STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 15-2016

MICHELE NEDVED,	)	
	)	
Charging Party,	)	
	)	HEARING OFFICER DECISION
vs.	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
PAVECO, LLC,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Michele Nedved brought this complaint alleging Paveco, LLC discriminated against her on the basis of disability and retaliated against her for protected activity.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on May 2, and May 3, 2016 in Kalispell, Montana. Attorney Donald Ford Jones represented Nedved. Attorney James C. Bartlett represented Paveco and Owner Russ Olsen appeared on its behalf.

At hearing, Nedved, Olsen, Donald Church, Leona "Nonie" Pruett, Deborah Solomon, Danielle Whitaker, Dr. Christopher Holdhusen and Dr. Lance L. Ercanbrack testified under oath. Charging Party's Exhibits 8, 9, and 14, as well as Respondent's Exhibits 101 through 105 were admitted into the record.

Paveco moved for the dismissal of the complaint after the testimony of Dr. Holdhusen. Paveco argued dismissal was warranted as Nedved had failed to show that she was disabled within the meaning of the MHRA. Nedved opposed the motion arguing sufficient evidence had been offered to show a disability and Paveco's failure to actively engage in the interactive process. The Hearing Officer reserved

ruling on the motion. It is unnecessary to rule on the merits of the motion based upon the decision outlined below.

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 in the Office of Administrative Hearings on July 1, 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

1. Did Paveco, LLC discriminate and/or retaliate against Michele Nedved based upon disability in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Paveco, LLC did illegally discriminate and/or retaliate against Michele Nedved as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Paveco, LLC did illegally discriminate and/or retaliate against Michele Nedved as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory and/or retaliatory practices?

III. FINDINGS OF FACT

1. Paveco, LLC (Paveco) is a paving and road construction company located in Kalispell, Montana.

2. Russ Olsen is the owner of Paveco. Olsen is the primary supervisor of Paveco's employees.

3. Michele Nedved resides in Hungry Horse, Montana and was a resident of Flathead County at all times material to these matters.

4. Paveco employed Nedved as a truck driver beginning in June 2013.

5. Nedved holds a Commercial Driver's License (CDL) and has received training as a heavy equipment operator, working in a wood shop, and welding.

6. From June 2013 through November 2013, Nedved worked for Paveco without incident until she was laid off due to a lack of work with the intention that she would be returning to work the following spring. Nedved was considered "job attached" after her layoff.[1]

7. In late March or early April 2014, Nedved returned to work for Paveco. Nedved worked on small jobs during the early part of the season and worked full-time as a truck driver beginning in May 2014.

8. Nedved typically arrived at the shop at approximately 6:30 a.m. and clocked in at approximately 7:00 a.m.

9. Nedved performed a safety check of her truck each morning, which required her to open the hood of the truck and to climb into the back of the dump truck and/or pup trailer and clear any debris left from the previous day. Nedved was frequently required to shovel out asphalt or crushed pebbles prior to taking the truck out for the day.

10. Nedved's job was physically demanding and required her to be able to lift, haul, push, pull and otherwise carry heavy and awkward items throughout the workday.

11. On or about June 6, 2014, Nedved was working on a project in Eureka, Montana, which is approximately 60 miles northwest of Kalispell. The trip usually takes approximately one hour but could take up to two to three hours depending upon traffic. The job was behind schedule and created a lot of pressure for the crew.

12. On or about June 6, 2014, Nedved felt ill most of the day. After completing her second trip to Eureka, Nedved felt disoriented, nauseous and flushed. Nedved tried to alleviate her discomfort by drinking water and eating snacks but she continued to feel ill. Nedved decided to go to the gravel pit where she knew Olsen would be working. Nedved tried telling Olsen she was not feeling well, but he was busy and unwilling or unable to stop and speak with her.

13. Nedved went to Paveco's office after leaving the gravel pit. Nedved spoke with Deborah Solomon, who was Paveco's full-charge bookkeeper and office manager

[1] The hearing officer takes judicial notice of the definition of "job attached" as defined under Admin. R. Mont. 24.11.452A(4)(c).

at the time. Solomon also served as Paveco's Equal Employment Opportunity (EEO) officer.

