

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012381:

MITCHELL REINHARDT,) Case No. 748-2008
)
 Charging Party,)
)
 vs.) HEARING OFFICER DECISION
) AND NOTICE OF ISSUANCE
) OF ADMINISTRATIVE DECISION
 BURLINGTON NORTHERN SANTA FE)
 RAILWAY COMPANY,)
)
 Respondent.)

* * * * *

I. PROCEDURAL BACKGROUND

The procedural background in this case has been recited on numerous occasions in administrative, quasi-judicial and judicial decisions and orders and will not be repeated here, except to state that on December 23, 2014, the Montana Human Rights Commission (MHRC) reversed the original hearing officer’s third decision in this matter and reinstated the second decision dated March 11, 2013. The entire administrative file was then forwarded to the federal district court.

On April 4, 2016, the federal district court reversed the final agency decision of the MHRC and remanded the matter for further fact finding and legal analysis for a direct-evidence/perceived-disability claim of discrimination. Reinhardt v. BNSF Railroad, CV 10-27-H-CCL, “Remand Order” (D.Mt., Hel. Div., April 4, 2016), p.2. The MHRC subsequently remanded the matter to the Office of Administrative Hearings for proceedings consistent with the federal district court’s mandate.

On May 19, 2016, Chief Administrative Law Judge David A. Scrimm conducted a scheduling conference with counsel and set a briefing schedule. Chief Administrative Law Judge Scrimm assumed control of the case due to the retirement of Hearing Officer Spear.

Upon a review of the record in its entirety, counsel's briefs, and the applicable law, the undersigned now makes the following findings of fact, reaches the following conclusions of law, and issues the following judgment.

II. ISSUE

The issue in this case is whether the Respondent conducted an independent assessment of the risk of substantial harm, investigated reasonable accommodation and engaged in the interactive process to identify appropriate reasonable accommodation that would ameliorate any risk of harm. After making such a determination, the Hearing Officer is to decide whether the Respondent proved its safety defense and is therefore not liable to the Charging Party or whether it failed to do so and is liable.

III. FINDINGS OF FACT¹

1. Charging Party Mitchell Reinhardt first applied for an appointment as a conductor with BNSF Railway Company (BNSF) in 2005, having concluded that the railroad was hiring "older" people. Reinhardt was initially selected for a conductor trainee position in Glendive, but did not pass the Industrial Physical Capability Screening (IPCS) test due to a left shoulder deficiency.

2. In 2005, BNSF indicated that graduates of the National Association of Railway Schools (NARS) program would be given preferences for positions with the railroad. After he initially failed the IPCS test, Reinhardt attended and completed a six-week NARS training course, obtaining his NARS certificate. Reinhardt also reconditioned himself, worked with BNSF to retake the IPCS test, and passed it on August 19, 2005. He again applied but was not selected for conductor training.

¹ BNSF urges the Hearing Officer to maintain the Findings of Fact in Hearing Officer Terry Spear's 2013 Decision, Reinhardt did not argue the issue but submitted a proposed decision that included findings that differed from those found in the 2013 decision. This Hearing Officer retains all those findings from the 2013 decision that are not in conflict with the District Court's decision that Reinhardt had proved his prima facie case and that BNSF perceived Reinhardt as disabled. This Hearing Officer also finds that Hearing Officer Spear's additional findings from his 2014 decision are largely applicable here and uses his language to provide better readability of this decision. This Hearing Officer includes the additional findings required by the Court as amendments to Findings of Fact 14, 15, 17, 18, 23, 25, 26, 33, 34, 35, 36, 38, 40, 41, 42, 43, 44, 46, 48 and 54 and new findings 11 and 55 through 65. This Hearing Officer has also removed the underling and bolding found in Hearing Officer Spear's Decisions as to make this decision more readable.

3. In July 2006, Reinhardt again applied for Glendive and Forsyth conductor trainee positions, and was invited to the hiring session in Glendive. He completed an application for employment, including his resumé, completed BNSF's medical history questionnaire and again took the IPCS test. On or about August 5, 2006, BNSF's Medical Department notified Reinhardt that he met the medical standards for the position of conductor trainee. Accepted for a conductor trainee position, Reinhardt began working for BNSF on August 28, 2006. His training coordinator was Daniel Dassinger and his immediate supervisor was Trainmaster Don Kautzmann.

4. BNSF is a railroad operating in 28 states, including Montana, and two Canadian provinces. It employs approximately 36,000 people. BNSF maintains a division headquarters at Billings, Montana.

5. The job of a BNSF conductor requires many key skills and abilities, including coupling air hoses, which provide pneumatics for the braking system on trains. Coupling involves bending down and reaching in between cars for the air hoses, then grasping, pulling and twisting to connect them.

6. BNSF trains can be up to two miles long. The conductor job requires performing train and equipment inspections. The inspections require proficiently walking the train to identify any unsafe conditions or mechanical defects, down one side of the train and then back up the other on uneven terrain and ballast, which stretches for more than a mile at a time. Inspections and other train work also require climbing on and off equipment by lifting one foot approximately three feet onto a ladder while reaching up to grasp the grab irons with both hands and pulling one's weight up onto the ladder.

7. Conductors must also ride on moving cars while holding onto a ladder, sometimes for an extended period of time. Thus, the job also requires the ability to maintain balance while working on and around moving equipment, including getting on and off cars on uneven terrain and ballast. Conductors must operate switches, which involves bending down over the switch and reaching and being able to exert muscular strength sufficient to push and pull the lever. Conductors must be able to make quick hand and leg movements.

8. Due to the nature of the position (working around moving and heavy equipment), it is imperative that crew members, including conductors, are aware of their environment and are able to react and respond quickly to any condition needing attention. In addition, if there is a broken "knuckle" (coupler connecting two cars)

when the train is outside of a terminal, the conductor must replace it, lifting and carrying a replacement “knuckle,” which weighs up to 83 pounds.

9. Pursuant to the collective bargaining agreement (CBA) between BNSF and the United Transportation Union, conductor training consists of a one week orientation, followed by three weeks of on-the-job training, three weeks of classroom instruction and then another eight weeks of on-the-job training. At the conclusion of this training, successful trainees are given a promotion examination. Employees who pass the exam become conductors. Employees who fail the examination are scheduled for up to an additional four weeks of either classroom or on the job training, then given a second test. Employees who pass the second test become conductors. Employees who fail the second test forfeit all seniority and employment rights. BNSF has the right to “disapprove an application for employment” (in other words, discharge the probationary employee) within 60 calendar days beyond the initial three weeks of classroom training, not just at the conclusion of the training process.

10. Not every person medically qualified to work as a conductor trainee for BNSF necessarily has the ability to do so safely. Without any physical impairment that substantially limits one or more of a person’s major life activities, a medically qualified individual may still lack the physical capacity safely to perform one or more of the essential functions of the position detailed in Findings 5-8. Such a lack is a basis for BNSF to disapprove an application for employment (discharge the probationary employee) at any time within the 60 days beyond the initial three weeks of classroom training. Indeed, confirming that an otherwise qualified applicant can actually safely perform all of the essential functions of the position after completing training is one of the primary purposes of the probationary period.

