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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 757-2020:

KRISTI JOACHIM, Charging Party, vs. ST. LUKE COMMUNITY HEALTHCARE, Respondent.	**HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party, Kristi Joachim, alleged Respondent herein, St. Luke Community Healthcare, discriminated against her by failing to engage in the interactive process in good faith ultimately violating their duty to provide her with reasonable accommodations as a result of her physical injury.

Prior to hearing, Charging Party filed motions in limine to prevent the introduction of certain evidence into the hearing regarding: (1) prior unrelated "bad acts" and evidence of "bad acts" or misconduct during Charging Party's employment with Respondent; (2) any evidence of unrelated "bad acts" or misconduct by Joachim outside of her employment; (3) collateral source payments; and (4) any expert testimony not disclosed by Respondent; (5) any evidence of settlement discussions; (6) reference at hearing to the ruling on the motions in limine. The first two motions were withdrawn by counsel at the final prehearing conference and, given no objection to the remainder of the requests, requests (3) and (6) were granted.

Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter on July 14-15, 2020 in Polson, Montana, with the parties represented by counsel. Attorney L. Jason Bryan represented Charging Party, and Jeffrey Smith represented the Respondent. At hearing, Kristi Joachim, Jeffrey LaPorte MD, David

Joachim, Craig Rider, Mallory Worthington, Sara Boilen, Psy.D., Theresa Jones, Steve Todd, Talley Davis, Melissa Hoppe, and Benjamin Grass, MD, all testified under oath.

Respondent reserved the right to object to Charging Party's Exhibit 1 (relevance), and objected to Charging Party's Exhibit 6 (lack of foundation and authenticity), 8 (inadmissible hearsay), and 15 (lack of authenticity and hearsay). Hearing Officer Vanisko reserved ruling on objections, and hereby rejects Charging Party's Exhibits 6 (Verizon records), and 8 (notice of determination), and admits Charging Party's Exhibit 15 (medical expenses), with the latter being for the purpose of showing out-of-pocket expenses for medication. Having received no additional objection, Charging's Party's Exhibit 1 (personnel file) is also admitted. In addition, Charging Party's Exhibits 2-5, 7, 9-14, 16-17, revised 18 with redactions, 19, supplemented 20, and 21 were admitted at hearing, as were Respondent's Exhibits 101-121 and 126-130, with Exhibits 122-125 withdrawn.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received in the Office of Administrative Hearings.

II. ISSUES

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

2. If St. Luke did fail to reasonably accommodate Joachim as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Respondent did fail to reasonably accommodate Joachim 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. Respondent St. Luke Community Healthcare (St. Luke) is a medical group practice located in Ronan, Montana, was organized in Montana, and operates under Montana law.

2. Kristi Joachim (Joachim) was as ultrasound technician hired by St. Luke on or about July 19, 1993, and was employed for almost 26 years until her departure on May 10, 2019.

3. During her employment, Joachim was familiar with St. Luke's Employee Handbook and was provided a copy of it, which she acknowledged receipt of and having read on or about December 17, 2008.

4. The ability to perform ultrasounds requires additional training and schooling and is a specialized skill in the imaging department.

5. Ultrasound studies are a vital piece of medical treatment, acting as a diagnostic tool in both routine and emergent care. Ultrasounds are used in numerous settings, including for life-threatening issues. A lack of skilled ultrasound technicians could put patient care at risk.

6. There are, on average, eight ultrasounds scheduled per day, not including emergencies. It was not uncommon for St. Luke to refer ultrasounds to other providers when necessary.

7. For all relevant periods, Craig Rider (Rider) was St. Luke's Supervisor for the Imaging Department

8. For all relevant periods, St. Luke's CEO was Steve Todd (Todd).

9. On or about November 28, 2018, Joachim suffered a non-work-related right shoulder injury, resulting in a physical disability. Joachim is right-hand dominant.

10. Prior to her injury, Joachim's duties as an ultrasound tech included having to help move and transfer patients, having to have her right arm outstretched several hours per day while holding an ultrasound transducer, making computer and table adjustments, and helping to move x-ray tubes as needed. Some procedures performed by Joachim as an ultrasound tech required more than one tech, such as with ill or difficult patients, or venous studies where one tech scanned and the other documented.

11. At the time of Joachim's injury, St. Luke had two full-time equivalent (FTE) ultrasound tech positions. In addition to working their full-time shifts, the ultrasound techs were also on-call to provide testing for emergency situations.

12. On December 8, 2018, Dr. Adrian Davis of St. Luke's diagnosed Joachim with a partial tear in the rotator cuff and bursitis. Dr. Davis' treatment plan was to begin physical therapy and other conservative measures.

13. Joachim immediately notified St. Luke of the injury and requested six weeks off work.

14. Subsequently, Joachim requested 12 weeks' leave pursuant to the Family Medical Leave Act (FMLA). St. Luke granted the leave retroactively to begin on November 29, 2018.

15. Joachim's FMLA leave began on November 29, 2018 and ended on February 21, 2019.

16. During the period of time Joachim was on FMLA leave, St. Luke maintained Joachim's employment status as an FTE employee and kept her position available for reinstatement.

17. Joachim's recovery took longer than anticipated. On January 15, 2019, approximately six weeks into her leave, Joachim underwent surgery performed by Dr. Anthony Laporte (Dr. Laporte) at Missoula Bone & Joint.

18. On or about January 23, 2019, Dr. LaPorte filled out a Work Status Report for Joachim. The report restricted Joachim from her time-of-injury work, but anticipated that she could return to work on or about February 27, 2019.

19. Rider fully intended to try to hold Joachim's position open when she initially requested a leave of absence. However, scheduling ultrasound techs and ensuring there was sufficient coverage became frustrating as Joachim's return to work date with no restrictions continued to be extended during the duration of her leave.

20. On January 20, 2019, St. Luke hired a new ultrasound tech, Mallory Worthington (Worthington), to fill in for both the radiology and cardiology departments at St. Luke as an as-needed, *pro re nata* ("PRN") employee.