14. Solomon trained employees, including Nedved, on how to fill out forms related to workers' compensation as she does with all new employees. Solomon also maintained a bulletin board where information regarding workers' compensation and human rights was posted.

15. Solomon left her employment with Paveco in December 2015. Solomon is currently preparing to sit for the CPA exam.

16. Nedved told Solomon and Bill Johnson, another Paveco employee who was in the office at the time, that she was not feeling well and lifted her shirt to show two lumps on or near her diaphragm. Nedved asked Solomon to feel the lumps and asked if she could have gotten a hernia by being punched by a friend. Solomon directed Nedved to take time off so she could see a doctor.

17. Nedved contacted Solomon a few days later to ask for additional time off. Solomon told Nedved she could take additional time off because she was not needed at work.[2]

18. On June 16, 2014, Nedved visited Dr. Christopher Holdhusen, who suspected Nedved had suffered a hernia and ordered an ultrasound to confirm his suspicions.

19. Nedved went to Paveco's office to speak to Olsen during this period. Nedved told Olsen that she required time off to tend to her medical issues. Olsen was not aware of what Nedved's medical issues were at that time or that Nedved had potentially injured herself on the job.

20. On June 23, 2014, Nedved and her mother, Leona "Nonie" Pruett, met with Dr. Holdhusen. Nedved and Pruett drove their own vehicles to Dr. Holdhusen's office.

21. Dr. Holdhusen informed Nedved that she had suffered an epigastric hernia and she required surgery. Dr. Holdhusen directed Nedved to not lift anything and to not return to work.

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[2] Exhibit 15, which was not admitted, reflects Nedved worked 28.20 hours during the pay period June 8, 2014 through June 21, 2014. Neither party addressed this in their briefs.

22. A hernia occurs when there is a tear in the abdominal wall that fatty tissue attached to the stomach or a portion of an organ pushes through the top layer of the abdominal wall. A strangulated hernia occurs when blood supply is cut off in the affected area and causes damage to the tissue.

23. A hernia is not self-healing and requires surgery. A hernia may be repaired by the use of mesh or by suture. If the hernia is small, mesh is generally not required.[3]

24. On June 23, 2014, Dr. Holdhusen wrote two notes on his prescription pad for Nedved. The first note reads, "Has an abdominal hernia that should be repaired before she can do any physical labor." The second note reads, "Michele has 2 abdominal hernias that are several weeks old and occurred on the job 6/6/14." One note was intended for Nedved's employer and the other note was intended for the Montana State Fund (MSF).

25. Nedved and Pruett went to Paveco's offices shortly after their meeting with Dr. Holdhusen. Nedved and Pruett drove in separate cars.

26. The offices of Paveco are relatively small. Olsen's office is a few feet from the front door of the building. Solomon's desk is also near the front door and she can often hear conversations held in Olsen's office when his office door is open.

27. Nedved and Pruett met with Olsen in his office. Olsen's office door was left opened.

28. Nedved informed Olsen she had a hernia and she required time off. Nedved tried to offer Olsen her notes from Dr. Holdhusen but Olsen refused to take the notes. Nedved asked Olsen if it would be okay to file a workers' compensation claim because she did not have health insurance.

29. Olsen became upset because this was the first he heard that Nedved had allegedly suffered a work-related injury. Olsen questioned how Nedved's doctor knew it was a work-related injury since Nedved had never before suggested she had suffered an injury while on the job.

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[3]Dr. Holdhusen testified to the dangers of a strangulated hernia. However, there was no substantial evidence showing Nedved suffered from such a condition.

30. Nedved's mother then questioned why filing a workers' compensation claim was such a big deal. Olsen then asked Pruett why she did not put it on her business' workers' compensation insurance if it was not such a big deal. Olsen and Pruett's voices became raised and could be overheard by other employees.

31. The conversation escalated to an argument between Nedved's mother and Olsen with Olsen directing Nedved and her mother to leave. Olsen got up from his desk and began moving toward the door, which Nedved and her mother took as a cue that it was time to leave. Olsen escorted the women to the front door of the office building, which he held for them as they left the building.