11. There is nothing identified in the CBA that indicates that the training program is designed to identify disabilities and/or accommodations for disabilities. Reinhardt was terminated just after the third week of his field training. Had he trained for another five weeks and then failed the program, BNSF had the option of putting him through up to 4 more weeks of training.

12. Under Section 5 of the CBA Memo of Understanding, for an employee who is unable to complete training due to a bona fide illness or injury, BNSF is obligated to extend the training period for the period of unavailability, for up to eight months. There is nothing in this Section that would prevent BNSF from identifying an illness or injury and seeking medical evaluation.

13. As part of the training program, the training coordinator serves as a “mother hen,” helping trainees with problems, answering questions and shepherding them through the training process. The training coordinator must anticipate problems during training and fashion solutions. The training coordinator fills out a check list during the first week of training to assure that each new employee can properly perform the tasks of conductor.

14. Over the history of railroading in America, an unusual aspect of training for new hires has evolved – the use of union employees (craft instructors) rather than management for much of the training. To some extent, this distances management from some of the actual training and evaluation of new hires, requiring management to rely to a greater extent upon the feedback of the seasoned union employees who train and observe the trainees. Dassinger was the BNSF training coordinator during Reinhardt’s tenure with the railroad. Dassinger believed the craft instructors were to notify him if a trainee had any medical problems. TR. p. 416.

15. Evaluation of the employee’s on-the-job training is performed by the craft instructors. In practice, an employee is evaluated on each trip by a conductor. These evaluations are normally provided on a form filled out by the supervising conductor and given to the training coordinator at the end of each trip. Other employees who may observe the trainee at work (such as other crew members) can also submit evaluations or comments. Classroom work is evaluated by testing done by the classroom administrators.

16. During training the craft instructors are still doing their jobs and rarely let the trainees do anything without being observed. Several trainers substantially limit what the trainees are allowed to do by themselves. Tr. p. 285; Knoll Depo p. 8, l. 22-24; Ballentine Depo P. 11-12. As a result, had Reinhardt failed and then gone through four more weeks of training, it would have been at least nine more weeks before he would be working alone with an engineer.

17. Dassinger evaluated Reinhardt’s orientation week, which Reinhardt successfully completed. Dassinger did not notice that Reinhardt had any physical limitations during this week. TR. p. 14-15. Dassinger filled out an evaluation form for Reinhardt, which was not produced in this case. See, *infra*, Finding 36, p. 8, footnote 2.

18. In early September 2006, Reinhardt began his initial three-week on-the-job training, which he successfully completed. During that on-the-job training, Dassinger observed Reinhardt in the field, learning to work on and around the

railroad cars, on a few occasions. On one of those occasions, the trainees individually climbed a ladder on a grain car and practiced performing their hand signals while on the ladder. Dassinger commented that Reinhardt, while signaling from the ladder, was not adequately signaling. He asked Reinhardt if he was “scared,” to which Reinhardt replied that he was “nervous” and had been up on the car “a long time.” Dassinger made no inquiries into Reinhardt’s physical limitations that would indicate he was engaging in the interactive process. TR. p. 371.

19. For new trainees to be nervous working around railroad cars and equipment is not at all unusual. Familiarizing new hires with the working environment, so they can learn to react promptly and properly, is a goal of training.

20. After completion of the initial on-the-job training weeks, classroom training followed in weeks five, six and seven (Sept. 25 – Oct. 13, 2006). Reinhardt successfully completed this classroom training.

21. On October 16, 2006, Reinhardt began the additional eight weeks of field work. He was now at the point in his training where he began working on moving trains, observed by the other crew members (particularly but not exclusively the conductors) that he accompanied on particular assignments, whether “trips” on a train out on the road or more local work, such as switching cars in the yard or helper service (on a unit or units assisting in pushing other trains).

22. Keith Clingingsmith is a conductor. At the time of hearing, he served as Training Coordinator, as Dassinger’s successor. Clingingsmith has worked for BNSF as a brakeman and conductor since 1976. On October 21, 2006, Reinhardt accompanied Clingingsmith, the conductor, on a helper service assignment. Afterwards, Clingingsmith filled out an evaluation form for Reinhardt in which all but three of the 22 categories assessed were marked good or fair. However, Clingingsmith, along with engineer, Al Koncilya, reported both to Dassinger and to Glendive trainmaster Don Kautzmann that Reinhardt was not “walking stable.” In attempting to describe the problem that he observed, Clingingsmith opined that Reinhardt might have a health issue, which he described as “a stroke.”

23. Clingingsmith did not ask Reinhardt about the source of his “health problems” or whether he was feeling okay. Clingingsmith’s report that Reinhardt was unstable, might have health issues and may have had a stroke was the first report Kautzmann received about Reinhardt.

24. Clingingsmith requested that he work with Reinhardt on more than one trip because of his concern about Reinhardt's ability to perform the physical requirements of the job. In addition to his observations about Reinhardt's uncertain balance while working in or around moving equipment, uneven terrain and ballast, Clingingsmith had doubts about Reinhardt's ability to throw switches and to couple the engine and air hoses, also essential requirements of the job. His concerns involved performance, but also the safety of Reinhardt or others. He observed Reinhardt walking with difficulty toward switches and exhibiting confusion about switching activities. Clingingsmith did make a statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely. He did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. His comments clearly reported concerns about whether Reinhardt was capable of performing his job duties safely, no matter what the cause.

25. Clingingsmith also recommended that Reinhardt be placed with another veteran conductor. Knowing that Reinhardt had obtained a NARS certificate, Clingingsmith discussed with Dassinger calling to verify Reinhardt's NARS training performance. Despite his predominantly "good" or "fair" scoring on his written evaluation, Clingingsmith reported that Reinhardt was "poor" on his understanding of track warrants and documents, his identification of switches, and his overall understanding concerning his responsibility and key requirements. Clingingsmith noted that Reinhardt needed help with overall field work. Clingingsmith did not ask Reinhardt about whether he had a stroke or some other disability that affected his gait. Clingingsmith believed that if Reinhardt would have been done [with his training] at that time, he would either have been hurt or hurt someone else. At that time, Reinhardt still had seven more weeks of training to complete. Clingingsmith believed Reinhardt was performing better at the end of the 3 or 4 days he spent with him. Tr. p. 303.

26. Al Koncilya is a locomotive engineer for BNSF, who has worked for 33 years as an engineer and brakeman. He worked with Reinhardt and Clingingsmith on the same helper service assignment in Glendive. When separating the helper engine from the train, he, like Clingingsmith, observed Reinhardt was not "walking stable." Immediately after finishing the shift, he also made an oral report to Kautzmann, out of concern about Reinhardt's mobility. Koncilya's concern was that he, as an engineer, could be working in the future with just Reinhardt, as a conductor, and did not want him falling under the engine. He also questioned whether Reinhardt could get out of harm's way quickly, when and if that was necessary. Koncilya did not make any statement that he thought Reinhardt might have a physical impairment

that limited his capacity to perform his job duties safely. Koncilya did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. Koncilya reported concerns about whether Reinhardt was capable of performing his job duties safely, without manifesting any discriminatory attitude toward Reinhardt because of age or disability. Koncilya did not inquire with Reinhardt about his physical challenges believing it was Dassinger or Kautzmann's job. TR. p. 289 and p. 273. Koncilya made his findings about Reinhardt's ability to do the conductor job based on 10-12 minutes of observation during Reinhardt's first week of field training. TR. pp. 268-9.

