

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1973-2018:

TERRY ROD,)	
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
BURLINGTON NORTHERN SANTA FE)	
RAILWAY COMPANY,)	
(BNSF Railway Company),)	
)	
Respondent.)	

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I. PROCEDURAL AND PRELIMINARY MATTERS

Terry Rod brought this complaint alleging Burlington Northern Santa Fe Railway Company discriminated against him on the basis of disability in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.

Hearing Officer Caroline A. Holien convened a contested case hearing on October 2, October 3, and October 4, 2018 in Glendive, Montana. Terry Rod appeared personally and was represented by Jon Moyers, Attorney at Law, and Kathryn Kohn Troidahl, Attorney at Law. Burlington Northern Santa Fe Railway Company appeared through its designated representative, Gab Schlosser, and was represented by Michelle Friend, Attorney at Law.

At hearing, Rod, Schlosser, Tracey Rod, John Denny, Doug Byron, Tanya Guthmiller, RN, Dr. Shelley Killen, Sam Burman, Gary Whitmore, Kevin Mitchell, Margot Luckman, Doug Abbott, Richie Crisafulli, Schlosser, Brent White, Lon Hutcheson, Dr. Laura Gillis, Jamie Holt, and Brett Ouellette testified under oath.

Charging Party's exhibits 1 through 33; 35; 36; 39 through 42; 44 through 48; 50; 51; and 53 through 55 were admitted; as were Respondent's Exhibits 101; 102; 104 through 110; 112; 115 through 118; 120; 122; 126; 127; and 129 through 133.

The Hearing Officer ruled that the deposition transcripts of Ouellette, Holt, Dr. Gillis, Chrisafulli and Schlosser were admissible and would be admitted in their entirety in the Order on Evidentiary Issues Raised at Hearing, issued on March 12, 2019. The Hearing Officer further ruled in that order that the testimony of Lonn Hutcheson and Jamie Holt was admissible on the grounds that Hutcheson appeared as a non-expert witness. The Hearing Officer also ruled that Hutcheson's Job Task Analysis (JTA) was admissible. The Hearing Officer also ruled that Rod's Railroad Retirement Benefits may be used as an offset against an award of back pay damages, which will be further discussed below.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination upon the timely filing of the last brief. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did BNSF Railway Company discriminate against Terry Rod on the basis of disability in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If BNSF Railway Company did illegally discriminate against Terry Rod on the basis of disability 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 BNSF Railway Company did illegally discriminate against Terry Rod on the basis of disability, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

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III. FINDINGS OF FACT

Rod's Employment With BNSF

1. Burlington Northern Santa Fe Railway Company (BNSF) is a large, national freight carrier that operates throughout the United States and employs thousands of people.

2. BNSF hired Terry Rod as a machinist at its Diesel Shop in Glendive, Montana on October 24, 1994. Ex. 1. The machinist position is a union position.

3. Gabe Schlosser is Shop Foreman II at the Glendive Diesel Shop, as he was during the relevant period of Rod's claim. Schlosser is responsible for managing the daily operations of the entire facility, including budgeting, manpower, labor relation issues, and human resource issues. Schlosser Hrg. Tr. 500:16-20.

4. The superintendent for the shop, Shawn Ball, is located in Havre, Montana, thereby leaving Schlosser solely responsible for managing the Glendive Diesel Shop. Schlosser Hrg. 501:1-12.

5. Rod has an associates of applied science in welding. Rod previously worked for two years in diesel mechanics and has an associates of applied science in diesel mechanics. Rod Hrg. Tr. 17:21-18:2.

6. BNSF required Rod to undergo a preemployment examination as part of its hiring process in 1994. Rod was determined, at that time, to be "medically satisfactory for employment." Ex. 2.

7. Rod and other employees in his craft belong to the International Association of Machinists and Aerospace Workers (IAMAW). Union, or scheduled workers such as Rod, work in a seniority-based system that allows them to exercise their seniority when bidding on jobs within the worker's craft. Rod Hrg. Tr. 24:19-26:11. At the time of hearing, Rod held the number three position in the Glendive Diesel Shop. Rod Hrg. Tr. 19:9-17; Ex. 31.

8. From 2007 through May 2017, Rod relied upon his seniority in bidding on machinist jobs. Rod was able to maintain full-time employment throughout his employment without being subject to furlough. Rod Hrg. Tr. 25:2-26:6.

9. Rod's duties as a machinist generally included "chang[ing] oil, oil filters, fuel filters, do[ing] the maintenance, repair[ing] locomotives, do[ing] traction motors . . . on the whole train." Rod Hrg. Tr. 20:11-16. A machinist essentially serves as the mechanic for the locomotive. Rod Hrg. Tr. 20:17-19.

10. From 1994 to 2007, Rod was fully qualified and physically able to perform all of his assigned duties as a machinist. Rod worked without any restrictions during this period. Rod Hrg. Tr. 20:20-25.

11. The Collective Bargaining Agreement (CBA) in place during the relevant period of Rod's employment included Rule 24, Faithful Service, which provides:

Employees who have given long and faithful service to the Company and who have become unable to satisfactorily handle their normal assignments, shall be given consideration for transfer to other work as may be available within their own craft when practical to do so, in which event they shall be paid the established rate applying to the position to which transferred. This rule is to be applied in cooperation with the Local Committee of the craft involved.

Exs. 33; 110.

12. The Glendive Diesel Shop employs several crafts of skilled labor, including machinists, electricians and laborers, to perform work on locomotives. The CBA prohibits employees from working outside of their craft.

13. The machinist position requires the following skills and abilities:

Walking capability: Walk on uneven ground (e.g. ballast, uneven grades, inclines)

Climbing capability: climb stairs, descend stairs, climb ladders, descend ladders, onto equipment (e.g. roof of locomotive, elevated work platform) while maintaining 3 point contact

Lower extremity capability: kneeling, squatting, crouching and standing and walking for prolonged extensive periods of time and distances in all types of weather throughout a work shift

Upper extremity capability: overhead reaching, pushing and pulling and strength to operate heavy machinery

Back capability: lift, carry, push or pull up to 50 lbs, bend and twist

Operation of equipment: forklift, Kubota, company vehicle

Fine Motor capabilities: able to hold, grasp, turn and pull hand held devices

Visual and auditory capability - must see hand signals from near and far; visually distinguish colors; depth perception to judge speed and distance of moving objects; see at night; hear and, with training, distinguish auditory signals

Ex. 29.

14. BNSF's policy provides for a reasonable accommodation to be provided to applicants and employees with disabilities as required by applicable law, "unless such accommodation would cause Undue Hardship or a safety concern." The policy further provides:

2. Reasonable accommodation will be provided to qualified individuals with a Disability when the accommodation is directly related to performing the essential functions of a job, participating in the hiring process, or enjoying equal benefits and privileges of employment.

3. Generally, an applicant or employee should request that a Reasonable Accommodation be provided. BNSF Railway will encourage applicants and employees to do so in writing but will not refuse a Reasonable Accommodation request solely because the request is made orally. BNSF Railway will decide whether to provide a Reasonable Accommodation on a case-by-case basis considering various factors and based on an individualized assessment of each situation. It may be necessary for BNSF Railway to engage in an informal, interactive process with the applicant or employee to reach a determination regarding a Reasonable Accommodation. Applicants and employees may be required to provide documentation supporting the need for a Reasonable Accommodation and as otherwise necessary to assist BNSF Railway in reaching a determination.

4. BNSF Railway may decide to provide a Reasonable Accommodation that differs from one requested or suggested by the applicant or employee if such an alternative Reasonable Accommodation is effective.
5. Retaliation against an applicant or employee for requesting a Reasonable Accommodation is prohibited.

Ex. 104.

BNSF Changes Rod's Job Duties in 2007

15. Rod was diagnosed with idiopathic spastic paraparesis, which causes him to have a spastic gait, in 2016. Dr. Killen Hrg. Tr. 230:1-5. This condition affects only his lower extremities. Rod has no restrictions or physical impairments to his upper extremities. Ex. 7.

16. In February 2007, Rod's supervisors began having concerns about whether Rod could safely perform his job duties due to issues they had observed regarding his gait and his balance. Rod Hrg. Tr. 21:1-23:5; Ex. 3. Rod's job duties were modified to include ordering parts for the equipment serviced at the Glendive Diesel Shop. Rod's duties were "... administrative and sedentary in nature. The new job did not require him to climb ladders, or operate the forklift." Rod's modified job duties were primarily administrative and sedentary in nature. See Ex. 3.

17. On or about April 26, 2007, BNSF placed Rod on a paid medical leave of absence as efforts were made to determine what type of work Rod could safely perform. See Exs. 5, 7(Progress Report, p. 1 of 3).

18. BNSF required Rod to travel to Billings where an occupational evaluation was conducted. Rod was required to complete an obstacle course where he climbed a ladder, carried a basket with some weight in it and other tasks. Rod Hrg. Tr. 23:8- BNSF also conducted an evaluation at the Glendive Diesel Shop in which Rod was observed performing his assigned duties. Rod, Hrg. Tr. 23:16-20.

19. In a letter dated May 1, 2007, Tom Goetz, who was then the Regional Manager, BNSF Medical and Environmental Health Department, requested information from Rod's healthcare provider regarding "any functional limitations with regard to climbing, walking at unprotected heights, getting on or off machinery such as a forklift, etc." Ex. 3. Goetz wrote, "Management at the Glendive Diesel

Shop has assured me that Mr. Rod's modified job in the parts ordering section of the shop remains open to Mr. Rod, and his employment is not in jeopardy." *Id.*

20. BNSF's Medical Officer at the time, Dr. Sharon Clark, MPH, noted that Rod's "condition has not changed much, nor is any treatment recommended." Pending further review, Dr. Clark approved Rod to work with the following restriction: "Employee is released for material ordering job duties but restricted from working on the shop floor as a machinist." *See* Exs. 5, 6.

