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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 156-2021:

TIFFANY SORENSON, Charging Party, vs. TOWN PUMP, Respondent.	**HEARING OFFICER DECISION AND NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

I. PROCEDURAL AND PRELIMINARY MATTERS

Charging Party Tiffany Sorenson ("Sorenson") filed a complaint with the Human Rights Bureau ("HRB") on December 4, 2019, alleging Respondent Town Pump discriminated against her on the basis of disability by failing to provide reasonable accommodations and by creating a hostile work environment, ultimately violating their duty to provide her with reasonable accommodations as a result of her physical injury.

Prior to hearing, Town Pump filed a motion for summary judgment on the basis there were no disputed issues of material fact regarding any of Sorenson's claims. The Hearing Officer denied the motion, finding there were disputed issues of material fact. Sorenson also filed motions in limine seeking to establish both that: (1) statements and acts of Town Pump's management outside of Sorenson's presence of which she was aware were evidence of hostile work environment; and (2) tasks assigned by management outside of Sorenson's work restrictions were evidence of hostile work environment. These motions were also denied on the basis that they sought to ascribe meaning to unadmitted evidence prior to hearing, which was premature and an inappropriate basis for a motion in limine.

A contested case hearing was held remotely via Zoom with Hearing Officer Chad Vanisko on December 21 and 22, 2020. Joseph Nevin represented Sorenson. Cynthia L. Walker represented Town Pump. Sorenson and Town Pump In-House Counsel David Gutierrez were present via Zoom during the hearing.

Sorenson, Keith Coleman, Becca House, Aleta Munden, Kayla Apple, Evelynn Swanton, Donnel Standiford, Lori Harrell, Amanda Wheeler, Katelyn Buck, and Kathy Lawson all testified under oath. The following exhibits were admitted by stipulation of the parties: Charging Party's Exhibits 6, 8, and 9 and Respondent's Exhibits 101, 102, 104, and 116. In addition, the following exhibits were admitted during the hearing: Charging Party's Exhibits 11 and 12 and Respondent's Exhibits 103, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117 (pp. 2-48), 121, 122, 128, and 129. Closing arguments were deferred to the post-hearing briefs, with opening briefs to be submitted by February 22, 2021, and optional reply briefs to be submitted by March 5, 2021.

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 Town Pump fail to reasonably accommodate Sorenson in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

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

4. Did Town Pump discriminate against Sorenson on the basis of disability by creating a hostile work environment in violation of the Montana Human Rights Act, Title 49, Chapter 2, Montana Code Annotated?

5. If Town Pump did illegally discriminate against Sorenson as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the Department order to rectify such harm?

6. If Town Pump did illegally discriminate against Sorenson 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. On February 3, 2018, Sorenson was hired as a part-time Floor Runner at the Lucky Lil's casino in Helena, Montana.

2. Initially, Sorenson was employed by Lewis and Clark Lounge Corp., which did not have any relationship to Town Pump. Town Pump became Sorenson's employer effective June 18, 2018.

3. Sorenson cared about her job and wanted to do well.

4. The general atmosphere and interpersonal interactions among employees at Sorenson's specific work locations could best be described as juvenile at times, none of which was encouraged or condoned by Town Pump upper management. The situation was likely the result of inexperience and conflicting personalities at local stores.

5. In August, 2018, Sorenson suffered an on-the-job injury involving her left shoulder. Sorenson is right-hand dominant.

6. Sorenson had become a shift supervisor at some point, but "demoted" herself to a floor runner because of the shift schedules that did not work well with her family schedule.

7. Sorenson was off work due to her injury from August, 2018, through September 14, 2018, at which time she was released to return to work with restrictions.

8. After reviewing medical status forms Sorenson submitted, Town Pump engaged in accommodation discussions. Those discussions concerned her restrictions and job description, and had her identify tasks she felt she could not perform. The parties agreed to accommodations that would allow Sorenson to perform the essential functions of her job, which were reduced to writing on Accommodations Request forms.