21. Worthington had inquired, unsolicited, about possible work at St. Luke after relocating to the area, and St. Luke was surprised at Worthington's credentials, as it had previously found it very difficult to hire ultrasound techs in their community. St. Luke staff considered themselves lucky to have been able to employ Worthington.

22. Worthington began working as a PRN on January 29, 2019. Worthington only worked in the imaging department as an ultrasound tech, which was where help was most needed to get caught up with the schedule. Even though Worthington was a PRN employee, she was working full-time from the beginning of her employment.

23. After Worthington began working as a PRN ultrasound tech, the ultrasound department was approximately three weeks behind schedule. It took until the middle of March, 2019, for the ultrasound department to get caught up on scheduling.

24. Although St. Luke normally had two ultrasound techs, from the time of Joachim's injury until January 29, 2019, there was only one FTE performing ultrasounds, Talley Davis (Davis). During this time, Davis was working Monday through Friday, and was the only on-call ultrasound tech. By the time Worthington was hired, Davis was exhausted from covering both Joachim's position and her own, and believed leaving the position open for longer could have resulted in a risk to patient care.

25. For five years prior to hiring Worthington, St. Luke had not had a PRN ultrasound tech. Prior to that, there were two student PRN who had worked briefly in the department at different times.

26. There was a period of time in 2016 when, as during Joachim's absence, Joachim was the only FTE ultrasound tech. St. Luke was actively trying to find another FTE ultrasound tech during that period of time, and Joachim could not keep up with the demands of the position by herself. Melissa Hoppe (Hoppe), a mammographer in St. Luke's radiology department, recalled Joachim verbally complaining about the work load when she was the only FTE ultrasound tech and crying on numerous occasions due to situation.

27. On February 13, 2019, Joachim was released to work by Dr. Laporte with the following expansive restrictions: "no pushing, pulling or lifting" and "no work with the right arm." (Ex. 4.). It was anticipated Joachim would have these restrictions until May 1, 2019.

28. Dr. Laporte confirmed at hearing in this matter that the restrictions meant Joachim could not use her right arm and therefore could not perform her duties as an ultrasound tech without modifications to the job. Dr. Laporte also opined that Joachim could have performed her ultrasound duties if there were modifications so that she would not have to use her right arm.

29. Joachim immediately provided her release to Rider, her supervisor, detailing her medical restrictions.

30. Rider informed Joachim St. Luke could not accommodate her medical restrictions, and that her only alternative was to remain on continued leave.

31. Joachim's FMLA expired on February 21, 2019.

32. St. Luke had previously allowed an extension of leave as an accommodation to other employees when their ADA leave ran out. St. Luke did not offer this option to Joachim.

33. Upon expiration of Joachim's FMLA leave time, St. Luke reclassified Joachim's employment status from FTE to PRN.

34. Joachim understood that PRN employees who did not work for six consecutive months would effectively be terminated.

35. Joachim discussed her concerns regarding a change of status to PRN with both Rider and the St. Luke's Human Resources Manager, Theresa Jones (Jones). Joachim was particularly concerned about losing the benefits associated with her FTE position.

36. Because of her concerns over loss of benefits, Joachim inquired with St. Luke about the possibility of returning to work in a clerical position, such as answering telephones, that would be within her restrictions.

37. Rider informed Joachim there were no light duty assignments within the imaging department, but that Joachim could inquire about other positions with the human resources department.

38. Rider made no actual inquiry regarding what duties Joachim might be able to perform, nor did he explore what accommodations could be made to accommodate Joachim. Instead, he referred Joachim to Jones in human resources, and did not speak with Jones himself until after Joachim spoke with her.

39. When Joachim followed up with Jones, Jones informed Joachim there were no positions available within her restrictions. Jones did not inquire about or ask for further clarification regarding Joachim's restrictions, nor did she look into the possibility of modifying Joachim's current position. Although Jones asserted Joachim could not perform any position at St. Luke's, no evidence was presented as to whether Jones considered providing modifications for Joachim.

40. No one at St. Luke ever independently reached out to Joachim regarding accommodations.

41. St. Luke did not look into the possibility of modifying any positions to fit into Joachim's restrictions, and made no other proactive attempts to look into light duty work or modifications for Joachim. St. Luke also never made inquiry regarding what duties Joachim was actually capable of in light of her restrictions.

42. Although St. Luke had offered an extension of FMLA leave as an accommodation to other employees, it did not offer to do so for Joachim.

43. At the time of Joachim's inquiry, Rider had intentions of bringing Joachim back to her FTE position once she was released to work without restrictions. Until that point, St. Luke had always told Joachim they were intending to reinstate her position when she was released to full duty.

44. On April 24, 2019, a Work Status Report form from Dr. Laporte's office noted Joachim would not be released to full duty until May 13, 2019.

45. Joachim immediately informed Rider of Dr. Laporte's redetermination of her medical status and release to full duty date.

46. At some point in late-April or early-May, 2019, Worthington asked Rider that she be moved into an FTE position, and conveyed she may have to leave for other opportunities if she was not made an FTE.

47. St. Luke was concerned that Joachim would not actually be released to work on May 13, 2019, and because that was only an anticipated date, the date would be extended again as had consistently happened up to that point. Joachim never, in fact, received a subsequent Work Status Report that noted unequivocally she was released to work with no restrictions.

48. On or around May 6, 2019, Rider offered Ms. Worthington an FTE position in the ultrasound tech department. Worthington did not immediately accept the offer.

49. On or around May 7, 2019, Joachim spoke with Rider regarding returning to work without restrictions on May 13, 2019 and coming back to work again either that or the following day.

50. During the May 7, 2019, meeting between Joachim and Rider, Rider gave no indication Joachim might not be permitted to return to her FTE position following her release on May 13, 2019. Rider also did not convey that he had recently offered an FTE job to Worthington.

51. On or around May 9 or 10, 2019, Worthington informed Rider she would accept the FTE position offered to her on May 6, 2019.

52. On May 10, 2019, Rider notified Joachim she would remain a PRN employee. Rider further informed Joachim he had no work for her in that position in the upcoming future.