21. On May 2, 2007, Rod's healthcare provider noted in his Progress Report:

In discussion with the patient, I believe he is cleared for any office work of a sedentary nature. With regard to returning to the shop floor on the locomotive shop regarding ladder climbing, operating forklift, and the ramp climbing. I would require a functional capacity evaluation and/or job site evaluation by a skilled occupational therapist to gather objective data to state whether he could perform these duties acceptably. Certainly, with this spastic paraparesis, he does have some increased risk in these activities. Whether this is at a level that is not acceptable, I would require objective data from the above mentioned tests. I have recommended that Mr. Rod continue with the parts ordering job position for which I feel he is quite capable of performing the duties in a safe fashion.

Ex. 7, Progress Report, p. 2 of 3.

22. On June 13, 2017, Rod's health care provider responded to Goetz' letter:

Mr. Terry Rod is an individual under my care who has idiopathic spastic paraparesis. His upper extremities and his cognition are unimpaired. With regard to the patient's mobility issues, I believe that he is reasonably safe for any office work; he is safe for ambulation on regular indoor surfaces to include gentle ramps. The patient, I believe, is capable of ambulating into the building to his office and can ambulate distances adequate for going to the bathroom, lunchroom or other areas with normal indoor surfaces.

Ex. 7 ("I have recommended that Rod continue with the parts ordering job position, for which I feel he is quite capable of performing the duties in a safe fashion.").

23. On July 29, 2007, BNSF required Rod to submit to an occupational therapy work site evaluation by John Repac, OTR/L. The stated purpose of the occupational therapy work site evaluation was “[t]o observe actual job conditions of BNSF employee Terry Rod . . . On-site measurements/observations, along with job analysis specifications, will be compared with physical performance to determine job compatibility.” Exs. 8,9.

24. Repac conducted a Functional Capacities Evaluation (FCE) and ERGOS Evaluation Summary Report for the purpose of comparing “the physical performance of Rod with job requirements for parts/inventory control and machinist” at the Glendive Diesel Shop.

25. Repac noted in his report that Rod reported the following:

I have been really nervous about this evaluation for some time now. I am trying to relax so that you see my best performance. I know that I can do this job and I don't understand what all the problems are about. I have been working as a machinist for the railroad for over 13 years now, first in Livingston and now in Glendive. I have never had a lost time accident because I am aware of my limitations and am deliberate in all my movements. If I thought I was getting into an unsafe position or putting someone else in one I would be the first person to point that out. As an example, I don't climb on top of the locomotives anymore because I know that is not the best place for me. That has never been a problem because my working partners have agreed to do that work if I do something else. Very often I take the most confined and dirtiest jobs that the other guys don't like. Replacing the traction motors is a good example. My partner will run for parts because he is quicker than I am and I will get into the pit. I also don't prefer to go down to the service track because I know down there I am not as fast as the other guys and I don't in any way want to slow down the work. Some of the guys I work with prefer that job and it works out fine that way. Ideally, I would like to keep my new position as parts person and occasionally get some overtime working in my old position (machinist).

Ex. 10, pp. 1, 2.

26. Repac noted during his testing and evaluation of Rod that Rod exerted “high levels of effort.” *Id.* Repac ultimately concluded:

Mr. Rod met or exceeded all maximum DOL requirements for the position of parts/inventory control (Glendive, MT shop). He also met requirements for machinist (Burlington Northern Santa Fe Railway, Glendive shop) with the recommendations noted.

Ex. 10, p. 5.

27. Repac's recommendations included:

Avoid working at unprotected heights (top of locomotive). Avoid work at service track/pit. Avoid the use of ladders where possible. Use handholds wherever possible. Limit walking to 100 yards at one time (without rest).

Id., p. 2.

28. On August 15, 2007, Dr. Clark, issued a physician review report and Fitness for Duty Recommendation that noted BNSF Approved Restrictions as included: no climbing (ladder, scaffold, etc.); no working on unprotected heights; no work or prolonged walking on sharply angled ground or on large size ballast; and no climbing on/up rungs or rung-type steps. Exs. 11, 12.

29. Rod's modified duties included ordering parts, completing warranty work, communicating with other shops, receiving and shelving parts, and preparing packing slips and receipts. The job was located in an area of the shop referred to as the "marsh" where Rod sat at a desk with a computer; shelving near his desk where parts were located; and a counter where workers came to request parts, which Rod would then retrieve. See Ex. 54, 55.

30. Rod regularly bid on machinist positions during that ten-year period. Whatever position Rod was awarded during the bidding process, BNSF would assign him to perform "other duties" that included his modified duties as the Shop Support/Warehouse Coordinator at the Glendive Diesel Shop. Rod Hrg. Tr. 25:2-23.

31. Rod's restrictions continued for the next ten years with regular reviews to determine what duties he could safely perform. See Exs. 13-23. In April 2008, Rod's restrictions were expanded to include, "No activity that requires good balance." Ex. 17. However, that restriction is not noted in subsequent reports prepared by BNSF staff or Rod's healthcare providers. See Exs. 13-23.

32. On December 11, 2013, BNSF directed Rod to undergo a medical evaluation to determine if there were any treatment options available to improve his gait and balance. BNSF placed Rod on a paid medical leave of absence after he had fallen at work and his supervisor had observed him trip on carpet at a local business outside of work. Ex. 14; *see also* Ex. 15, p.1 and Ex. 16, p.1.

33. On December 12, 2013, Rod was evaluated by his health care provider, who released him to continue working for BNSF as he had been in the modified machinist parts/inventory position. Rod's healthcare provider noted:

[Rod] has the hereditary spastic paraplegia and is the same as has been, was not injured during his fall, work - sedentary at desk/computer - - after sitting for long periods which he tries to avoid will take a few seconds/minute for him to get his legs steady before he walks but this has not changed (I have taken care of this man for years. His condition has not changed during today's evaluation. He wants to cont[inue] to work and provide for his family as does [sic] most men. Emotionally work is good for him and the type of job he has is very adequate for his disability. He cont[inues] to be as independent at home also).

Ex. 15.

34. On January 9, 2014, BNSF required Rod to be evaluated by Dr. Shelley Killen, M.D., a specialist in spasticity management. Dr. Killen noted in her Consultative Report that she saw no "reason that he cannot return to work at a sedentary job at this point . . .". Ex. 16. Dr. Killen noted in her letter to BNSF that she had increased Rod's medications and directed him to participate in physical therapy, which she believed would improve his gait and spasticity. Ex. 17. Dr. Killen also wrote:

Therefore, without any significant lifting or carrying restrictions his gait should not affect his ability to do his job in any manner and his current working diagnosis does not have any type of cognitive changes associated with it so I would not anticipate him to have any problems performing administrative functions in the materials department of the warehouse in Glendive.

I believe it would also be safe for him to return to work at this point in time as long as he is allowed time to attend the couple of physical therapy sessions that I have requested as I believe he is actually going to

see a therapist in Miles City for those sessions . . . It certainly appears that he thoroughly enjoys his job and is very motivated to continue working so hopefully we can get him returned immediately and he can continue to be a productive employee as it certainly sounds like he has been in the past.

Id.

35. Dr. Killen also included in her letter to BNSF:

I believe by controlling the spasticity we will better be able to control his gait. If it should be necessary we may also add a single-point cane to help with steadiness during walking . . .

Id.

36. On January 16, 2014, BNSF Field Manager Brett Ouellette, provisionally released Rod to continue working at the Glendive Diesel Shop as a machinist with the restrictions of no walking on uneven surfaces and no climbing. Rod was also directed to follow up with Dr. Killen and to complete physical therapy. Ex. 18.

37. On July 14, 2014, Rod's provisional release was removed, and BNSF's medical department released him to continue working as a machinist with the restrictions of no walking on uneven surfaces and no climbing. Rod continued working for BNSF as its Shop Support/Warehouse Coordinator. Ex. 19.

38. In 2014, Rod had a baclofen pump implanted as part of his treatment plan. Dr. Killen Hrg. Tr. 233:24-234:10.

39. BNSF continued monitoring Rod's fitness for duty. In February and May 2015, BNSF requested and received Rod's updated medical records from Dr. Killen. Ex. 20.

40. On May 11, 2015, Dr. Killen informed BNSF that she was increasing Rod's pump dosage, noting Rod had been improving and had shown increased strength and stability in his gait patterns with each increase and adjustment to his pump dosage. Ex. 21.

41. Rod's healthcare providers noted in May 2016 and November 2016 that Rod's "functional ability continues to improve" based upon his course of medical treatment. Exs. 22, 23.

42. Despite Rod's modified job duties, he was still considered to be in the machinist craft. His informal job title was initially Shop Support. Rod's most recent informal job title was Warehouse Coordinator. Rod Hrg. Tr. 26:7-24; *see also* Exs. 41, 42.

43. As the warehouse coordinator, Rod worked with Brent White, who was in the laborer craft. Rod would typically receive the parts, while White unloaded the trucks and operated the forklift. White also put the parts away while Rod took and received the packing slips. Rod Hrg. Tr. 28:8-29:5.

44. Prior to Rod assuming the duties in the marsh area, that position was held by Ron Eckert, who also had been a machinist. Rod Hrg. Tr. 32:2-8.