32. Olsen then followed them out of the building into the parking lot where he told Nedved and Pruett to get off his property and to never return.

33. Olsen later asked Solomon to call Nedved because he was concerned about Nedved's feelings after the blowup between him and her mother. Solomon tried calling Nedved using the office phone and was unable to reach Nedved. Solomon then tried using her cell phone with the thought that Nedved was avoiding phone calls from the office. Solomon was unable to reach Nedved. Solomon left Nedved voice mail messages and sent her a text message. Nedved received at least one message from Solomon that she chose not to respond to.

34. On June 27, 2014, Solomon filed a First Report with MSF noting:

> Employee came to me on 6-23-14 and informed me that she did not have any medical insurance; would it be ok to put her hernia on a workers' comp claim? I explained to her that worker's comp was only for on the job injuries not personal medical insurance. At that time she decided it did happen on the job.

35. Solomon also filed a two-page letter with the First Report. Relying upon Olsen's notes, Solomon noted that Nedved never indicated she had suffered a work related injury until June 23, 2014.

36. Olsen and his staff stopped attempting to contact Nedved by phone or by text after filing the First Report with MSF. Olsen had been advised by MSF staff that it would be inappropriate for him or his staff to have contact with Nedved during the pendency of her claim.

37. Pruett assisted Nedved in preparing and filing her claim with MSF shortly after their conversation with Olsen. Pruett used a form she had for her own business.

38. On July 10, 2014, Nedved underwent surgery for her hernia. Nedved's surgeon, Dr. Justine Gavagan, imposed a work restriction of no lifting 20 pounds or more for four weeks.

39. On July 23, 2014, Olsen sent Nedved a letter asking when she intended to return to work. Nedved was directed to respond no later than August 1, 2014.

40. On July 28, 2014, Nedved had her first post-operative appointment with Dr. Gavagan. At that time, Dr. Gavagan noted Nedved was "healing nicely, no discomfort, no swelling, no infection." Nedved was instructed "to do no heavy lifting over 20lbs for 4 weeks."

41. On August 1, 2014, Nedved sent a fax to Olsen indicating she was unsure when she would be able to return to work.

42. On August 4, 2014, Olsen sent Nedved a second letter asking for a definitive yes or no as to whether she intended to return to work. Olsen advised Nedved that she would need a doctor's note if she intended to return to work.

43. On August 21, 2014, Nedved had a second post-operative appointment with Dr. Gavagan. Dr. Gavagan noted Nedved was "[d]oing very well" but imposed a 50 pound lifting restriction for approximately two weeks.

44. Nedved was released to return to work with no restrictions effective September 10, 2014.

45. Nedved has failed to show she was disabled as defined under the MHRA. Nedved similarly failed to show that she was engaged in protected activity, as defined under the MHRA or that Paveco took an adverse employment action against her based upon her having engaged in protected activity.

46. Paveco has shown it had a legitimate, non-discriminatory reason for not engaging in the interactive process with Nedved. Nedved has not shown the reason offered by Paveco was pretext for discrimination.

47. Paveco did not discharge Nedved. Nedved chose not to return to work despite being informed on at least two occasions that Paveco expected her to return to work once she was able to return to work without work restrictions.

48. Nedved has failed to show Paveco retaliated against her for protected activity.

IV. OPINION[4]

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, ¶39, 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 P2d 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, Nedved must first demonstrate a prima facie case of discrimination by showing that (a) she belonged to a protected class; (b) she was otherwise qualified for continued employment; and (c) Paveco denied her continued employment because of a disability. Mont. Code Ann. §49-2-303(1)(a); Admin. R. Mont. 24.9.610(2)(a). In essence, Nedved must show that (a) she is a qualified individual with a disability or impairment; (b) the employer was aware of her 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)).

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[4] 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.

If Nedved proves a prima facie case of discrimination by a preponderance of the evidence, the burden shifts to Paveco to articulate a legitimate, non-discriminatory reason for its alleged failure to accommodate her. Heiat , 275 Mont. at 328. The burden then shifts to Nedved to establish "by a preponderance of the evidence that the legitimate reasons offered by [Paveco] were not its true reasons, but were a pretext for discrimination." Id.; Admin. R. Mont. 24.9.610(3).

