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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 723-2017:

DON SMIES,	)	
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**AND NOTICE OF ISSUANCE OF**
	)	**ADMINISTRATIVE DECISION**
TOWN OF FAIRVIEW,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Don Smies brought this complaint alleging Town of Fairview (Fairview) discriminated against him on the basis of disability and retaliated against him for protected activity.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on September 12, and September 13, 2017, in Sidney, Montana. Attorney Eric E. Holm represented Smies. Attorney Jared S. Dahle represented Fairview. Fairview Police Chief Cal Seadeek appeared on its behalf.

At hearing, Smies, Missy Smies, Chief Seadeek, and Mayor Brian Cummins, testified under oath. The parties stipulated to the admission of Charging Party's Exhibits 1 through 21; as well as Respondent's Exhibits 104, 106, 118 and 120. Respondent's Exhibits 102-8 and 102-9 were admitted into the record. Exhibit 102-21 was excluded based upon Charging Party's hearsay objection.

The parties stipulated to the admission of the deposition transcript of Dr. Anthony Roccisano. The deposition testimony of Dr. Bruce Raymond Belleville was submitted to the Hearing Officer for her post-hearing review and involves documents included in Exhibit 101. The parties disputed the admission of the deposition testimony of Rajohn Karanjai.

Additionally, counsel graciously agreed to address the following issues in their post-hearing briefing:

1. The admissibility of the deposition testimony of Dr. Karanjai, and, if admitted, what evidentiary weight the deposition testimony should be accorded.

2. The performance issues identified by Police Chief Cal Seadeek, specifically incidents involving Miller, Fugate, Kloker, and Hutzenbiller.

3. The issue of spoilation of evidence pertaining to the application materials submitted on behalf of Charging Party in December 2015.

4. Charging Party's standing objection to the admission of Exhibit 101, specifically the issue of whether the evidence constitutes inadmissible hearsay.

The matter was deemed submitted for determination after the filing of the last brief that was timely received on November 2, 2017. 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. FAIRVIEW'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Rule 50, Mont. R. Civ. Proc., provides that a court may grant a party's Motion for Judgment as a Matter of Law if a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue. Judgment as a matter of law is properly granted only when there is a complete absence of any evidence which would justify submitting an issue to a jury and all such evidence and any legitimate inferences that might be drawn from the evidence must be considered in the light most favorable to the party opposing the motion. *Johnson v. Costco Wholesale*, 2007 MT 43 at¶ 13; 336 Mont. 105, 152 P.3d 727 (citing *Williams v. Union Fid. Life Ins. Co.*, 2005 MT 273, 329 Mont. 158, 123 P.3d 213). Judgment as a matter of law is not proper if reasonable persons could differ regarding conclusions that could be drawn from the evidence. Id. (citing *Kearney v. KXLF Communications, Inc.*, 263 Mont. 407, 417, 869 P.2d 772, 777-78 (1994).

At the close of Smies' case, Fairview moved for dismissal of Smies' complaint arguing Smies failed to meet his burden of proof. The Hearing Officer took the

motion under advisement and advised counsel that the motion would be addressed in her decision.

Smies produced sufficient evidence through his testimony and documentary evidence stipulated to by the parties that would, at the very least, lead reasonable persons to differ regarding what conclusions could be drawn from the evidence he had presented. Therefore, Respondent's Motion for Judgment as a Matter of Law is hereby DENIED.

III. ISSUES

1. Did the Town of Fairview discriminate and/or retaliate against Don Smies based upon disability in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If the Town of Fairview did illegally discriminate and/or retaliate against Don Smies as alleged, what harm, if any, did he sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If the Town of Fairview did illegally discriminate and/or retaliate against Don Smies 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?

IV. EVIDENTIARY ISSUES BRIEFED BY THE PARTIES

A. The Deposition Testimony of Dr. Karanjai is Admissible and Relevant as to the Issue of Damages.

Smies argues the deposition testimony of Dr. Rajohn Karanjai should not be given great evidentiary weight, because the testimony is not relevant to the issues in this case. Dr. Karanjai is Smies' family practice doctor, who Smies argues played no role in his back surgery, release to work, or accommodation requests. Fairview counters that Dr. Karanjai is Smies' primary treating physician and is in a position to give an informed opinion about Smies' physical impairments and ability to perform the duties required of a police officer.

Fairview's argument is well taken. Dr. Karanjai was in a position as Smies' primary treating physician to have reviewed Smies' medical records and to form an opinion as to Smies' physical health and apparent ability to perform the job duties

required of a police officer. Dr. Karanjai's deposition testimony is relevant as to whether Smies would be able to return to work as a full-time police officer and therefore must be considered when determining the appropriate damages in this case.

B. Evidence Regarding the Performance Issues Noted by Chief Seadeek is Relevant and Admissible.

Smies argues that evidence regarding alleged performance issues referenced at hearing should be excluded from the record as it is irrelevant to any issue in the case and calls for improper speculation. Fairview counters that such evidence is relevant as to Smies' claim for damages as it is likely Smies would have been discharged for the complained of conduct. In support of its argument, Fairview included written statements from those individuals complaining about Smies' behavior. Those complaints ranged from Smies' allegedly making threatening comments and gestures toward a teacher at Smies' son's school; Smies' allegedly approaching an individual and sending her a text message at or near the time she was serving as a juror; and allegedly threatening another officer.

Evidence regarding Smies' alleged performance issues is relevant as to the issue of whether Smies was discharged due to his alleged disability or for performance issues, or a mixture of both. It should be noted that the alleged incidents took place in early May 2015; September 2015; and November 5, 2015. It is unclear as to whether some of these incidents may have taken place when Smies was on a leave of absence related to his back injury. However, the issues raised in these complaints are potentially relevant as to why Fairview may or may not have rejected Smies' application in December 2015.

Smies' argument that the evidence should not be admissible as it can only lead to speculative testimony that Chief Seadeek would have terminated Smies if he had not been out on a leave of absence. Chief Seadeek testified it was likely that the complained of conduct may have resulted in Smies' discharge. Smies was entitled to due process under Fairview's policies and procedures, which would undercut any argument that Smies was certain to be discharged due to the performance issues if he had not been out on medical leave or that Smies' performance issues factored into the employer's decision to discharge him from his employment in November 2015. Therefore, while evidence regarding Smies' alleged performance issues is relevant and admissible, the speculative nature of the evidence undercuts its evidentiary value. Further, the written statements submitted with Fairview's brief will not be considered. The written statements should have been disclosed during the discovery process or, at the very least, offered at hearing. It would be fundamentally unfair to

allow the admission of those statements when those individuals were not subject to cross examination by Smies' counsel or subject to observation by the hearing officer for a determination of credibility. Inclusion of those statements with post-hearing briefing does not make them part of the record and those statements will not be considered as evidence in this matter.

C. Evidence Regarding Language Included in Fairview's Application Materials is Admissible.

Fairview offered evidence through Chief Seadeek's testimony that its application materials included language to the effect that an application would be rejected unless it was signed by the applicant. Fairview conceded it inadvertently lost or destroyed Smies' application materials and neither party offered the blank application materials Fairview used during that period. Smies argues that such evidence should be excluded as it is hearsay and Chief Seadeek's testimony cannot be verified or subject to meaningful cross examination.

Fairview argues Smies' objection constitutes a legal contention that was waived when it was not included in Smies' final pre-hearing order. Smies counters that it is not a legal contention but merely an evidentiary objection properly offered at hearing. Smies' argument is well taken. The issue was not ripe for objection until Fairview attempted to introduce evidence suggesting Smies' application materials included language warning the application would be rejected if not signed by the applicant. The final pre-hearing order includes no mention from either party of the application materials being missing or destroyed. It is unclear why that is the case. However, both Chief Seadeek and Smies are in a position to testify as to the application materials and whether the materials included any language warning the applicant that failure to sign the application materials could result in them being rejected. Such testimony is admissible under Rule 1004 (1), M.R.Evid., which provides that other evidence of the contents of a writing, recording, or photograph is admissible if [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. There has been no allegation that Fairview destroyed the documents in bad faith or that some sanction would be appropriate in this case. Therefore, evidence offered pertaining to the language included in Fairveiw's application materials is admissible.

D. Smies' Medical Records is Admitted Pursuant to Rule 703, M.R.Evid.

Smies argues the medical records that comprise Exhibit 101 are inadmissible under Rule 403, M. R. Evid, as they constitute inadmissible hearsay that contains

unfairly prejudicial information. Smies also argues there is a lack of foundation for the admission of the documents.

Fairview counters that Smies' medical records were reviewed by its disclosed medical expert as part of his examination, report of his examination and the formation of his opinions. Fairview also notes that the medical records are admissible under the hearsay exception found in Rule 803(4), M.R.Evid.

Hearsay "is a statement, other than one made by the declarant while testifying" in a judicial proceeding and is offered "to prove the truth of the matter asserted." Rule 801(c), M. R. Evid. Hearsay is generally inadmissible "except as otherwise provided by statute" or the Rules of Evidence. M. R. Evid. 802.