Rod's Most Recent Medical Reports

45. Dr. Killen most recently saw Rod on August 7, 2018. Dr. Killen found Rod's gait had improved and she was "very impressed with how his gait looked." Dr. Killen Hrg. Tr. 236:12-237:22. Dr. Killen

46. Dr. Killen's professional opinion based upon her knowledge of Rod's medical history and the work restrictions added to his medical reports by Tanya Guthmiller, FNP, in August 2018, is that Rod can safely perform the modified job duties he had performed for BNSF for ten years. Dr. Killen previously had an opportunity to see Rod's work area shortly after his pump was implanted when she traveled through Glendive on a personal trip. Dr. Killen adjusted his pump at the shop and saw nothing that caused her concern that Rod would be unable to continue to safely work for BNSF. Dr. Killen Hrg. Tr. 241:1-243:20.

47. Rod personally felt improvements in the spasticity in his legs and his stability with use of the baclofen pump. Rod uses walking sticks for stability and uses a wheelchair to avoid fatigue and to rest his legs. Rod's medical condition has not prevented him from hunting, including traveling to Africa for a safari hunting trip; nor has it prevented him from fishing, driving, and attending sporting events.

48. Rod's physical restrictions have remained the same since 2007. Rod Hrg. Tr. 24:2-9. Rod has no restrictions on his ability to operate a forklift, and he is able to work at a desk and at a computer. *Id.*

BNSF's 2016 and 2017 Furloughs

49. BNSF employed approximately 145-150 employees at the Glendive Diesel Shop in early 2016. Schlosser Hrg. Tr. 501:13-17. BNSF directed Schlosser as to how many employees would be displaced and given the option when it ordered furloughs at the Glendive Diesel Shop. As a result of the furloughs, the shop went from a three-shift shop to a two-shift shop, with its service track still running 24/7. Schlosser Hrg. Tr. 501:16-502:4.

50. BNSF ordered furloughs again in the spring of 2017. As a result of the 2016 and 2017 furloughs, the Glendive Diesel Shop went from a shop with 140 to 150 employees to a shop with 65 employees. Schlosser Hrg. Tr. 501:21-502:8.

51. As a result of the 2017 furloughs, the shop went from a two-shift shop to a one-shift shop and required a "complete realignment of the manpower." Schlosser Hrg. Tr. 502:8-15. "[T]he air room job went away, that's when, when we no longer put two – we no longer had to bid machinists at the service track, we no longer had two bid hostlers at the service track." *Id.*

52. The furloughs limited the amount of work performed at the Glendive Diesel Shop. Locomotives were shipped out rather than be serviced at the shop, and the shop was unable to perform a similar number of periodic cycles for maintenance of locomotives mandated by the Federal Railroad Administration as it had performed in previous years. Schlosser Hrg. Tr. 502:20-503:14.

53. The reduction in manpower required Schlosser to conduct a complete realignment of the shop's workforce. Schlosser ". . . abolished almost every job out there and then repositioned them with the, the most people we could get on first shift to work on a locomotive, and then second shift was very small, and third shift was even smaller than that." Schlosser Hrg. Tr. 503:10-24.

54. "Abolished," as used by Schlosser in his testimony was explained as:

So each job that a person, that a craftsman bids, that's their job. It has a job number and it has specific days off. So that's how they bid it, they bid it for the days off.

And so I had to abolish all of those jobs – the majority of them, and reposition them to where I had – still leveling, I still had to keep the shop fluid. We weren't, we weren't shut down, so I had to make sure we still produced an efficient and safe locomotive. So that's when I abolished them and repositioned them with Tuesday Wednesdays off, Wednesday Thursdays off, Thursday Fridays off, Saturday Sundays off, so we had an even flow of rest days.

Schlosser Hrg. Tr. 504:1-13.

55. Employees were required to bid on the newly crafted positions. As a result of the 2016 and 2017 furloughs, the Glendive Diesel Shop lost its craftsmen and half of its supervisory staff. Schlosser Hrg. Tr. 14-25.

56. Beginning with the 2016 furloughs, the demands of the materials shop decreased, as did all other areas of the Glendive Diesel Shop. Schlosser Hrg. Tr. 509:15-510:5. During this same period, BNSF implemented new computer systems to streamline the shop operations. *Id.* at 510:6-25.

57. The staffing of the service track was also affected by the furloughs. The service track has to operate 24/7 with an exempt person under the union agreements. Schlosser wanted to put a machinist on the service track, but could only put one job on the service track 24/7 whereas he previously had the luxury of putting two machinists on the service track. Schlosser consulted with Derek Cargill, General Director of Labor Relations for BNSF, to determine if his decision was contrary to the union agreements and learned it was not. Schlosser Hrg. Tr. 505:22-506:24.

Rod Bids for Machinist Positions in May 2017

58. In April and May 2017, several BNSF employees, including Rod, bid on the newly bulletined positions.

59. On or about May 1, 2017, Rod submitted bids for three positions at the Glendive Diesel Shop: Machinist Lead Relief (Bull. No. 00016); Machinist Lead (Bull. No. 00022); and Machinist (Bull. No. 00024). Rod Hrg. Tr. 36:25-38:21; Ex. 53.

60. Rod bid for the positions out of concern that another machinist, Dennis LeDoux, whose position was being abolished, would bump Rod due to LeDoux having greater seniority than Rod. Rod Hrg. Tr. 37:5-18. Rod understood that

bidding for the machinist position would allow him to continue performing the modified duties he had previously performed for ten years Rod. Hrg. Tr. 38:4-8. Rod also understood the two other machinist positions involved office work, “because from what [he saw], they sat at a desk and they arrived trains and set trains up.” Rod Hrg. Tr. 38:22-25.

61. At some point during the bidding process, Schlosser determined there was not enough sedentary work available to accommodate Rod’s work restrictions. Schlosser notified Ouellette, who prepared a letter informing Rod that he was being removed from service. Schlosser Hrg. Tr. 511:19-513:22.

62. Machinists are the majority of the manpower at the Glendive Diesel Shop. Of the approximately 65 positions left at the shop after the furloughs, 30 of those positions were machinist jobs. Schlosser Hrg. Tr. 505:16-21.

63. The machinist position on the service track could not perform supervisory duties under the union agreement. Schlosser assigned the supervisory duties to the house supervisor and “pushed the leadman position . . . to machinist.” Schlosser Hrg. Tr. 506:7-12.

64. Schlosser ultimately wrote the job description for the Leadman Machinist positions to include traditional machinist duties. Schlosser Hrg. Tr. 507:3-9; *see also* Ex. 107. Schlosser intended the Leadman Machinist positions to assume the responsibility of conducting facility audits that had previously been conducted by service track supervisors. Schlosser Hrg. Tr. 508:1-17. It was also intended that the Leadman Machinist would be working on the service track and assisting exempt employees with safe production and running the shop. *See* Byron Hrg. Tr. 198:20-199:6; Whitmore Hrg. Tr. 360:21-23; 368:8-364:13.

65. The Machinist’s Lead Relief and Machinist Lead position bulletins for bidding listed the duties of the positions as including:

Successful bidder must be capable of handling the duties assigned to the job and any other work assigned in accordance with the agreement of the craft. Qualifications of a successful bidder: require knowledge of locomotive maintenance/troubleshooting procedures to include FRA, AAR and BNSF policies and standards. Must be proficient in coordinating information from several sources. Candidate must have computer skills and possess technical ability to conduct analysis of computer generated reports. Must be able to work well under pressure and tight deadlines. Prepare and conduct job safety briefings with

peers, ensure labor and equipment are position to inspect, test and repair equipment to meet the needs of the daily plan. Roles and responsibilities of a successful bidder: Utilizing computer programs. Execute the power plan while working with MLU/AMLU. Communicate with train master/traincrews/utility crews. Inspect and monitor RC Building work environment. You will be required to work 1 hour of OT prior to the start of your shift on all days you work as Machinist Lead. Maintenance, running repairs, and any other assigned duties in accordance with agreement.

Ex. 53, p.4; Ex. 107.

66. The only distinction between the Machinist Lead Relief and Machinist Lead positions was that the Machinist Lead Relief was to be scheduled Friday and Saturday to work as the Lead and a Machinist for the remaining three days of the work week. *Id.*

67. Schlosser did not create the leadman position with the intention of precluding Rod from working at BNSF. Schlosser did not consider Rod's accommodations when creating the new positions but was focused on ensuring the staffing levels at the shop met the needs of BNSF. Schlosser Hrg. Tr. 509:1-14.

68. Effective May 8, 2017, Rod was awarded the Machinist position (Bull No. 00024). Ex. 53.

69. Schlosser did not believe Rod could work the Machinist Lead positions because he considered the positions to be working leadman positions that would require greater physical work than Rod's work restrictions would allow. Schlosser felt with his ability of placing only one machinist on the service track that the working leadman position would be able to physically assist the machinist working on the service track. Schlosser Hrg. Tr. 515:4-517:10.

70. On May 8, 2017, Schlosser informed Rod that he was being removed from service. Schlosser told Rod that if he "didn't have all [his] restrictions released, [h]e didn't have a job anymore." Rod Hrg. Tr. 39:17-40:17. Schlosser and Chad Voegel, Mechanical Foreman I, met with Rod at the end of his shift and gave him the letter prepared with the assistance of Ouelette informing Rod that he was being placed on medical leave. Ex. 32; Schlosser Dep. Tr. 85:15-86:10.

71. Rod contacted Ouellette and his union representative after speaking with Schlosser. Rod Hrg. Tr. 41:23-42:3. Ouellette told Rod there was nothing he could do about putting him to work at the Glendive Diesel Shop. Rod Hrg. Tr. 42:6-9.