At all times, Nedved retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. Heiat, 912 P.2d at 792. Unless there is specific law to the contrary (which there is not in Human Rights administrative hearings), the burden of persuasion always remains on the party advancing the claim for relief or the defense at issue. E.g., Mont. Code Ann. §26-1-401; Taliaferro v. State (1988), 235 Mont. 23, 26, 764 P.2d 860, 864 (". . . the ultimate burden of persuading the trier of fact is on the plaintiff at all times."); Crockett v. City of Billings (1988), 234 Mont. 87, 761 P.2d 813, 818 ("Ultimately, the plaintiff must persuade the court by a preponderance of the evidence that the employer intentionally discriminated against her.").

A. Nedved Has Not Proven a Prima Facie Case of Discrimination

Nedved argues she was substantially limited in the major life activities of lifting and work due to having a double hiatal hernia. Paveco disputes Nedved was substantially limited and argues work restrictions, in and of themselves, do not necessarily require a finding that Nedved was substantially limited under the Montana Human Rights Act (MHRA).

1. Nedved has not shown she was disabled as defined under the MHRA.

To qualify as a member of a protected class under the Montana Human Rights Act (MHRA), Nedved must prove she 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; a record of such impairment; or the employer regards the person as having 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).

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).

An individualized assessment is required to determine whether an impairment substantially limits a major life activity. 29 C.F.R. § 1630.2(j)(1)(iv). To make such a determination, "it may be useful to consider . . . the condition under which the individual performs the major life activity; the manner in which the individual

performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity . . . ." 29 C.F.R. § 1630.2(j)(4)(I). Additional considerations "may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function." 29 C.F.R. § 1630.2(j)(4)(ii).

The ADAA's more expansive coverage was considered by the court in a case involving a pregnant employee who had suffered injuries due to a slip and fall at work and was unable to work for a short period of time in Martinez v. New York State Div. of Human Rights, 2015 U.S. Dist. LEXIS 12536 (S.D.N.Y. Feb. 2, 2015). In Martinez, the issue was whether the employee's impairments, which the court found to be temporary and transitory, constituted a disability under the Rehabilitation Act. The Federal Rehabilitation Act relies in large part upon the definitions set forth under the ADAAA, including the definition of disability. In determining the employee's medical issues were not substantially limiting and, therefore, did not constitute a disability, the court relied, in part, upon the following excerpt from Margaret C. Jasper, Legal Almanac: The Americans With Disabilities Act § 2.5 (2012):

> [T]he person must have an impairment that must substantially limit his or her major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working.
>
> Thus, an individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, non-chronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.
>
> For example, an employee suffers a broken wrist that is expected to heal, but while it is healing he is unable to perform the essential functions of his job as an assembly-line worker. This employee is not protected by the ADA because, although he is "impaired," the impairment does not substantially limit a major life activity because it is of limited duration and will have no long-term effect.

Courts have also considered the duration of an employee's impairment when determining if the employee was disabled under the ADAAA. Sampson v. Methacton Sch. Dist., 88 F. Supp. 3d 422, 2015 U.S. Dist. LEXIS 17747 (E.D. Pa. 2015). In Sampson, the court found that an employee, who had a torn miniscus in her left knee and was limited in her ability to walk for a finite period and required the use of a knee brace, was not a disabled as it was not a permanent, long term condition that substantially impaired a major life activity. The court further noted that not every impairment will constitute a disability.

> Applying the protections of the ADA to temporary impairments . . . would work a significant expansion of the Act. The ADA simply was not designed to protect the public from all adverse effects of ill-health and misfortune. Rather, the ADA was designed to assure that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. Extending the statutory protections available under the ADA to individuals with broken bones, sprained joints, sore muscles, infectious diseases, or other ailments that temporarily limit an individual's ability to work would trivialize this lofty objective.

Sampson at 436, quoting Halperin v. Abacus Tech. Corp., 128 F.3d 191, 200 (4th Cir. 1997) abrogated on other grounds by Baird ex rel. Baird v. Rose, 192 F.3d 462 (4th Cir 1999).

