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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 474-2019:

VERONICA CAVELL, Charging Party, vs. MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES, DEVELOPMENTAL DISABILITIES PROGRAM, Respondent.	)	**HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

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I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party Veronica Cavell (Cavell) has alleged that her employer and Respondent herein, Montana Department of Public Health and Human Services (DPHHS), Developmental Disabilities Program (DDP[1]), discriminated against her by failing to make reasonable accommodations for her physical disability. Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter in Helena, Montana, with the parties represented by counsel. Cavell was represented by Anne Sherwood of Morrison, Sherwood, Wilson & Deola, PLLP, and DPHHS/DDP was represented by Mary Tapper.

At hearing, Cavell, Travis Tilleman, Novelene Martin, Lindsay Carter, Renne't Sarbu, and Lloyd Sparks all testified under oath. The following exhibits were admitted by stipulation of the parties at the hearing: Joint (JT) 101-119. Charging Party's Exhibit 3, a partial duplicate of JT 110, was admitted without objection during the hearing.

[1] For ease of reference, although Cavell specifically worked for DDP, DPHHS is generally used throughout when referring to Cavell's employer.

The parties submitted post-hearing briefs. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following Hearing Officer decision is rendered.

II. ISSUES

1. Absent undue hardship, did Respondent fail to reasonably accommodate Cavell in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Respondent did fail to reasonably accommodate Cavell 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 Respondent did fail to reasonably accommodate Cavell as alleged, in addition to an order to refrain from such conduct, what should the Department require to correct and prevent similar discriminatory practices?

III. FINDINGS OF FACT

1. Cavell was hired as a Quality Improvement Specialist (QIS) with DDP in June, 2011.

2. Cavell's QIS job was and presently is a full-time position at 40 hours per week.

3. DDP is a program of the Developmental Services Division (DSD) of DPHHS. DDP contracts with private entities to provide services for individuals with developmental disabilities and their families.

4. Cavell's job responsibilities as a QIS involve performing quality assurance activities for services provided to persons with developmental disabilities, which can include visits to residential group homes, individual residences, and day service locations. Other responsibilities include on-site visits, monitoring trends in incident management reports, and conducting screenings to select individuals for waiver service opportunities.

5. Cavell was diagnosed with Chronic Obstructive Pulmonary Disease (COPD) in February, 2012. Because of her COPD, Cavell experiences constant tiredness and low energy. Getting enough sleep is a critical factor in managing her

COPD. COPD does not impact Cavell's work as long as she is on a schedule that accommodates her body and its schedule.

6. As a result of her COPD, Cavell requested leave under the Family Medical Leave Act (FMLA).

7. On March 28, 2013, Cavell was deemed eligible for FMLA leave. In each year since then, Cavell has utilized intermittent leave under FMLA as well as sick leave and leave without pay in order to work 6 hours per day, or 30 hours per week, until her annual 480 hours of leave was exhausted.

8. Cavell usually exhausted her 480 hours of FMLA leave three-to-four months prior to becoming eligible for FMLA leave again in March the following year.

9. After Cavell exhausted her FMLA leave in 2014, 2015, and 2016, DPHHS provided her an accommodation under the Americans with Disabilities Act (ADA), allowing her to continue to work 30 hours per week while taking 10 hours per week of leave without pay.

10. Although not exclusively the case, Cavell would typically take 2 hours of unpaid leave each day, and would supplement any additional hours taken off with sick leave. When she was eligible for FMLA leave, the leave without pay would usually be taken as FMLA leave.

11. Notwithstanding that Cavell's position is full time, because Cavell worked a reduced schedule, her workload also was reduced.

12. In May, 2015, Lindsey Carter (Carter) became Cavell's supervisor. Although their relationship may have been mildly strained at times due to issues arising in the present case, Cavell stated that she always felt Carter supported her.

13. Carter supervised six QIS positions. However, a hiring freeze was in effect, and one position which was vacant was ultimately eliminated due to budget cuts. Consequently, Carter performed QIS responsibilities in addition to her role as a supervisor.

14. Carter has allowed Cavell to choose the hours she wanted to work. Cavell has requested various start times including 9:30 a.m., 10:30 a.m., 11:00 a.m., and 12:00 p.m. Carter also allowed Cavell to flex her time when she requested it for

running errands, coming to work later, leaving early, or combining meal and rest breaks. Carter has also completed Cavell's work tasks to meet deadlines.

15. Katy Wessel, M.D., (Dr. Wessel) is Cavell's physician who signed the Certificate of Health Care Provider for FMLA leave in 2017 and 2018.