72. On May 17, 2017, Rod's union representative, John Denny, District 19, IAMAW General Chairman, sent a letter to BNSF Shop Superintendent Bret Bridges, whose office is in Alliance, Nebraska, requesting a reasonable accommodation on behalf of Rod. Ex. 26.

The Machinist Leadman Position

73. The Machinist Leadman has traditionally been an administrative and sedentary position that required a large amount of monitoring several computer screens and receiving electronic reports regarding the locomotives and required maintenance.

74. A Machinist Leadman "arrives and departs all of the locomotives coming into [the] yard." Byron Hrg. Tr. 167:10-14. The position is similar to that of an air traffic controller. Byron Hrg. Tr. There are a several computer screens at the leadman's desk where the various lines coming through the yard are visible. The leadman controls the electronic switches so employees working the yard are protected. The leadman can "open up the switch, bring them in, direct them and park them . . . [the leadman] notif[ies] workers" what work needs to be done before cutting the air so the workers can bring the locomotive to the service track." Byron Hrg. Tr. 167:10-169:30. The leadman has the ability to direct the work done by the machinists, electricians and laborers in the yard from the leadman desk. Byron Hrg. Tr. 170:7-15.

75. One of the screens at the leadman desk shows the locomotives coming into the yard. The locomotives are listed with what issues need to be addressed. The leadman is able to see on the screen if there is a defect, what regular maintenance is required and the fuel. Any other necessary information about the locomotive is also seen on the screen. Byron Hrg. Tr. 174:1-8. The leadman is able to direct the crew as to what work must be done. *Id.* 15-17.

76. In addition to reports received by radio or computer alerts, the leadman also receives a CAD, which is BSNF's internal email, at the leadman desk. Byron Hrg. Tr. 175:14-176:21.

77. The hostlers move the unit onto the switch or onto the service track. Byron Hrg. Tr. 169:4-8.

78. Doug Byron worked at the Glendive Diesel Shp for approximately 36 years before retiring in May 2018. Byron worked as a machinist for the last 20 years of his employment with BNSF and as a relief leadman for the last nine months of his employment. Byron Hrg. Tr. 151:1-152:22.

79. Byron worked as the relief leadman for the dayshift. Byron Hrg. Tr. 155:17-22. Byron worked two days as the leadman and the remaining three days he would perform other duties as assigned, which were typically in the shop. Byron Hrg. Tr. 155:23-156:8.

80. Byron also worked as a lead machinist tool man and helped the parts department for two different periods. Byron Hrg. Tr. 156:21-157:1. Byron frequently worked with Rod. Byron observed that Rod was always busy in that role, and he was a good source of information on the computers and ordering, receiving and shipping parts. Byron Hrg. Tr. 157:12-158:14.

81. Byron also assisted in the configuration of the “marsh area,” where Rod worked. Byron observed that Rod had been able to successfully work in the “marsh area” for several years. Byron also believes an individual who used a wheelchair could perform the administrative tasks at a desk without issue and could retrieve parts with the assistance of another employee. Byron Hrg. Tr. 160:11-164:12.

82. The office where Byron worked as a leadman is located “right around the corner” from the “marsh area,” on the ground level of the shop. Byron Hrg. Tr. 166:1-19; see Exs. 55-6, 55-7.

83. Byron did not change brake shoes in the pit, did not climb locomotives, did not make repairs, did not stand on the top of the locomotives, did not check vents or similar functions as a leadman. Byron Hrg. Tr. 171:18-22. Byron did not go out to the service track to check to see if the work was being done. Byron was able to monitor the cameras from his desk and he would talk to the laborers when they came into the service track office and signed off on the work having been completed. Byron Hrg. Tr. 172:14-22. Byron understood that the physical review of the work having been performed was the responsibility of the foreman. Byron Hrg. Tr. 172:23-173:5.

84. Byron spent the entirety of his nine-hour shift working at the leadman desk in the office. Byron Hrg. Tr. 173:11-18.

85. Samuel Burman has worked as a machinist at the Glendive Diesel Shop for 13 years. Burman Hrg. Tr. 307:16-18. Burman was in a position to observe Rod performing his duties in the “marsh area” and believed Rod was doing a “very good job back there.” Burman and other employees referred to Rod as a “warehouse coordinator.” *Id.* 1-16.

86. Burman had observed the shop becoming busier during the weeks leading up to hearing. BNSF had required Burman and other employees to work a mandatory overtime during that period. Burman Hrg. Tr. 309:16-310:10.

87. Burman worked as a leadman for approximately three months at the time of hearing. Burman Hrg. Tr. 311:16-24. In Burman’s experience, it has been “a lot of computer time.” Burman Hrg. Tr. 312:20-24.

88. Similar to Byron, Burman has not performed any physical labor in relation to audits. Each locomotive has blue cards, which are used for daily inspections. In Burman’s experience, hostlers grab the blue card from the leadman desk and put it in the locomotive. Burman Hrg. Tr. 315:14-318:5.

89. Approximately one to two weeks prior to hearing, Schlosser sent an email to the leadman directing them to conduct environmental audits to ensure the work area is clean and free from debris. Burman finds it difficult to perform these audits due to the administrative demands of the leadman position, which frequently requires him to spend the majority of his shift at the leadman desk. Burman Hrg. Tr. 318:3-319:12. Burman received an email from Schlosser the day before he testified directing him and other leadman to perform “pit audits” at the service track and to email the audits to the workers responsible for cleaning the area. Schlosser’s email included “exclamation points.” Burman Hrg. Tr. 319:13-22. Burman has only been able to complete two or three of these audits during the time he worked as a leadman. *Id.* 23-25. There are portions of these inspections that could be performed using the computer and the various cameras in the yard. Burman Hrg. Tr. 321:11-322:3. The leadman is not required to perform the work necessary to address the deficiencies identified in the audit. *Id.* The inspections were previously performed by the foreman. Burman Hrg. Tr. 322:4-8.

90. Gary Whitmore has worked as a machinist at the Glendive Diesel Shop for approximately 14 years. Whitmore Hrg. Tr. 351:22-352:10. During his time

working with Rod, he never had any concerns about Rod's ability to perform his job duties in the materials department. Whitmore Hrg. Tr. 354:6-19.

91. Whitmore has observed that other workers, who have no apparent physical disabilities or limitations, have been performing Rod's duties in the materials department since he was removed from service in May 2017. In fact, several employees have been assigned to perform overtime during the period following Rod's removal from service. Whitmore Hrg. Tr. 354:20-355:5.

92. Whitmore worked as a leadman for approximately five months beginning in May 2017 and before BNSF began bringing workers back from furloughs. Whitmore Hrg. Tr. 355:8-22. Whitmore performed the majority of his duties as a leadman at the leadman desk. Whitmore considered his primary duties as a leadman to keep the flow of traffic moving and operating switches and locks. Whitmore's duties required him to spend the majority of his time on the computer and talking with people by telephone or by radio. Whitmore Hrg. Tr. 355:23-356:16.

93. Whitmore never went out to the yard to put the blue cards or daily inspection cards on the locomotives. The cards were printed at the service track or the workers would pick them up and put them in the locomotive. Whitmore could call hostlers, who would come to his desk to retrieve the blue card from him and put them on the locomotive. Whitmore Hrg. Tr. 357:7-17. Similar to Byron, Whitmore did not perform any physical labor associated with the maintenance of the locomotives. Whitmore Hrg. Tr. 357:18-358:14. In short, Byron "never went to the service track, period, during that time." Id. 13-14.

94. Whitmore received the email Schlosser sent regarding the facilities audit. Whitmore has never performed such an audit. Whitmore has never known that to be one of the duties of a leadman. Whitmore Hrg. Tr. 358:15-359:8.

95. Kevin Mitchell has worked as a hostler laborer with BSNF for approximately one year. As a laborer, Mitchell is responsible for cleaning the bathrooms, shop and collecting the garbage for the facility. As a hostler, Mitchell is responsible for switching engines in and out of the shop and service track, cleaning the cabs and fueling at the service track. Mitchell Hrg. Tr. 378:1-19.

96. Brent White is also a hostler laborer. White is two positions below Mitchell in terms of seniority. Mitchell Hrg. Tr. 378:20-24. White and Mitchell both work the day shift. While Mitchell works as a laborer during his shift, White

works in the materials department. Mitchell's work load has increased with White working in the materials department. Mitchell Hrg. Tr. 383:2-7.

97. Tom Crane has been working as the dayshift leadman since approximately May 2017. Crane has less seniority than Rod. Mitchell Hrg. Tr. 180:2-6; Ex. 31.

98. The Machinist Leadman position has been primarily sedentary since Rod's removal from service. The job involves a large amount of desk work that can easily be performed from a wheelchair or other adaptive equipment.

99. The materials department has had overtime and increased staffing needs since Rod was removed from service. The materials department offers work that could be performed by an individual in a wheelchair or other adaptive equipment.

100. As of June 2018, BNSF was advertising for workers citing the increased demand in freight transportation. BNSF was also offering hiring bonus in an effort to recruit new employees. Ex. 44.

101. Despite these staffing needs, BNSF did not call Rod back to service.

BNSF Illegally Removed Rod From Service due to his Disability

102. BNSF removed Rod from service due to the belief of BNSF personnel that his physical impairment rendered Rod unable to safely and effectively perform the original duties assigned to him as a machinist or the duties required of the Machinist Leadman position. BNSF's decision to remove Rod from service in May 2017 was not pretext for anything else.