Medical records are not ordinarily self-authenticating and require proper foundation before they are admissible. *Palmer v. Farmers Ins. Exch.*, 233 Mont. 515, 521, 761 P.2d 401, 405 (1988); see M. R. Evid. 902. "In *Palmer*, the plaintiff offered three exhibits into evidence without calling the professionals who prepared the exhibits: an emergency room report, a hospital dismissal form, and an ambulance report. The district court admitted the records pursuant to M. R. Evid. 803(6)--over the defendant's objection that they lacked foundation. Although the records would have ordinarily required foundation, we affirmed the court because the defense had already stipulated to their authenticity." *Cheff v. BNSF Ry. Co.*, 358 Mont. 144, ¶40 243 P.3d 1115, citing *Palmer*, 233 Mont. at 521-22, 761 P.2d at 405-06.

As was in the case in *Cheff*, Smies has not stipulated to the authenticity of the records. Smies disputed several things included in the records, including the physician's opinion as to his ability to work as a police officer in the future. Further, neither the physician nor the custodian of the record was called to lay a proper foundation for the admission of the documents or to be cross examined regarding the accuracy of those records.

Similar issues were raised in *Mason v. Ditzel*, 255 Mont. 364, 842 P.2d 707 (1992). In Mason, the plaintiff objected to the admission of her medical records through the videotaped deposition testimony of an expert witness who had examined her for only two hours but had reviewed her medical records when forming his opinion. The plaintiff also objected to the admission of her medical records through another expert witness who had formed his opinion based upon a review of her medical records. The Montana Supreme Court found the District Court did not abuse its discretion in allowing the expert witnesses from reading the plaintiff's

medical records aloud as the records were admissible pursuant to Rule 703, M.R.Evd. *Mason*, 255 Mont. at 373-75; 842 P.2d 707, 713.

The Montana Supreme Court recently affirmed this principle from Mason, when it noted that Rule 703, M.R.Evid, ultimately favors admission of otherwise inadmissible hearsay "by repurposing otherwise inadmissible hearsay as definitional non-hearsay." *In re CK*, 2017 MT 69,¶19, 387 Mont. 127, 391 P.3d 735. Under this view, because its limited purpose is "only to show the basis of the testifying expert's opinion" rather than as substantive proof of the facts asserted therein, the otherwise inadmissible hearsay is definitional non-hearsay and thus not subject to the Rule 802 [hearsay] exclusion. In re Ck, ¶19 (citations omitted). The court concluded in that Rule 703 also constitutes an implicit exception to the hearsay rule. *In re CK*, ¶20(citations omitted).

The documents included in Exhibit 101 were reviewed by and relied upon by Dr. Belleville when he completed his Independent Medical Evaluation of Smies on May 9, 2017. While the questioning of Smies' included questions concerning his use of opioid medication, such questioning helped the hearing officer assess the credibility and reliability of the opinions offered in the deposition testimony of Dr. Belleville. Smies' exceptions to the reports included in the medical records were noted for the record and considered by the hearing officer. It is therefore determined that the medical records included in Exhibit 101, including Dr. Belleville's deposition testimony and IME are hereby admitted and part of the record for this matter.

V. FACTS STIPULATED TO BY THE PARTIES

1. The Town of Fairview (Fairview) hired Don Smies as a police officer on August 5, 2013. Fairview terminated Smies' employment on November 20, 2015.

2. Smies requested disability leave, which was granted by Fairview.

3. Smies' injury required three surgeries.

4. Smies' first surgery was conducted on August 7, 2015, and the second surgery occurred on October 12, 2015.

5. On November 11, 2015, Smies provided Fairview with a physician's note releasing him to full-duty on January 1, 2016.

6. Smies requested leave without pay through January 1, 2016.

7. On November 16, 2015, the Fairview City Council met to consider Smies' request.

8. The City Council denied Smies' request.

9. Following his termination, Smies applied for his old position with Fairview when it was posted in December 2015.

10. Smies was not interviewed or hired for the position.

11. Fairview evicted Smies from his Fairview-owned rental home.

VI. FINDINGS OF FACT

12. Don Smies is an individual residing at all times relevant to this matter in Fairview, Montana, which is located in Richland County.

13. The Town of Fairview (Fairview) is an incorporated town in Richland County. Fairview is located near the North Dakota border and abuts the Bakken oil fields. Fairview has a population of less than 1,000 people.

14. Smies previously worked as a law enforcement officer in Kansas. Smies successfully completed training at the Kansas Law Enforcement Training Center and attained his law enforcement certification.

15. Smies served as a road deputy for the Morris County Sheriff's Department for approximately three years. Fairview Police Chief Cal Seadeek was Smies' supervisor for a period of time at the Morris County Sheriff's Department.

16. Smies and Seadeek have known each other for approximately 16 years. Smies came to know Seadeek when he served on the ambulance crew in Morris County. Smies and Seadeek served as deputies together for Morris County prior to Seadeek being promoted to sergeant.

17. Smies and Seadeek, as well as their families, were close friends who often socialized.

18. In March 2013, Seadeek moved to Montana and became the Fairview Police Chief. At that time, Fairview had no full-time police officers and used four part-time police officers to cover various shifts.

19. Smies visited Seadeek shortly after Seadeek moved to Montana. Smies indicated he would be interested in working as a police officer in Fairview.

20. In August 2013, Seadeek asked Smies if he was still interested in serving as a police officer in Fairview. Smies submitted an application, but was not interviewed. Seadeek essentially vouched for Smies with the City Council and Mayor and recommended Smies be hired for the open position. Fairview did not follow any formal application process or hiring procedure when Smies was hired for the police officer position.

21. On or about August 2013, Fairview officially hired Smies as a police officer.

22. In April 2014, Smies was promoted to Lieutenant after another officer left Fairview to return to Nebraska. Chief Seadeek promoted Smies, in part, because Smies was the most experienced officer at the time and Chief Seadeek felt another supervisor was needed for a newly hired officer.

23. Smies' duties generally included traffic control due to the increased amount of traffic in the community due to the activity in the Bakken oil fields at that time. Smies' duties and salary were increased after his promotion to lieutenant.

24. As lieutenant, Smies frequently alternated shifts with Seadeek, so they would work seven days on, seven days off, opposite each other. When Seadeek was off, Smies was essentially in charge of the Fairview Police Department.

25. Smies received no performance evaluations and no disciplinary write-ups from the time after he was hired until he was placed on medical leave in 2015. Smies, at one time, issued more citations than any other officer in the department.

26. In February 2015, Smies fell on ice while at work. Smies' injury was covered under workers' compensation. Smies' doctor determined that he had a muscle spasm in his upper back and prescribed him pain medication.

27. In March 2015, Smies first visited Dr. Anthony Roccisano, M.D., after being referred by his treating physician, Dr. Rajohn Karanjai, M.D. Dr. Roccisano reviewed a CT scan and an MRI from 2013 for Smies and determined he had significant disc degeneration and some stenosis at L4 and L5. Roccisano Dep. 10:9-25. The term "disc degeneration" generally refers to the disc having lost its normal hydration that can be a natural phenomenon or a result of an injury. Roccisano Dep.

11:2-12. Stenosis is a narrowing of the spine on the nerve roots that can result in numbness, tingling, and weakness in the leg. Roccisano Dep. 12:1-3.

28. Dr. Roccisano recommended that he try an L4-5 epidural and physical therapy with a follow-up visit in six weeks. Roccisano Dep. 13:1-7.

29. In July 2015, Smies felt a "stinger" in his back while on the job. Smies informed Chief Seadeek that his back hurt and he was going to go home to stretch it out. Smies went home at approximately 4:00 p.m. and returned to work a short time later to respond to a missing person report. Smies' pain subsided, but his leg felt like it had fallen to sleep.

30. On August 6, 2015, Smies visited Dr. Roccisano complaining of left leg weakness and a sudden onset of back pain and leg pain about three weeks earlier. Dr. Roccisano reviewed an MRI done on July 20, 2015 showing a disc herniation at L4 and L5 and disc herniation at L5 and S1, both of which was causing severe stenosis. Roccisano Dep. 15:4-17. Dr. Roccisano determined that the disc herniation was the cause of the foot drop Smies was experiencing with his left foot, which caused him to drag the foot as he walked. Id. at 22-24; 17:8-12.

31. Dr. Roccisano recommended Smies undergo an L4-5 and L5-S1 disectomy. Roccisano Dep. 18:4-11. The surgery was performed on August 7, 2015. Id. at 19-22. The recuperative process for this type of procedure is typically a minimum of three months. Roccisano Dep. 21:1-7.

32. In early August 2015, Smies advised Chief Seadeek that he was going to require time off because he suspected his doctor was going to recommend back surgery. Smies asked Chief Seadeek if he thought he should put off the surgery or have it right away. Chief Seadeek assured Smies that the Fairview Police Department had sufficient staff, and he should do it right away.

33. Fairview's policies allowed Chief Seadeek to approve a leave of absence for up to 90 days. Anything longer required approval of the Fairview Town Council.

34. Notes from the Regular Meeting of the Fairview City Council (Council) meeting reflect that Chief Seadeek informed the Council that Smies "had minor back surgery due to a non-work related issue and is off until at least August 27th. He has a doctor's appointment the 26th and will find out then when he can return to duty." Ex. 1, SMIES000195. Chief Seadeek advised the City Council that Smies' absence would not affect employee scheduling.