53. Had Worthington not accepted the offer, Rider would have returned Joachim to her FTE position.

54. From May 10, 2019, to the date of the hearing, St. Luke never called in a PRN for the ultrasound tech department, notwithstanding that Worthington left her position with St. Luke.

55. Joachim had remained in constant contact with St. Luke following her injury, including with both Rider and Jones, and relayed to them updates on her work ability as well as her intention to return to her FTE position.

56. St. Luke asserts it suffered a financial hardship because Davis acting alone as an ultrasound tech could not keep up with the demand for scheduled testing. As a consequence, St. Luke claims it was forced to refer patients to other facilities beyond what would normally be the case, though provided no evidence of such an occurrence. It is undisputed, however, that for the period during which only one tech was working, venous insufficiency studies could not be regularly performed, and these were among the imaging departments most lucrative procedures.

57. St. Luke estimated a direct loss in excess of $45,000.00 in revenue during the period where the ultrasound department did not have sufficient coverage. Typically, the ultrasound department is staffed Monday through Saturday. St. Luke's calculation was based on the approximately 27 days of uncovered time leading to lost revenue between Joachim's initial leave date and Worthington's hiring.

58. On an absolute basis, the financial reports produced by St. Luke for the imaging department do not appear to show a significant overall loss of revenue, though potential increases in revenue may have been forgone as a result of Joachim's absence.

59. Although no evidence quantified such a loss, St. Luke may have also lost goodwill with its patients due to having to schedule testing further out than normal, which may have resulted in poor customer service and the potential for additional lost revenue. Todd believed the potential costs of losing a patient and/or having a bad outcome due to insufficient coverage in the imaging department were significant.

60. St. Luke admits it cannot measure lost patient goodwill. However, based on an outside report not admitted into evidence and not specific to the hospital, Todd estimated the value of a new patient is more than $600,000 and that typical lifetime household healthcare expenditures are more than $1.5 million for hospitals and over $1.0 million for physician-related expenses. That same report estimated that over 70% of patients' most recent healthcare visits influence their loyalty to an organization, as do the experiences of their family and friends. St. Luke did not, however, present any expert testimony to corroborate its assertions based on an outside report.

61. On February 19, 2020, Joachim underwent a psychological evaluation at Sweetgrass Psychological Services performed by Sara Boilen, Psy.D. (Dr. Boilen). The purpose of the evaluation was to asses her functioning and determine the psychological impacts of Joachim's recent termination from St. Luke. The evaluation consisted of a client history form, a clinical interview, a consultative interview with Joachim's husband, and a Minnesota Multiphasic Personality Inventory, Second Edition, Restructured Format (MMPI).

62. Dr. Boilen related several emotionally distressing events from Joachim's past, including alcoholic parents, Joachim's own struggles with alcoholism (there is no indication Joachim was not in recovery at any time relevant to this matter), two suicide attempts, and several mentally and physically abusive partners. Most recently, Joachim had lost her father and two pets.

63. Dr. Boilen found Joachim experiences more distress than the normal population. Joachim's MMPI score was in the 98th percentile, which showed Joachim reported more distress than most people, and may signify an exaggerated reporting. Dr. Boilen agreed that significant elevation of that score may be linked to non-credible symptom reporting, but did not believe Joachim was exaggerating her reporting because of her life history coupled with other test observations. Dr. Boilen described Joachim's profile as consistent with somebody who had a fairly insecure sense of herself in the world. Her personal life was forever changing and chaotic, and her job was her primary place of stability. The loss of Joachim's job resulted in a high amount of distress.

64. Based on her clinical judgment and the MMPI, Dr. Boilen, in addition to several other findings, concluded that Joachim's job loss was particularly devastating to her. Dr. Boilen opined that she had no reason to doubt Joachim's job loss caused her to experience the symptoms she had reported and that, more likely than not, the job loss was a major contributing factor to Joachim's distress.

65. By Joachim's own account, her job loss affected her sense of identity and purpose. Joachim also experiences loss of sleep, fatigue, anxiety, relationship issues, depression, digestive issues, and abandonment issues.

66. Joachim applied for positions at hospitals in the area without success. From May, 2019, through September, 2019, Joachim applied for approximately seven different jobs, not including duplicates.

67. On September 23, 2019, Joachim began working at S& K Electronics in Pablo, Montana, as a quality assurance inspector with a starting salary of $12.70 per hour. At the time of the hearing, her wage was $13.72 per hour following two wage increases. Although Joachim was not there long enough to earn the amount in 2019, S & K paid out $1,400.00 in profit sharing that year. Joachim works 40 hours per week.

68. Joachim's salary at St. Luke as an FTE was $36.94 per hour. Her benefits included health insurance with a $2,000.00 deductible and retirement contributions, for which she put in $100.00 each pay period and St. Luke matched her at 4% of her base salary. Joachim's 2018 W-2 shows $60,835.93 in income.

69. Prior to losing her FTE position with St. Luke and associated health insurance benefits, Joachim was taking medications which cost her $90.00 per month after her insurance copay. Since losing her benefits, Joachim has had to pay out of pocket expenses for her prescriptions and had to discontinue her more expensive medications while also using cheaper versions of the ones she continues to take. The medications now cost her $300.00 per month. Although Joachim had been on anti-depressants in excess of 20 years, she did not increase those medications following her job loss.

70. Joachim had planned to work at St. Luke as an ultrasound tech until her age of retirement, between 62- to 67-years-old.

71. Joachim and her husband, David Joachim, had recently purchased a home prior to Joachim's job loss. The loss of her position hindered their ability to pay their mortgage. Both Joachim and her husband believed they would lose the

house, requiring Joachim to withdraw $10,000.00 out of her savings and retirement to stay up-to-date with the mortgage.

72. Joachim did not receive counseling or help for the emotional distress caused by her job loss because she could not afford it without health insurance.

IV. DISCUSSION

A. 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).

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 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).

To establish a prima facie case for failure to accommodate, Joachim 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) St. Luke was aware of Joachim's disability and she requested accommodations related to the disability; (3) a reasonable accommodation exists that would have been effective; and (4) St. Luke 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, St. Luke 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.