16. In March, 2017, Cavell met with Dr. Wessel to complete her FMLA paperwork. Cavell told Dr. Wessel she needed to keep her work schedule to six hours per day, from 12:00 p.m. to 6:00 p.m.

17. In November, 2017, Carter asked Cavell if she wanted her to speak with Lloyd Sparks (Sparks), DPHHS' Civil Rights/EEO Coordinator, regarding an accommodation after she exhausted her FMLA leave. Cavell agreed, and Carter met with Sparks to discuss Cavell's ADA accommodation.

18. At the start of 2017, DPHHS was facing budgetary issues. DPHHS and other state agencies were directed by the governor, pursuant to Mont. Code Ann. § 17-7-140(1)(c), to make budgetary cuts to balance the budget. Thus, in November 2017, Novelene Martin (Martin), Bureau Chief of DDP, participated in discussions regarding budget cuts within DDP. DPHHS and other state agencies had been directed by the Governor to make budgetary cuts to balance the budget. DPHHS underwent budgetary reductions which affected all divisions of DPHHS, including the services provided by DDP.

19. In December, 2017, Sparks told Carter that Cavell's ADA accommodation was approved.

20. During a conference call on December 20, 2017, Carter learned DPHHS planned to eliminate case management contractors and combine the QIS and Case Manager positions due to budget cuts. The change would impact Cavell and other QISs by adding case management responsibilities and increasing their caseloads to cover work previously performed by contractors. DDP was also under a hiring freeze.

21. Also on December 20, 2017, after she learned of the intended organizational changes, Carter sent an e-mail to Cavell requesting a meeting to discuss changes in the QIS position.

22. On December 21, 2017, case management contractors were notified that their contracts would be cancelled effective March 31, 2018, and would not be renewed.

23. On December 28, 2017, Carter sent an e-mail to Cavell and other QISs to schedule training in January for their additional responsibilities. Cavell responded that she was available for training on January 18, 2018.

24. In a separate e-mail to Cavell, Carter asked her if she planned on staying with DDP in light of the changes in the QIS position because Cavell had previously told Carter she could not perform the case management role.

25. On December 29, 2017, Cavell attended a meeting with Travis Tilleman (Tilleman), DPHHS Director of Human Resources, and union representatives Jill Cohenour (Cohenour) and Renne't Sarbu (Sarbu). The purpose of the meeting was to ask Cavell if she was interested in voluntary retirement.

26. Cavell indicated she was interested in retiring, and, at Cavell's request, DPHHS prepared a Settlement Agreement and Release (Agreement) which provided Cavell would voluntarily retire effective December 29, 2017, in exchange for additional compensation.

27. Carter was unaware of Cavell's decision to retire until Tilleman informed her after the meeting on December 29, 2017.

28. Cavell still had uncompleted work to perform at the time she chose to retire.

29. On January 2, 2018, Cavell signed the Agreement during a meeting with Tilleman and Cohenour. Tilleman informed Cavell she had seven days to change her mind.

30. Cavell subsequently conferred with her son regarding her intent to retire, and determined she could not afford to retire.

31. Cavell met with Tilleman on January 4, 2018, and informed him she could not afford to retire and was rescinding the Agreement. Tilleman informed Cavell there was a possibility she would have to work 40 hours per week because of the change in the QIS position.

32. Tilleman informed Carter that Cavell had changed her mind and was not, in fact, retiring.

33. Because of the anticipated change in circumstances due to an increased workload, Sparks and Carter determined Cavell's prior accommodation for her QIS position would be unreasonable for the combined job.

34. The combined QIS / Case Manager position was the only factor Sparks and Carter believed created undue hardship for DPHHS in offering Cavell's prior accommodation.

35. On January 4, 2018, Carter and Cavell met to discuss her work schedule. Carter denied Cavell's accommodation on the basis of undue hardship, as she believed Cavell would not be able to handle the increased job duties of the combined QIS and Case Manager position in only 30 hours a week. Carter told Cavell that day that she would need to start working 8-hour days beginning on January 8, 2018.

36. Based on Cavell's timecards, the practical effect of the denial of her 6-hour-per-day accommodation request was that she would have to work more hours and could no longer take leave without pay absent FMLA leave, and would instead have to use sick leave or vacation if she needed time off.

37. Working longer hours contradicted Dr. Wessel's advice as to what was best for Cavell's health.

38. In response to Carter, Cavell requested that she be allowed to work from 9:30 a.m. to 6:00 p.m.

39. Carter sent an e-mail to Cavell that same day which confirmed their conversation regarding Cavell's request for an alternate work schedule (albeit without reduced hours), the work Cavell needed to complete, and employment paperwork.