35. On August 26, 2015, Dr. Roccisano saw Smies for his post-operative appointment. Smies reported feeling less pain and discomfort in his lower back and legs. Dr. Roccisano told Smies he wanted him to go to physical therapy before he would release him to return to work. Roccisano Dep. 23:7-11. Dr. Roccisano did not give Smies a time period in which he expected him to be able to return to work without any restrictions. Roccisano Dep. 24:16-25: 25:1-2.

36. Smies had several MRI's following his August 26, 2015 appointment showing he had disc material coming out at the L5-S1 level, which was preventing Smies' condition from improving at the rate expected by Dr. Roccisano. Roccisano Dep. 25:22-25;26:12-18.

37. At the September 14, 2015 City Council Meeting, Chief Seadeek advised the Council that Smies was still out on leave. Notes from the Council meeting do not indicate that any further discussion occurred regarding Smies' leave of absence. Ex. 2.

38. On or about September 25, 2015, Dr. Roccisano spoke to Smies about the need for another surgery at the L5-S1 level. Smies' second surgery was conducted on October 12, 2015. Roccisano Dep. 28:8-9.

39. On October 12, 2015, Dr. Roccisano provided Smies with a doctor's note that read, "Patient is off work until further notice." Ex. 3. Smies gave a copy of this note to City Clerk Norma Faye Carlson.

40. Chief Seadeek did not contact Smies or attempt to obtain further information regarding Smies' condition from Smies' physician.

41. Around this time, Smies learned he was running out of sick and vacation leave and was required to make a formal request for time off. On October 14, 2015, Smies submitted a letter to the Council that included:

> On August 7th of this year, I underwent surgery to relieve pressure off of a nerve controlling my foot. I had a bulging disc in L4-L5 and L5-S-1. After the surgery, and correcting many med changes by my two physicians, I began physical therapy and there was no relief to my foot. After a follow-up appointment two weeks ago, another MRI showed that more disc had herniated in the same place but was pressing worse on the nerve. On Monday of this week, I had surgery again, correcting the discs. This time I stayed a day in the hospital and started physical

> therapy. Dr. Roccisano believes I will fully recover. He has instructed me not to lift more than ten pounds and not to bend or turn quickly for a month. He does believe in two weeks I can do office work and in six to eight weeks, depending on my healing process, should be able to return for light duty. I will keep you updated on my appointments as they happen and any other problems or successes. I am asking for this time off to heal to return to my career.

Ex. 5.

42. The Council approved Smies' request for additional time off. Ex. 4. The notes from the Council meeting indicate there was no discussion regarding Smies' continued absence from the police department.

43. Effective October 28, 2015, Dr. Roccisano released Smies to light duty or office work with limitations that included, "No bending, twisting or lifting over 15 lbs." Ex. 6. Dr. Roccisano would not allow a full release for Smies to return to his law enforcement position due to risk of reinjury. Roccisano Dep. 30:16-20; 31:3-6.

44. On November 6, 2015, Carlson gave Smies a memorandum that indicated the Mayor was requesting a "clear description of 'lighter duties' and how they relate" to his job. Carlson provided Smies a copy of a job description to be provided to his doctor so the doctor could make "notations and restrictions on it in accordance with the requirements of the job." Carlson also noted that the Mayor was requesting "an actual date for when the light duty restrictions will be lifted and you will be able to return to work full time and full duty." Ex. 7.

45. Included with Carlson's memorandum was a Post It note that read, "Physician needs to specify clearly the ability to perform or not perform the duties highlighted. He will also need to provide actual dates for the expected return to full duty." Ex. 8.

46. On or about November 11, 2015, Dr. Roccisano submitted a copy of the job description provided by Carlson noting that Smies was limited to "no climbing" and no stopping, kneeling, crouching, or crawling. Smies was also prohibited from lifting more than 15 to 20 pounds. The job description also included the note, "Light duty lifted Jan. 1st 2016, can return to full duty." Ex. 10.

47. On November 16, 2015, Smies submitted a written request for an extension of his Leave of Absence to January 1, 2016. Ex. 11.

48. On November 16, 2015, a Special Town Council Meeting was convened by Fairview Mayor Cummins. Mayor Cummins read Smies' request for the Council members who were present. Council Member Lynn Shelmerdine asked Chief Seadeek if the police department would be "OK without [Smies] until January." Chief Seadeek indicated it would, but advised that a part-time officer who had been covering for Smies was applying for other jobs and the police department would be "hurting for coverage" if the part-time officer moved on. Ultimately, the Town Council did not approve Smies' leave of absence request. Ex. 12.

49. On November 18, 2015, Smies saw Dr. Roccisano again complaining of left leg numbness that was improving. Dr. Roccisano told Smies he was not able to go back to work full duty at that point and he wanted to see him again in about six weeks. Roccisano Dep. 39:15-17.

50. Dr. Roccisano wanted to see Smies again before he would release him to return to work without restriction. Roccisano Dep. 42:5-9.[1]

51. On November 20, 2015, Mayor Cummins sent Smies a letter advising him that his leave of absence requested had not been approved and his employment was being terminated. In the letter, the essential functions of the police officer and police lieutenant positions were listed as, ". . . sit and talk or hear, stand, walk, use hands to finger, handle or feel objects, tools, or controls; reach with hands and arms; climb or balance; stoop, kneel, crouch or crawl; lift and/or move more than 100 pounds; make arrests and enforce city ordinances, state and federal laws." Ex. 13.

52. Mayor Cummins also noted in the November 20, 2015 letter:

> After carefully taking your situation and all possible accommodations, including continued leave into consideration, it has been determined that due to your safety, other Officer's safety, public safety and budgetary restrictions we are unable to provide an accommodation for you to perform the essential functions of your position and therefore are terminating your employment as Police Lieutenant with the City of Fairview effective November 20, 2015 for inability to perform the

[1]Smies underwent a surgery to do a revision decompression at L4-5 and L5-S1 on April 14, 2016, which was more than four months after his termination. Smies did not follow-up with Dr. Roccisano after the April 14, 2016 surgery. Roccisano Dep. 49:16-19.

essential functions of your position with or without a reasonable accommodation.

Ex. 13.

53. Chief Seadeek testified that he had concerns about Smies' performance at the time of Smies' termination. Fairview's policies require a due process hearing prior to discipline being issued. Fairview has a progressive disciplinary process in place that begins with a verbal reprimand, moves to a first and second written warning, and can lead to termination if the problem continues. At the time of his termination, Smies had never been informed of Chief Seadeek's concerns or was in any way aware that his performance was at issue.

54. Chief Seadeek's testimony that these performance issues could have led to Smies' discharge is merely speculative and establishes those issues were not the basis for Smies' discharge.

55. Fairview discharged Smies because it regarded him as disabled and unable to perform the essential functions of his position as Lieutenant. At the time of its decision, Fairview had no information from any medical professional treating Smies that he would be unable to return to work on January 1, 2016.

56. At the time of Smies' termination, Fairview had no information that Smies had been a long time user of opioid medication to treat pain associated with various physical impairments experienced by Smies over a period of several years. Dr. Karanjai felt Smies had "functioned really well on opioids. Always been alert in my office . . .". Karanjai Dep. 67:11-14.[2] There is no evidence showing Smies' use of opioid medication adversely affected his ability to perform his job duties.

57. In the absence of any specific evidence regarding the essential functions of Smies' position, the essential functions of a certified peace officer in the State of Montana can be found at Mont. Code Ann. § 46-1-202(17), which defines "peace officer" as, "any person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person's authority."

[2]Dr. Karanjai counseled Smies on February 29, 2016 and March 31, 2016 that he should prepare mentally for not being able to go back to work due to his ongoing back issues. Karanjai Dep. 73-77.

58. Smies was a qualified individual with a disability who could perform the essential functions of his position with an accommodation.

59. Fairview engaged in the interactive process with Smies after first granting his request for a leave of absence in August 2015. Fairview requested and received Smies' work restrictions; considered whether it could accommodate those restrictions and determined that it could not without incurring additional costs and subjecting Smies and other officers to working conditions that jeopardized their health and safety.

60. At the time of Smies' final request, Fairview did not have a dedicated "desk job" in its police department. The department had someone doing filing and typing no more than six hours per week. The light duty restrictions described by Smies during his testimony, which included organizing the evidence locker and administrative and clerical duties were all duties Smies could have safely performed with his work restrictions. Allowing Smies to perform light duty work for approximately six weeks would not have imposed an undue burden on Fairview.

61. Fairview failed to independently assess whether the accommodations requested by Smies would create a reasonable probability of substantial harm.

62. Fairview failed to assess whether there were any accommodations that could have reduced or eliminated any potential risk of harm.

63. Fairview did not have any legitimate, non-discriminatory reason for its decision to not accommodate Smies and to terminate his employment.

64. In mid-December 2015, Smies applied for his former position that had been posted by Fairview. Smies permitted his wife to sign and submit his application and the release of information documents via email.