9. During accommodation discussions, it was emphasized that Sorenson was not to perform work outside of her restrictions, and that other employees were to

perform tasks she was unable to perform herself. Sorenson expressed concern that other employees would perceive her as lazy due to her inability to perform all floor runner tasks. Sorenson was told she would not be disciplined for not performing tasks she felt she was unable to perform.

10. On September 25, 2018, Sorenson contacted Town Pump's hotline to complain she did not feel like she could work with her co-worker, Bree, and that she felt there was favoritism and a conflict of interest between Bree and manager Kelly Hazlitt ("Hazlitt") because Hazlitt was going to adopt Bree's unborn child.

11. Sorenson's hotline complaint was investigated by Town Pump District Manager Evelynn Swanton ("Swanton"), which resulted in Bree being transferred to a different location. This information was communicated to Sorenson during an October 1, 2018, meeting.

12. Also on October 1, 2018, an accommodation meeting took place. As a result of the discussions at the meeting, Sorenson requested a leave of absence from October 1, 2018, until October 15, 2018, as an accommodation. Town Pump agreed to the leave of absence.

13. Manager Sarina Crews ("Crews"), who started work with Town Pump on November 12, 2018, and Swanton held an accommodation discussion with Sorenson on December 5, 2018, and completed an Accommodations Request form, identifying both tasks Sorenson could not perform and accommodations agreed upon with her that would allow Sorenson to perform her job.

14. In January, 2019, Sorenson provided a Medical Status form completed by her provider which continued her then-current restrictions and stated Sorenson was awaiting authorization for shoulder surgery.

15. In late January, 2019, due to a recent robbery, Sorenson agreed to work additional shifts for a few weeks to allow for double-staffing. Sorenson prepared a written statement agreeing to work additional shifts, which stated she understood that she could leave if needed to go home due to being in pain. Sorenson further agreed she would continue to stay within her limitations and not perform any restricted duties.

16. On April 4, 2019, Sorenson provided a Medical Status form completed by her medical provider which indicated she could lift up to 10 pounds with her left arm, up to 20 pounds with both arms, and that she was to avoid repetitive overhead work.

17. Assistant manager Keith Coleman ("Coleman") testified that, in mid-April, 2019, Assistant Manager Amanda Wheeler ("Wheeler") told Sorenson to mop the floor, which Sorenson told Wheeler she could not do. Coleman further testified that Wheeler told Sorenson she did not believe Sorenson's accommodation was real, loud enough for customers to hear. Contrary to Coleman's testimony, Coleman did not work during the same hours as Sorenson in April, 2019. The only time Wheeler, Sorenson, and Coleman worked together during the month of April was for staff meeting on April 22, 2019, from noon to approximately 1:15 p.m. On April 22, 2019, Sorenson's shift did not begin until 7:17 p.m., approximately forty-five minutes after Wheeler had left for the day and approximately one-and-a-half hours after Coleman had left for the day.

18. On May 21, 2019, Sorenson confronted Wheeler, who was briefly at work, about not being happy with her work schedule, arguing she should be scheduled for Friday and Saturday closing shifts every week because midday shifts did not make good money. Wheeler explained that Sorenson needed to take her concerns about the schedule to Crews, who did the scheduling.

19. While Wheeler was on her way out, Sorenson complained about an e-mail Crews had sent to all employees about the importance of providing good customer service. Although the e-mail was not directed at a particular employee, the argument included discussion about Wheeler viewing video of Sorenson sitting at the bar with a co-worker for over an hour while on shift, and that she should only sit in the back office and not at the bar if she needed breaks. Sorenson informed Wheeler that she should not have to give good service to "crack heads," that she had an accommodation that allowed her to sit whenever she wanted for however long she wanted. Wheeler responded that she was under the impression Sorenson no longer had an accommodation, but that she really did not know and would have Crews look into the matter and contact Sorenson. Sorenson said she could not come in during the hours when Crews was working, and accused Wheeler of saying all she did was sit around all the time. As Wheeler began to leave, Sorenson yelled something to the effect of, "Have a great night, Aman-DUH!" which Wheeler documented.