40. On January 8, 2018, Carter and Cavell met again to discuss the work she needed to complete and confirmed their conversation by e-mail.

41. On January 11, 2018, Carter and Cavell met again and discussed Cavell's alternate work hours and use of remaining FMLA leave. Cavell prepared an alternate work schedule for Carter's approval wherein she requested that she be accommodated to work from 10:30 a.m. to 7:00 p.m., with a 30-minute lunch and two 15-minute breaks.

42. Cavell also informed Carter that she wanted to use her remaining 17 hours of FMLA leave intermittently until she was eligible to begin FMLA leave again in March 2018. Carter agreed Cavell could do so.

43. On January 12, 2018, Sparks sent Cavell an e-mail formally informing her that her accommodation had been denied on the basis of undue hardship to DPHHS. Sparks' e-mail noted that because DPHHS was planning to increase QIS duties and caseloads in response to the budget cuts, allowing Cavell to work less hours would not ensure the additional work was going to be completed in a timely manner. Sparks asked Cavell to contact him with questions or to discuss accommodations, but did not provide her with information regarding how to appeal the decision.

44. Cavell did not respond to Sparks' e-mail, request further accommodations, or object to the alternate work schedule she had proposed and had agreed to work (albeit after having a work schedule with lesser hours denied). It was her opinion there was nothing else she could do. Similarly, however, Sparks never followed up and contacted Cavell again about her accommodation or her job duties.

45. Generally speaking, although Sparks had involvement and was responsible for paperwork, Carter, as Cavell's supervisor, was responsible for the ultimate decision on whether to grant a requested accommodation.

46. At the time Cavell's request for accommodation was denied, the QIS and Case Management positions were not yet combined. It was not anticipated the positions would be combined until approximately April 1, 2018.

47. On January 12, 2018, Carter approved the alternate 9:30 a.m. to 6:00 p.m. schedule and sent an e-mail to Cavell both regarding the work schedule and reiterating the unfinished work Cavell needed to complete.

48. On January 18, 2018, Carter e-mailed Cavell suggesting she spend her time on catching up on her work and not reviewing e-mail.

49. Carter allowed Cavell flexibility with her schedule, such as making up her time to stay later or coming to work later, and Carter carefully tracked Cavell's attendance and reviewed her timesheets to ensure they were correct.

50. On January 29, 2018, Cavell requested a sit/stand work station. Sparks responded to the request on January 30, 2018, but Cavell did not contact Sparks to follow-up with her request.

51. At some point in January, 2018, DDP convened a Transition Workgroup to determine how to implement the combination of the QIS and Case Manager positions. The working group included three of Carter's employees.

52. A job description for the combined QIS and Case Manager position was drafted by Human Resources, but was never finalized, and the position was never actually created.

53. On February 9, 2018, Carter notified the QISs and Case Managers that the two positions would probably not be combined because a request for proposal was going out for contracted case management. At that time, DPHHS was fairly confident the RFP would be successful.

54. Cavell used her annual leave from February 12-16, 2018, for a trip to Denmark to visit her son and his family. Carter also completed some work for Cavell while she was on vacation.

55. On February 22, 2018, Cavell and Carter exchanged e-mails regarding calling in when Cavell was late to work, clarification of Cavell's work hours, tracking Cavell's work while she was on vacation, and other concerns.

56. On February 23, 2018, Carter and Cavell met to discuss pending tasks. Cavell wished to change her work schedule to 11:00 a.m. to 7:30 p.m., which Carter approved.

57. In March, 2018, DPHHS posted a request for proposal to vendors, and a vendor was awarded the contract in May, 2018, effective June 1, 2018.

58. Cavell was eligible to take FMLA leave again beginning March 28, 2018. With the exception of her vacation, Cavell worked what was, on its face, full-time in her QIS position during January, February, and March of 2018 until her FMLA renewed on March 28, 2018. During that time, she did not receive leave without pay for medical reasons.

59. Ultimately, the QIS and Case Manager positions were *not* combined as a result of case management contractors indicating they were interested in a different payment methodology. However, if no vendor had met the minimum requirements of the request for proposal, DPHHS planned to combine the QIS and Case Manager positions.

60. Even after becoming aware on February 9, 2018, that the QIS and Case Manager positions would likely not be combined, DPHHS never attempted to implement Cavell's requested accommodation of working 6 hours per day, or 30 hours per week, until late-March, 2018.