65. Chief Seadeek identified the signature on Smies' application materials as being Smies' wife's signature. Chief Seadeek ultimately rejected Smies' application for this reason. Chief Seadeek never contacted Smies or Smies' wife regarding the issue despite contacting two of Smies' references.

66. Smies' application materials were lost due to computer issues. Neither party submitted Fairview job application materials to show whether the materials include any advisory that Fairview would reject any application not properly signed

by the applicant. There is no evidence of record showing the materials were destroyed deliberately or maliciously.

67. Fairview's rejected Smies' application in retaliation for his engaging in protected activity. Fairview did not have a legitimate, non-discriminatory reason for rejecting Smies' application materials.

68. Fairview's discriminatory and retaliatory conduct have caused Smies harm, including lost past and future wages, humiliation and emotional distress for which he is entitled to damages.

69. Smies suffered a loss in both back pay and front pay as a result of Fairview's discriminatory and retaliatory behavior.

70. Smies' last pay stub for 2014, which was the last full year of his employment with Fairveiw, shows he earned $78,651.37 that year, which presumably includes overtime that Smies could reasonably expect to earn each year.

71. Smies' 2016 W-2 from Richland County shows he earned $17,382.84. Ex. 21. This is a loss of $61,268.53 per year, which is approximately a weekly loss of approximately $1,178.24 ($61,268.53/52 weeks).

72. Smies applied for several safety officer, maintenance and security positions after being terminated by Fairview. Smies exercised reasonable diligence in attempting to seek and to obtain other employment. Smies and his family desire to remain in Fairview, Montana, which is in the far northeast corner of Montana. Jobs are not plentiful in the area, and Smies has obtained part-time employment that utilizes his law enforcement training and experience with Richland County. However, the part-time job Smies has obtained is not substantially equivalent to his former employment with Fairview in that it offers less by way of hours and compensation. Smies has made a good faith effort to mitigate his damages since his discharge from Fairview.

73. There are 118 weeks from the date of Smies' termination (November 20, 2015) and the date of the decision. Smies is entitled to back pay in the amount of $139,032.42 through the date of this decision plus interest.

74. No medical professional has declared Smies unable to return to his former position as a police officer. At the time of hearing, Smies had no work restrictions in place.

75. Smies is entitled to an award of two years of front pay. Smies' award of front pay should be reduced by six weeks to account for his April 14, 2016 back surgery. Six weeks is appropriate based upon the number of weeks Smies was unable to work following his second surgery. See FOF 30 & 32. Therefore, Smies is entitled to an award of $115,467.52 for front pay damages ($1,178.24 x. 98 weeks).

76. Smies suffered emotion distress as a result of Fairview's discriminatory and retaliatory actions. $35,000.00 represents a reasonable amount of compensation for the discrimination he suffered.

77. Imposition of affirmative relief, which requires Fairview to ensure that its employees are throughly trained with respect to prohibitions against disability discrimination and appropriate methods of dealing with such discrimination, is appropriate.

VII. OPINION[3]

The Montana Human Rights Act (MHRA) prohibits employment discrimination based on physical disability. §49-2-303(1)(a) MCA. To establish a prima facie case of discrimination, Smies must show that (a) he belonged to a protected class; (b) he was otherwise qualified for continued employment; and (c) Fairview denied him continued employment because of a disability. Mont. Code Ann. §49-2-303(1)(a); Admin. R. Mont. 24.9.610(2)(a). See also, *Reeves v Dairy Queen,* 287 Mont. 196, 204, 953 P.2d 703, 708 (1998) (***citing*** *Hafner v. Conoco, Inc*., 268 Mont. 396, 401, 886 P.2d 947, 950 (1994); §§49-4-101, 49-2-303(1)(a) MCA.

A. Smies Has Established a Direct Evidence Prima Facie Case of Discrimination Based Upon Disability.

Disability discrimination claims are generally evaluated using the three-part test for federal discrimination claims set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). However, if the plaintiff establishes his prima facie case of discrimination with direct evidence, then the McDonnell Douglas burden-shifting analysis is abandoned and the issue that remains is whether the termination or other adverse employment action was illegal. *Reinhardt v. Burlington N. Santa Fe R.R.*, 846 F. Supp. 2d 1108, 1112 (2012).

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[3] 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.

Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence . . . ". Black's Law Dictionary, 413 (5th Ed. 1979). "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." *Aragon v. Republic Silver State Disposal, Inc.,* 292 F.3d 654, 659 (9th Cir. 2002). Direct evidence typically "consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer." *Coghlan v. American Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005).

1. Smies has shown Fairview regarded him as disabled.

To qualify as a member of a protected class under the MHRA, Smies must prove he has a "physical disability" within the meaning of the MHRA. "[P]hysical or mental disability" is defined as an impairment that substantially limits one or more of a person's major life activities or is regarded by the employer as such an impairment. Mont. Code Ann. § 49-2-101(19)(a). Whether a particular impairment is a disability under the MHRA requires a factual determination, made on a case-by-case basis. *Reeves*, ¶26. 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).

Whether a particular impairment is a disability under the MHRA requires a factual determination, made on a case-by-case basis. *Reeves*, ¶26. "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, writing, and mobility." *McDonald v. Dept. of Env. Quality*, 2009 MT 209, ¶ 39, 351 Mont. 243, 214 P.3d 749. In making that factual determination, it is a matter of law that work is a major life activity. *Walker,* 278 Mont. at 348, 924 P.2d at1342, *Martinell,* 68 Mont. at 304, 886 P.2d at 428.

The Montana Supreme Court regularly looks to federal statutes and regulations when interpreting provisions of the MHRA. See *McDonald,* 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*, 268 Mont. at 402, 886 P.2d at 951(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*, 365 Mont. 359,¶ 15, 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 be so narrowly construed as to improperly exclude employees from protection. Courts have been directed to focus more on whether the employer has met its obligations under the law rather than focusing primarily on whether or not someone has a disability. See §1630.2(j)(1)(vi) and corresponding Appendix section.

The ADAAA provides, "[t]he term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. Substantially limits 'is not meant to be a demanding standard'." 29 C.F.R. § 1630.2(j)(1)(I). The ADAA further provides an impairment "need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section. " 29 C.F.R. § 1630.2(j)(3)(ii). "The court's focus should be on "whether [employers] have complied with their obligations and whether discrimination has occurred, not [on] whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis. 29 C.F.R. § 1630(j)(2)(iii).

The Montana Supreme Court followed this more expansive view of "substantially limits" in *Welch v. Holcim, Inc.*, 373 Mont. 181, 316 P.3d 823 (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." *Id.* at ¶ 22, quoting *Butterfield v. Sidney Public Schools*, 2001 MT 177, ¶ 21; 306 Mont. 179; 32 P.3d 1243.

Smies has suffered several back injuries during the past five years, including throwing out his back in 2013; falling on ice while at work in February 2015; and feeling a "stinger" in his back in July 2015, which ultimately led to Smies having three back surgeries in 2015 and 2016. At some point, Smies suffered from "foot drop, which caused him to drag his left foot when walking. Prior to his leave of

absence in July 2015, Smies' left leg was frequently numb and felt as though it had fallen to sleep.

The hearing officer struggled with the issue of whether Smies' physical impairments actually constituted a disability as defined under the MHRA. There was little evidence offered showing Smies' physical impairments prevented him from engaging in family activities or caused him to be limited in the major life activities of caring for himself, performing manual tasks, walking, hearing, speaking, breathing or learning. Part of the hearing officer's difficulty stems from Smies' stubborn denials that his physical impairments ever limited or interfered with his ability to safely fulfill his duties as a police officer. In late October 2015, Smies was able to obtain part-time employment as the Coordinator of the Richland County DUI Task Force at or near the time of his separation from Fairveiw, which suggests his physical impairments did not prevent him from performing a variety of jobs during the period in question.

Smies' physical impairments have clearly caused him a great deal of pain and discomfort. However, Smies' physical impairments have not substantially limited him in major life activities, including the ability to work in a wide variety of jobs. See *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002)("The number of Americans restricted by back problems to light work is legion. They are not disabled."). Therefore, Smies has failed to show his physical impairments constitute a disability as defined under Mont. Code Ann. § 49-2-101(19)(a).

However, Smies may still be entitled to the protections of the MHRA if he can show Fairview regarded him as restricted in the ability to perform the basic functions of his own job. *Welch,* ¶ 28 (citations omitted). In order to show that he is disabled under the "regarded as" definition of physical disability, Smies must establish Fairview regarded him "as handicapped in his ability to work by finding [his] impairment to foreclose generally the type of employment involved." *Hafner*, 268 Mont. at 402, 886 P.2d at 951, citing *Forrisi v. Brown*, 794 F.2d 931, 934 (4th cir. 1986). Smies can only make this showing if he can produce evidence that Fairview refused to allow him to continue working because it believed that he was "restricted in basic job functions." *Butterfield*, ¶ 32.

Both Chief Seadeek and Mayor Cummins testified they had concerns that Smies' physical impairments would interfere with or limit his ability to respond appropriately in an emergency situation. Both expressed concern that Smies' physical impairments could potentially endanger not only him but also other officers. In fact, and perhaps most importantly, the basis for Smies' termination was his

"inability to perform the essential functions of [his] position with or without a reasonable accommodation." Ex. 13. Therefore, Smies has shown that Fairview regarded him as being an individual with a disability as provided for under Mont. Code Ann. §49-2-101(19)(a)(iii).