However, other courts have found the temporary nature of an impairment is irrelevant as to the issue of whether the impairment substantially limits an individual's major life activity. Moore v. Jackson County Bd. of Educ., 979 F. Supp. 2d 1251, 2013 U.S. Dist. LEXIS 154128(N.D. Ala. 2013) (ankle injury that was temporary in nature found to substantially limit employee's ability to perform the major life activities of standing, walking, running, and her general musculoskeletal function); Heatherly v. Portillo's Hot Dogs, Inc., No. 11 C 8480, 2013 WL 3790909 (N.D. Ill. July 19, 2013) (plaintiff presented sufficient evidence to raise an issue a genuine issue of material fact as to whether a high risk pregnancy rendered her disabled under the ADAA due to lifting restrictions imposed by her doctor).

The Montana Supreme Court affirmed an expansive construction of the term "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; 29 C.F.R. § 1630.2(I). The court found Welch's work restriction prohibiting him from working the night shift disqualified him from working only at a particular job for a particular employer and not a class of jobs or a broad range of jobs. Welch, 373 Mont. at 188, 316 P.3d at 829. In that case, the court affirmed the hearing officer's finding that Welch's medical condition did not substantially limit any major life activities as he was able to continue participating in activities such as golfing, camping and hiking and was able to find other employment. As a result, the court found Welch was not disabled as defined under the MHRA.

The Montana Supreme Court addressed the meaning of "substantially limits" in disability discrimination cases with different results prior to the passage of the ADAAA. Adamson v. Pondera County (2004) 319 Mont. 378, 84 P.3d 1048 (worker who sustained two non-work related shoulder injuries that required surgery was not disabled under the MHRA becuase his condition did not prevent him from working a broad class of jobs); Martinell v. Montana Power Company (1994), 68 Mont. 292, 886 P.2d 421 (worker's condition was not a transitory and insubstantial condition and constituted a disability, because the worker's condition had lasted for two years and had cost her potential promotions and her job).

Nedved was able to get to and from doctor's appointments after June 6, 2014 without any apparent difficulty. Nedved was also able to drive to and from Paveco's offices on June 23, 2014 without any difficulty. The only restrictions imposed upon Nedved at the time of her first appointment with Dr. Holdhusen was not to return to work and to avoid lifting more than 20 pounds. Nedved was cleared to work with no restrictions effective September 10, 2014. Nedved offered no substantial and credible evidence showing her medical condition had any long lasting impact on her ability to perform work.

While Nedved's medical condition may have temporarily prevented her from being able to safely perform her job duties as a truck driver for Paveco, the evidence does not show her medical condition substantially limited her major life activities. Further, the evidence does not show her medical condition significantly restricted her 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 (citations omitted). To find that a hernia, which was diagnosed, treated, and corrected within a span of approximately 11 weeks, constituted a disability that triggered the protections of the MHRA would

be contrary to the spirit and the intent of the ADAAA and would otherwise improperly expand the definition of "disability."

Nedved has not carried her burden of production or persuasion to show she was substantially limited in one or more major life activities and belonged to a protected class under Mont. Code Ann. § 49-2-101(19)(a)(I). It should be noted that Nedved cannot show that she has a record of such impairment or that Paveco regarded her as having such an impairment as provided for under Mont. Code Ann. § 49-2-101(19)(a). Nedved offered no evidence showing she had a history of medical issues that would constitute a disability under the MHRA. Further, Nedved cannot show Paveco regarded her as having such an impairment due to the transitory and temporary nature of her condition. 29 C.F.R. § 1630.2(g)(1)(iii)(being regarded as having such an impairment means". . . the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor'"). Therefore, Nedved has failed to meet her burden of demonstrating she is disabled within the meaning of the MHRA.

2. Nedved cannot prove the remaining elements of the prima facie case.

Assuming arguendo Nedved had shown by a preponderance of the evidence that she was a qualified individual with a disability or impairment under the MHRA, the question would then become whether Paveco unreasonably failed to accommodate her. Nedved must show Paveco 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").

a. Paveco was not responsible for the breakdown 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. Loulseged 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. "A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or

response, may also be acting in bad faith." Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996). As the court noted in Barnett v. U.S. Air, Inc., 228 F.3d 1105,1114-15 (9th Cir. Cal. 2000) (vacated on other grounds):

> The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The shared goal is to identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.