61. In spite of DPHHS's plans to combine positions, Cavell's job duties never changed during the time she was required to work 8-hour days (albeit she never consistently did so), and she never received any additional training.

62. Cavell did not, in fact, work a full-time schedule from January to March, 2018, until she was eligible again for FMLA leave (Cavell also had 17 hours of FMLA leave remaining to use throughout this period). Her work hours during that time were as follows, including averages for hours worked each day based on weekly totals and taking into account holidays:

- Week of January 1, 2018 - 15 hours (4 days @ 3.75 hours)
- Week of January 8, 2018 - 36.5 hours (5 days @ 7.3 hours)
- Week of January 15, 2018 - 31 hours (4 days @ 7.75 hours)
- Week of January 22, 2018 - 36.5 hours (5 days @ 7.3 hours)
- Week of January 29, 2018 - 38.5 hours (5 days @ 7.7 hours)
- Week of February 5, 2018 - 32 hours (5 days at 6.4 hours)
- Week of February 12, 2018 - vacation leave (N/A)
- Week of February 19, 2018 - 26 hours (4 days @ 6.5 hours)
- Week of February 26, 2018 - 37.5 hours (5 days @ 7.5 hours)
- Week of March 5, 2018 - 36.5 hours (5 days @ 7.3 hours)
- Week of March 12, 2018 - 36 hours (5 days @ 7.2 hours)
- Week of March 19, 2018 - 38 hours (5 days @ 7.6 hours)
- Week of March 26, 2018 - 19.5 hours (5 days @ 3.9 hours)[2]

63. From January 1 through March 28, 2018, Cavell worked 383 hours over a total of 55 days (excluding vacation and holidays), for an average of 6.96 hours per day. This excludes March 28-29, 2019, when Cavell became FMLA eligible again and took both days off as FMLA leave.

[2] This includes overlap with the period when Cavell became FMLA eligible again on March 28, 2018. Excluding March 29-30, during which Cavell took 16 hours of FMLA leave, she worked an average of 6.5 hours over 3 days.

64. Cavell's hourly wage rate during the period at issue was approximately $21.08.

65. Cavell's job was never threatened and Cavell was never subject to any discipline because of her reduced hours during the foregoing period.

66. Effective approximately March 28, 2018, DPHHS granted Cavell's accommodation request to work 6 hours per day, or 30 hours per week, for the remainder of 2018 / 2019.

67. In her own approximation and because of her COPD, working longer hours negatively impacted Cavell's health and well-being, caused her distress, and placed her at increased risk of exacerbating her COPD and/or causing co-morbidities such as pneumonia. Cavell estimated that the detrimental health effects caused by her increased work schedule took months to recover from. However, Cavell's medical visits with Dr. Wessel on August 31, 2017, April 11, 2018, and August 10, 2018, were unrelated to her COPD diagnosis.

68. While working 40-hour weeks from January through March, 2018, Cavell felt she could not take time off when she needed in order to prevent getting sick, and that accrued sick leave could only be used as last resort. Cavell also believed her impaired physical and mental health which resulted from working 40-hour weeks interfered with her ability to do her job and prevented her from being able to do her job the way other employees in her position could. To this end, Cavell told Carter that working 40-hour weeks was negatively impacting her health and that she was having difficulty doing her job as a result.

IV. DISCUSSION

Cavell has not claimed disparate treatment or any other form of discrimination other than failure to accommodate her disability. Cavell also explicitly set forth that she is not alleging a failure to engage in the interactive process. As such, this decision will only address failure to accommodate.

Montana law prohibits discrimination against employees based on a physical or mental disability. Mont. Code Ann. § 49-2-303(1)(a). Montana looks to guidance from federal anti-discrimination law under the Americans with Disabilities Act (ADA) when construing provisions of the Montana Human Rights Act (MHRA). *BNSF Ry. Co. v. Feit*, 2012 MT 147, ¶ 8, 365 Mont. 359, 281 P.3d 225. It is an unlawful discriminatory practice for an employer to either fail to make reasonable