St. Luke does not dispute that, during the all times relevant to this claim, Joachim was disabled within the meaning of the MHRA as a result of her shoulder injury and subsequent surgery. It also does not expressly dispute that Joachim was

qualified and able to perform the essential functions of the job with or without reasonable accommodations. Given Joachim's injury and her skillset, the Hearing Officer finds she has met the first element of her prima facie case.

St. Luke was also aware of Joachim's disability. Joachim's specific requests for accommodation were limited, but she nonetheless did make such requests and St. Luke was aware of them. As such, Joachim has also met the second element of her prima facie case. The primary dispute in this matter concerns whether a reasonable accommodation existed that would have been effective and which St. Luke failed to provide.

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); *accord* 42 U.S.C. § 12111(9). An employee need only show that an accommodation seems reasonable on its face. *US Airways, Inc.*, 535 U.S. at 401-02 (citations omitted). Thus, 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).

Joachim makes several allegations as to how St. Luke failed to accommodate her, but some of those allegations involve what effectively amounts to a failure to create a new position for her (e.g., answering phones). There is no duty imposed upon an employer to create a new position to accommodate a disabled employee, particularly where the employee is no longer performing their essential functions. *Wellington v. Lyon Cty. Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir. 1999) (citations omitted); *see also Stephenson v. United Airlines, Inc.*, 9 Fed. App'x 760, 766 (9th Cir. 2001); *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 482-483 (7th Cir. 2017). To the extent that Joachim was asking for the creation of a new position, there was no reasonable accommodation in terms of a modified or light duty position that would have been effective and which St. Luke failed to provide.

Notwithstanding the foregoing, because of St. Luke's complete failure to engage in the interactive process (discussed below), it cannot show that it even contemplated ways in it might have been able to alter her job as an ultrasound tech. The Hearing Officer will readily grant that a modification involving limited-to-no use of Joachim's right arm would have been difficult, but its failure to even explore the

matter weighs heavily against any argument that providing such an accommodation would have been an undue hardship.

One accommodation which St. Luke's was clearly aware it could have offered which would have protected Joachim's position and which it failed to offer was an extension of Joachim's FMLA leave. Joachim spoke with Rider and Jones about her concerns regarding the end of her FMLA leave, but no attempt was made to consider an extension as an accommodation. St. Luke did not even go so far as to offer to accommodate Joachim by leaving her in a position that would have allowed her to maintain her health insurance and benefits while she recovered. Joachim specifically argues now that St. Luke failed to offer a reasonable accommodation when it did not extend her leave by 13 days on April 24, 2019, after she provided St. Luke with a Work Status Report that revised her anticipated release date from May 1, 2019, to May 13, 2019 (it was during this time period that St. Luke hired Worthington in an FTE position).

Even though it did not offer to extend her protected leave, St. Luke argues it did, in fact, provide an accommodation for Joachim when it held her position open from the start of her FMLA leave on November 29, 2018, leave until it offered Worthington the position, which it calculates at approximately 22.5 weeks, or 10.5 weeks past the end of Joachim's FMLA leave. With regard to the reasonableness of an extension of protected leave, it may be considered a reasonable accommodation, but the analysis is handled like any other accommodation. "Determining whether a proposed accommodation (medical leave in this case) is reasonable, including whether it imposes an undue hardship on the employer, requires a fact-specific, individualized inquiry." *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (citing *Hall v. U.S. Postal Serv.*, 857 F.2d 1073, 1080 (6th Cir. 1988). One factor to be considered is whether a job is being held open indefinitely. *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 (1st Cir. 2000) (citations omitted).

Setting aside arguments of undue hardship, St. Luke concedes leaving Joachim's position open for her return was a reasonable accommodation. For purposes of Joachim's prima facie case, then, the Hearing Officer finds the additional 13 day accommodation argued for by Joachim was reasonable and effective by virtue of St. Luke's own argument that it was already accommodating Joachim, and that St. Luke failed to provide the accommodation. The Hearing Officer further finds, however, that St. Luke actually failed to offer any accommodation at all, which is highlighted by the fact that Joachim's health insurance and benefits were cut off while she was still recovering. Rather, it merely chose not to hire someone to replace Joachim until Worthington's hiring as an FTE, and failing to fill the position any sooner was merely happenstance. St. Luke admittedly had not searched for candidates for the position, but as soon as one came along, it was able to leap on

hiring that person without consideration of Joachim and her disabilities because it had never, in fact, protected Joachim's position. Thus, contrary to St. Luke's argument, it offered no real accommodation and took no actions that actually protected Joachim's position. Thus, at a minimum, extension of Joachim's FMLA leave would have been a reasonable accommodation that was not offered by St. Luke. Joachim has therefore met all elements of her prima facie case for failure to accommodate.

B. Failure to Engage in the Interactive Process

As a separate element to her claim, Joachim has alleged St. Luke failed to engage in the interactive process. As discussed below, a failure to engage in the interactive process is not a separate claim in itself, but rather an alternative means of proving why an employer failed to accommodate a disabled employee.

In order to identify reasonable accommodations, an employer is required to engage in good faith in the "interactive process" with an employee, which is essentially opening up a line of communication regarding possible accommodations. *See McDonald*, ¶ 80; *see also* 29 C.F.R. § 1630.2(o)(3). The failure to engage in an interactive process is not sufficient in itself to establish a claim. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319-20 (3d Cir. 1999) (citations omitted). In order to recover, there must be some showing that a reasonable accommodation was possible but not made because of the failure to engage in the interactive process. *Id.*; *see also Williams v. 306 Philadelphia House. Auth. Police Dep't.*, 380 F.3d 751, 772 (3d Cir. 2004).