20. Sorenson asserts that, on or about May 22, 2019, Wheeler asked her to clean the outside windows and doors, which tasks were generally outside of Sorenson's restrictions. Sorenson initially asserted this request occurred on May 24, 2019, until it was pointed out that neither Sorenson nor Wheeler worked on May 24, 2019. Notwithstanding that Wheeler denied assigning these tasks to Sorenson, the only times the two worked together between May 20, 2019, and May 31, 2019, were for seven minutes on May 21, 2019, from 9:21 p.m. to 9:28 p.m., when Wheeler

came in to do an alcohol check, and for two hours on May 28, 2019, from midnight to 2:00 a.m., and for one-and-a-half hours on May 29, 2019, from approximately noon to 1:30 p.m. Sorenson and Wheeler participated in interviews with Harrell and Swanton on May 29, 2019, for approximately one-and-a-half hours. None of these overcrossing work schedules comport with a reasonable time during which Wheeler could have requested Sorenson clean windows and doors.

21. Co-worker Becca House ("House"), who claimed to have heard Wheeler assign Sorenson the task of washing outside windows and doors, did not work during the same hours as Sorenson and Wheeler on May 21 or 28, 2019. Furthermore, following House's shift on May 29, 2019, she participated in an interview with Harrell and Swanton.

22. On May 23, 2019, Sorenson contacted Town Pump's hotline to complain about her interactions with Wheeler and Wheeler's statement she was under the impression Sorenson no longer had an accommodation. Sorenson also complained that Crews and Swanton were not meeting with her on her time to discuss accommodations, that conversations between Crews and Swanton were taking place without her, and that her accommodations were not being followed. Sorenson acknowledged, however, that another meeting was scheduled for the following week to engage in further discussion regarding reasonable accommodations.

23. Casino Operations Manager Lori Harrell ("Harrell") contacted Sorenson and spoke with her for about an hour regarding her hotline complaint.

24. An employee survey was conducted by Town Pump between May 28 and 29, 2019, with employee interviews and questions drafted by Harrell. The questions in the survey primarily concerned schedules and whether employees were using text as a way to communicate schedule changes. Some employees had issues with Wheeler over allegations she was stealing tips, which Town Pump investigated and determined were unfounded.

25. Coleman felt that Wheeler and Crews were more demanding of Sorenson than he was, but he never reported any issues to Town Pump management. Coleman noted that his management style collided with Crews', which was a "my way or the highway," particularly with Sorenson.

26. After completing her investigation, Harrell held a meeting with the employees and reviewed policies regarding customer service, cell phone use/texting, conduct and civility, and confidentiality. Harrell also discussed how to address issues

related to scheduling, tardiness and leaving early, being on call, calling off, trading shifts, time limits of breaks, designated break area, and tip sharing.

27. On May 29, 2019, an accommodation meeting was held with Sorenson, Harrell, Swanton, and Crews. Sorenson raised several issues with regard to tasks she could not perform, including not lifting heavy trash cans, not mopping with a heavy mop, not vacuuming with a heavy vacuum, not cleaning mirrors above her shoulder, and not shoveling heavy snow. Following the meeting, an updated Accommodations Request Form was completed and was agreed to and signed by Sorenson. The agreement stated, among other things, that Sorenson should use a Hoky sweeper (i.e., an unpowered carpet sweeper) if she needed to spot vacuum or use a small mop and not to mop everything at one time to give her shoulder a rest, and to avoid repetitive overhead work. Expectations for dusting were also discussed, with the conclusion that Sorenson could dust shelves in the center of the room that were approximately waist-high using a light duster without violating her restrictions.

28. On June 2, 2019, Sorenson received a Counseling Report for arguing with Wheeler, an assistant manager, on May 26, 2019, in the presence of customers. Wheeler also received a Counseling Report for her role in the argument, and Crews was issued a counseling report for failing to follow up on Sorenson's accommodations in a timely manner.

29. Sorenson submitted a Medical Status Form dated July 3, 2019, which had the same restrictions as the previous form submitted in April, 2019.