103. Rod was qualified to perform the essential functions of the Machinist Lead positions with an accommodation. While Rod's physical disability limited his ability to perform the more physical requirements of the positions, those duties were not essential functions and could have been altered to accommodate Rod. *See Ex. 46 (Margot Luckman, M.S., C.R.C., L.C.P.C, C.M., Rehabilitation Assessment Report).*

104. Accommodating Rod would not have been unreasonable given the years of service he had with BNSF, which, under the CBA, requires consideration of the long and faithful service rule. Further, given the size and resources available to BNSF, it would not have been unduly burdensome for BNSF to accommodate Rod in accordance with Rule 24, as well as its previous practice of aiding those long-term

employees, who through physical injury or impairment, are unable to perform their assigned duties without such an accommodation.

Rod's Damages

105. Rod was harmed as a result of BNSF's decision to remove him from service. BNSF's only reason for removing Rod from service was his disability.

106. Rod is limited in what kind of work he can seek due to his desire to remain in Glendive where he and his family have lived since 1994. Rod's wife has a job she enjoys and values and where they own their home and have raised their family. Tracey Rod Hrg. Tr. 90:14-91:22.

107. BNSF's decision to remove Rod from service due to his disability has caused him embarrassment and increased stress due to the financial strain that has resulted. Rod's interpersonal relationships with other BNSF employees has been adversely affected, with several people Rod once counted as friends and co-workers avoiding him in public. Rod Hrg. Tr. 55:1-56:12.

108. At the time Rod was removed from service, he was earning an average of \$2,542.50 on a bi-weekly basis. See Ex. 48, p. 4 of 5¹.

109. Rod was approved for Railroad Retirement Board (RRB) disability benefits in the monthly amount of \$3,418.00 effective May 8, 2017 and continuing in perpetuity. See *Order on Evidentiary Issues Raised at Hearing* (04/01/2019). Rod's RRB disability benefits should offset the damages awarded in this matter. See Addendum A.

110. There have been 67 pay periods since the date of Rod's removal from service and the date of this decision. Rod's lost wages and lost fringe benefits, which are valued at 33.17% of his wages, totals \$113,863.91. See Ex. 45, p. 6. See also Addendum A.

111. The interest on those lost wages is \$11,293.63, calculated at a rate of 7.75% per year, for a total of \$125,157.63.²

¹ The average was determined by adding Rod's bi-weekly wages by ten pay periods.

² Mont. Code Ann. § 25-9-205(1)(a) provides that interest payable on judgments is equal to the rate for bank prime loans on the date the judgment was entered, plus 3%. As of the date of this

112. Rod is entitled to an award of four years for front pay and lost benefits in the amount of \$174,824.00, accounting for the offset of Rod's monthly RRB disability benefits in the amount of \$3,418.00. The present value is \$159,815.26. See Addendum A.

113. Rod suffered emotional distress as a result of BNSF's discriminatory conduct. \$100,000.00 represents a reasonable amount of compensation for the discrimination Rod suffered.

114. Imposition of affirmative relief, which requires BNSF to ensure that its employees and management are thoroughly trained with respect to prohibitions against disability discrimination is appropriate. Affirmative relief also requires that HRB ensure BNSF has acted in accordance with the results of trainings ordered in previous decisions issued by the Office of Administrative Hearings.

IV. DISCUSSION³

Montana law prohibits discrimination in employment because of physical or mental disability. Mont. Code Ann. §49-2-303(1)(a). An individual has a physical disability when he or she has a physical impairment that substantially limits one or more major life activities, a record of such an impairment, or a condition regarded by the employer as being such an impairment. Mont. Code Ann. §49-2-101(19)(a)(I) through (a)(iii). Discrimination based on physical disability includes failure to make a reasonable accommodation required by an otherwise qualified person who has a physical disability. An accommodation that would require an undue hardship is not a reasonable accommodation. Mont. Code Ann. §49-2-101(19)(b). Work is a major life activity. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 304, 886 P.2d 421, 428; see also *McDonald v. Dept. of Env. Quality*, ¶139, 2009 MT 209, 351 Mont. 243, 214 P.3d 749.

The Montana Supreme Court regularly looks to federal statutes and regulations when interpreting provisions of the MHRA. See *McDonald v. Dept. of Environmental Quality*, 2009 MT 209, 351 Mont. 243, 214 P.3d 749, P 39 n. 8 (at

decision, the bank prime loan interest rate was 4.75%. Therefore, the interest rate for the judgment entered in this matter is 7.75%.

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.

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

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

In a case such as this where there is direct evidence of discrimination, the Montana Supreme Court has held the *McDonnell Douglas* test is unnecessary.

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

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

The court went on to hold:

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

Id. (citations omitted).

A. ROD IS “OTHERWISE QUALIFIED” FOR THE MACHINIST POSITIONS WITH OR WITHOUT AN ACCOMMODATION

BNSF removed Rod from service in May 2017 due to the determination by BNSF personnel that Rod could not safely or effectively perform a machinist’s job duties due to his physical disability. Given that the reason for Rod’s removal from service in May 2017 is not disputed, it must now be determined whether Rod’s removal from service constitute illegal discrimination. *See Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 621-22, 83 L.Ed. 2d 523 (1985); *Reinhardt v. Burlington N. Santa Fe R.R.*, 846 F. Supp. 2d 1108, 1112 (D. Mont. Feb. 6, 2012). Ultimately, the determinative issue is “. . . whether the employee is ‘otherwise qualified’ with or without a reasonable accommodation.” *Laudert v. Richland County Sheriff’s Dep’t*, 2000 MT 218, ¶23, 301 Mont. 114, 7 P.3d 386 (citing *Reeves* at ¶16).

1. *Rod is qualified for the machinist positions.*

In determining if the employee is “otherwise qualified,” two criteria are considered: (1) "whether [the plaintiff’s] impairment prevented [him] from performing the essential functions of [his] job," and (2) "[i]f so, . . . whether [he] might have nevertheless been able to perform those functions if the [employer] provided [him] a reasonable accommodation." *Robert v. Bd. of Cnty. Comm’rs*, 691 F.3d 1211, 1216 (10th Cir. 2012).

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.” The second step is to determine whether the person with the disability or impairment, who is also “otherwise qualified,” requires an accommodation to perform an essential function. 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).

Rod, by virtue of the number of years he worked for BNSF and the lack of formal and/or informal discipline, had the requisite background, work experience, skill, training, good judgment and other job related requirements to be “otherwise qualified” for the machinist positions. Further, the obvious respect and regard Rod’s

co-workers have for his knowledge and expertise was obvious during their testimony at hearing. Rod clearly took his job duties seriously and was a valuable asset for BNSF at the Glendive Diesel Shop. The next issue is whether Rod, as an “otherwise qualified” individual with a disability, requires an accommodation to perform the essential functions of the machinist positions. *See* 42 U.S.C. §12111(8). However, before that issue may be addressed, it is necessary to determine the essential functions of the machinist positions.

2. *The physical duties described by Schlosser are not essential functions of the machinist positions.*

BNSF contends Rod cannot perform the essential functions of the machinist lead and/or machinist positions because the work restrictions required by his disability prohibit him from climbing locomotives, rungs or rung-type steps; working on unprotected heights; and working or walking on sharply angled group or on a large size ballast. *See* Ex. 12. BNSF argues it accommodated Rod for ten years but was unable to continue doing so due to the staffing changes at the Glendive Diesel Shop as a result of economic conditions beyond the control of BNSF.

The only duty listed in the bulletined leadman machinist positions that is at issue is the duty to “[i]nspect and monitor RC building work environment.” Ex. 53. The remaining duties require knowledge of the computer programs utilized by BNSF and its policies and procedures -- all of which are well within Rod’s expertise and well within his medical restrictions. Therefore, the crux of the issue is whether the physical demands of the job, as set forth in the job bulletin, are an essential function of the position.

“Essential functions’ means the fundamental job duties of the employment position the individual with a disability holds or desires. ‘Essential functions’ does not include the marginal functions of the position.” 42 U.S.C. § 12926(f). The identification of essential job functions is a “highly fact-specific inquiry.” *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 888, fn. 12.

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

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).

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. See *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 863-64 (9th Cir. 2009). "However, this analysis 'is not intended to second guess the employer or to require him to lower company standards. . . . Provided that any necessary job specification is *job-related, uniformly enforced, and consistent with business necessity*, the employer has a right to establish what a job is and what is required to perform it'." *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1262 (quoting *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003)(emphasis added).

Consequently, a distinction must be made between the requirements of a given position and the essential functions of that position. *Coneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318, 329 (3rd Cir. 2003). “Whether a particular function is essential is a factual determination that must be made on a case-by-case basis.” *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 279 (3rd Cir. 2001 (*quoting* EEOC Interpretive Guidance on Title I of the ADA, 29 C.F.R. pt. 1630, App. 1630.2(n)). “[T]he essential function inquiry is not conducted on an individual’s hire day. ‘The ADA does not limit an employer’s ability to establish or change the content, nature, or functions of a job’.” *Hennagir*, 587 F.3d at 1262.

BNSF employees are required to perform work only within their craft. Consequently, there are duties only a machinist can perform, only a laborer can perform, and so on. As such, deference must be given to that fact when considering the essential functions of the machinist position. See 29 C.F.R. § 1630.2(n)(2).

General Foreman Gabe Schlosser testified the leadman position bid on by Rod was a “working leadman position” and the intention was to have the working leadman available to help the machinist working the service track when that person became busy. Schlosser Hrg. Tr. 515:8-516:13. The working leadman would be expected to do such tasks as taking wheel measurements for the machinists underneath the locomotive and writing them down, assisting in troubleshooting and assisting in handing hoses to the service track machinist. Schlosser Hrg. Tr. 516:8-13. Schlosser further testified it was the intention of BNSF to have the leadman performing facility and service track audits on a regular basis. Schlosser testified those audits could not be adequately performed by camera, as contended by Rod. Schlosser Hrg. Tr. 518:19-519:15.