27. Reinhardt's next assignment, on October 25, 2006, was with conductor John Wilson. Wilson evaluated Reinhardt's performance as "good" in every category. Wilson, with a seniority date of January 16, 2006, had far less experience than many other union employees who worked with and evaluated Reinhardt.

28. Pete Score is an engineer for BNSF, who has worked as a brakeman, conductor and engineer since 1989. He worked with Reinhardt between four and seven times on runs between Glendive and Forsyth. Score observed Reinhardt having inordinate difficulty walking and keeping his balance while on ballast and getting on and off the locomotive. He was concerned that Reinhardt was going to get hurt. During the time that Score worked with Reinhardt, he reported his concerns to Dassinger. Score did not make any statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely. Score did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. Score reported concerns about whether Reinhardt was capable of performing his job duties safely, without manifesting any discriminatory attitude toward Reinhardt because of age or disability.

29. On October 30, 2006, Dassinger assigned Reinhardt to work in the switch yard. While this was not inappropriate, it consisted of duties not assigned to others in Reinhardt's class. Switch yard duty involved 12-hour days in which the employees spent most of the time on their feet climbing in and out of trains and rail cars.

30. Reinhardt worked his switch yard shifts with two conductors – Jim Knoll and Steve Ballentine. Knoll worked with Reinhardt on yard switcher duty from approximately October 30 to November 2, 2006. Knoll has worked for BNSF as a conductor and brakeman since 1974. He has trained 75 to 80 new hires during his entire railroad career.

31. Kautzmann and Dassinger felt that they should assign Reinhardt work with more older, experienced workers, preferably with some of their better craft instructors. Knoll was one such worker. He had been in the yard for years and had trained many new hires. He had filled out evaluation forms for 10 years – if a trainee did not provide an evaluation form, Knoll would report his observations orally.

32. Knoll turned in an evaluation of Reinhardt, dated November 3, 2006, to Dassinger and Kautzmann, and also discussed his evaluation with Kautzmann. Out of 35 categories in which he evaluated Reinhardt, Knoll gave him four “good” ratings, 21 “fair” ratings and 10 ratings worse than “fair.” He rated Reinhardt “poor” in safe, alert and efficient job performance around equipment; proper radio procedure; working with end of train devices (ETD); understanding switch lists, track lists and work orders; understanding and identifying hazards at industries; understanding basic switching moves; aligning drawbars; setting out/picking up efficiently and properly; inspecting cars and brake tests; remaining safe and alert while working on or around equipment; and in Reinhardt’s overall understanding concerning a conductor’s responsibility and skill requirements. He and Ballentine both noted Reinhardt’s difficulty coupling hoses.

33. Knoll appended a “note” to his evaluation, expressing his feeling that Reinhardt “does not have the physical capability to do the job [and] seems very unstable walking along the tracks and . . . on moving equipment.” Reinhardt’s performance of his duties “scared” Knoll. Knoll had never before reported feeling that a trainee could not physically perform the job nor written a similar “note.” Knoll did not make any statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely. Knoll did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. Knoll reported concerns about whether Reinhardt was capable of performing his job duties safely, without manifesting any discriminatory attitude towards Reinhardt because of age or disability. Knoll did not ask Reinhardt how he was feeling or whether he had a physical problem that prevented him from doing the job.

34. Ballentine, who worked on the yard switcher crew with Knoll and Reinhardt, had been employed by BNSF as a conductor or brakeman since 1976, and had trained approximately 20 conductor trainees since 1992. Like Knoll, Ballentine would either fill out reports on progress or provide an oral report to the training coordinator and/or the trainmaster. Ballentine also observed Reinhardt having difficulty coupling air hoses, showing insecurity on equipment, and having difficulty walking on ballast. Ballentine had conversations with Dassinger (before Reinhardt’s eventual dismissal) in which he expressed his safety concerns regarding Reinhardt.

Reinhardt was the first trainee that Ballentine had felt this strongly about reporting as a safety risk. Dassinger told him to put it in writing when he got time. Ballentine filled out an evaluation, dated November 14, 2006, and submitted it, not knowing that BNSF had already dismissed Reinhardt. Ballentine did not make any statement that he thought Reinhardt might have a physical impairment that limited his capacity to perform his job duties safely. Ballentine did not make any statement that he thought Reinhardt might be too old to perform his job duties safely. Ballentine reported concerns about whether Reinhardt was capable of performing his job duties safely, without manifesting any discriminatory attitude towards Reinhardt about age or disability. Ballentine also had a problem with one of the hoses that he complained about Reinhardt having difficulties with and had to have the engineer adjust the train to allow the hoses to be connected. TR. p. 79.

35. A huge training concern is making sure that trainees are capable of doing every aspect of the job – that they are not going to get hurt or get someone else hurt. Dassinger routinely tracked the progress of new hires through evaluations completed by the craft instructors. The initial evaluations indicating that Reinhardt had a slow pace and seemed nervous were not determinative of Reinhardt’s future employment. However, the continued reports of performance problems and safety concerns did become crucial for Reinhardt’s future with BNSF.

36. Knoll’s evaluation and note, as well as Knoll and Ballentine’s oral reports, raised a question for Kautzmann about whether Reinhardt could safely work as a conductor. Kautzmann talked with Tom Lowe, his supervisor, and also with Mike Woodard, BNSF’s Human Resource Officer at the time, about his concerns and about the reports that he was getting from other employees. Kautzmann told Woodard that he might have to let Reinhardt go. Kautzmann mentioned “stroke” and “too old” comments made in some of the oral and written reports, as descriptions of what craft instructors had observed. Woodard responded that Reinhardt had successfully completed the NARS program and was deemed medically qualified. Woodward also pointedly stated that Kautzmann was not a medical expert and that the BNSF did not choose employees based on their ages. He told Kautzmann that the proper procedure would be to let Reinhardt proceed through the training program and see how he did. He also told Kautzmann that any decision to terminate Reinhardt had to be on the basis of documented test results or performance issues.

37. Woodard’s duties as a Human Resource Officer required him to caution Kautzmann about relying upon statements expressly mentioning either possible disability issues or age as a basis for safety questions.

38. Kautzmann's statements to Woodard about Reinhardt having a stroke and being too old strongly indicate that he perceived Reinhardt as disabled. They also indicate that Kautzmann continued to hold these beliefs from the first time he heard them to the day he terminated Reinhardt. Kautzmann did not follow Woodard's advice but fired Reinhardt while Woodard was away on vacation.

39. Reinhardt knew that he had difficulty connecting air hoses while working the yard switching job at the end of October and first few days of November. He was having problems with his legs (weakness and difficulty with coordination), particularly on long or busy shifts. He had experienced difficulty keeping up with Knoll and Ballentine. On or about November 6, Dassinger told him he was "unhappy with him" that Knoll and Ballentine weren't happy with him and had complaints about his performance. Reinhardt knew he had not been able to keep up the pace of getting up and down engines and coupling trains. He did not report any of the problems he was having with his legs to BNSF. He did not report that he had any physical impairment that limited his ability safely to perform his job duties.