accommodations to the known physical limitations of an otherwise qualified employee with a disability or deny equal employment opportunities to a person with a physical disability because of the need to make a reasonable accommodation. Mont. Code. Ann. § 49-2-101(19)(b); Admin. R. Mont. 24.9.604(3)(C), 24.9.606(1)(a)-(b); *accord* 29 C.F.R. § 1630.9(a). A person with a physical disability is qualified to hold an employment position if the person can perform the essential functions of the job with or without a reasonable accommodation for the person's physical disability. Admin. R. Mont. 24.9.606(2). "If a person suffers from a disability, the employer has a duty to provide a reasonable accommodation if, with such accommodation, the person could perform the essential job functions of the position." *Pannoni v. Bd. of Trs.*, 2004 MT 130, ¶ 27, 321 Mont. 311, 90 P.3d 438 (citing Mont. Code Ann. § 49-2-101(19)(b) and Admin. R. Mont. 24.9.606(2)). "'This duty to make reasonable accommodations is an essential part of Montana's anti-discrimination statutes.'" *Borges v. Missoula Cnty. Sheriff's Office*, 2018 MT 14, ¶ 31, 390 Mont. 161, 415 P.3d 976 (quoting *McDonald v. Dep't of Envtl. Quality*, 2009 MT 209, ¶ 40, 351 Mont. 243, 214 P.3d 749).

An employer commits unlawful discrimination by failing to make reasonable accommodations to known physical limitations of an otherwise qualified employee unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Mont. Code. Ann. § 49-2-101(19)(b); Admin. R. Mont. 24.9.606(4). An undue hardship means an action requiring significant difficulty or extraordinary cost when considered in light of the nature and expense of the accommodation needed, the overall financial resources of the facility, the overall financial resources of the business, and the type of operations of the employer. Admin. R. Mont. 24.9.606(5). It is the employer's burden to prove undue hardship. *See Morton v. United Parcel Service*, 272 F.2d 1249, 1257 (9th Cir. 2001) (undue hardship is an affirmative defense the employer must prove).

DPHHS has asserted that disability discrimination claims are analyzed using a burden-shifting approach, and cites to law relating to disparate treatment. While this assertion is generally true for discrimination cases, including where a failure to accommodate is associated with an adverse employment action such as termination, cases purely asserting a failure to accommodate are different. "A plaintiff need not allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim," as a claim of discrimination based on a failure to reasonably accommodate is distinct from such claims. *McGary v. City of Portland*, 386 F.3d 1259, 1266 (9th Cir. 2004) (citations omitted); *see also Borges*, 2018 MT 14, ¶¶ 29-39 (applying no burden-shifting or adverse employment action analysis to a failure to accommodate case); *Pannoni v. Bd. of Trs.*, 2004 MT 130, ¶¶ 24-35, 321 Mont. 311,

318, 90 P.3d 438, 444 (applying no burden-shifting or adverse employment action analysis to a failure to accommodate case).

Here, Cavell is not asserting that the failure to accommodate was due to discriminatory animus. In such cases, the allegation is not that the employer treated the disabled person differently because of a disability, but that the employer failed to make reasonable accommodations for the limitations imposed by her disability. The failure to provide a reasonable accommodation for a known disability is inherently "'on the basis of' the disability,'" and there is no need to probe the subjective intent of the employer. *See Punt v. Kelly Servs.*, 862 F.3d 1040, 1048-49 (10th Cir. 2017) (quoting 42 U.S.C. § 12112(a)); *see also Snapp v. United Transp. Union*, 889 F.3d 1088, 1095 (9th Cir. 2018) (citing 42 U.S.C. § 12112(b)(5)(A)) ("The ADA treats the failure to provide a reasonable accommodation as an act of discrimination if the employee is a 'qualified individual,' the employer receives adequate notice, and a reasonable accommodation is available that would not place an undue hardship on the operation of the employer's business."); *EEOC v. AutoZone, Inc.*, 630 F.3d 635, 638 n.1 (7th Cir. 2010) (citations omitted) (no adverse employment action is required to prove a failure to accommodate); *but see McDonald v. Dep't of Envtl. Quality*, 2009 MT 209, ¶¶ 35-36, 77-79, 351 Mont. 243, 214 P.3d 749 (Cotter, J., dissenting) (adverse employment action analysis applies to whether a *delay* in accommodating is actionable).

A. Prima Facie Case

To establish a prima facie case for failure to accommodate, Cavell must show that: (1) she is both disabled within the meaning of the MHRA and an otherwise qualified individual able to perform the essential functions of the job with or without reasonable accommodations; (2) DPHHS was aware of Cavell's disability and she requested accommodations related to the disability; (3) a reasonable accommodation exists that would have been effective; and (4) DPHHS failed to provide a reasonable accommodation. Admin. R. Mont. 24.9.606(1)(a)-(4); *see also Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 284 (3d Cir. 2001) (citations omitted). As stated above, DPHHS may counter these arguments by showing that providing the accommodation would have resulted in undue hardship to the employer. Admin. R. Mont. 24.9.606(5); *Skerski*, 257 F.3d at 284.