2. Smies is an otherwise qualified individual who could perform the essential functions of the Lieutenant position with an accommodation.

A person with a disability is qualified to hold an employment position if the person can perform the essential job functions of that position with or without a reasonable accommodation. Admin. R. Mont. 24.9.606(2). *See also McDonald,* ¶40; Mont. Code Ann. § 49-2-303(1)(a).

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

The substantial and credible evidence shows that, at the time of his termination, Smies had the requisite background, work experience, skill, training, good judgment and other job-related requirements required to serve as a police officer in Fairview. However, the inquiry into whether Smies was a qualified individual does not end there. The next step is determining whether, because of an impairment, he needed an accommodation to perform an essential function.

This part of the analysis is somewhat complicated by the fact that neither party specifically argued what the essential functions were for Smies' position. Fairview provided a copy of a job description to Smies to give to his doctor in order for the doctor to "make notations and restrictions on it in accordance with the requirements of the job." Ex. 8. The job description offered at hearing is a one page document that includes a section entitled, "Physical Demands," which provides:

> The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

> While performing the duties of this job, the employee is frequently required to sit and talk or hear. The employee is occasionally required to stand; walk; use hands to finger, handle, or feel objections, tools, or controls; reach with hands and arms; climb or balance; stoop, kneel, crouch, or crawl; and ~~taste or smell.~~
>
> The employee must occasionally lift and/or move more than 100 pounds. ~~Specific vision abilities required by this job include close vision, distance vision, color vision, peripheral vision, depth perception, and the ability to adjust focus.~~

Ex. 8 (strikeout included in the original).

The next section is entitled, "Work Environment," which provides, in part:

> While performing the duties of this job, the employee frequently works in outside weather conditions. The employee occasionally works near moving mechanical parts; in high, precarious places; and with explosives and is occasionally exposed to wet and/or humid conditions, fumes, or airborne particles, toxic or caustic chemicals, extreme cold, extreme heat, and vibration.

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

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

42 U.S.C. § 12111(8).

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

> (1) the function may be essential because the reason the position exists is to perform that function; (2) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and /or (3) the

> function may be highly specialized so that the incumbent in the position is hired for his or her expertise of ability to perform the particular function.

29 C.F.R. § 1630.2(n)(2).

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

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

29 C.F.R. § 1630.2(n)(3); see also *Skerski v. Time Warner Cable Co., a Div. of Time Warner Entm't Co.*, L.P., 257 F.3d 273, 279 (3d Cir. 2001) (discussing and applying the seven factors). "[N]one of the factors nor any of the evidentiary examples alone are necessarily dispositive." *Skerski*, 257 F.3d at 279.

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

In the absence of any specific guidance as to the essential functions of the Fairview Lieutenant's position, the hearing officer first looks to Mont. Code Ann. § 46-1-202(17), which defines "peace officer" as being, "any person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person's authority." Smies testified he spent a good deal of his time while on duty doing traffic control within the town of Fairview, which required him to stop vehicles, get in and out of his squad car, approach a suspect's vehicle typically parked upon a public roadway, and engage with the suspect either seated inside the vehicle or

standing outside of the vehicle. Presumably, Smies was required to perform these duties in all types of weather, which in that part of Montana could be particularly harsh depending upon the season. It is generally well understood that a police officer is expected to engage with the public in a variety of situations, including volatile situations where the subject may be combative and hostile. At all times, a police officer is expected to respond to any situation without a moment's hesitation as the ultimate duty of any police officer is to ensure the safety of the community, as well as the safety of his or her fellow officers.

The hearing officer has no reason to reject Smies' argument that his job duties also included clerical and administrative functions that he could safely perform within in his doctor's medical restrictions. It is true that police officers are responsible for writing police reports, maintaining custody of evidence, and other administrative duties necessary for a police department to continue functioning. Although the determination of which job functions are essential is generally a factual analysis, it is clear "that no rational trier of fact could conclude that the essential functions of the job of a police officer do not include duties well beyond the limited clerical work that plaintiff [was] capable of performing." *Santos v. Port Authority,* 1995 U.S. Dist. LEXIS 10168, at *6, No. 94 CV 8427, 1995 WL 431336, at *1 (S.D.N.Y. July 20, 1995). "The very use of [the] term ["police officer"] suggests a position whose essential functions include far more vigorous activities than the clerical duties plaintiff had been performing since [June 1995]." 1995 U.S. Dist. LEXIS 10168, *6, [WL] at *2; see *Colwell v. Suffolk County Police Department*, 967 F. Supp. 1419, 1427 (E.D.N.Y. 1997) ("It's common sense that a foot patrolman, a police officer, is a line officer. He has to be there, or she has to be there, ready to do battle … at any time. It's a common sense type of understanding."), rev'd on other grounds, 158 F.3d 635 (2d Cir. 1998). Given his physical impairments at the time of his termination, Smies was not able to perform the essential functions of his position without an accommodation.

Smies argues Fairview could have granted him one of two accommodations that would have allowed him to continue in his employment. First, Smies points to clerical and administrative duties he could have safely performed within the office. In the alternative, Smies argues that Fairview could have granted his request for a continued leave of absence until he was cleared to return to work without restrictions on January 1, 2016. Ex. 10. Smies must show that the accommodations he has identified are reasonable. See *Stewart v. Happy Herman's Cheshire Bridge, Inc*., 117 F.3d 1278, 1286 (11th Cir. 1997)("The burden of identifying an accommodation that would allow a qualified individual to perform the job rests with that individual, as does the ultimate burden of persuasion with respect to demonstrating that such an

accommodation is reasonable."). Once the employee proves that a reasonable accommodation exists, the employer may present evidence that its employee's requested accommodation imposes an unreasonable hardship. See *Willis v. Conopco, Inc.*, 108 F.3d 282, 286 (11th Cir. 1997), *Morisky v. Broward County*, 80 F.3d 445, 447 (11th Cir. 1996).

The evidence suggests that either of the accommodations pointed to by Smies would have allowed him to continue in his employment. See *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1135-36 (9th Cir. 2001)("A leave of absence for medical treatment may be a reasonable accommodation under the ADA. We have held that where a leave of absence would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA.")(citations omitted). See also Admin. R. Mont. 24.9.606(3)(b)(the definition of "reasonable accommodation" includes "job restructuring, part-time or modified work schedules . . ."). Contrary to Fairview's argument, Smies is not precluded as a matter of law from being qualified simply because he was unable to work at the time of his termination. See *Villalobos v. TWC Admin. LLC*, 2017 U.S. App. LEXIS 26728, *4, 2017 WL 6569587. The accommodations requested by Smies would have allowed him to continue in his employment. Therefore, Smies has shown he is an otherwise qualified individual who could perform the essential functions of his position with a reasonable accommodation.

3. Smies has shown through direct evidence that Fairview failed to accommodate his disability and discharged him due to his physical impairments.

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

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

Reeves, ¶16 (citations omitted).

Direct evidence of discrimination is not limited to evidence of comments made in the workplace related to the plaintiff's disability. 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. An example of this type of direct evidence ". . . would be when an employer states explicitly that it is terminating an employee because of his age or disability . . .". *Reinhardt*, 846 F. Supp. 2d at 1113.

The direct evidence in this case is found in the final paragraph of the November 20, 2015 termination letter, which states:

> After carefully taking your situation and all possible accommodations, including continued leave into consideration, it has been determined that due to your safety, other Officer's safety, public safety and budgetary restrictions we are unable to provide an accommodation for you to perform the essential functions of your position and therefore are terminating your employment as Police Lieutenant with the City of Fairview effective November 20, 2015 for inability to perform the essential functions of your position with or without a reasonable accommodation.

C.P. Ex. 13.

Fairview concedes Smies' disability was the reason for its decision to end his employment. Fairview argues Smies was unable, due to his disability, to perform the essential functions required of the Lieutenant position. Chief Seadeek pointed to performance issues during his testimony that Fairview argues could have led to Smies' receiving discipline, up to and including termination. However, there is no substantial and credible evidence of record showing Fairview's decision to discharge Smies in November 2015 was based upon anything other than its assessment that Smies was unable to perform his job duties due to his disability.

As noted above, the burden shifting approach of *McDonnell Douglas* is "inappropriate and unduly confusing" due to the direct evidence of Fairview's discriminatory intent. 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. Smies has proven through direct evidence that Fairview discriminated against him on the basis of his disability. Therefore, the only issue left to be decided is whether the employer's action is illegal. *Reinhardt*, 846 F. Supp. 2d at 1113; *Reeves*, ¶ 16.

B. Fairview Has Not Established It Had A Non-Discriminatory Legal Justification For Its Decision to Not Accommodate Smies' Disability.