40. Dassinger told Reinhardt that he would be getting one more chance, on the local freight to Hettinger. He assigned Reinhardt, with Jason Ackerman as the conductor, to the Hettinger trip on November 7, 2006 (an "over and back" run, returning on November 8, 2006). During this conversation, Dassinger told Reinhardt that "maybe he was too old for the job." Dassinger also told Reinhardt that he would be watched closely so he should do the best he could. Dassinger asked Reinhardt about his abilities prior to the Hettinger run.

When I asked him if he could handle the job [the trip] he just told me he wasn't sure. And then I asked him if he could walk back a number of cars - - - I think I said 90 cars, to put a train together. And then again, he said I'm not sure. I asked him if he was on his own whether he would be able to make all the air hoses, and, then again, he told me he wasn't sure. But he never said no or never said yes. It was just I'm not sure.

TR. p. 406.

Reinhardt walked the Hettinger train four times and successfully completed several air hoses. Tr. P.83-87.

41. Prior to the Hettinger run, Dassinger had made one previous inquiry to Reinhardt about how he was doing:

It was just a quick talk with him just asking him how things were going. I told him I was getting some complaints on him (from Clingingsmith and Koncilya at this point in time) How are things going? He said good. He said he had no problems. Everything was –what he thought was – he thought he was doing a real good job, and I just kind of let it go at that. At that time I didn't have that many complaints.

TR. p. 396-7.

42. Reinhardt had these two opportunities to advise Dassinger of any physical impairment he was experiencing that was in any way limiting his ability safely to perform his job duties. He did not advise BNSF of any such impairment. After the November 6 conversation, Reinhardt knew or should reasonably have known that BNSF was considering “disapproving his application for employment” (in other words, discharging him while he was still a probationary employee).

43. Dassinger did not discuss or address any of the physical problems noted by the craft instructors as directed by the Conductor/Foreman/Hostler Training Manual, other than to suggest that Reinhardt was too old for the job. Dassinger did not ask Reinhardt if he had sustained an injury since he saw him during the orientation week. Kautzmann did not know that Dassinger had given Reinhardt another chance at convincing BNSF he could do the job. Although Kautzmann perceived Reinhardt as disabled, he had no objective and current medical opinion about the nature and extent of the disability.

44. BNSF did not seek to engage Reinhardt in an interactive process even though it perceived him as disabled. The fact that “stroke” was repeated up the chain of command indicates that this perception was accepted. BNSF perceived Reinhardt as disabled and had a duty to engage him in the interactive process to determine whether an accommodation could be provided.

45. Dassinger made two calls to NARS to find out more about Reinhardt's performance and to see if they had information that he could use to help Reinhardt get through the BNSF training program. NARS provided no helpful information.

46. By this time, Dassinger and Kautzmann had talked five or six times about Reinhardt's performance.. Dassinger made him generally aware of the written and oral reports and complaints about Reinhardt, and Kautzmann had heard some of the oral reports and complaints himself. Dassinger also reported (to Woodard as well as

to Kautzmann) that there were many (“30-40”) good evaluations of Reinhardt.² Kautzmann as well as Dassinger had enough experience to know that some “bad” evaluations would be normal at the commencement of field work, but the gravity of the reported concerns about Reinhardt’s performance were extraordinary. Kautzmann did not review any other bad or the good reviews before deciding to terminate Reinhardt. He relied solely on what he heard from the trainers directly or through Dassinger. TR. p. 43.

47. Without talking to Woodard again or waiting to find out from Dassinger or Ackerman how the Hettinger trip had gone, Kautzmann had another conversation with his supervisor, Tom Lowe. They decided to end Reinhardt’s employment. On November 9, 2006, Kautzmann prepared a termination letter for Lowe’s signature. Reinhardt had worked less than half of the 60 calendar days beyond initial classroom training during which BNSF, under the CBA, could fire a probationary employee.

48. On November 10, 2006, Kautzmann called Reinhardt into his office and, in Dassinger’s presence, told him that BNSF had concerns about his physical capacity to perform his job duties and that for safety’s sake they were terminating his employment. Kautzmann never saw the reports good, bad or indifferent, on the Hettinger run before deciding to fire Reinhardt. Reinhardt’s last chance did not materialize because Kautzmann fired him before learning the results. BNSF terminated Reinhardt’s employment because of concerns from operating employees in the field that Reinhardt was not capable of safely performing his job and could place himself and others in harm’s way. BNSF’s decision also took into consideration the open and obvious physical disability that Reinhardt displayed. Kautzmann did not ask Reinhardt if he had been injured or whether he was experiencing any medical problems at this meeting or offer to send him to their own doctor for evaluation.

49. Dassinger was surprised that the decision had already been made and was being implemented on November 10, 2006. Based upon the evaluations, complaints and reports he had received, and his conversations with Kautzmann about Reinhardt, he expected Reinhardt to be discharged, just not quite so soon.

50. On November 12, 2006, Dassinger sent an email to BNSF personnel, including Woodard, advising them that Reinhardt had been terminated. When

²At hearing, Dassinger testified that he had overstated the number of good evaluations, which could not have been more than 23, based upon the number of assignments Reinhardt worked. The question of numbers of good versus bad evaluations arose because BNSF produced virtually none of the good evaluations. BNSF witnesses testified that they could not find most of the evaluations.

Woodard received the email, he called and asked Dassinger why Reinhardt had been fired and requested documentation related to performance deficiencies from Dassinger. On November 13-14, 2006, Dassinger collected bad evaluations of Reinhardt, consisting of three evaluations done in September, Knoll's evaluation and note and the evaluations from Ackerman and Ballentine, both of which had been dated and submitted after Reinhardt's discharge. As already noted, Ballentine had voiced his concerns to BNSF before the discharge decision was made.

51. Woodard questioned the decision to terminate Reinhardt's employment. He was worried about the adequacy of the documentation. He felt that descriptions of the problems Reinhardt seemed to have at work in terms such as "old" and "too old," as well as by reference to a possible medical condition³, were inappropriate. Woodard's main concern was whether the existing documentation would justify the firing in any subsequent litigation.

52. The CBA's provision for additional time and a second test, for a probationary employee who completes training but fails the promotion exam, does not apply to probationary employees discharged before completing their training.

53. The CBA's provision for additional time to complete training, for a probationary employee who has a bona fide medical illness or injury during training, does not apply to probationary employees who neither report nor otherwise assert the occurrence of a bona fide medical illness or injury during training. The CBA's provision for additional time to complete training, for a probationary employee who has a bona fide medical illness or injury during training, may apply to probationary employees who report or assert any physical or mental impairment limiting their ability safely to perform essential functions of their work, but Reinhardt neither reported nor asserted any such impairment or resulting limitation. The CBA did not prevent BNSF from reporting what it was observing about Reinhardt's physical abilities to its medical staff or from asking him if he had sustained an injury.