Gene Burman, who has also worked as a leadman machinist since May 2017, confirmed the position requires “a lot of computer time . . . it’s not hard work; it’s just a computer.” Burman described the position as requiring a lot of “desk work.” Burman Hrg. Tr. 312:2-313:24. Burman described the primary functions of the leadman position as including a lot of desk work:

The leadman position is . . . we run the, run the switches, protect the people on the service track.

We sit there at the computers, and they’ve got these messages, these CAD messages from different sections, like Dickinson, Forsyth dispatchers - (inaudible) - train going to power through. So then you need to look on your computer, see how the fuel is, what the defects are,

do you believe you need to bring this train on, communicate so the railroad runs fluid.

But in the same sense, you've still got to be there running the switches and making sure your people are safe.

You know . . . it's a lot of, a lot of computer time. It's a lot of – you know, you've got to have your radio with you constantly. If you need to use the restroom, take the radio with you, your phone. It's not hard work; it's just at a computer.

Burman Hrg. Tr. 311:16-313:1.

Burman also described the work station of the leadman as including a series of computer screens where the leadman can control the switches, check the trains defects, determine which train is coming through and which train requires maintenance. Burman also noted that he can observe the service track workers on one of the screens, which he does to ensure the workers are doing what they're supposed to be doing. Burman Hrg. Tr. 313:2-314:2. Burman opined that, based upon his experience, Rod would be able to do the job from his wheelchair. Burman Hrg. Tr. 315:4-13.

Gary Whitmore, who has also worked as a leadman for approximately five months beginning in May 2017, confirmed that he did not perform any work in that role outside of sitting at a desk. Whitmore Hrg. Tr. 355:23-356:1. Whitmore testified he never worked on locomotives; never put the blue cards or daily inspection cards on the locomotives; never physically retrieved or delivered parts in the shop area; never flagged the ends of the locomotives; never went to the service track to assist workers in performing maintenance on the locomotives; and never performed a facilities audit, during his term of service as a machinist leadman. Whitmore Hrg. Tr. 356:2-358:28. Whitmore described the primary function of the leadman position as keeping the flow of traffic moving and operating switches and locks, all of which he performed from his desk. Whitmore Hrg. Tr. 356:5-16.

John Denny testified that, when he worked at the Glendive Diesel Shop, the leadman position “consisted of being in the office, routing trains;” “at the time I was working at the railroad, they never left the desk.” Denny Hrg. Tr. 119:2-13, 121:14-17. Doug Byron testified he spent the entirety of his shift on most days working as a leadman at his desk. Byron Hrg. Tr. 177:4-178:21. Byron further testified that he

has observed Tom Crane, who has been working the dayshift leadman position since May 2017, working at his desk. Byron Hrg. Tr. 179:14-180:17.

Brent White, who has worked as a BNSF hostler laborer for approximately 20 years and who has worked in the materials department for approximately five years, confirmed that he has rarely seen the dayshift leadman performing any work on the shop floor or out in the yard. White described the leadman position as being a desk job “in real life.” White Depo. Tr. 29:17-30:14. When questioned by counsel at his deposition, White had the following exchange:

Q. For the leadman job that you talked about, what leadman job was that?

A. Machinist leadman . . . you’re in charge of the – the locomotives – the trains that come into town. You . . . tell . . . your hostlers that - like me, that move the locomotives, your machinist, your electricians that are working on that set of locomotives what they need to do and stuff like that. They sit at a desk for eight hours. They’re supposed to be working leadman, but they sit at a desk for eight hours. And I even told Terry [Rod], why don’t you bid that job? You could see where this job is going.

Q. Right.

A. You know, why? And he didn’t . . .

Q. So the leadman job that you’re describing, even though it was supposed to be a working man, was basically a desk job?

A. On day shift. The other two - - you know, there’s three shifts. The other two actually did go outside and walk out there and talk to the employees, get on the locomotives. The day leadman job, he doesn’t he sits at a desk.

White Depo. Tr. 29:17-30:14.

White confirmed that Tom Crane, who currently holds the position bid on by Rod, works at his desk throughout the majority of his shift. *Id.* White acknowledged that the dayshift leadman position is not “supposed to be” a desk job, “[b]ut in real

life it is,” and had been for the 18 months between Rod’s removal and White’s deposition in July 2018. White Depo. 32:14-19.

As noted by White, there is a stark contrast between the duties outlined in the bulletined job posting and the “real life” duties of the position. While Schlosser may have intended the leadman position to include more physical duties, the reality is that the position is primarily sedentary in nature. This is particularly true with the dayshift position, which is the position bid on by Rod. Not one witness who had previously or who currently works as a leadman described the position as a physically demanding position. Not one witness testified that he had ever been required to perform or had observed the dayshift leadman perform locomotive repairs; pick up or deliver the inspection cards to the service track or other areas of the shop; pick up or deliver materials or parts to other workers; assist in the service pit; flag locomotives; lace air hoses; or anything else that would be described as physically taxing. The consensus amongst the men who either performed the dayshift leadman position or were in a position to observe the worker serving in that position is that it could easily be performed by Rod, even with his physical limitations, with little or no difficulty.

BNSF’s position is also undercut by the email sent by Schlosser a week or two prior to hearing adding visual inspections to the leadman’s duties. From Rod’s removal from in service in May 2017 and the several months prior to hearing, the functions described as being essential by BNSF were not being performed on a regular basis by any worker in the leadman machinist position. It would appear that fact escaped BNSF’s notice given that Schlosser only addressed it just prior to hearing. Given the little amount of time spent on the functions described as essential by BNSF and the lack of consequence for those functions not having been performed, the duty to “ [i]nspect and monitor RC building work environment,” is not an essential function of the leadman position.

Finally, and particularly troubling, is BNSF’s failure to consider Rule 24, the long and faithful service rule, of the CBA. BNSF had a duty under the CBA to consider how to enable Rod to remain in a machinist role. The evidence of record suggests BNSF gave little to no consideration of this rule before removing Rod from service. One could consider Schlosser’s overture to Whitmore, who is the local union chairman, when he was rewriting the job description for the leadman position as demonstrating a consideration of Rule 24. However, neither Whitmore nor Schlosser testified that either the rule or Rod were specifically mentioned in the conversation. The conversation appeared to consist merely of Schlosser asking Whitmore if he could rewrite the position to make it a working leadman position, and Whitmore confirming the union had no issue with the position being re-written. Whitmore

testified the union would have typically filed a grievance on Rod's removal from service. Whitmore explained that the union tends to "back off" when separate claims such as a human rights complaint are filed by the worker. So, the fact the union did not pursue a grievance on what appears to be a violation of Rule 24 is not dispositive as to whether BNSF acted contrary to this particular term of the CBA.

The substantial and credible evidence of record shows the dayshift leadman position is primarily a sedentary position with the physical labor being a function of the position but not an essential function. The credible testimony of the various BNSF workers who testified establishes Rod could perform the duties from his wheelchair with little or no difficulty. It is therefore determined that the duty to "[i]nspect and monitor RC building work environment" is not an essential function of the machinist positions at the Glendive Diesel Shop.

BNSF submitted *Bilinsky v. Am. Airlines, Inc.*, 2019 U.S. App. LEXIS 19101 (7th Cir.) as supplemental authority during post-hearing briefing. BNSF argues the facts of *Bilinsky* are substantially similar to the facts in this case. In *Bilinsky*, the plaintiff worked for the employer since 1991 in a variety of roles. The plaintiff had health issues that required accommodation by the employer, which included working from home. After a merger in 2013, the employer decided that all workers needed to be present in its Dallas office. The plaintiff lived in Chicago and did not want to relocate to Dallas due to her health issues. In May 2015, after allowing the plaintiff to work remotely, the employer notified her that she would have to relocate to Dallas or leave her job. On May 1, 2015, the employer discharged the plaintiff.

The court found the plaintiff was not a "qualified individual" because she was unable to perform the essential functions of the position. The court acknowledged that she had been able to successfully perform her job duties when allowed to work remotely, but the essential functions of the job changed as a result of the merger, namely all employees, not just the plaintiff, were required to work in the office. The court noted, "Just as an employer is not required to create a new position or strip a current job of its essential functions [under the ADA], an employer is not required to maintain an existing position or structure that, for legitimate reasons, it no longer believes is appropriate." *Id.* (internal quotation and citation omitted).

Rod's argument that *Bilinsky* is not helpful to BNSF's case is well taken. The court cautioned that it was important to "look to evidence of the employer's actual practices in the workplace." *Id.* at *9 (citation omitted). In Rod's case, the duties were shared between he and White, with no issue. The duties continue to be shared as evidenced by the fact that BNSF assigned another employee to perform warranty

work, which Rod performed previously without issue, in an effort to help White⁴. The actual practice of the shop, as testified to by current and former BNSF employees, would allow Rod to continue in his modified position or as the leadman machinist on a full-time basis without interruption to BNSF's operations or difficulties for its employees.

The substantial and credible evidence of record shows Rod is an "otherwise qualified" individual who can perform the essential functions of the machinist leadman positions with an accommodation.

B. BNSF FAILED TO REASONABLY ACCOMMODATE ROD

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

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

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

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

⁴It is unclear why BNSF did not call Rod back to service when it began offering significant hiring bonuses for new employees and determined it was necessary to assign another employee to perform the warranty work that Rod previously performed.

