was not reasonable.

Freund's request that he either be allowed to serve as a WGF without having the requisite weld certification or that welding be assigned to or shared with another employee was not reasonable.

Montana Code Ann. § 49-2-101(19)(b) provides:

Discrimination based on, because of, on the basis of, or on the grounds of physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. An accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.

The term "reasonable accommodation" means "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, than enable [a qualified] individual with a disability to perform the essential functions of that position. 29 CFR §1630.2(o)(1)(ii). The essence of the concept of reasonable accommodation demands that in certain instances employers must make special adjustments to their policies for individuals with disabilities and the presumption is that such an accommodation is required unless the employer can demonstrate that the accommodation would impose an undue hardship. See, e.g. *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999), citing *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 334-34 (2nd Cir. 1995) and *Ralph Lucent Techs., Inc.*, 135 F.3d 166, 172 (1st Cir. 1998).

Undue hardship is defined to mean a "significant" difficulty and expense to be incurred by an employer. In determining whether an accommodation would impose an undue hardship, the courts generally consider the following factors:

- (1) the nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions or outside funding;
- (2) the overall financial resources of the employer's facility or facilities involved in the provision of the accommodation, the number of persons employed at such a facility, and the effect on the employer's expenses and resources;
- (3) the overall financial resources of the employer as a whole, the overall size of the business with respect to the total number of employees, and the number, type and location of its facilities;
- (4) the type of operation or operations of the employer, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or

physical relationship of the facility or facilities in question to the employer, and (5) the impact of the accommodation upon the operation on the facility involved, including the impact on the relative ability of other employees to perform their duties and the impact on the facility's ability to conduct business. Consequently, an employer may not simply assert that an accommodation will impose an undue hardship on its business and thereby be relieved of the duty to provide accommodation. Rather the employer must prove by a preponderance of the evidence that the accommodation will in fact impose undue hardship on the business.

See 42 USC §1211(10)(b); 29 CFR §1630.2(p); 29 CFR §1630.15(D).

NorthWestern argues an employer should not be required to assign welding to another employee or allow Freund to share the welding task with another employee. NorthWestern argues there were only five certified welders in the Bozeman division at the time of Freund's accommodation request. NorthWestern contends Freund's refusal to sit for the weld certification test resulted in a work force reduction of approximately 20% that created an unreasonable burden for the employer in trying to assemble a qualified crew. NorthWestern also argues it would be contrary to the CBA to provide welding assistance to Freund when it has not done so for other employees who have chosen to stop welding.

The evidence shows that there were a limited number of welders available in the Bozeman division at the time of Freund's accommodation request. NorthWestern is required to maintain qualified crews that are able to respond to emergency situations in a timely and efficient manner. Allowing Freund to remain as a WGF but assigning a certified welder to his crew would impose an undue burden on the employer and would require another employee to essentially perform the duties that are required of a WGF. Ensuring that a certified welder was available to Freund or assigned permanently to his crew would impose an undue hardship on NorthWestern in terms of being able to assemble and assign crews according to the OQ Plan.

Freund also asserted that NorthWestern could have reasonably accommodated him by assigning him to a different position. Freund acknowledges an employer is not generally required to create another job for an employee, but an employer may be required to reassign an employee to a comparable or equivalent vacant position in order to reasonably accommodate the employee's disability. See 29 C.F.R. § 1630.2(o); *School Bd. Of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987).

NorthWestern counters that no equivalent position existed at the time of Freund's request and reassignment would require NorthWestern to create a new permanent position. NorthWestern argues there is no position classified as a "permanent foreman" other than the WGF position. NorthWestern argues the only possibility to meet this demand is when a journeyman is called upon to act as a temporary foreman and is paid a foreman's wage under the CBA. NorthWestern points to the court's decision in *Willis v. Pacific Maritime Ass'n*, 236 F.3d 1160, 1165 (9th Circ. 2001), in which the court found employees seeking a transfer to a position involving permanent light duty work violated the seniority provision of the CBA because other employees with greater seniority already occupied the positions. The court also noted the positions sought were not "vacant" because other workers who had the requisite years of seniority were eligible to transfer before the employee requesting the accommodation. Freund counters that the decision in *Willis* pertained specifically to those situations where an accommodation request directly conflicts with an established seniority system established under a CBA. Freund argues the *Willis* court specifically noted that it was not deciding "...whether an accommodation is reasonable if the terms of the collective bargaining agreement are flexible enough to permit an accommodation for a less senior disabled person." *Id.* At 681.