54. After BNSF dismissed him, Reinhardt sought treatment from Ty Dufner, P.T., regarding his problems with his legs. He had subsequent medical evaluation and treatment for those and other problems with his upper as well as his lower

³ For example, Tr. p. 295, lines 19-23: "[H]ave you ever seen somebody that had a stroke or had recovered from a stroke?" And I think we said, 'Yeah,' we both, you know, knew. And I said, 'And to me that seems like where we're at here.'" Clingingsmith, reading his deposition testimony at hearing about the conversation he had with Koncilya, the engineer, describing their observations and concerns about Reinhardt [interior quotation marks added].

extremities. His reports to the medical professionals about the onset and severity of those problems are too vague to make any findings about whether any of these problems manifested while he worked for BNSF and caused or contributed to his performance difficulties as a conductor trainee. The evidence adduced regarding post termination medical evaluations and treatment of Reinhardt does not support any findings that Reinhardt suffered from any defined medical problem that caused him difficulties in safely performing the required physical activities necessitated by essential conductor job duties. The evidence adduced regarding post termination medical evaluations and treatment of Reinhardt does support a finding that Reinhardt, while he was a probationary employee of BNSF, experienced a physical impairment limiting his ability safely to perform essential functions of his work. The cause of his symptoms was never determined.

55. Reinhardt reported to the Billings Clinic Miles City Physical Therapy department and indicated that his legs were very sore and weak and that he did not have very good balance. He indicated he had recently worked four twelve-hour days and thought he would recover more quickly. Ex. 122 p. 50. He was referred to Dr. Base who evaluated Reinhardt for weakness in his legs and hands. Dr. Base found polyneuropathy and ataxia. Dr. Base suggested Reinhardt get an MRI but Reinhardt was concerned about the cost and did not have that procedure done. Dr. Base referred Reinhardt to a Dr. Gaddy, a neurologist. Dr. Gaddy conducted a number of tests and diagnosed Reinhardt with sensory ataxia and peripheral neuropathy.

56. BNSF terminated Reinhardt's employment because BNSF perceived him to be disabled and because it believed that Reinhardt would be unable to fulfill the essential functions of his position as a conductor-in-training in a safe manner.

57. BNSF based its decision to terminate Reinhardt's employment on the assessments offered by various BNSF employees that Reinhardt may be too old for the position because he was at risk of injury because of his slowness and hesitancy in performing his work – he sometimes walked in an unstable manner, and he moved as if he were recovering from a stroke. Ultimately, BNSF determined that Reinhardt exhibited certain physical limitations that prevented him from safely performing some essential job tasks. It did not conduct a risk of harm analysis before deciding to terminate Reinhardt.

58. BNSF regarded Reinhardt as physically limited in the performance of the major life activity of work, therefore, BNSF regarded Reinhardt as physically disabled. BNSF believed Reinhardt to have a physical impairment that gave rise to safety and performance issues. Therefore, BNSF's termination of Reinhardt's

employment is direct evidence of discrimination on the basis of disability and possibly on the basis of age.

59. BNSF had a duty to provide a reasonable accommodation to a person with a physical disability if, with such accommodation, the person could perform the job's essential functions. An accommodation that would require an undue hardship or that would endanger the health or safety of any person would not be a reasonable accommodation. Rather than engage in the mandatory interactive process and determine whether there were any potential accommodations that would have allowed Reinhardt to safely carry out the functions of a railway conductor, BNSF summarily terminated Reinhardt's employment on November 10, 2006.

60. BNSF did not conduct an independent assessment of the risk of substantial harm, investigate a reasonable accommodation or engage in an interactive process to identify reasonable accommodations that would ameliorate the risk of harm.

61. BNSF failed to comply with Montana law prohibiting discrimination in employment on the basis of disability. Reinhardt established that disability discrimination was more likely than not. He only established the possibility of discrimination based upon age, which did not prove that age discrimination was more likely than not. Commission Remand Order, pp. 4-6.

62. An order requiring BNSF to refrain from discriminating in employment on the basis of physical disability is necessary. It is also reasonable to require BNSF hereafter, whenever BNSF personnel judge a current employee within the Division operating in Montana to be suffering from a physical condition rendering him or her physically incapable of performing her or his job adequately or safely, to undertake an interactive process with that employee to determine whether a reasonable accommodation is possible that would allow the employee adequately and safely to perform the essential functions of his or her job, and, provided it is possible within the applicable employment and privacy laws, to undertake that process even if the employee denies having any physical disability, before discharging said employee for safety reasons. It is also reasonable to require BNSF management personnel and employees responsible for training and evaluating new train crew personnel, within the Division operating in Montana, to be trained regarding accommodation of physical disabilities and regarding conducting an independent medical evaluation of an employee who is manifesting a physical impairment that limits the employee's ability to perform the job. It is also reasonable to require BNSF to develop and

implement human resources procedures for maintaining the performance evaluations of any employee it discharges for safety reasons during their probationary period.

63. Had BNSF engaged in the interactive process and determined the extent of his disability, it is more likely than not that it would have discharged Reinhardt upon the completion of that process. His admitted difficulties, those identified by those whose job it was to train him and the medical problems for which he sought diagnosis and treatment would have necessitated either his discharge or his resignation.

64. Had BNSF properly conducted a risk of harm analysis before discharging Reinhardt, it is more likely than not that his employment would have continued until the end of the training period. During this period Reinhardt would have earned additional wages and benefits. Reinhardt is entitled to pre-judgment interest on those wages in the amount of representing ten percent simple interest times 10 years.

65. Because Reinhardt reasonably believed he had one more chance in maintaining his job and because he performed the duties Dassinger questioned him about, he reasonably believed that he had saved his job. He was then shocked when his success turned to failure when Kautzmann discharged him before he knew how Reinhardt had done on the Hettinger run. For the emotional distress incurred, Reinhardt is entitled to \$10,000.00 in damages.

IV. DISCUSSION⁴

A. Law of the Case.

The Federal District Court has already determined that this is a direct evidence case, that

there is no substantial dispute between the parties regarding the reason for [Reinhardt's] termination. Both parties agree that BNSF terminated Reinhardt because it believed that his physical impairment gave rise to safety and performance issues, and that Reinhardt has proven a "prima facie direct evidence case of discrimination based on a perceived physical disability." Reinhardt v. BNSF CV 10-27-H-CL at p.8.

⁴ Fact statements incorporated by reference as findings. Coffman v. Niece (1940), 110 Mont. 541, 105 P.2d 661.

Those determinations are the law of the case and must be adhered to by the Hearing Officer and the Human Rights Commission. See *Hafner v. Conoco* 1999 MT 68: 293 Mont. 542: 977 P. 2d 330 citing *Marriage of Scott* (1997) 283 Mont. 169, 175; 939 P.2d 1001-02.

Direct evidence can relate to the adverse action taken against the charging party or to the respondent's discriminatory intent in taking that action. *Foxman v. MIADS* (6/29/1992), HRC Case #8901003997; *Edwards v. Western Energy* (9/8/1990), HRC Case #AHpE86-2885; *Elliot v. Helena* (6/14/1989), HRC Case #8701003108.