F.3d 328, 334-34 (2nd Cir. 1995) and *Ralph Lucent Techs., Inc.*, 135 F.3d 166, 172 (1st Cir. 1998).

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

(1) the nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions or outside funding; (2) the overall financial resources of the employer’s facility or facilities involved in the provision of the accommodation, the number of persons employed at such a facility, and the effect on the employer’s expenses and resources; (3) the overall financial resources of the employer as a whole, the overall size of the business with respect to the total number of employees, and the number, type and location of its facilities; (4) the type of operation or operations of the employer, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or physical relationship of the facility or facilities in question to the employer, and (5) the impact of the accommodation upon the operation on the facility involved, including the impact on the relative ability of other employees to perform their duties and the impact on the facility’s ability to conduct business. Consequently, an employer may not simply assert that an accommodation will impose an undue hardship on its business and thereby be relieved of the duty to provide accommodation. Rather the employer must prove by a preponderance of the evidence that the accommodation will in fact impose undue hardship on the business.

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

BNSF argues that Rod has failed to show a reasonable accommodation exists that would allow him to perform the essential functions of the machinist position. BNSF notes Rod reported to RRB that the position requires walking on uneven surfaces, staging and collecting materials, and receiving and stocking locomotive parts. BNSF argues that providing Rod with the accommodation he seeks, namely that he not be required to perform the more physically demanding duties of the machinist position, would, in effect, create a part-time job for him, which BNSF cannot do under the CBA. BNSF contends that the machinist position has changed significantly over the years and due to technological advances and the business needs of BNSF, the machinist position is not the sedentary position it once was.

Rod counters that BNSF was capable of providing him an accommodation that allowed him to remain in the machinist position for ten years by assigning him “other duties.” Rod further argues that the position he bid for and was awarded in May 2017 was primarily sedentary for several years, including the period between his removal from service and the weeks prior to hearing when Schlosser sent an email to BNSF personnel advising them that they were required to perform regular audits.

Those witnesses who currently work for BNSF testified that the warehouse area continues to be busy and has required overtime, as well as additional personnel to cover the duties previously performed by Rod. Burman testified that since May 2017 that BNSF has been training another individual on warranty work to assist White and additional workers have been called into “catch up” White. Burman noted that another machinist is serving as the tool room attendant. Burman further testified that the new laborer hired to work in the materials department is doing the type of work Rod had previously performed. Burman Hrg. Tr. 306:17-309:12. Burman also noted that workers in the materials department have frequently been called upon to work overtime since Rod was removed from service. Burman Hrg. Tr. 309:16-310:15. Burman opined that the materials department would benefit greatly from having Rod return to his former duties based upon his expertise and knowledge of the tools and equipment. Burman Hrg. Tr. 310:20-311:15.

BNSF’s argument is not persuasive. The evidence shows that it was able, without issue, to accommodate Rod for ten years. The evidence further shows the machinist leadman position has traditionally been a sedentary position. The function of the position has been primarily desk work, with few physically taxing duties. The work space is set up to allow the machinist to monitor the tracks and the locomotives, which has been used by other machinists during the period in question without issue. *See Ex. 55.* No witness familiar with the work area seemed to think it would be an issue for Rod to work in the space typically used by the machinist leadman or to return to his former duties as the warehouse coordinator.

BNSF is a large, national freight company that employs thousands of people at various locations throughout the United States. While BNSF suffered some economic losses during the period in question, its financial status is not so precarious that it cannot afford to accommodate Rod. Its operational structure allows for another person to work within Rod’s area and to assist him with the more physical demands of the job as they may arise. As it has done in the past, hostler laborers are capable of getting the blue cards, and Rod can perform the audits using the computers as other leadman have done. Further, Rod is mobile with his walking sticks and wheelchair, and he should be capable of performing some of the physical

tasks, as he has in the past. Given the testimony of Rod's co-workers, it appears that there would be little rancor amongst other BNSF employees if he were to be returned to service. Frankly, it is clear that several BNSF employees would appreciate having his expertise back in the shop.

The substantial and credible evidence of record shows that BNSF failed to reasonably accommodate Rod when it removed him from service in May 2017.

C. ROD IS ENTITLED TO DAMAGES

1. *Back Pay*

In employment discrimination, once the charging party has established that his 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 at the rate of 8.25% per year 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). There is no offset for unemployment insurance benefits received against wage loss recovery resulting from illegal discrimination. *Vortex Fishing Sys. Inc. v. Foss*, ¶ 28, 2001 MT 312, 308 Mont. 3, 38 P.3d 836. *See also Kauffman v. Sidereal Corp.*, 695 F.2d 343, 347 (9th Cir. 1982), quoting *Nat'l Labor Rel'ns Bd. v. Gullett Gin Co.*, 340 U.S. 361 (1951).

BNSF bears the burden proving that Rod failed to mitigate his damages. *Cromwell v. Victor Sch. Dist. No. 7*, 2006 MT 171, ¶25, 333 Mont. 1, 140 P.3d 487.

To satisfy this burden, BNSF must prove “that, based on undisputed facts in the record, during the time in question there was substantially equivalent jobs available, which [Rod] could have obtained, and that [Rod] failed to use reasonable diligence in seeking one.” *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994).

BNSF has not produced sufficient evidence showing Rod has failed to mitigate his damages. Rod owns a home in Glendive, Montana, where he resides with his family. Rod’s wife has a job in Glendive, which she wishes to keep until she retires. Rod has no desire to leave Glendive. Moreover, there are no equivalent jobs available in Glendive that Rod could have obtained using reasonable diligence. Clearly, BNSF employment is prized in Glendive and the surrounding area, and there is little to no chance that Rod could have obtained equivalent employment without having to relocate hundreds of miles away, which he is not required to do under the law.

Rod has shown he is entitled to back pay damages in the amount of \$113,86.91, which represents 67 bi-weekly pay periods with a bi-weekly wage of \$2,542.50 and lost fringe benefits. This award is reasonable likely to make Rod whole for the discrimination he experienced at BNSF. Rod is also entitled to interest on the lost wages through the date of the decision at the rate of 7.75% per annum, which amounts to \$11,293.72 for a total of \$125,157.63. *See* Addendum A.

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 his 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).

Reinstatement appears not to be a viable remedy in this case given the hard feelings between Rod and BNSF management. Rod has repeatedly expressed a desire and an interest in returning to work for BNSF. It is not beyond the realm of possibility that Rod's return to service would be a successful venture for both parties.

If the parties determine Rod is able to return to work for the employer despite these issues, he should be returned to service no later than January 1, 2020. This would allow BNSF to make the necessary accommodations that would allow Rod to return to his employment.

However, if Rod's return is not possible, front pay will therefore be appropriate in this case. Rod seeks front pay up to his achieving 65 years of age, when he intended to retire from BNSF.

"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).

While Rod's argument is understandable, providing for front pay up to the point he reaches the age of 65 years is too speculative to be a reasonable award of damages. Awarding four years of front pay as requested by Rod would be unduly speculative or not supported by the record. It would also result in an unjust windfall for Rod. Therefore, Rod is entitled to an award of \$174,824.00 in front pay damages, including lost fringe benefits, the total of which accounts for the offset by Rod's receipt of monthly RRB disability benefits in the amount of \$3,418.00. The present value of this award is \$159,815.26. *See* Addendum A.

3. *Emotional Distress*

Emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. 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.

The severity of the harm governs the amount of recovery. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836. From a factual standpoint, the instant case is similar to hearing officer decision issued in *Louis M. Mele v. BNSF Railway Company*, OAH Case No. 2186-2005 (01/13/2006). In *Mele*, the Hearing Officer determined the Charging Party, who had been disqualified from a

shop craft laborer position due to a perceived disability had suffered a loss of self esteem and his actual financial losses that resulted from his repeated applications entitled him to an emotional distress award of \$7,500.00.

In the hearing officer decision issued in *Matt O'Dea v. BNSF Railway Company*, OAH Case. No. 2091-2005 (issued 05/15/2007), the Hearing Officer determined an emotional distress award of \$25,000.00 was warranted after finding the withdrawal of a conditional offer of employment due to the perceived disability of obesity cost the Charging Party not only the loss of another job but adversely affected his self esteem. Similarly, in *Chad Cringle v. BNSF Railway Company*, OAH Case No. 1233-2009 (issued 09/02/2009), the Hearing Officer found BNSF's refusal to hire the Charging Party due to the perceived disability of obesity caused emotional distress that warranted an award of \$25,000.00. See also *Mitchell Reinhardt v. BNSF Railway Company*, OAH Case No. 748-2008 (remand order issued 03/23/2017)(refusal to hire despite the successful completion of several weeks of training warranted \$10,000.00 emotional distress award).

While the cases cited above focus on BNSF's pre-employment decisions based upon perceived disabilities, the facts are similar to the facts in this case in that BNSF failed to consider whether Rod could actually perform the machinist job duties, including the leadman machinist position, before it subjected him to the adverse employment action of removing him from service in May 2017. BNSF clearly and admirably accommodated Rod for ten years, but then it acted with very little consideration of whether he could continue to perform "other duties as assigned" of the machinist position or the sedentary duties that were really the duties of the leadman machinist position.

In this case, Rod not only suffered emotional distress as an individual discriminated against due to his disability that included upset, stress, sadness and frustration, but he had to observe and deal with the emotional distress of his wife and children, all of whom had their lives upended as a result of BNSF's discriminatory actions. Rod worked for BNSF for several years and was left with the feelings of an individual readily dismissed by an employer for whom he hoped to work for several more years.