An employee can demonstrate that an employer breached its duty to provide reasonable accommodations because it failed to engage in good faith in the interactive process by showing that: "1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith." *Taylor*, 184 F.3d at 319-20 (3d Cir. 1999) (emphasis added) (citations omitted). Because a failure to engage in the interactive process and associated failure to provide a reasonable accommodation for a known disability is inherently "'on the basis of' the disability,'" there is no need to probe the subjective intent of the employer or show discriminatory animus. *See Punt v. Kelly Servs.*, 862 F.3d 1040, 1048-49 (10th Cir. 2017) (quoting 42 U.S.C. § 12112(a)) (specifically regarding failure to provide reasonable accommodations).

The interactive process, which is mandatory, was described by the Montana Supreme Court in the *McDonald* case. As the Court explained:

> . . . [E]mployers are required to engage in an "interactive process" with disabled employees to identify and implement appropriate reasonable accommodations. *Barnett v. U.S. Air*, 228 F.3d 1105, 1111-14 (9th Cir. 2000) (*en banc*), judgment vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002); 29 C.F.R. § 1630.2(o)(3), app. § 1630.9. The interactive process, which is triggered by the employee's request for an accommodation or the employer's recognition of the need for one, requires good-faith exploration of possible accommodations. *Barnett*, 228 F.3d at 1112, 1114. The employer should meet with the employee, request information about the condition and what limitations the employee has, ask the employee what she specifically wants, show some sign of having considered her request, and offer and discuss available alternatives when the request is too burdensome. *Barnett*, 228 F.3d at 1115. Both sides must communicate directly and exchange essential information, and neither side should delay or obstruct the process. *Barnett*, 228 F.3d at 1114-15. Since the duty to accommodate is a continuing duty which is not exhausted by one effort, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. *Humphrey v. Memorial Hospitals*, 239 F.3d 1128, 1138 (9th Cir. 2001).

McDonald, ¶ 80. In a nutshell, "[t]he interactive process requires '(1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective.'" *Alexander*, ¶ 13 (citing *United States EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110-11 (9th Cir. 2010)).

As discussed above, Joachim has already shown that St. Luke's knew of her disability and that Joachim requested accommodations. It is also apparent from the facts that St. Luke's did essentially nothing to engage in the interactive process. The only time St. Luke discussed accommodations with Joachim were when she approached them. While St. Luke's argues Joachim was at fault for not more extensively engaging in discussions herself, Joachim's failings do not make up for St. Luke's own shortcomings. This shortcoming is evidenced by the fact that St. Luke did not even attempt to engage in the interactive process when presented with Joachim's final 13-day extension of work restrictions, and instead hired a replacement. Given its total lack of engagement in the interactive process, the Hearing Officer finds that St. Luke did not make a good faith effort to engage in the

process. Having already found St. Luke was aware of Joachim's disability, this satisfies the first two elements of a claim that St. Luke breached its duty to engage in the interactive process in good faith.

Joachim has also shown that a reasonable accommodation—an extension of her FMLA leave—was possible but not made because of the failure to engage in the interactive process. Thus, in addition to showing the prima facie elements of a failure to accommodate, Joachim has also alternatively shown that, but for St. Luke's complete and total failure to engage in the interactive process, she could have been reasonably accommodated.

C. Undue Hardship

Even though Joachim has made prima facie cases for failure to accommodate and failure to engage in the interactive process, St. Luke has asserted the affirmative defense of undue hardship. 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:
>
> > (a) the nature and expense of the accommodation needed;
> >
> > (b) the overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility, the effect on expenses and resources of the facility, and other impacts of the accommodation on the operation of the facility;
> >
> > (c) the overall financial resources of the business, the overall size of the business of the employer with respect to the number of employees, and the number and type and location of the facilities of the employer; and
> >
> > (d) the type of operation or operations of the employer, including composition, structure, and functions of the work force of the employer, and the geographic separateness and administrative or

> fiscal relationship of the facility or facilities in question to the employer.

Admin. R. Mont. 24.9.606(5)(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;
>
> (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;
>
> (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;
>
> (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
>
> (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). St. Luke presents several arguments regarding undue hardship associated with leaving the ultrasound open. While these arguments are strong, they do not rise to the level of showing undue hardship.

St. Luke presented argument regarding the financial hardship it suffered as a result of Joachim's absence. Its arguments with regard to lost revenue during Joachim's absence, while intellectually honest, were not borne out by the actual financial numbers. It is also difficult to quantify loss of goodwill associated with the delays in testing and increased necessity to refer patients elsewhere, and whether St. Luke would have suffered any consequences from extending Joachim's leave is uncertain, particularly given Worthington's presence at the time. St. Luke has therefore failed to show offering a reasonable accommodation to Joachim resulted in undue financial hardship.

The most compelling argument for undue hardship raised by St. Luke goes not to financial hardship, but rather to the type of operation run by St. Luke—i.e., that it is a hospital with the health and welfare of the community it serves at stake. St. Luke argues that, without adequate ultrasound care, it placed the community which relies on its services at risk which could have manifested itself in the form of services being unavailable when needed, mistakes being made, and any number of other scenarios which could have put patients, and therefore St. Luke, in jeopardy. St. Luke presented nothing more than speculation, however, when asserting an extension of Joachim's leave—ultimately just by 13 days—would have resulted in a threat to the community and therefore an undue hardship. This argument of undue hardship therefore also fails.

In light of the foregoing, St. Luke has failed to show that a 13-day extension of Joachim's leave would have been an undue hardship to the hospital. This finding, however, is juxtaposed against the fact St. Luke never actually extended her FMLA leave at all, and therefore never even attempted an accommodation. This failure to offer protection of any kind was evidenced by the fact that, as soon as it was placed in a position where Worthington expressed a desire to work in an FTE position, St. Luke hired her. Because Worthington had covered Joachim's position as a PRN prior to that time, St. Luke would have experienced no hardship by extending Joachim's protected leave by an additional 13 days since it had not provided any protection at all up to that point. Abstaining from hiring Worthington as an FTE prior to her request was not an accommodation to Joachim, only a function of the fact that Worthington had not previously asked to work in an FTE position.