When direct evidence proves illegal discrimination, the burden of persuasion (not just the burden of production) shifts to the respondent, to prove either that the direct evidence is not credible or that any illegal motive played no role in the action taken. *Admin. R. Mont.* 24.9.610(5); *Carney v. Martin Luther King Homes, Inc.* (8th Cir. 1987), 824 F.2d 643, 648; *Fields v. Clark University* (1st Cir. 1987), 817 F.2d 931, 935; *Blalock v. M.T.I.* (6th Cir. 1985), 775 F.2d 703, 712. Unless the respondent meets this burden with sufficient proof to discredit the direct evidence or to show a non-discriminatory legal justification for the adverse action, the charging party's direct evidence proves the illegal discrimination. *Blalock* at 707.

B. BNSF Perceived Reinhardt as Disabled and Had a Duty to Determine Whether His disability Could be Accommodated.

Montana law requires employers to reasonably accommodate their employees if the employees are disabled or are regarded as such, unless the accommodation would impose an undue hardship on the employer or endanger the health and safety of any person. *Reeves v. Dairy Queen*, ¶40, 1998 MT 13; 287 Mont. 196; 953 P.2d 703 (citing § 49-2-101(19)(b), MCA). See also *Admin. R. Mont.* 24.9.606, *Hafner*, *op. cit.* at ¶36.

BNSF argues it had no duty to accommodate Reinhardt because he failed to request an accommodation. Secondly, it argues that it conducted all the requirements of the safety defense and determined that no accommodation would ameliorate the risks of harm that Reinhardt's disabilities posed.

1. Reinhardt did not have to ask for an accommodation for a disability that was obvious.

The ADA protects a disabled person by prohibiting affected employers from "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an ... employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer]." 42 U.S.C. § 12112(b)(5)(A).

Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 680 (9th Cir. 2001)(emphasis added)

In the leading case on the issue, *Brady v. Walmart Stores, Inc.* 531 F. 3d 127 (2d. Cir. 2008) the Second Circuit held that when an employer has independent knowledge of a disability it has an obligation to research what accommodations could be made. *Brady* has been followed by the Sixth Circuit *Moloney v. Home Depot U.S.A., Inc.*, 2012 U.S. Dist. LEXIS 75430, 36-40 (E.D. Mich. May 31, 2012) (The Court believes that the Second Circuit's decision in *Brady*, relied on by Plaintiff, provides the appropriate guidance) and the Tenth Circuit in *Ewing v. DoubleTree DTWC, LLC*, 2016 U.S. App. LEXIS 22177, 6-9 (10th Cir. Utah Dec. 14, 2016)(Employer must have knowledge that the individual is disabled).

BNSF was receiving multiple reports that Reinhardt had some physical impairment or even may have had a stroke that effected his ability to maneuver on ballast and other uneven surfaces, and to couple air hoses. Its management never investigated the extent of his disability despite warnings from its human resources staff that medical opinions were necessary before discharging Reinhardt. It now relies on physical examinations that took place prior to Reinhardt displaying the disability. Reinhardt's disabilities were apparent to its trainers but it denies that its management was aware of any open and obvious maladies. Had Kautzmann observed Reinhardt in the field, he would have noticed what his employees were telling him. BNSF can not rely on the craft workers comments and reports to assert a safety defense and at the same time deny that those reports put it on notice that Reinhardt had a disability and an accompanying duty to research whether accommodations could be made.

BNSF further argues that its managers made inquiries into Reinhardt's disabilities. The record discloses that only Don Dassinger made any inquiries into Reinhardt's performance issues. Those inquiries fall far short of the standard. In his first "quick talk," Dassinger asked "how things were going" Reinhardt replied "good." Dassinger also told him that he was getting some complaints about Reinhardt. In the second "discussion" Dassinger told him that there were more complaints and that he

needed to do well on the trip to Hettinger. Dassinger asked if he could walk the train and couple hoses and to both questions Reinhardt replied “I’m not sure.”

Under the Brady standard, BNSF has not established it made the requisite inquiries. An employer defending a claim of disability discrimination based on a safety basis (the Safety Defense) has two primary obligations: first to determine the risk of harm at issue; and second, to determine whether an accommodation would ameliorate the risk. See Reeves at ¶¶35 and 42; Hafner, supra.

2. BNSF Failed to Conduct a Risk of Harm Analysis.

In order to prevail on its safety defense, BNSF had to show that it conducted an independent assessment of the risk of substantial harm in order to evaluate the “probability and severity of potential injury in the circumstances taking into account all relevant information regarding the work and medical history of the person with the disability before” discharging Reinhardt. Admin R. Mont 24.9.606 (8). The question here is not an evaluation of the risk assessment BNSF conducted – it did not knowingly conduct such an analysis. The question really comes down to whether the steps it took prior to discharging Reinhardt can be fairly said to be the legal equivalent of a risk of harm analysis.

The Montana Supreme Court has adopted, as the test for determining whether an accommodation would endanger the health or safety of any person, “whether the continued employment of the employee poses a reasonable probability of substantial harm.” Hafner at ¶30 citing *Jansen Foods v. Food Circus Supermarkets, Inc.*, (N.J. 1988) 110 N.J. 363; 541 A. 2d. 682, adopting the *Mantolete v. Bolger* standard. 767 F.2d at 1422-23. A failure to independently assess whether the accommodation would create a reasonable probability of substantial harm creates a disputable presumption that the employer’s justification is pretext for discrimination on the basis of disability. Hafner ¶32.

The Hafner court held:

. . . in all employment discrimination cases, the appropriate standard to be applied when determining whether employment of a job applicant poses a risk of harm to himself or others, is the *Mantolete* standard, that is, whether employment of the job applicant poses a reasonable probability of substantial harm to himself or others.

Hafner ¶34.

The Montana Supreme Court has repeatedly “stressed the importance of the employer speaking directly with the employee concerning ways to ensure the employee's safety in future employment.” Hafner ¶38, citing Reeves ¶42. The Court has also turned to federal regulations under the ADA that detail the highly individualized nature of the independent assessment required under that statute's “direct threat” analysis to determine whether an employer has satisfied the elements of a safety defense. Hafner ¶40, quoting the interpretive guidelines to 29 C.F.R. §1630.2(r).

The federal rule provides:

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk; [BNSF did not know – it could have been temporary and it did not manifest during Reinhardt’s physical nor during earlier training];

(2) The nature and severity of the potential harm [BNSF had a good idea that harm could be severe];

(3) The likelihood that the potential harm will occur [BNSF did not attempt any actual assessment of this factor];

(4) The imminence of the potential harm [BNSF did not attempt any actual assessment of this factor].