The credible evidence at hearing demonstrated that Rod suffered substantial emotional distress as a result of his being removed from service after so many years of faithful service to BNSF. Rod testified he has felt humiliated and embarrassed by the possibility that he could not provide for his family. Rod and his wife both described having strained relationships with BNSF employees, many of whom they had

counted as close friends, after Rod's removal from service. The strain of Rod's unemployment on him individually and his family was readily apparent at hearing. BNSF's actions have had a profound effect on Rod's mental well-being, his interpersonal relationships and his pride.

Rod has requested \$500,000.00 in emotional distress damages. While BNSF's actions have had an adverse effect on Rod and those he loved, Rod has not suffered the type of emotional distress that would make such an award reasonable. Rod has not required mental health counseling, nor did he offer evidence showing that his emotional well being has been irreparably harmed by BNSF's actions. An award of \$100,000.00 is more reasonably likely to address the emotional distress Rod has suffered since his removal from service in May 2017.

4. *Affirmative Relief*

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the Respondent's future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a). The circumstances of the discrimination in this case mandate imposition of particularized affirmative relief to eliminate the risk of any further violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1). This relief should include injunctive relief against BNSF and appropriate training to ensure that no further acts of discrimination based upon a person's disability occurs.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-512(1).

2. Burlington Northern Santa Fe Railway Company, illegally discriminated against Terry Rod on the basis of disability when it removed him from service in May 2017 and failed to reasonably accommodate his disability.

3. Terry Rod is entitled to recover \$174,824.00 in front pay, the present value of which is \$159,815.26, to address the suffering he experienced as a result of the discriminatory conduct of Burlington Northern Santa Fe Railway Company.

4. Terry Rod is entitled to recover \$125,157.63 in back pay, which is reasonable to address his suffering as a result of the discriminatory conduct of Burlington Northern Santa Fe Railway Company, which includes \$11,293.72 in interest.

5. Terry Rod is entitled to recover \$100,000.00 for the emotional distress she suffered as a result of the illegal discrimination. McEachern is entitled to post judgment interest on all of these amounts.

6. The circumstances of the discrimination in this case mandate the imposition of affirmative relief in order to eliminate the risk of future violations of the Montana Human Rights Act. Mont. Code Ann. § 49-2-506(1).

7. For purposes of Mont. Code Ann. § 49-2-505(8), Terry Rod is the prevailing party.

VI. ORDER

1. Judgment is granted in favor of Terry Rod and against Burlington Northern Santa Fe Railway Company as it discriminated against him on the basis of disability violation of the Montana Human Rights Act.

2. Within 60 days of the date of this decision, Burlington Northern Santa Fe Railway Company, shall pay to Terry Rod the sum of \$399,981.63, representing \$299,981.63 in economic losses sustained and \$100,000.00 in emotional distress damages.

3. The department permanently enjoins Burlington Northern Santa Fe Railway Company from discriminating against any person on the basis of disability.

4. Burlington Northern Santa Fe Railway Company must consult with an attorney with expertise in human rights law to ensure that its policies and procedures are sufficient to identify, investigate and resolve employee complaints of discrimination. This review should also include training for its employees to prevent and timely remedy disability discrimination. Under the policies, the employees and managers of Burlington Northern Santa Fe Railway Company will receive information on how to report complaints of discrimination. The plan and policies must be approved by the Montana Human Rights Bureau.

5. The Montana Human Rights Bureau shall review its previous dealings with Burlington Northern Santa Fe Railway Company to ensure that it has acted in accordance with any plans or policies previously approved by the Montana Human Rights Bureau. Burlington Northern Santa Fe Railway Company shall comply with all conditions of affirmative relief mandated by the Montana Human Rights Bureau.

DATED: this 27th day of November, 2019.

/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: Terry Rod, Charging Party, and his attorneys, Jon M. Moyers and Kathryn Troidahl,; and Burlington Northern Santa Fe Railway Company, Respondent, and its attorney, Michelle Friend:

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) and (4).

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. Please contact Nordhagen Court Reporting for a copy of the transcript.

ROD.HOD.CHP

Addendum A

		<u>Backpay</u>	
		<u>Bi-Weekly</u>	
Wages:	\$	2,542.50	
Estimated Benefits:	\$	847.50	
RRB Offset:	\$	1,709.00	(Effective 5/8/2017)
Start Date:		5/1/2017	
End Date:		11/27/2019	
Interest Rate:		7.75%	(H.15 + 3%)
Interest Alone:	\$	11,293.72	
Total with Interest:	\$	125,157.63	

		<u>Front Pay</u>	
Total Award:	\$	174,824.00	
Years:		4	
Periods Per Year:		26	
Bi-Weekly Wages + Benefits:	\$	3,390.00	
RRB Offset:	\$	1,709.00	
Net Periodic Payment:	\$	1,681.00	
Discount Rate:		2.25%	
Periodic Rate:		0.086%	
Present Value (Lump Sum):	\$	159,815.26	
Discount Approx. = 10-yr. Treasury 1-yr. Avg.			

Front Pay Calculations

<u>Pay Date</u>	<u>Net Pay+Benefits</u>	<u>Interest</u>
May 11, 2017	\$ 2,197.48	\$ 433.93
May 25, 2017	\$ 1,681.00	\$ 326.94
June 8, 2017	\$ 1,681.00	\$ 321.95
June 22, 2017	\$ 1,681.00	\$ 316.95
July 6, 2017	\$ 1,681.00	\$ 311.95
July 20, 2017	\$ 1,681.00	\$ 306.96
August 3, 2017	\$ 1,681.00	\$ 301.96
August 17, 2017	\$ 1,681.00	\$ 296.96
August 31, 2017	\$ 1,681.00	\$ 291.96
September 14, 2017	\$ 1,681.00	\$ 286.97
September 28, 2017	\$ 1,681.00	\$ 281.97
October 12, 2017	\$ 1,681.00	\$ 276.97
October 26, 2017	\$ 1,681.00	\$ 271.98

Front Pay Calculations

<u>Pay Date</u>	<u>Net Pay+Benefits</u>	<u>Interest</u>
November 9, 2017	\$ 1,681.00	\$ 266.98
November 23, 2017	\$ 1,681.00	\$ 261.98
December 7, 2017	\$ 1,681.00	\$ 256.99
December 21, 2017	\$ 1,681.00	\$ 251.99
January 4, 2018	\$ 1,681.00	\$ 246.99
January 18, 2018	\$ 1,681.00	\$ 241.99
February 1, 2018	\$ 1,681.00	\$ 237.00
February 15, 2018	\$ 1,681.00	\$ 232.00
March 1, 2018	\$ 1,681.00	\$ 227.00
March 15, 2018	\$ 1,681.00	\$ 222.01
March 29, 2018	\$ 1,681.00	\$ 217.01
April 12, 2018	\$ 1,681.00	\$ 212.01
April 26, 2018	\$ 1,681.00	\$ 207.02
May 10, 2018	\$ 1,681.00	\$ 202.02
May 24, 2018	\$ 1,681.00	\$ 197.02
June 7, 2018	\$ 1,681.00	\$ 192.03
June 21, 2018	\$ 1,681.00	\$ 187.03
July 5, 2018	\$ 1,681.00	\$ 182.03
July 19, 2018	\$ 1,681.00	\$ 177.03
August 2, 2018	\$ 1,681.00	\$ 172.04
August 16, 2018	\$ 1,681.00	\$ 167.04
August 30, 2018	\$ 1,681.00	\$ 162.04
September 13, 2018	\$ 1,681.00	\$ 157.05
September 27, 2018	\$ 1,681.00	\$ 152.05
October 11, 2018	\$ 1,681.00	\$ 147.05
October 25, 2018	\$ 1,681.00	\$ 142.06
November 8, 2018	\$ 1,681.00	\$ 137.06
November 22, 2018	\$ 1,681.00	\$ 132.06
December 6, 2018	\$ 1,681.00	\$ 127.07
December 20, 2018	\$ 1,681.00	\$ 122.07
January 3, 2019	\$ 1,681.00	\$ 117.07
January 17, 2019	\$ 1,681.00	\$ 112.07
January 31, 2019	\$ 1,681.00	\$ 107.08
February 14, 2019	\$ 1,681.00	\$ 102.08
February 28, 2019	\$ 1,681.00	\$ 97.08
March 14, 2019	\$ 1,681.00	\$ 92.09
March 28, 2019	\$ 1,681.00	\$ 87.09
April 11, 2019	\$ 1,681.00	\$ 82.09
April 25, 2019	\$ 1,681.00	\$ 77.10
May 9, 2019	\$ 1,681.00	\$ 72.10
May 23, 2019	\$ 1,681.00	\$ 67.10
June 6, 2019	\$ 1,681.00	\$ 62.10
June 20, 2019	\$ 1,681.00	\$ 57.11
July 4, 2019	\$ 1,681.00	\$ 52.11

Front Pay Calculations

<u>Pay Date</u>	<u>Net Pay+Benefits</u>	<u>Interest</u>
July 18, 2019	\$ 1,681.00	\$ 47.11
August 1, 2019	\$ 1,681.00	\$ 42.12
August 15, 2019	\$ 1,681.00	\$ 37.12
August 29, 2019	\$ 1,681.00	\$ 32.12
September 12, 2019	\$ 1,681.00	\$ 27.13
September 26, 2019	\$ 1,681.00	\$ 22.13
October 10, 2019	\$ 1,681.00	\$ 17.13
October 24, 2019	\$ 1,681.00	\$ 12.14
November 7, 2019	\$ 1,681.00	\$ 7.14
November 21, 2019	\$ 1,681.00	\$ 2.14
November 27, 2019	\$ 720.43	\$ -
	<u>\$ 113,863.91</u>	<u>\$ 11,293.72</u>