Because it effectively failed to offer any accommodation to Joachim at all, it would not have been an undue hardship to have actually offered an accommodation for the additional 13 days. While the Hearing Officer does acknowledge St. Luke's argument that the May 13 date may have been speculative, it waived any argument regarding whether the date was speculative when it did not give Joachim the opportunity to attempt a return.

Because St. Luke has failed to show undue hardship and Joachim has successfully argued her prima facie cases for both failure to accommodate and failure to engage in the interactive process, Joachim has prevailed in her claim.

V. DAMAGES

1. Back Pay

In cases of 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. *See P.W. Berry Co. v. Freese*, 239 Mont. 183, 187, 779 P.2d 521, 523-24 (1989); *see also* 42 U.S.C. § 12117(a). Back pay is an equitable remedy commonly utilized to compensate the victim of unlawful employment discrimination and to deter employers from discriminating. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (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*, 2005 MT 123, ¶ 62, 327 Mont. 173, 112 P.3d 1039. Prejudgment interest on the back pay is also reasonable. *See P.W. Berry*, 239 Mont. at 185, 779 P.2d at 523.

The Charging Party has an affirmative duty to mitigate lost wages by using reasonable diligence to locate substantially equivalent employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). 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"); *see also, e.g., Landgraf v. Usi Film Prods.*, 511 U.S. 244, 252 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. *See Vortex*, ¶ 28; *see also Kauffman v. Sidereal Corp.*, 695 F.2d 343, 347 (9th Cir. 1982) (quoting *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951).

St. Luke's bears the burden proving that Joachim failed to mitigate her damages. *Cromwell v. Victor Sch. Dist. No. 7*, 2006 MT 171, ¶ 25, 333 Mont. 1, 140 P.3d 487. To satisfy this burden, St. Luke's must prove "that, based on undisputed facts in the record, during the time in question there were substantially equivalent jobs available, which [a charging party] could have obtained, and that [the charging party] failed to use reasonable diligence in seeking one." *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994).

At the time of her termination, Joachim's salary at St. Luke as an FTE was $36.94 per hour. Her benefits included health insurance with a $2,000 deductible and retirement contributions, for which she put in $100.00 each pay period and St. Luke matched her at 4% of her base salary. Joachim's 2018 W-2 shows $60,835.93 in income, which indicates she was working less than full-time. The Hearing Officer

finds that the amount shown on the 2018 W-2 is the most appropriate figure to use for annual earnings, which are less than her hourly pay would imply.

Although Joachim attempted to find other ultrasound positions, she was unable to do so in a reasonable geographic area. The evidence shows Joachim made reasonable efforts to find suitable employment that would have provided similar wages and benefits to those at St. Luke, but was unable to do so. She ultimately accepted a full-time position as a quality assurance inspector at S & K Electronics, where she began working on September 23, 2019, with a starting salary of $12.70 per hour. At the time of the hearing, her wage was $13.72 per hour following two wage increases. Although the evidence was unclear as to exactly what was earned by Joachim, S & K paid profit sharing of $1,400.00 in 2019. Joachim works 40 hours per week.

St. Luke does not specifically argue what amount Joachim may be owed in back pay, but rather argues she is entitled to nothing. Joachim, conversely, requests that this tribunal award damages at a rate of $235.00 per day, offset by $64.00 per day for mitigating wages for a net of $171.00 per day. These are broad stroke figures which, particularly in the case of mitigation, appear to be incorrect on their face. Because Joachim failed to submit more detailed earnings, the Hearing Officer will assign lost wages of $1,169.92 per week based on $60,835.93 in income. The hearing officer will further assume Joachim earned $13.72 per hour as of January 1, 2020, and that she also was on track to earn $1,400.00 in profit sharing. These figures result in offsetting weekly wages of $508.00 until the end of 2019 (based on $12.70 per hour), and $575.45 thereafter (based on $13.72 per hour, plus $1,400.00 in profit sharing). Joachim's back pay award should not begin until she was released to work on May 13, 2019, and the offset is not effective until her start of work with S & K on September 23, 2019.

The evidence therefore supports a back pay award from May 13, 2019, through March 26, 2021, in the amount of $69,627.91. This award is reasonable likely to make Joachim whole for the discrimination she experienced at St. Luke. Joachim is also entitled to interest on the lost wages and benefits through the date of the decision at the rate of 6.25% per annum (the present H.15 bank prime rate plus 3.00%), which amounts to $4,537.38, for a total of $74,165.29. *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. *See Kerr*, 226 Mont. at 74, 733 P.2d at1295.

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). "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).

Reinstatement would seem reasonable in this case, but neither party has suggested that reinstatement is a viable alternative. Joachim asserts she is entitled to four years of front pay. As with back pay, St. Luke does not dispute this amount directly, but rather argues Joachim is not entitled to any award. Given the length of Joachim's service with St. Luke and its total failure to even engage in the interactive process with her, the Hearing Officer finds four years of front pay to be a reasonable time period, and that Joachim is entitled to an award of $123,649.76 in front pay damages, calculated using the same weekly amounts and offset as used for back pay. The present value of this award is $119,468.88. *See* Addendum A.

3. Emotional Distress

Joachim suffered emotional distress damages and is due compensation as a result. The Hearing Officer is empowered to take any reasonable measure to rectify any harm, pecuniary or otherwise, to Joachim 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*.

An employer is liable for all harms it inflicted upon a charging party, even if that party was unusually susceptible to emotional distress. *See, e.g., EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1286 (7th Cir. 1995) (regarding emotional distress damages for an employee with terminal cancer was not excessive because the emotional burden on a person dying of cancer). A charging party typically cannot, however, recover damages for harm resulting from factors unrelated to the discrimination which may have also caused emotional distress. See, e.g., McKinnon v. Kwong Wah Rest., 83 F.3d 498, 506 (1st Cir. 1996) (awarding $2,500.00 compensatory damages where it was difficult to differentiate between harm caused by childhood abuse and workplace harassment); *but see Malandris v. Merrill Lynch, Peirce, Fenner & Smith Inc.*, 703 F.2d 1152, 1170 (10th Cir. 1981) (employer liable for compensatory damages where aggravation of preexisting emotional distress was a foreseeable consequence of the employer's conduct).