29 CFR 1630.2(r).

The specificity of the test developed and approved in Hafner is instructive:

In light of Reeves, and the clear import of the independent assessment requirement expressed by the Administrative Rules of Montana and the federal regulations interpreting the ADA, we hold that when an employer defends an employment discrimination case by asserting risk of harm, the employer has a duty to independently assess that risk of harm in accordance with Rule 24.9.606(8), ARM, regardless of whether the case arises under the McDonnell or Reeves burden-shifting tests, and regardless of whether the alleged risk of harm is directed to the employee's initial qualifications or the existence of reasonable accommodations. We hold that in determining whether an employer has discharged its duty in this regard, a district court must make specific findings concerning with whom the employer spoke about the risk of substantial harm and whether the employer took into account all relevant information concerning the risk of harm including the following: the seriousness of the employee's injury, the employee's work history, the employee's medical history, and the existence of reasonable accommodations that could possibly reduce the risk of substantial harm to the employee. These findings are necessary to a complete resolution of an employment discrimination claim. Applying our holding to the instant case, we determine that the District Court erred in failing to make more specific findings concerning whether Conoco adequately discharged its affirmative duty to independently assess the risk of substantial harm to Hafner.

Hafner ¶41.

Thus the determination of whether a direct threat exists depends on an individualized assessment based on reasonable medical judgment which in turn is based on the most current medical knowledge or on the best available objective evidence. Kautzmann, in determining that Reinhardt was a direct threat and needed to be terminated, had to have at his disposal an individualized assessment of Reinhardt's abilities to safely perform the conductor position that was based on a reasonable medical judgment. He could not rely on Reinhardt's initial medical screening and limited skills assessment, he had to have current information and that information could not be based on what the craft instructors told him unless they were medical professionals. A doctor in rendering a medical judgment could have relied on the craft instructors' observations, in part, but would have needed to observe and examine Reinhardt. If BNSF was correct that its screening and training program fulfilled these elements, it would still have to show that it considered the remaining four factors.

BNSF argues that its “entire hiring/probationary process, including extensive medical screening, discussions with Reinhardt, and seasoned craft instructor observations and evaluations of Reinhardt working in the field, show BNSF actually evaluated all the available evidence and determined that Reinhardt’s continued employment posed a real risk of substantial harm to himself and other employees.” Resp. Opening Br. p. 4. But BNSF cannot reach that conclusion without current medical information it did not have and did not try to obtain.

BNSF argues “taken as a whole, the facts demonstrate BNSF’s entire process from the pre-hire medical evaluations and screenings, the interactions with and attempts to get information from Reinhardt to the direct observations and individual evaluations of his actual work within the probationary period constitute an individualized assessment.” Id. at 8. “What better evaluation of actual work history could there be than having expert employee instructors observe and evaluate work performance” citing 1620.2 (r). Id. at 13. Again, BNSF ignores the requirement that the assessment be based on “reasonable medical judgment.” After Reinhardt was identified as having some form of difficulty, BNSF did not review his medical history and did not have him reexamined to obtain more current medical knowledge. The information from the craft instructors was solid information but it was not used to inform a “reasonable medical judgment.” It is simply not the case that having the limited medical information gathered during the hiring process justifies doing nothing more when a disability appears to be manifest. BNSF argues that it did not have to conduct a second medical inquiry, but how was it going to have a reasonable medical judgment without having more information? Reinhardt had not exhibited his difficulty at work when Dassinger observed him during orientation. A review of his medical information accumulated more than three months prior to his termination could serve as part of the data for a current medical determination, but without a reasonable medical judgment of what the current difficulties involved, which would necessarily include conversations with Reinhardt by the employer and its evaluating doctor, how could BNSF have the requisite information to decide whether a direct threat existed?

BNSF admits that its physical capabilities assessment was limited, which is a considerable understatement. Reinhardt’s prior and even current statements that he had no physical problems had gotten more equivocal as time passed. Reinhardt had displayed no physical problems during the first four weeks of his training. If he was walking like he had a stroke at that time, Dassinger should have noticed, and he did not. So, when the craft instructors began to express legitimate concerns about Reinhardt, BNSF needed to do more than to have Dassinger ask “how’s it going?”

BNSF failed to properly conduct the risk of harm analysis before discharging Reinhardt. BNSF did not know or seek to determine how long Reinhardt's apparent disability would endure or to map its exact parameters. Perhaps Reinhardt had simply injured himself on or off the job during the field training period. Reinhardt was 47 years old and a few days before he was discharged he worked four consecutive twelve-hour shifts in the switch yard that required much more exertion than the other work he would normally perform. Perhaps he needed time to recover from that extra exertion. BNSF simply did not know.

BNSF was well aware of the nature and severity of the potential harm should Reinhardt be unable safely to perform his job duties. Over the scope of its entire operations, BNSF has unquestionably learned what can happen when employees do not safely perform their duties.

But there is no evidence in this record to show the likelihood of the potential harm. BNSF did not know whether Reinhardt's disability was temporary or permanent. Perhaps it was unaware that most of the craft instructors did not have the trainees do much of the work because they had their jobs to complete and likely the trainees would slow them down. This would ameliorate the likelihood of potential harm at least during the training period. BNSF could also have reduced any risk by putting Reinhardt on paid administrative leave while it conducted the necessary analysis.

BNSF did not know if the potential harm was imminent, Reinhardt was somewhat unstable on ballast but he was still in training and would not be operating on his own until after that time. Had Reinhardt fallen, would the other employees put the train into motion without accounting for him first? Given what we now know from his post employment physical problems and medical treatments, it appears that Reinhardt posed a high risk of injury, but BNSF did not know that when it discharged him.

After determining what the risk of harm is, an employer is required to determine whether the risk could be reduced or eliminated by an accommodation. Hafner ¶137. There is no evidence BNSF conducted any such analysis. It simply decided the danger was too great and terminated Reinhardt's employment.

C. BNSF Did Not Prove its Risk of Harm Defense or Rebut the Presumption That its Reasons Were a Pretext for Discrimination.

BNSF management personnel never witnessed Reinhardt's difficulties safely performing his job duties. BNSF management received multiple statements questioning whether Reinhardt was capable of performing his job duties safely, from fellow workers. Some manifested a discriminatory attitude towards Reinhardt because of perceived or actual disability. Kautzmann's first cautionary information about Reinhardt was that he walked like he had had a stroke. Kautzmann repeated that to Woodard just before he fired Reinhardt. Kautzmann's decision was based, at least in part, on his belief that Reinhardt was disabled. Therefore, BNSF cannot overcome the presumption of discriminatory animus when it failed to conduct an independent assessment of the risk of harm.

D. Mixed motive analysis.

As noted, evidence that the illegal motive played no role in the action taken defeats a direct evidence case. But this must be evidence that the illegal motive played no role in the action. *Laudert v. Richland County Sheriff's Office*, ¶¶33-34, 218 MT 2000, 301 Mont. 114, 125, 7 P.3d 386. The critical question for Reinhardt's claims of both age and disability discrimination is whether the evidence adduced was sufficient to establish that the illegal motive played no role at all in BNSF's discharge of Reinhardt. BNSF has not proven that illegal discrimination played no part in its decision to discharge Reinhardt.

However, Montana law follows federal precedent that a respondent can show that it would have made the same decision even without the unlawful discrimination, which requires a lesser showing than proof from which it is more likely than not that the unlawful discrimination played no part in the decision. *Laudert* at ¶¶38-42; *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 819; *Muntin v. State of Cal. P.&R.D.* (9th Cir. 1984), 738 F.2d 1054, 1056. This affirmative defense bears the rubric of a "mixed motive" case. In essence, if Reinhardt proved illegal discrimination, but BNSF showed it would have discharged him anyway, even without its illegal age and illegal perceived disability discrimination, because of the "pure" safety concerns it legitimately had, then there was no resulting harm to Reinhardt from the illegal discrimination – the same result would have occurred without it. *Laudert*. Thus, the goal of the Human Rights Act to "require any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against"⁵ was not triggered by his discharge, since the discharge would have occurred anyway, and the mixed motive analysis applies.