Paveco argues that Nedved failed to offer sufficient evidence showing she had a "known disability" at the time of her June 23, 2014 meeting with Olsen and her mother. Paveco argues Nedved would had to have first met with Dr. Gavagan to get the particulars of the surgery and any work restrictions before a "known disability" could be presented to Paveco. Nedved argues that she informed Olsen of her diagnosed hernia, her lifting restrictions and need to take time off from work during and offered him doctor's notes during the June 23, 2014 meeting. Nedved argued that Olsen, in response to this information, ordered Nedved and her mother off the property.

Paveco's argument is not persuasive. To impose such a requirement would essentially result in form over substance. Nedved presented sufficient information, replete with doctor's notes, for Olsen to be on notice that there was a potential need for accommodation.

However, the Hearing Officer is not persuaded that Olsen's behavior at the June 23, 2014 meeting was prompted by Nedved's request for time off to tend to her medical condition. It is more likely that Olsen reacted negatively to what he perceived as the efforts of Nedved and her mother to force him to file a fraudulent workers' compensation claim. Nedved's argument to the contrary is undercut by the fact that she had been allowed time off to tend to her medical condition prior to any formal diagnosis having been made. There was no substantial and credible evidence showing Olsen protested Nedved's request for time off during the June 23, 2014 meeting or otherwise questioned her need for time off. Rather, the evidence shows the conversation broke down once Olsen refused to file what he believed to be a fraudulent workers' compensation claim. It is doubtful that Olsen acted in such a manner based solely upon Nedved's request for time off, as alleged, given their friendly relationship prior to June 23, 2014. In fact, both Olsen and Nedved testified at hearing about the regard they each held for the other. It seems incongruous that

Olsen would have such a negative reaction to a simple request for time off given that he had already allowed Nedved to take several days off without comment. Therefore, Nedved has failed to show Paveco was responsible for the breakdown in the interactive process and, as such, has failed to show that Paveco unreasonably failed to accommodate her.

While Olsen ordered Nedved and her mother off the property on June 23, 2014, the subsequent actions of the employer clearly show Nedved was not discharged from her employment with Paveco. Olsen became upset after Nedved's mother suggested he file a workers' compensation claim against his business because Nedved lacked health insurance. Olsen had never before heard that Nedved had been injured on the job and he was under the impression her medical issues were attributable to her social activities. Olsen ordered Nedved and her mother off the property after becoming upset at the suggestion he file a workers' compensation claim based upon Nedved's claimed injury.

Nedved's mother denied raising her voice or asking Olsen to help Nedved out. Nedved's mother's memory lapsed when pressed for more specific details about her exchange with Olsen when questioned by Paveco's attorney. Similarly, Nedved's memory seemed to fade when asked about when she filed her workers' compensation claim under questioning by Paveco's attorney. Further, Nedved was initially adamant that no one attempted to contact her on behalf of Paveco and then she conceded that she might have received at least one phone call that she could not get to due to being in Columbia Falls at the time.

Olsen's testimony was bolstered by the testimony of Solomon, who was present near Olsen's office during the June 23, 2014 conversation. Solomon heard Nedved's mother ask what the big deal was after hearing Olsen say that workers' compensation was not intended to serve as a personal health insurance plan. Solomon mainly heard the voices of Nedved's mother and Olsen while they were in Olsen's office. Solomon observed Olsen direct Nedved's mother to leave and to not come back after they left the office. Solomon noted that Olsen was looking at Nedved's mother when he gave the order to leave and she understood him to be talking to Nedved's mother and not to Nedved. Solomon tried calling and texting Nedved at Olsen's request shortly after the confrontation without success. Solomon has little reason to lie or mislead the fact finder. She had not worked at Paveco for approximately six months at the time of hearing having gained other employment as a full-charge bookkeeper and office manager and preparing to sit for the CPA exam. Solomon's demeanor was straightforward and her testimony was clear and direct.

Similarly, Olsen's testimony was also clear, direct and more detailed than the testimony offered by Nedved, which was frequently meandering and non-responsive.