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1. Cavell Is Disabled and Able to Perform the Essential Functions of the QIS Position With or Without Accommodation

DPHHS' arguments made in post-hearing briefing are somewhat difficult to apply to the present analysis since they are focused on a disparate treatment analysis. However, it is clear that DPHHS does not dispute Cavell is disabled within the meaning of the MHRA. (DPHHS Open. Br. at 9.) Furthermore, although it made arguments that Cavell was behind in her current work and would not be able to handle the combined workload of the QIS and Case Manager positions while working less than 40 hours per week, such a position never actually existed. Cavell had performed her QIS position since 2012, with accommodations since 2013 or 2014, and DPHHS never made any argument that Cavell was unable to perform the essential functions of her job with or without reasonable accommodations. As such, Cavell has satisfied the first element of her claim. *See* Admin. R. Mont. 24.9.606(2).

2. DPHHS Was Aware of Cavell's Disability and Need for an Accommodation

DPHHS similarly does not dispute it was aware of Cavell's disability or need for an accommodation. Indeed, it denied her request for accommodation. DPHHS does, however, fault Cavell for not further engaging in the interactive process when she had the opportunity to do so. This argument fails, not only because it is not an element of Cavell's claim, but also because it was not Cavell's duty to engage in the interactive process.

". . . [W]hen an employee notifies the employer of the employee's disability and desire for an accommodation, that notification triggers the employer's obligation to engage in an 'interactive process' with the employee to identify potential reasonable accommodations." *Borges*, ¶ 33 (citing *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000)) (other citations omitted). Here, there is no evidence that DPHHS did anything more than reject Cavell's accommodation and suggest she could continue to communicate with Carter and Sparks if she had issues. Cavell did so when she requested that her daily start and end times be changed. There is nothing in the record to suggest that, after denying the 6-hour-day accommodation recommended by Dr. Wessel, there was anything else Cavell could do in order to request further accommodation.

Thus, notwithstanding that it was DPHHS' duty to engage in the interactive process with Cavell and not the other way around, and further notwithstanding that it is not an element of her claim, Cavell has shown that DPHHS was aware of her

disability and she requested accommodations for it which were rejected. Cavell has satisfied the second element of her claim. *See Skerski*, 257 F.3d at 284.

3. Existence of an Effective Accommodation

Although not a defense to Cavell's claims, DPHHS' position is that it was not legally obligated to accommodate a reduced schedule of 6 hours per day with a reduced workload because Cavell's position was full-time. DPHHS argues that it only accommodated Cavell in an altruistic attempt to assist her with her disability so she could continue to work and be successful in her job. DPHHS' position is contrary to established legal authority. Absent undue hardship, and an employer *must* allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation. Admin R. Mont. 24.9.606(3)(b); *accord* 42 U.S.C. § 12111(9)(B).

With regard to accommodations, a reasonable accommodation must be for the limitations caused by the disability, not necessarily the disability itself. 29 C.F.R. § 1630.9(a); *see also Taylor v. Principal Fin. Grp.*, 93 F.3d 155, 164 (5th Cir. 1996) (citations omitted). A "reasonable accommodation" may include "job restructuring, part-time or modified work schedules, reassignment to vacant positions which the employee is qualified to hold . . . and other similar accommodations for individuals with physical or mental disabilities." Admin. R. Mont. 24.9.606(3)(b). Part-time work schedules are specifically addressed in the ADA:

> (9) Reasonable accommodation. The term "reasonable accommodation" may include—
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> * * *
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(B); *see also Ralph v. Lucent Techs.*, 135 F.3d 166, 170 (1st Cir. 1998) (noting that accommodation of a disability by providing for part-time work is authorized by the ADA and by the E.E.O.C. Guidelines). An employer must provide a modified or part-time schedule when required as a reasonable accommodation even if it does not provide such schedules for other employees. *See US Airways, Inc. v.*

Barnett, 535 U.S. 391, 397-98 (2002) (citations omitted) (referring to § 12111(9)(B) and finding that the fact an accommodation provides a preference to an employee does not, in itself, make it unreasonable); *see also Fedro v. Reno*, 21 F.3d 1391, 1395-96 (7th Cir. 1994) (citations omitted).

An employee need only show that an accommodation seems reasonable on its face. *US Airways, Inc.*, 535 U.S. at 401-02 (citations omitted). Cavell's testimony that a reduced work schedule assisted with management of her COPD was uncontroverted. Similarly, there was nothing put into the record suggesting Dr. Wessel's opinion that the reduced schedule was beneficial to Cavell was medically incorrect. Cavell has shown that a reasonable accommodation existed–namely a part-time schedule–which would have been effective in alleviating the limitations caused by her disability. Cavell has therefore satisfied the third element of her claim.