Patterson testified that transferring Freund from a WGF position to another foreman position would essentially require the creation of a new position that would have to be posted and open to application by other NorthWestern employees. Patterson conceded Freund would be qualified for another foreman position so long as that position did not require welding. Patterson testified that no such position exists under NorthWestern's current employment structure.

Freund has frequently been called upon to act as a temporary foreman of the plastics crew since NorthWestern granted him a temporary accommodation. Freund has offered no evidence showing that there was a permanent foreman position available that would allow him to continue as a foreman with the rate of pay he received as a WGF without him being required to weld. Further, NorthWestern has shown by a preponderance of the evidence that reassigning Freund to a foreman position would essentially call for the creation of a new position, which it is not required to do in order to grant an accommodation.

The preponderance of the evidence shows NorthWestern engaged in the interactive process with Freund. Freund was given the opportunity to offer suggestions as to accommodations he felt would address his unwillingness to continue welding and NorthWestern evaluated the practicality of those suggestions, as well as

evaluating other potential solutions to the problem such as new equipment. Therefore, Freund has not shown NorthWestern failed to accommodate him.

3. Requiring Freund to Take the Weld Certification Test Was Reasonable.

Freund's request that he remain as the WGF without the weld certification amounts to a request that NorthWestern waive the requirement that the WGF pass the annual weld certification test. NorthWestern argues that such a request is unreasonable in that doing so would cause NorthWestern not to be in compliance with federal regulations setting forth the minimum requirements for operator qualification for individuals performing covered tasks on a pipeline facility. NorthWestern argues the regulations set for in CFR 49, Part 192; Subpart N - Qualification of Pipeline Personnel require NorthWestern to have and follow a written qualification plan that identifies the covered tasks that will be completed by qualified operators. The OQ Plan allows for most tasks to be performed by non-qualified individuals if there is a qualified person to directly observe the non-qualified person. However, the exceptions to this requirement are welding and plastic joining tasks. Those tasks cannot be performed by non-qualified individuals, even under direct supervision.

NorthWestern's argument is well taken. The courts have held that the ADA does not permit an individual to refuse to take an examination required for a license, certification or credential. While an individual may request a reasonable accommodation to a test, the request cannot result in a fundamental alteration of the test. *Rawdin v. American Bd. of Pediatrics*, 985 F.Supp. 2d 636, 655 (E.D. PA. 2013) citing 42 USC §12182(b)(2)(ii).

In this case, as determined above, welding is an essential function of the WGF position. Allowing for waiver of the weld certification test would fundamentally alter the skills needed to be tested and the skills needed for the WGF position. The weld certification test is essential to the WGF position and is required under the OQ Plan. Therefore, allowing the waiver of the requirement of passing the weld certification test would not be a reasonable accommodation.

4. NorthWestern Did Not Treat Freund Differently Than Marti.

Freund argued that NorthWestern had excused other WGF from welding due to vision problems. Freund points to Steve Marti, who formerly served as the WGF for Livingston, as the example. Marti was classified as a WGF prior to 2007 when he elected to resign from that position but remain employed as a journeyman. Marti

subsequently requested to be excused from welding as a journeyman. Marti never requested to continue as a WGF, only that he be relieved of the welding duty.

Marti's situation and pay scale is unique in that it is dictated by the terms of the CBA. Marti earns holiday time, vacation and PTO under a journeyman classification but is paid as a WGF according to the terms of the CBA. Marti was the only worker in Livingston from approximately 2007 to 2010 and, as a result, was paid WGF wages. However, Marti was not classified as a WGF because he lacked the necessary weld certification. At the time of hearing, there was still no NorthWestern employee classified as a WGF in Livingston because there are no employees in the division that are weld certified and, as a result, are qualified to be classified as a WGF.