In *Reinhardt*, the court outlined the employer's burden when a plaintiff establishes his or her case of disability discrimination in employment through direct evidence. The court noted:

> In response to a direct evidence claim wherein the reason given by the employer is not in dispute, the employer may prove by a preponderance of the evidence either (1) that plaintiff's direct evidence is simply not credible, or (2) that no unlawful motive played a role in the adverse employment action." In proving its case, the employer may rely on Mont. Code Ann. § 49-2-303(1)(a), to defend itself by proving that the reasonable demands of the position do require an age or physical disability distinction. Additionally, the employer may defend with Mont. Code Ann. § 49-2-101(19)(b), which provides that "[a]n accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation."

Reinhardt, 846 F. Supp. at 1113 (citations omitted).

Fairview offers no argument that the direct evidence is simply not credible. Rather, Fairview argues that its decision not to further accommodate Smies and to terminate his employmetn was not based on any unlawful motive. Fairview argues the accommodations sought by Smies would impose an undue hardship on the employer and would endanger the health and safety of Smies and other officers. Smies, in turn, argues that Fairview failed to engage in the interactive process and failed to accommodate Smies' disability.

1. Fairview Engaged in the Interactive Process.

"The duty to launch the interactive process to search for a reasonable accommodation is triggered by a request for an accommodation." *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). "[T]he interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees' with the goal of 'identify[ing] an accommodation that allows the employee to perform the job effectively.' *Barnett*, supra, 228 F.3d at p. 1114. 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*, ¶80.

The duty to investigate any potential available accommodations arises prior to and must be thoroughly considered before, the employer takes an adverse action, and where an employer fails to make the type of independent assessment required, a disputable presumption arises that its justification - be it alleged undue burden, safety concerns or otherwise - is a pretext for discrimination on the basis of disability. *Reeves*, ¶42. See also *Hafner*, ¶41, citing ARM 24.9.606(7). If the employer fails to make an independent assessment, a disputable presumption arises that the employer's justification is a pretext for discrimination. Admin. R. Mont. 24.9.606(7).

On or about October 29, 2015, Smies' doctor submitted a doctor's note to Fairview that indicated he could return to light duty "or office work" as of October 28, 2015, with a prohibition against "bending, twisting or lifting over 15 pounds." Ex. 6. Town Clerk Norma Faye Carlson sent a memo to Smies seeking "a clearer description of 'light duties' and how they relate[d] to [his] job." Ex. 7. A note accompanied the memo that read, "Physician needs to specify clearly the ability to perform or not perform the duties highlighted. He will also need to provide actual dates for the expected return to full duty." A job description was subsequently sent to Smies' doctor, who returned it with the notations of "no climbing" and "Light duty lifted Jan. 1st, 2016, can return to full duty." Ex. 10. The job description also noted Smies was prohibited from stooping, kneeling, crouching or crawling and lifting and/or moving more than 15 to 20 pounds. Id.

Prior to receiving Smies' doctor's notes on November 9, 2016, Smies and his wife met with Chief Seadeek, Mayor Cummins and Carlson. At this meeting, Smies' wife indicated he could return to full duty six months after surgery but he could perform light duty work such as training following surgery. Chief Seadeek expressed

concerns about Smies not being able to twist or bend and Smies indicated that was only for the first month.

Smies subsequently filed a written request to extend his leave of absence without pay on November 16, 2015. A Special Town Council Meeting was held that same day to discuss Smies' request, as well as his stated work restrictions. It appears a majority of the council was present for the meeting, which was held immediately prior to the public meeting. Smies was not present at the meeting. The council determined that it was not able to accommodate Smies due to budgetary concerns and, apparently, the prospect of additional meetings if Smies was to require additional time off. See. Ex. 12. Smies arrived for the public meeting and learned his request had been denied. Smies informed the council that he had another doctor's appointment on November 18, and he would provide an update to the council at that time. On November 20, 2015, Fairview discharged Smies without apparently receiving an update from his doctor.

The evidence shows Fairview engaged in the interactive process with Smies after learning he required additional time off due to his back issues. Fairview requested and received Smies' work restrictions and considered whether it could reasonably accommodate Smies' suggestion as to light duties he could perform in the office. Fairview further considered whether it could continue to grant Smies a leave of absence given its staffing issues, and the fact Fairview was relying upon an officer from another town to cover for Smies. Fairview fulfilled its obligation of engaging in the interactive process upon receiving Smies' accommodation request. Therefore, the next issue is whether Fairview can show that Smies' requested accommodation would impose an undue burden or would endanger the safety of Smies or others.

2. Fairview has not shown that granting Smies' requested accommodations would have caused an undue hardship.

Administrative Rules of Montana 24.9.606(1)(a) provides that failing to make reasonable accommodations to a known physical limitation of an otherwise qualified employee is an unlawful discriminatory practice. A "[r]easonable accommodation" to a person with a physical or mental disability for the purposes of enabling the person to perform the essential functions of an employment position may include:

. . . . .

(b) job restructuring, part-time or modified work schedules, reassignment to vacant positions which the employee is qualified to hold, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations or training materials or

> policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with physical or mental disabilities.

Admin. R. Mont. 24.9.606(3)(b).

An accommodation is not reasonable if it would impose an undue hardship upon the employer. An "undue hardship" means an action requiring significant difficulty or extraordinary cost when considered in light of:

> (a) the nature and expense of the accommodation needed;
> (b) the overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility, the effect on expenses and resources of the facility, and other impacts of the accommodation on the operation of the facility;
> (c) the overall financial resources of the business, the overall size of the business of the employer with respect to the number of employees, and the number and type and location of the facilities of the employer; and
> (d) the type of operation or operations of the employer, including composition, structure, and functions of the work force of the employer, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer.

Admin. R. Mont. 24.9.606(5).

Smies' requested accommodations included an unpaid leave of absence from November 16, 2015 through January 1, 2016 and light duty work. Fairview was already relying on an officer from another town to cover for Smies at the time he asked to extend his leave of absence. Chief Seadeek testified he was concerned that the officer, who was looking for full-time work at that time, would not always be available to cover for Smies. However, Chief Seadeek's speculation proved not to be the case and the officer continued to cover for Smies until a new officer was hired in January 2016.

The department's budget for 2014 was approximately $200,000 to $225,000; had grown to approximately $400,000 in 2015; and was expected to dip to $370,000 to $380,000 in 2017. There was no employee assigned specifically to answer the phones; make copies; complete filing; or perform other administrative or clerical duties. All officers were expected to perform those duties during their shift. However, the substantial evidence of record does not show that either

accommodation or a combination of the two would have caused Fairview to incur a considerable expense or otherwise adversely impact either the department's expenses and resources or its operations. The leave of absence requested was without pay and would have had no tangible effect on the department's budget. Further, the leave of absence would have had no real effect on the department's operations given that it had already arranged for another officer to cover Smies' shifts and had been able to operate without difficulty while Smies was out on leave.

The Fairview Police Department has four full-time officers including the Chief of Police. During the period in question, the police department had one person who did filing, and she worked approximately six hours per week. Contrary to Fairview's contention, allowing Smies to perform light duty work such as filing, report writing, training, and the like would not have required Fairview to create an entirely new position. Nor would granting Smies' requested accommodation of light duty work have required Fairview to eliminate or reassign essential job functions. Rather, it would have allowed Smies for a finite period to perform some of the duties required of an officer while he continued to heal from his final surgery. Further, there was little evidence offered showing that allowing Smies to perform light duty work for a few weeks would have had a negative impact on the department's operations or budget. The substantial and credible evidence of record does not show that granting Smies' requested accommodations would have caused Fairview to suffer an undue hardship.

3. Fairview has not shown Smies' requested accommodations would have endangered the safety of Smies, as well as other officers.

"If an employer defends an adverse employment action against a person with a physical or mental disability on the grounds that an accommodation would endanger the health or safety of a person, the employer's failure to independently assess whether the accommodation would create a reasonable probability of substantial harm will create a disputable presumption that the employer's justification is a pretext for discrimination on the basis of disability." Admin. R. Mont. 24.9.606(7). See *McDonald v. Dep't of Envtl. Quality*, 2009 MT 209, 351 Mont. 243, 214 P.3d 749, 764 fn.9 (Mont. 2009) (citing both *Barnett v. U.S. Air*, 228 F.3d 1105, 1111-14 (9th Cir. 2000) (en banc), judgment vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516, 152 L.Ed.2d 589 (2002), and also 29 C.F.R. § 1630.2(o)(3).

To protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, the Supreme Court has required an individualized direct threat inquiry that relies on the best current medical or other objective

evidence. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (citations omitted). 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 employer has a duty to investigate what reasonable accommodations might be available to assist the employee before firing the employee. *Reeves,* ¶42. The *Reeves* court held:

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

Id.

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;
> (2) The nature and severity of the potential harm;
> (3) The likelihood that the potential harm will occur;
> (4) The imminence of the potential harm.

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.

Smies worked for Fairview for approximately two years. Smies' job performance was such that he was promoted to Lieutenant approximately seven months after his hire. Chief Seadeek and Smies typically worked opposite shifts, which would suggest Chief Seadeek valued Smies' work enough to trust him to lead a shift without his oversight.

At the time of his termination, Smies had been on a leave of absence for approximately four months with the permission of Chief Seadeek and the Fairview City Council. The evidence shows Fairview was generally aware Smies had required multiple back surgeries with the final one being performed on or about October 14, 2015. There is no evidence to suggest Fairview had any more specific information

about Smies' physical condition beyond that which was alluded to in Dr. Roccisano's note dated November 11, 2015.