4. Refusal of a Reasonable Accommodation

DPHHS does not dispute that it rejected Cavell's accommodation request to work 6-hour days. Although it did grant Cavell's request to alter what hours of the day she worked, it has already been determined that a part-time schedule was a reasonable accommodation. The question here is not whether other accommodations could have been offered, but whether the accommodation actually being requested was reasonable. Regardless of DPHHS' reasons for refusing Cavell's accommodation request, this satisfies the final element of Cavell's claim.

B. Undue Hardship

As stated above, undue hardship is an affirmative defense to offering an otherwise-reasonable accommodation. Admin. R. Mont. 24.9.606(5). Several non-exclusive factors may be considered when determining whether an accommodation would impose an undue hardship on an employer.

> (5) For purposes of determining whether an accommodation to a physical or mental disability is reasonable, "undue hardship" means an action requiring significant difficulty or extraordinary cost when considered in light of:
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> (a) the nature and expense of the accommodation needed;
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> (b) the overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of

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

Admin. R. Mont. 24.9.606(5)(a)-(d).

Federal factors to be considered are similar:

> (I) The nature and net cost of the accommodation . . . taking into consideration the availability of tax credits and deductions, and/or outside funding;
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> (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
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> (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
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> (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
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> (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

29 C.F.R. § 1630.2(p)(2)(i)-(v). DPHHS' arguments regarding undue hardship are primarily focused on its financial resources amid budgetary woes and, to a lesser extent, Cavell's work ability. Neither of these arguments are persuasive.

According to DPHHS, accommodating Cavell with a reduced work schedule would have resulted in an undue hardship due to the increased demands of the new, combined QIS / Case Manager position combined with Cavell falling behind in her work. At all times throughout the hearing, however, DPHHS' witnesses asserted the combined position was the *only* factor actually causing undue hardship. The question, therefore, is whether, due to this sole factor of a combined position that never actually existed, Cavell's accommodation was no longer a workable solution and caused undue hardship to DPHHS.

For several years, DPHHS accommodated Cavell by allowing her to work approximately 6 hours per day, or 30 hours per week. DPHHS even went so far as to initially grant the accommodation to Cavell for the 2017 / 2018 period at issue in this case because they believed it was reasonable and would not create an undue hardship absent budgetary constraints. Furthermore, DPHHS granted Cavell's accommodation request for the 2018 / 2019 period, which indicates DPHHS considered the accommodation reasonable for Cavell's QIS position and, again, not an undue hardship absent budgetary constraints. Bearing in mind that Cavell's position never changed throughout the relevant time period, DPHHS granted Cavell's requested accommodation for every year it was requested except when it temporarily retracted the accommodation in 2017.

The reduced budget of DPHHS and, more specifically, DDP at the start of the 2018 calendar year precipitated the planned combination of the QIS and Case Manager positions. It was this combination of positions which DPHHS asserts created an undue hardship, particularly since DPHHS believed Cavell was not capable of performing the duties of both positions with anything less than a full-time schedule. While DPHHS' concerns may have been warranted, the combined position never existed outside a draft job description. It is granted that there were no doubt plans to combine these positions when and if necessary, but the fact remains that Cavell's position and job duties never changed from what they were previously. Indeed, DPHHS knew by no later than February 9, 2018, that the two positions would probably not be combined because a request for proposal was going out for contracted case management, which DPHHS was fairly confident would be successful.

DPHHS acknowledges that the QIS and Case Manager positions were never combined, but states that, "[t]here is no requirement under the ADA that the undue hardship be 'real and not hypothetical.'" (DPHHS R. Br. at 8.) DPHHS' position is untenable, as it would allow an employer to raise any basis, whether real or imagined, to prove undue hardship. *See, e.g., Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135 (1st Cir. 2004) (courts in ADA cases are skeptical of hypothetical hardships). In this case, because the hardship was only ever hypothetical, it is not necessary to consider the specific financial impact of the accommodation on DPHHS. *See* Admin. R. Mont. 24.9.606(5)(a)-(d). Even if it were necessary to consider the financial impact in detail, however, DPHHS presented no evidence of financial hardship beyond the fact that DPHHS had determined budget cuts necessitated combining the QIS and Case Manager positions. There was no evidence, for example, of DDP's actual budget and how Cavell's accommodation affected that budget. The evidence was simply not enough to show undue hardship, particularly where that hardship was merely hypothetical.