Joachim provided a great deal of evidence regarding the emotional distress caused by St. Luke's actions, particularly in light of her longevity with the hospital and the grounding effect of her career. Joachim also, however, provided evidence showing she suffered from preexisting emotional distress which was difficult to differentiate from the workplace issues. The issue is further compounded because, as a result of her reduced benefits and income, Joachim did not seek out additional therapy or medical treatment for her increased stress following the loss of her FTE employment with St. Luke. In addition, the only concrete evidence of emotional distress taken from Dr. Boilen's reports show Joachim's symptoms may be the result of non-credible symptom reporting.

Joachim ultimately argues she is due $50,000.00 in emotional distress, while St. Luke argues she is owed nothing. St. Luke takes this argument too far and fails to recognize both its failings as well as Joachim's length of employment and its role as a consistent factor in her life. The Hearing Officer ultimately believes that Joachim's request would be reasonable if all the emotional distress she suffered was solely the result of St. Luke's actions, but it is not. Recognizing this issue, Joachim attempted

to argue she is particularly susceptible to emotional distress because of preexisting issues and therefore should have no offset. The weight of the evidence showed this was not the case, though, and that St. Luke should not be responsible for the emotional distress it did not cause. A reasonable assumption is that because so much of the emotional distress previously suffered by Joachim stemmed from remote events in the past, St. Luke is predominantly but not entirely responsible for Joachim's present emotional distress, or approximately 75% of the emotional distress shown by Joachim at hearing. Assigning 75% responsibility for emotional distress to St. Luke's results a total emotional distress award of $37,500.00.

4. Affirmative Relief

The determination that the actions of St. Luke were discriminatory mandates affirmative relief under the MHRA to enjoin and prevent future discriminatory acts by St. Luke. Mont. Code Ann. §49-2-506(1)(a). In this case, appropriate affirmative relief is an injunction and an order requiring that, within 20 days of this order, St. Luke shall (1) identify its current management and supervisory employees with responsibility for reasonable accommodations at any Montana locations and identify appropriate disability discrimination training of at least as much as meets the approval of Montana Human Rights Bureau (HRB). St. Luke must thereafter provide that training at its expense at the earliest availability, and thereafter annually for then current management employees with responsibility for operations at any Montana locations, keeping records to verify its continuing compliance with this judgment; and (2) must work with an attorney familiar with employment discrimination laws to create and review policies and notices regarding reasonable accommodations that comply with the MHRA; and must thereafter adopt policies and appropriately disseminate policies to all employees. Verification must be provided to HRB within 10 days of completion.

VI. CONCLUSIONS OF LAW

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

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

5. The accommodation of an extension of leave sought by Joachim was both effective and reasonable, and was not undue hardship on St. Luke to continue providing as sought by Joachim. Admin R. Mont. 24.9.606(3)(b); Admin. R. Mont. 24.9.606(5).

6. St. Luke failed to engage in the interactive process in good faith, and failed to accommodate Joachim as a result. *McDonald*, ¶ 80; Admin. R. Mont. 24.9.606(5).

7. Joachim is entitled to recover $69,627.91 in back pay, as well as interest in the amount of $4,537.38, for a total of $75,523.53.

8. Joachim is entitled to recover $123,649.76 in front pay, the present value of which is $113,032.17.

9. Joachim is entitled to recover $37,500.00 in emotional distress.

10. 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).

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

VII. ORDER

1. Judgment is granted in favor of Joachim against St. Luke.

2. Within 90 days of the date of this decision, St. Luke shall pay to Joachim the sum of $231,134.16, representing $74,165.29 in backpay and interest; $119,468.88 in front pay, and $37,500.00 in emotional distress damages.

3. Within 20 days of this order, St. Luke shall (1) identify its current management and supervisory employees with responsibility for reasonable accommodations at any Montana locations and identify appropriate disability discrimination training of at least as much as meets the approval of HRB. St. Luke must thereafter provide that training at its expense at the earliest availability, and thereafter annually for then current management employees with responsibility for operations at any Montana locations, keeping records to verify its continuing compliance with this judgment; and (2) must work with an attorney familiar with employment discrimination laws to create and review policies and notices regarding reasonable accommodations that comply with the MHRA; and must thereafter adopt

policies and appropriately disseminate policies to all employees. Verification must be provided to HRB within 10 days of completion.

DATED: this 26th day of March, 2021.

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

* * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Kristi Joachim, Charging Party, and her attorney, L. Jason Bryan; and St. Luke Community Healthcare, and its attorney, Jeffery B. Smith:

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.

Joachim Addendum A

Backpay		
		Weekly
Wages:	$	1,169.92
S & K Offset #1:	$	508.00
S & K Offset #2:	$	575.45
Start Date		5/13/2019
End Date:		3/26/2021
Interest Rate:		6.25%
Net Backpay and Benefits:	$	69,627.91
Interest:	$	4,537.38
Total with Interest:	$	74,165.29

Front Pay		
Total Award:	$	123,649.76
Years:		4
Periods Per Year:		52
Weekly Wages:	$	1,169.92
Net Periodic Payment:	$	594.47
Discount Rate:		0.86%
Periodic Rate:		0.017%
Present Value (Lump Sum):	$	119,468.88
Discount Approx. = 10-yr. Treasury 1-yr. Avg.		