⁵ Mont. Code Ann. §49-2-506(1)(b).

How to redress a case of mixed motive discrimination is not a matter left to the discretion of the Hearing Officer – the department has already exercised its discretion by adopting a regulation that dictates the outcome when the evidence establishes a mixed motive case:

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

Admin. R. Mont. 24.9.611.

The idea of “mixed motive” cases serves the public interest, although the charging party receives no recovery. The rule’s mandate for injunctive relief and authorization of discretionary additional affirmative relief under the Act manifests a department determination that such judgments will be sufficient to deter similar discrimination in the future by the offending employer, satisfying the public policy requirements of the Act under Mont. Code Ann. 49-2-506(1) and (1)(a).

Clearly, the line between a successful defense that the discrimination played no role in the decision and a mixed motive defense that the same decision would have been made without the discrimination can be an exceedingly fine one, particularly when the reason for the discharge (here, safety) pertains both to the evidence of discriminatory discharge (management and fellow workers reporting that because of age or perceived disability he was unsafe at work) and to the evidence of a legitimate business reason (management and fellow workers reported that he was unsafe at work without manifesting discriminatory animus because of his age or perceived disability). Which side of the line BNSF’s proof falls on is a question of fact.

Beyond cavil, the facts proved did establish a mixed motive defense. It is that BNSF would have discharged him later even without comments that Reinhardt was unsafe because of age or perceived disability. BNSF proved that even without the illegal discrimination, it would still have discharged Reinhardt during his probationary period. The “clean” evidence that Reinhardt could not safely do his job established that BNSF needed to remove him from the work place, for his own safety and that of other employees – the observations that Reinhardt was unsafe at work that did not include illicit references to age or disability, and subsequently, Reinhardt’s admitted problems for which he sought medical treatment that did not resolve those problems.

Reinhardt’s discussions with medical professionals indicated he was dragging his left foot and had difficulty climbing stairs. While there is no evidence that Reinhardt had fallen while working for BNSF it is clear that these ailments would have prevented him from successfully completing his probationary period. He related that he was doing okay until he started working in the rail yard which required a significant amount of physical strength and the ability to recover from that activity to be able to do it the next workday. He testified he was having significant difficulty with such recovery.

While discrimination occurred and Reinhardt might have been able to overcome the ataxia and neuropathy had he become a full-time employee of BNSF, this hearing officer is bound by the evidence in the record and cannot speculate on what might have happened. It would seem that despite the discriminatory animus, due to Reinhardt’s medical issues he would not have successfully completed his probationary period. However, had BNSF conducted the risk of harm analysis and engaged Reinhardt in the interactive process, it is more likely than not that Reinhardt would have been employed at least until the end of his probationary period. Dassinger himself was surprised that Kautzmann fired Reinhardt so soon. Reinhardt should not lose that few weeks of income due to BNSF’s discriminatory conduct.

Human Resources Officer Mike Woodard wrote a memo to his supervisor on May 22, 2007, in which he reported that Kautzmann fired Reinhardt because he was medically unsuited for the job, was not catching on and was too old for the job. He also reported that Dassinger had acknowledged that Kautzmann told Reinhardt he was too old and was medically unsuited for the job.

BNSF tried mightily to establish that the conclusory statements by Reinhardt’s trainers were not evidence of illegal motives, but descriptions of actual performance problems – explanations, not changing justifications. However, Kautzmann’s statements were direct evidence of a discriminatory animus. He perceived Reinhardt

as disabled from the earliest days of Reinhardt's training in the field until at least the day he told Reinhardt that he was too old and told his superiors and co-workers that Reinhardt appeared to have had a stroke.

V. CONCLUSIONS OF LAW

1. The Montana Department of Labor and Industry has jurisdiction over these charges of illegal discrimination. Mont. Code Ann. § 49-2-512(1).

2. BNSF Railway Company illegally discriminated against Reinhardt based on his perceived disability. Mont. Code Ann. § 49-2-303.

3. Reinhardt is the prevailing party for purposes of attorneys fees and costs. Mont. Code Ann. § 49-2-505 (7).

4. BNSF Railway would have discharged Reinhardt in any case as he did not have the necessary physical ability to safely perform the job of conductor. Admin. R. Mont. 24.9.611.

5. Reinhardt is entitled to the wages he would have earned until the end of his probationary period. Mont. Code Ann. § 49-2-506. Cf. Admin. R. Mont. 24.9.611

6. Because BNSF discriminated against Reinhardt, he is entitled to \$10,000.00 in emotional distress damages. Mont. Code Ann. § 49-2-506.

7. BNSF must undertake affirmative relief as a result of its discriminatory conduct. Mont. Code Ann. § 49-2-506.

VI. ORDER

1. Judgment issues in favor of charging party Mitchell Reinhardt on his charges of illegal discrimination in employment because of age or disability.

2. BNSF is enjoined from discriminating against persons with known or suspected disabilities. It is further required to develop and implement a plan as described in Finding of Fact 62 for addressing employment decisions involving disabled persons and those it may perceive as disabled, or those whose impairments are open and obvious. That plan shall include the significant involvement of the human resources department and its medical staff to determine compliance with the Montana Human Rights Act prior to the termination of any employee. That plan must be submitted for approval by the Department's Human Rights Bureau no longer than 90 days from the date of this Order.

3. Within four (4) business days of this Order, BNSF will submit documentation showing the hours Reinhardt worked prior to his discharge; the rate of pay he earned and an estimate of what he would have earned from the date of his

termination until the end of his probationary period based on the hours he worked prior to his discharge and in comparison with other trainees in his class. If BNSF pays this amount or paid Reinhardt through the end of his probationary period as Exhibit 120 seems to indicate, it shall submit an affidavit so indicating. Interest on any unpaid amount of these wages accrues at the rate of ten percent per year. Reinhardt will have four (4) business days to respond to BNSF's affidavit.

4. Within 30 days of this order, BNSF shall pay to Reinhardt the amount of \$10,000.00 as emotional distress damages.

DATED: March 23, 2017

/s/ DAVID A. SCRIMM

David A. Scrimm, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

* * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Peter Michael Meloy, Meloy Law Firm, attorney for charging party Mitchell Reinhardt, and Michelle T. Friend, Hedger Friend, PLLC, attorney for respondent BNSF Railway Company:

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 a final decision and is not reviewable or appealable in 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).

THIS IS A DECISION ON REMAND WITH NO NEW HEARING TRANSCRIPT. If your appeal requires review of the original hearing transcript, please include a request for that review in your notice of appeal. The appealing party or parties must then assure that the original transcript is moved to the current appellate file for Commission review. Contact Annah Howard, (406) 444-4356 immediately to arrange for availability of that original transcript.

Reinhardt.HOD.dsp