Chief Seadeek was clearly in a position, based upon his years of experience in law enforcement and his observation of Smies during this period, to assess whether Smies was able to safely perform the essential functions of a police lieutenant with his health issues. However, more is required of the employer. The employer must make an independent assessment "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."

There is no evidence in this record to show the likelihood of the potential harm. Fairview suspected but did not know with any certainty that Smies' physical impairment would continue past January 1, 2016. An appropriate way to avoid the risk of harm feared by Chief Seadeek and Mayor Cummins would be to grant Smies' request to continue on an unpaid leave of absence if neither believed Smies could safely perform light duty work. Further, any concerns about potential harm were speculative at best. Surely Smies could not safely perform traffic patrol duties or respond to a call for assistance while under work restrictions. However, there was substantial or credible evidence offered showing Smies could not perform office work or other light duty work during the period of his work restrictions. Smies' physical condition clearly gave his treating physicians concerns about his ability to safely return to law enforcement, but that information was not known to Fairview at the time it terminated Smies' employment. The only medical information Fairview had at the time it decided to terminate Smies was that Dr. Roccisano had prohibited Smies from climbing, stooping, kneeling crouching or crawling and from lifting more than 15 to 20 pounds but had released him to full duty effective January 1, 2016.

Ex. 10.

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,* ¶37. There is no evidence Fairview conducted any such analysis. It simply decided the danger was too great and terminated Smies' employment.

Fairview argues Smies did not visit Dr. Roccisano or any other medical professional after he submitted the November 11, 2015 note and there is no evidence showing Smies was ever cleared to return to work without restrictions. Smies was terminated on November 20, 2015. It makes little sense that Smies would seek a clearance to return to work when the possibility of returning to work was gone due to

the employer having terminated his employment. As noted by Smies at hearing, Fairview could have required him to undergo a physical examination before he was allowed to return to work. Fairview chose not to do so, and, instead, terminated Smies' employment. Therefore, Fairview has failed to prove its risk of harm defense. Further, it has failed to rebut the presumption that its reasons for discharging Smies were a pretext for discrimination.

Smies has shown that Fairview's decision to deny his request for accommodation and to terminate his employment was due to his being regarded as disabled. Fairview has failed to show that it would have suffered an undue hardship if it had chosen to accommodate Smies' disability rather than terminate his employment. Fairview has further failed to satisfy the elements of the risk of harm defense and cannot overcome the presumption of discriminatory animus due to its failure to conduct an independent assessment of the risk of harm.

C. Smies has shown a *prima facie* case of retaliation.

Montana law bans retaliation in employment because of protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2).

The elements of a prima facie retaliation case under Title VII 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. *Rolison v. Bozeman Deaconess Health Servs*., 2005 MT 95,¶17, 326 Mont. 491, 111 P.3d 202*; Beaver v. D.N.R.C.*, 2003 MT 287, ¶71, 318 Mont. 35, 78 P.3d 857; *see also,* Admin. R. Mont. 24.9.610(2). To maintain a retaliation claim, a plaintiff must show retaliation was the "but-for cause" of the adverse employment action. *Univ. of Tex. South Western Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). A retaliation claim is a separate action from the original discrimination suit. *Mahan v. Farmers Union Cent. Exch., Inc.*, 235 Mont. 410, 422, 768 P.2d 850, 858.

Circumstantial evidence can provide the basis for making out a prima facie case. Where 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 does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the

explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group*,, 79 F.3d 859, 868 (9th Cir. 1996).

"Protected activity" means the exercise of rights under the act or code and may include: (a) aiding or encouraging others in the exercise of rights under the act or code;(b) opposing any act or practice made unlawful by the act or code; and (c) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing to enforce any provision of the act or code. Admin. R. Mont. 24.9.603(1).

It is undisputed Smies engaged in protected activity when he requested an accommodation; communicated with Fairveiw regarding his condition and need for a leave of absence; and when he provided Dr. Roccisano's notes and medical opinions. Therefore, Smies has proven the first element of his prima facie case.

It is undisputed that following Smies' request for accommodation in November 2015, Fairview denied his request, terminated his employment, and failed to re-hire him when he applied for his former position in December 2015. Therefore, Smies has shown the second element of his prima facie case.

In order to establish the causal link between the protected conduct and the illegal employment action as required by the prima facie case, the evidence must show the employer's decision to terminate was based in part on knowledge of the employee's protected activity. *Sherrod v. Am. Airlines, Inc*., 132 F.3d 1112, 1122. "Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases." *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1069 (9th Cir. 2003); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)(Causation "may be inferred from . . . the proximity in time between the protected action and the allegedly retaliatory employment decision").

Smies has not produced any direct evidence that the employer's decision to discontinue accommodating his physical impairments and terminating his employment was as a result of any retaliatory animus. However, there is sufficient circumstantial evidence of record to support such a finding. The evidence shows the employer was clearly aware of Smies' protected activity and subsequently took an adverse action against him within weeks of the protected activity. Therefore, Smies has shown through circumstantial evidence that his protected activity and the adverse

employment actions are causally linked. Smies has proven his prima facie case of retaliation.

If the plaintiff makes out a prima facie case, the employer can rebut it by producing evidence of a legitimate, nondiscriminatory explanation for its actions. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)(if plaintiff establishes prima facie case, burden of production shifts to employer to articulate a nondiscriminatory reason for adverse employment action, causing the presumption created by the prima facie case to fall away.)

A plaintiff who establishes a prima facie case of retaliation bears the "ultimate burden of persuading the court that [she] has been the victim of intentional [retaliation]." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In order to carry this burden, a plaintiff must establish "both that the [employer's] reason was false and that [retaliation] was the real reason for the challenged conduct." *St. Mary's Honor Ctr.,* 509 U.S. at 515.

It is undisputed that Fairview did not interview or offer Smies the job he submitted application materials for in December 2015. Fairview contends its refusal of Smies' application materials was appropriate because they were signed by Smies' wife and not Smies himself. Fairview's contention is not believable based upon the circumstances in which Smies was initially hired. By all accounts, Fairview hired Smies based solely upon Chief Seadeek's recommendation. There was admittedly no interview and no actual proof that Smies had to submit an application in order to be considered for the police officer position in 2013. Fairview's reliance upon a hiring procedure it had not applied in the past in rejecting Smies' application in December 2015 is suspect. The evidence shows Fairview more likely than not rejected Smies' application due to its regarding him as disabled and his requests for accommodation during the final months of his employment. Fairview has not offered a legitimate, non-discriminatory reason for its refusal to even interview Smies for what was essentially his former position. Smies has succeeded in showing Fairview retaliated against him for protected activity.

D. *Damages*

The department may order any reasonable measure to rectify any harm Smies suffered as a result of illegal discrimination. Mont. Code Ann. §49-2-506(1)(b). Damages are awarded to make the victim whole. ***E.g.,*** *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523. ***See also***, *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830. To be compensable, the damages must be

causally related to making the victim whole, i.e., must come out of the discriminatory acts. Mont. Code Ann. §§ 49-2-506(1)(b); *Berry*, ***supra; see also,*** *Village of Freeport Park Commission v. New York Division of Human Rights*, 41 A.D. 2d 740, 341 N.Y.S. 2d 218 (App. 1973)(loss of earnings which did not flow from the discriminatory act is not compensable as it does not flow from the discrimination). Damages include emotional distress endured as a result of unlawful discrimination. *Vortex Fishing Syst.* ***at*** ¶33.

1. Back Pay

In employment discrimination, once the charging party has established that her damages flow from the illegal conduct, then there is a presumptive entitlement to an award of lost past earnings. *Berry,* 779 P.2d ***at*** 523-24. Back pay is an equitable remedy commonly utilized to compensate the victim of unlawful employment discrimination and to deter employers from discriminating. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). To defeat this presumptive entitlement, the respondent must demonstrate by clear and convincing evidence that a lesser amount of back pay is due the charging party. ***Id.***; ***see also,*** *Benjamin v. Anderson*, ¶62, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039. Prejudgment interest on the back pay (10% per year simple) is also reasonable. *Berry*, 779 P.2d ***at*** 523.

The Charging Party has an affirmative duty to mitigate lost wages by "us[ing] reasonable diligence" to locate "substantially equivalent" employment, see Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982), and a failure to mitigate damages can reduce or completely cancel out a back pay award. See 42 U.S.C. § 2000e-5(g) ("interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the back pay otherwise allowable"); e.g., *Landgraf v. USI Film Prods*., 511 U.S. 244, 253 n.5 (1994) (reducing back-pay awards by the amount plaintiff could have earned with reasonable diligence).

Smies applied for several safety officer, maintenance and security positions before he ultimately secured employment with Richland County as its DUI Task Force Coordinator in the fall of 2015 while on leave from his employment with Fairview. Smies and his family wish to remain in Fairview, which is located in the far northeast corner of Montana. Given the limited law enforcement and security jobs available in the area, Smies has shown he exercised reasonable diligence to mitigate his lost wages. Therefore, Smies is entitled to an award of back pay damages in the amount of $139,032.42.