The preponderance of the evidence shows NorthWestern treated Marti and Freund the same with the only difference being what was required under the CBA. Marti's and Freund's situations are not comparable in that Marti has not requested to continue working as a WGF without being weld certified. Therefore, Freund has failed to show NorthWestern treated him differently than Marti.

Freund has failed to prove that he is a qualified individual with a disability or impairment and that NorthWestern failed to reasonably accommodate him. As a result, Freund has failed to prove a prima facie case of discrimination.

D. Freund Has Not Shown By A Preponderance Of The Evidence That The Legitimate Reasons Offered by NorthWestern Were a Pretext For Discrimination.

Assuming arguendo that Freund had shown a prima facie case of discrimination, Freund's claim would still fail as he has not shown the reasons offered by NorthWestern for not offering him an accommodation were a pretext for discrimination. NorthWestern has offered substantial and credible evidence showing that it engaged in a lengthy and involved interactive process upon receiving Freund's accommodation request and that it would be an undue hardship for it to grant the accommodation sought by Freund. Therefore, the burden shifts to Freund to prove NorthWestern's proffered reasons were merely a pretext for discrimination. Hafner, 268 Mont. at 405, 886 P.2d at 953 (citation omitted).

Pretext may be proved directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the

employer's proffered explanation is unworthy of credence. *Hearing Aid Inst. v. Rasmussen* (1993), 258 Mont. 367, 372, 852 P.2d 628, 632 (citation omitted).

NorthWestern has shown that welding is an essential function of the WGF position and that requiring weld certification for individuals working as a WGF or seeking to work as a WGF is a reasonable job requirement. The record is replete with evidence that NorthWestern valued Freund's contributions as a long-term employee and that it sought reasonable measures to meet with Freund's accommodation request.

Freund alleged in his testimony that members of NorthWestern management were angry with his accommodation request. However, no substantial and credible evidence was offered to support that allegation. Rather, the evidence shows NorthWestern dutifully complied with its obligation to meet with Freund upon receiving his accommodation request and to explore what could reasonably be done to meet Freund's accommodation request. NorthWestern assigned independent and qualified human resources professionals to investigate not only Freund's accommodation request but also his allegation that he was being treated differently than other NorthWestern employees. Further, NorthWestern has not penalized Freund for pursuing an accommodation request as shown by its willingness to assign him to work as a supervisor or foreman as job requirements allowed, which has allowed him to continue receiving foreman pay for much of the time following his accommodation request. In short, NorthWestern has dealt fairly with Freund and has worked to ensure that he can continue in his employment in whatever capacity that meets not only the needs of the business but also Freund's personal needs. Freund has failed to show the reasons offered by NorthWestern in not meeting his accommodation request were pretext for discrimination.

VI. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Mont. Code Ann. § 49-2-509(7).

2. NorthWestern Energy did not discriminate against Walter Freund on the basis of disability.

3. NorthWestern Energy's actions in addressing Freund's request for accommodation was consistent with the CBA, as well as its treatment of similarly situated employees.

4. Freund has not shown he is an individual who 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.

5. Freund has not shown he is an otherwise qualified individual able to perform the essential functions of the Working Gas Foreman position, specifically the function of welding.

6. As Freund has not proven discrimination, his claim for damages, and the attendant motion related to respondent's renewal of its Motion for Summary Judgment at the close of hearing is moot.

7. Because Freund has failed to prevail in his claim of discrimination, this matter must be dismissed. Mont. Code Ann. §49-2-507.

VI. ORDER

Based upon the foregoing, judgment is entered in favor of NorthWestern Energy and Walter's Freund's complaint is dismissed.

DATED: this 8th day of April, 2016.

CAROLINE A. HOLIEN

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

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Walter Freund, and his attorney Michael J. San Souci; and Northwestern Energy, and its attorney, Harlan B. Krogh:

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 Fisher Court Reporting.