For the position Cavell actually held during the entire time period at issue, DPHHS has not shown any undue hardship. *See* Admin. R. Mont. 24.9.606(5). Cavell has therefore succeeded in her claim that she was wrongfully denied a reasonable accommodation.

C. Damages and Affirmative Relief

With regard to Cavell's emotional damages, the Hearing Officer is empowered to take any reasonable measure to rectify any harm, pecuniary or otherwise, to Cavell as a result of the illegal discrimination. *See* Mont. Code Ann. § 49-2-506(1)(b); *Vainio v. Brookshire*, 258 Mont. 273, 280-81, 852 P.2d 596, 601 (1993)(the Department has the authority to award money for emotional distress damages). The freedom from unlawful discrimination is clearly a fundamental human right. *See* Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right, without reasonable measures to rectify that harm. *See Vainio*, 258 Mont. at 280-81, 852 P.2d at 601. The severity of the harm governs the amount of recovery. *See Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.3d 836 (citations omitted). However, 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. *Id*.

Although Cavell has shown a failure to accommodate and established a record that she suffered unnecessary emotional distress as a result, she did not provide any testimony or evidence that readily lent itself to a damages calculation. As a result, the Hearing Officer is left to determine reasonable damages based on what evidence was presented.

From January 1 through March 28, 2018, Cavell worked 383 hours over a total of 55 days (excluding vacation and holidays), for an average of 6.96 hours per day. So as not to skew the calculation, these figures exclude March 28-29, 2019, when Cavell became FMLA eligible again and took both days off as FMLA leave. In total, Cavell worked approximately 52.8 hours more from January 1 through March 28, 2018, than she would have had her accommodation been granted. This additional work contributed to Cavell's emotional distress. Cavell also offered testimony regarding her emotional distress, although she did not show where she required any specific treatment, medical or otherwise, as a result of her distress. Furthermore, DPHHS as a whole and Carter specifically were open-minded about working with Cavell's schedule and not ultimately requiring that she work 40-hour weeks. Nonetheless, Cavell suffered both physically and emotionally because of the lack of accommodation, and is therefore awarded a total of $5,000.00 for compensatory damages and emotional distress.

The law requires affirmative relief enjoining further discriminatory acts and may further prescribe any appropriate conditions on DPHHS's future conduct relevant to the type of discrimination found. Mont. Code Ann. §49-2-506(1)(a). In this case, appropriate affirmative relief is an injunction and an order requiring DDP's management and any persons assigned to handle accommodations, civil rights and/or EEO issues on behalf of DPHHS for its employees to consult with HRB to identify appropriate training regarding accommodations for disabilities to ensure that the organization does not commit, condone, or otherwise allow further acts of discrimination.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-505.

2. Cavell is a member of a protected class within the meaning of the MHRA on the basis of physical disability. Mont. Code Ann. § 49-2-101(19)(a).

3. The MHRA prohibits discrimination in employment based upon physical disability. Mont. Code Ann. § 49-2-303(1)(a).

4. Cavell was a qualified employee within the meaning of the MHRA. Admin. R. Mont. 24.9.606(2).

5. The accommodation sought by Cavell was both effective and reasonable. Admin R. Mont. 24.9.606(3)(b).

6. Respondent violated the MHRA when it failed to make reasonable accommodations for Cavell's known physical limitations. Mont. Code. Ann. § 49-2-101(19)(b); Admin. R. Mont. 24.9.604(3)(c), 24.9.606(1)(a)-(b).

7. Respondent failed to show the accommodation sought by Cavell was unreasonable. Admin. R. Mont. 24.9.606(5).

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

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

VI. ORDER

1. Judgment is granted in favor of Cavell and against Respondent.

2. Respondent must pay Cavell the sum of $5,000.00 for compensatory damages and emotional distress.

3. DDP's management and any persons assigned to handle accommodations, civil rights and/or EEO issues on behalf of DPHHS for its employees must consult with HRB to identify appropriate training regarding accommodations for disabilities to ensure that the organization does not commit, condone, or otherwise allow further acts of discrimination.

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DATED: this 30th day of January, 2020.

/s/ CHAD R. VANISKO
Chad R. Vanisko, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Veronica Cavell, Charging Party, and her attorney, Anne E. Sherwood, Morrison Sherwood Wilson & Deola, PLLP; and Montana Department of Public Health and Human Services, Developmental Disabilities Program, Respondent, and its attorney, Mary Tapper, Montana Department of Public Health and Human Services, Office of Legal Affairs:

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. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard at (406) 444-4356 immediately to arrange for transcription of the record.

Cavell.HOD.cvp