2. Front Pay

Front pay compensates the Charging Party for the future effects of discrimination when reinstatement would be an appropriate, but not feasible, remedy or for the estimated length of the interim period before the plaintiff could return to her former position. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001). Future damages need only be reasonably certain and not absolutely certain, and of necessity are the subject of some degree of conjecture and speculation. *Kerr v. Gibson Products Co. of Bozeman, Inc.*, 226 Mont. 69, 74, 733 P.2d 1292, 1295.

The courts have considered the following factors when determining if reinstatement is feasible:

> (1) whether the employer is still in business; (2) whether there is a comparable position available for the plaintiff to assume; (3) whether an innocent employee would be displaced by reinstatement; (4) whether the parties agree that reinstatement is a viable remedy; (5) whether the degree of hostility or animosity between the parties, caused not only by the underlying offense but also by the litigation process, would undermine reinstatement; (6) whether reinstatement would arouse hostility in the workplace; (7) whether the plaintiff has since acquired similar work; (8) whether the plaintiff's career goals have changed since the unlawful termination; and (9) whether the plaintiff has the ability to return to work for the defendant employer, including consideration of the effect of the dismissal on the plaintiff's self-worth.

Webner v. Titan Distrib., 101 F. Supp. 2d 1215, 1236 (N.D. Iowa 2000) (citations omitted); *aff'd on other grounds,* 267 F.3d 828 (8th Cir. 2001).

The evidence shows there is no comparable position available with Fairview as Smies' position was filled by a new hire in January 2016. Reinstatement appears not to be a viable remedy given the hard feelings between Smies and Chief Seadeek. It would also appear, given the nature of some of the complaints against Smies prior to his termination, that his return to work would cause some hostility amongst other employees. While Smies states he wishes to return to law enforcement, the evidence shows that he cannot do so with the Fairview Police Department. Therefore, reinstatement is not a reasonable remedy in this case.

Fairview argues Smies is not entitled to damages because he was unable to perform the essential functions of the police lieutenant position due to his physical

impairment. Fairview points to the deposition testimony of Dr. Roccisano in which he stated he had never seen anyone in his practice who he has operated on three times with back surgery and returned to physically demanding work.

It has been noted that Smies had not undergone a physical examination after his October 2015 surgery and prior to his termination. Dr. Roccisano's contention is merely conjecture. It is possible that Smies would never have been able to go back to work as a police lieutenant. There is no medical evidence of record showing that not to be the case. The only real evidence of record is that Smies was released to return to work as of January 1, 2016. There was no mention in Dr. Roccisano's medical note that the full release was contingent upon a medical examination. It should be noted that Dr. Roccisano's testimony that such an examination would be required was during a deposition taken several months after Smies' termination.

Smies seeks damages through the date of his intended retirement at the age of 65. At the time of his termination, Smies was 51 years old. A front pay award equal to 14 years is excessive. "Because of the potential for windfall, [front pay's] use must be tempered." *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991). OAH has historically followed the guidance of the Wrongful Discharge from Employment Act, which allows for recovery of lost wages for a maximum of four years from the date of discharge. See Mont. Code Ann.§ 39-2-905(1); *Billbruck v. BNSF Ry. Co.*, HRC Case No. 0031010549 (Aug. 3, 2004).

Smies has made sufficient efforts to find suitable and comparable work since his termination by Fairview. He has applied for several jobs in and around Fairview and has obtained part-time employment with Richland County. While Smies has found other work, that work is not comparable to his former employment with Fairview. Smies worked for Fairview for approximately two years. Awarding anything more than two years would allow Smies to experience a windfall, which is discouraged under the law. Therefore, two years of front pay in addition to back pay is reasonable and supported by the credible and substantial evidence of record. The front pay should be reduced by six weeks to account for the period of time Smies was unable to work following his April 14, 2016 back surgery. Awarding front pay beyond the two years would be unduly speculative, unsupported by the record, and would result in an unjust windfall for Smies. Therefore, Smies is entitled to an award of $115,467.52 in front pay damages.

3. Emotional Distress

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. As already noted under "Constructive Discharge," Montana law expressly recognizes the right of every person to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a ***per se*** invasion of a legally protected interest. Montana does not expect any reasonable person to endure harm, including emotional distress, due to violation of such a fundamental human right. *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351; *Vainio*, p. 16, fn. 12; *Campbell v. Choteau Bar and Steak House* (3/9/93), HRC#8901003828. Medical evidence is not required to establish emotional distress damages, and such damages may be established by testimony or inferred from the circumstances. *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991). "[N]o evidence of economic loss or medical evidence of mental or physical symptoms stemming from the humiliation need be submitted." *Id.*

Vortex Fishing Syst. ***at*** ¶33, succinctly explains emotional distress awards:

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the "broad remunerative purpose of the civil rights laws," the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern Penn.Transp. Auth.* (3d Cir.1994), 21 F.3d 29, 34; ***see also*** *Chatman v. Slagle* (6th Cir.1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2d Cir.1995), 46 F.3d 162, 170. As the Court said in *Bolden,* in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (***quoting*** *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192, 1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman,* 107 F.3d at 385.

Smies seeks $35,000.00 in emotional distress damages. Smies testified he has often been frustrated, short of patience, and experienced a loss in self confidence since his termination. Smies testified he enjoyed law enforcement and feels a large part of his life has been taken away from him. Smies testified his emotional distress

has interfered with his ability to parent and to engage with his family. Smies has undergone mental health counseling due to his termination.

Smies' emotional distress is somewhat like that of the plaintiffs in *Johnson.* In that case, the plaintiffs (African-Americans) suffered emotional distress resulting from the refusal of a landlord to rent living quarters to them due to their race. The plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. There was no evidence of any recourse to professional treatment or lasting impact upon their psyches as a result of the discriminatory act. Nevertheless, the court increased their awards from $125.00 to $3,500.00 each for the overt racial discrimination.

In *McDonald*, the hearing officer awarded the Charging Party $10,000.00 for emotional distress damages after finding the employer had discriminated against the Charging Party when it failed to accommodate her disability. *McDonald*, 2009 MT. 209, ¶34.

Smies was understandably upset that his career in law enforcement ended due to the employer's unfounded conclusions that he was disabled and unable to perform his job duties. Smies' frustration and sadness coupled with the manner in which his employment ended and the employer's subsequently refusal to consider him for the position he had formerly held justified awarding emotional distress damages of $35,000.00.

4. Affirmative Relief

Affirmative relief must be imposed where there is a finding of discriminatory conduct on the part of an employer. Mont. Code Ann. §§ 49-2-506(1)(a). Affirmative relief in the form of both injunctive relief and training to ensure that such conduct does not reoccur in the future is necessary to rectify the harm in this case.

VIII. CONCLUSIONS OF LAW

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

2. Don Smies has proven that the Town of Fairview (Fairview) regarded him as being disabled. Mont. Code Ann. § 49-2-101(19)(a).

3. Smies has proven he was a qualified individual who could perform the essential functions of his position with an accommodation and Fairview failed to accommodate his disability. Mont. Code Ann. §49-2-303(1)(a); Admin. R. Mont. 24.9.610(2)(a).

4. Fairview failed to show that accommodating Smies would have resulted in an undue hardship or jeopardizing the safety of others. Admin. R. Mont. 24.9.606(1)(a),(7).

5. Smies has shown that Fairview retaliated against him for engaging in protected activity. Mont. Code Ann. § 49-2-301; Admin. R. Mont. 24.9.603(2).

6. Smies is owed compensatory damages in the amount of $261,569.48.

7. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Fairview must pay Smies the sum of $35,000.00 as damages for emotional distress.

8. The circumstances of this case mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

9. For purposes of attorneys' fees, the Charging Party is the prevailing party. Mont. Code Ann. § 49-2-505(8).

IX. ORDER

1. Judgment is found in favor of Don Smies and against the Town of Fairview, for discriminating against Smies and retaliating against him for engaging in protected activity in violation of the Montana Human Rights Act.

2. The Town of Fairview is enjoined from discriminating against any employee on the basis of disability or retaliating against any employee for engaging in protected activity.

3. The Town of Fairview must pay Smies the sum of $254,499.94, plus interest, and $35,000.00 for emotional distress.

4. The Town of Fairview must consult with an attorney with expertise in human rights law to develop and implement policies for the identification, investigation and resolution of complaints of discrimination that includes training for

its employees to prevent and timely remedy disability discrimination. Under the policies, the employees of the Town of Fairview will receive information on how to report complaints of discrimination. The plan and policies must be approved by the Montana Human Rights Bureau. In addition, the Town of Fairview shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

DATED: this 16th day of March, 2018.

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

* * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Don Smies, and his attorney, Eric B. Holm, Holm Law Firm, PLLC; and Respondent Town of Fairview, and its attorney, Jared S. Dahle, Garlington, Lohn & Robinson, PLLP:

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 ONE DIGITAL COPY, with:

Human Rights Commission
c/o Annah Howard
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 ONE DIGITAL COPY 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 at (406) 444-4356 immediately to arrange for transcription of the record.

Smies.HOD.chp