Emotional Distress:	$	37,500.00
Total:	**$**	**231,134.16**

Pay Date	Net Pay	Interest	
Monday, May 20, 2019	$ 1,169.92	$ 135.42	For prior week
Monday, May 27, 2019	$ 1,169.92	$ 134.02	
Monday, June 3, 2019	$ 1,169.92	$ 132.62	
Monday, June 10, 2019	$ 1,169.92	$ 131.22	
Monday, June 17, 2019	$ 1,169.92	$ 129.81	
Monday, June 24, 2019	$ 1,169.92	$ 128.41	
Monday, July 1, 2019	$ 1,169.92	$ 127.01	
Monday, July 8, 2019	$ 1,169.92	$ 125.61	
Monday, July 15, 2019	$ 1,169.92	$ 124.20	
Monday, July 22, 2019	$ 1,169.92	$ 122.80	
Monday, July 29, 2019	$ 1,169.92	$ 121.40	
Monday, August 5, 2019	$ 1,169.92	$ 120.00	
Monday, August 12, 2019	$ 1,169.92	$ 118.59	
Monday, August 19, 2019	$ 1,169.92	$ 117.19	
Monday, August 26, 2019	$ 1,169.92	$ 115.79	
Monday, September 2, 2019	$ 1,169.92	$ 114.39	
Monday, September 9, 2019	$ 1,169.92	$ 112.99	
Monday, September 16, 2019	$ 1,169.92	$ 111.58	
Monday, September 23, 2019	$ 661.92	$ 62.34	Start S & K Offset
Monday, September 30, 2019	$ 661.92	$ 61.54	
Monday, October 7, 2019	$ 661.92	$ 60.75	
Monday, October 14, 2019	$ 661.92	$ 59.96	
Monday, October 21, 2019	$ 661.92	$ 59.16	
Monday, October 28, 2019	$ 661.92	$ 58.37	
Monday, November 4, 2019	$ 661.92	$ 57.58	
Monday, November 11, 2019	$ 661.92	$ 56.78	
Monday, November 18, 2019	$ 661.92	$ 55.99	
Monday, November 25, 2019	$ 661.92	$ 55.20	
Monday, December 2, 2019	$ 661.92	$ 54.40	
Monday, December 9, 2019	$ 661.92	$ 53.61	
Monday, December 16, 2019	$ 661.92	$ 52.82	
Monday, December 23, 2019	$ 661.92	$ 52.02	
Monday, December 30, 2019	$ 661.92	$ 51.23	
Monday, January 6, 2020	$ 594.47	$ 45.30	Increase S & K Offset
Monday, January 13, 2020	$ 594.47	$ 44.59	
Monday, January 20, 2020	$ 594.47	$ 43.87	
Monday, January 27, 2020	$ 594.47	$ 43.16	
Monday, February 3, 2020	$ 594.47	$ 42.45	
Monday, February 10, 2020	$ 594.47	$ 41.74	
Monday, February 17, 2020	$ 594.47	$ 41.02	
Monday, February 24, 2020	$ 594.47	$ 40.31	
Monday, March 2, 2020	$ 594.47	$ 39.60	
Monday, March 9, 2020	$ 594.47	$ 38.88	
Monday, March 16, 2020	$ 594.47	$ 38.17	
Monday, March 23, 2020	$ 594.47	$ 37.46	
Monday, March 30, 2020	$ 594.47	$ 36.75	
Monday, April 6, 2020	$ 594.47	$ 36.03	
Monday, April 13, 2020	$ 594.47	$ 35.32	
Monday, April 20, 2020	$ 594.47	$ 34.61	
Monday, April 27, 2020	$ 594.47	$ 33.90	
Monday, May 4, 2020	$ 594.47	$ 33.18	
Monday, May 11, 2020	$ 594.47	$ 32.47	
Monday, May 18, 2020	$ 594.47	$ 31.76	
Monday, May 25, 2020	$ 594.47	$ 31.05	
Monday, June 1, 2020	$ 594.47	$ 30.33	
Monday, June 8, 2020	$ 594.47	$ 29.62	
Monday, June 15, 2020	$ 594.47	$ 28.91	
Monday, June 22, 2020	$ 594.47	$ 28.20	
Monday, June 29, 2020	$ 594.47	$ 27.48	
Monday, July 6, 2020	$ 594.47	$ 26.77	
Monday, July 13, 2020	$ 594.47	$ 26.06	
Monday, July 20, 2020	$ 594.47	$ 25.35	
Monday, July 27, 2020	$ 594.47	$ 24.63	
Monday, August 3, 2020	$ 594.47	$ 23.92	
Monday, August 10, 2020	$ 594.47	$ 23.21	
Monday, August 17, 2020	$ 594.47	$ 22.50	
Monday, August 24, 2020	$ 594.47	$ 21.78	
Monday, August 31, 2020	$ 594.47	$ 21.07	

Monday, September 7, 2020	$	594.47	$	20.36	
Monday, September 14, 2020	$	594.47	$	19.65	
Monday, September 21, 2020	$	594.47	$	18.93	
Monday, September 28, 2020	$	594.47	$	18.22	
Monday, October 5, 2020	$	594.47	$	17.51	
Monday, October 12, 2020	$	594.47	$	16.80	
Monday, October 19, 2020	$	594.47	$	16.08	
Monday, October 26, 2020	$	594.47	$	15.37	
Monday, November 2, 2020	$	594.47	$	14.66	
Monday, November 9, 2020	$	594.47	$	13.95	
Monday, November 16, 2020	$	594.47	$	13.23	
Monday, November 23, 2020	$	594.47	$	12.52	
Monday, November 30, 2020	$	594.47	$	11.81	
Monday, December 7, 2020	$	594.47	$	11.10	
Monday, December 14, 2020	$	594.47	$	10.38	
Monday, December 21, 2020	$	594.47	$	9.67	
Monday, December 28, 2020	$	594.47	$	8.96	
Monday, January 4, 2021	$	594.47	$	8.25	
Monday, January 11, 2021	$	594.47	$	7.53	
Monday, January 18, 2021	$	594.47	$	6.82	
Monday, January 25, 2021	$	594.47	$	6.11	
Monday, February 1, 2021	$	594.47	$	5.40	
Monday, February 8, 2021	$	594.47	$	4.68	
Monday, February 15, 2021	$	594.47	$	3.97	
Monday, February 22, 2021	$	594.47	$	3.26	
Monday, March 1, 2021	$	594.47	$	2.54	
Monday, March 8, 2021	$	594.47	$	1.83	
Monday, March 15, 2021	$	594.47	$	1.12	
Monday, March 22, 2021	$	594.47	$	0.41	
Friday, March 26, 2021	$	594.47	$	-	Full pay for full work week
	$	69,627.91	$	4,537.38	