Another factor bolsters the credibility of Olsen's testimony. Solomon trained Nedved on employee's rights and duties regarding EEOC information and workers' compensation. Solomon testified that there was a board in the employer's office where information on workers' compensation was posted. Solomon would have been the one for Nedved to come to if she needed to file a First Report for MSF. Nedved conceded Solomon was the person responsible for workers' compensation for Paveco. This supports Olsen's testimony that his conversation with Nedved and her mother was the first time he had ever heard that Nedved's medical issues may have been work related. Given the passage of time between Nedved's first indication of distress on June 6, 2014 and the meeting on June 23, 2014, it stands to reason that Olsen may have been skeptical that Nedved's medical condition was work related. Further, Nedved failed to offer credible and substantial evidence at the time of hearing that the injury was in fact work related. The injury was described as several weeks old by Dr. Holdhusen. Nedved testified she had been punched in the gut sometime in mid-May 2014 and Danielle Whitaker, a co-worker of Nedved's, testified that Nedved had indicated to her on or about June 6, 2014 that she was not feeling well due to an active social life or perhaps, "woman problems." Nedved's testimony was deemed less credible than the testimony offered by Olsen and Solomon.

Further, Paveco sent at least two letters to Nedved inquiring about when she intended to return to work and instructing her to obtain a doctor's note when she was able to return to work. A reasonable person in Nedved's position would understand her position was still available and she had not been discharged. Nedved's avoidance of Paveco's overtures and requests for information undercuts her argument that Paveco discharged her. Nedved has failed to show by a preponderance of the evidence that Paveco took an adverse action against her due to her alleged disability.

3. Paveco has offered a legitimate, non-discriminatory reason for its failure to accommodate Nedved's alleged disability.

Assuming Nedved had established a prima facie case of discrimination, the burden would then shift to Paveco to produce a legitimate non-discriminatory reason for the challenged employment action. Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). This burden is "one of production not persuasion; it can involve no credibility assessment." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 147

L. Ed. 2d 105 (2000). The burden of production is a light burden. The employer is not required to prove that their non-discriminatory reason actually motivated the decision, because the ultimate burden of proving intentional discrimination always rests with the plaintiff. See Khalil v. Rohm & Haas Co., 2008 U.S. Dist. LEXIS 10169, at *53 (E.D. Pa. Feb. 11, 2008). Paveco would only have had the burden to show, through competent evidence, that it had a legitimate nondiscriminatory reason for discharging Nedved. Crockett v. Billings (1988), 234 Mont. 87, 761 P.2d 813, 817. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," Burdine, 450 U.S. at 255, and "drops from the case," Id., at 255, n. 10.

Even if Nedved had been discharged, which the Hearing Officer does not so find, Paveco has satisfied the relatively light burden of showing Olsen had a non-discriminatory reason for discharging Nedved. Olsen's testimony was clear, direct and consistent with statements he made to MSF at or near the time of Nedved's discharge. It is clear that Olsen reacted in the heat of the moment when he ordered Nedved and her mother off the property. However, Olsen's subsequent actions demonstrate clearly that he never intended to discharge Nedved. Rather, it is clear that Olsen's reaction was based upon his perception that Nedved and her mother were asking him to file a fraudulent workers' compensation claim. Olsen testified he thought Nedved was a good worker and would have liked to keep her as employee. Further, there was evidence offered showing Olsen had allowed other employees who had work restrictions or other limitations to continue working. Therefore, Paveco has shown it had a legitimate, nondiscriminatory reason for discharging Nedved.

4. Nedved cannot show the legitimate reasons offered by Paveco were pretext for discrimination.

Again, assuming Nedved had shown a prima facie case of discrimination, the burden would now shift back to Nedved to show those reasons offered by Paveco were not its true reasons but were merely a pretext for discrimination. Nedved must prove by a preponderance of the evidence that the legitimate reasons offered were not the employer's true reasons but were a pretext for discrimination. Burdine, 450 U.S. at 253. "...[A] reason cannot be proved to be "a pretext for discrimination" unless it is shown both that the reason was false, and that discrimination was the real reason." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993). Nedved, at all times, retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination.

Nedved has not shown by a preponderance of the evidence that the reasons offered by Paveco for the breakdown in the interactive process and the June 23, 2014 confrontation were a pretext for discrimination. Olsen knew only that Nedved had two hernias that required time off from work. Neither Nedved nor her mother testified Olsen argued with them about Nedved requiring time off from work or that she would be requiring accommodations if and when she was able to return to work. The main thrust of the argument between Olsen and Nedved's mother was his belief that they were asking him to file a fraudulent workers' compensation claim. Given the action of Solomon and Olsen after the argument in filing a First Report and participating in the investigation conducted by MSF, it seems unlikely that Olsen's actions on June 23, 2014 were based upon Nedved's medical condition or the fact she required time off to seek medical treatment. It seems equally unlikely that Olsen's reaction was due to Nedved's apparent desire to file a workers' compensation claim. Rather, the more reasonable explanation is that Olsen believed Nedved's workers' compensation claim was not legitimate and he was being asked to engage in what he believed to be fraudulent behavior. Therefore, Nedved has failed to show by a preponderance of the evidence that the reason offered by Paveco for its employment action was merely pretext for discrimination.

B. Nedved Has Not Shown Paveco Retaliated Against Her For Protected Activity

It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because the individual has opposed any practices forbidden under this chapter or because the individual has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter. Mont. Code Ann. § 49-2-301.

The elements of a prima facie retaliation case are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. Beaver v. DNRC, 2003 MT 287, ¶71, 318 Mont. 287, 78 P.3d 857. In cases arising under the MHRA, the elements of a prima facie case of retaliation in the employment context vary, but generally consist of proof that the charging party was qualified for employment, engaged in a protected activity, and was subjected to adverse action, as well as a causal connection or other circumstances raising a reasonable inference that the charging party was treated differently because of engagement in the protected activity. Admin. R Mont. 24.9.610(2).

As in a discrimination claim, a charging party alleging retaliation must present evidence that is sufficient to convince a reasonable fact-finder that all of the elements of a prima facie case exist. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); Baker v. American Airlines, Inc., 430 F.3d 750, 753 (5th Cir. 2005).

Circumstantial or direct evidence can provide the basis for making out a prima facie case of retaliation. When the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent meets its burden, the presumption of discrimination created by the prima facie case disappears, and the charging party is left with the ultimate burden of persuading the trier of fact that the protected activity was the but-for cause of the adverse action. Id. The charging party may succeed in this either 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. Crockett, 234 Mont. 87, 95, 761 P.2d 813, 818, (Mont. 1988), citations omitted. At all times, Nedved retains the burden of persuading the trier of fact that she has been the victim of retaliation. St. Mary's Honor Center, 509 U.S. at 507; Heiat, 275 Mont. 322, 328, 912 P.2d 787, 792..

Since Nedved did not prove she was subjected to any illegal discrimination, she never was opposing any unlawful act or practice. Further, there was no evidence offered showing Olsen's discharge of Nedved was related to any activity described in Mont. Code Ann. § 49-2-301. Again, Nedved has failed to persuade Olsen's discharge of her was related to her claimed medical condition or any activity protected under the MHRA. Therefore, Nedved has failed to show Paveco retaliated against her for protected activity.

V. CONCLUSIONS OF LAW

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

2. Michele Nedved failed to prove that Paveco, LLC discriminated against her illegally because of disability and retaliated against her for engaging in protected activity. Mont. Code Ann. §§49-2-303(1) and 301.

3. For purposes of Mont. Code Ann. § 49-2-505(8), Paveco, LLC is the prevailing party.

VI. ORDER

Judgment is granted in favor of Paveco, LLC and against Michele Nedved, whose complaint is dismissed with prejudice as meritless.

DATED this 16th day of September, 2016.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien
Office of Administrative Hearings
Department of Labor and Industry
P.O. Box 1728
Helena, MT 59624

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Donald Jones, attorney for Michele Nedved; and James C Bartlett, attorney for Paveco, LLC.

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, Mont. Code Ann. § 49-2-505 (4), WITH 6 COPIES, with:

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

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

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

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

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

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard, (406) 444-4356 immediately to arrange for transcription of the record.

Nedved.HOD.chp