30. In mid-July 2019 Donnel Standiford ("Standiford") replaced Crews as the manager. Standiford had no prior experience working in a lounge or casino, and relied on others to teach and assist her.

31. Standiford's personality and lack of any background in management were not well-suited for the situation she entered into at Town Pump.

32. At the time Standiford took over as manager, there was a Hoky sweeper and small mop for employees to use at the location, but it was unclear whether the Hoky sweeper was functional and/or whether it had been loaned to another Town Pump location.

33. On July 28, 2019, Sorenson contacted a co-worker to cover her shift for the following day, July 29, 2019, stating that she was unable to make it to work because her house was located within the evacuation zone of a forest fire. Sorenson also contacted Standiford on July 29, 2019, to inform her that she would not be able

to make it in that day. Standiford reminded Sorenson she would need to complete a shift change form to trade shifts with her co-worker the next time she worked. Standiford's statement angered Sorenson, and Standiford hung up on Sorenson because she was talking over Standiford rather than answering a question about coming in for her shift.

34. Standiford contacted the incident command center for the forest fire north of Helena, Montana, and was informed that Sorenson's residence was not located within the evacuation zone.

35. Later, on July 29, 2019, Sorenson called back to Town Pump and spoke with co-worker Erin Covey ("Covey") and spoke ill of Standiford.

36. On August 6, 2019, Sorenson was called in by Standiford for what she thought was an accommodation meeting. The meeting was, however, with regard to discipline. Swanton had recommended that District Manager in Training Felisha Hoveland ("Hoveland") issue Sorenson a written Counseling Report for a violation of Town Pump's conduct and civility policies related to inappropriate and unprofessional behavior toward Standiford on July 29, 2019, which Sorenson refused to sign.

37. On August 12, 2019, Sorenson received a written Counseling Report for a cash shortage that occurred on August 8, 2019, which she signed.

38. On August 13, 2019, Swanton held an accommodation meeting with Sorenson via phone and completed a handwritten Accommodations Request form, indicating no changes from the May 29, 2019, form. Swanton sent an e-mail to Harrell on August 22, 2019, attaching the completed handwritten Accommodations Request form.

39. On August 23, 2019, Harrell sent an e-mail to Swanton advising her that the Accommodations Request form needed to be filled out completely each time. Harrell attached an updated typed Accommodations Request form and asked her to have Sorenson both sign and date it and also have Sorenson sign and date a new job description indicating the items she felt she was unable to perform. Sorenson could not have signed the typed Accommodations Request form on August 13, 2019, which would later become an issue with regard to shift changes requested by Sorenson and when those requests were made, as discussed below.

40. On August 26, 2019, Standiford asked Sorenson to dust shelves in the liquor store for an upcoming inspection. Sorenson did not complete the task, and

Standiford documented the incompletion in her Sorenson's Employee Conduct Log. Although Town Pump made it clear that Sorenson was not to work outside her restrictions, it is unclear whether Standiford ever communicated to Sorenson that she was only expected to dust within her restrictions (i.e., below chest height and avoiding repetitive overhead work).

41. Sorenson had no knowledge of the contents of her Employee Conduct Log until it was produced in discovery herein, after her resignation from Town Pump.

42. On August 28, 2019, Sorenson called Standiford's cell phone at approximately 7:00 p.m. to complain that there were too many employees on shift. Standiford explained that the reason for this was due to training a new employee. Sorenson became argumentative, questioned Standiford's decision, and when Standiford asked to speak with another employee, Sorenson disconnected the call. Standiford called back and spoke with Sorenson's co-worker, Katelyn Buck ("Buck"), who reported Sorenson was creating a hostile and negative atmosphere and was making a scene in front of customers.

43. Sorenson asserted she closed alone on August 28, 2019, yet she only worked 2 hours and 26 minutes of her shift, clocking out at 8:12 p.m. after arguing with her co-workers and Standiford about the number of employees working.

44. At hearing, Buck, who became an assistant manager in September, 2020, expressed frustration with Sorenson insofar as never knowing if she would finish an entire shift, which Buck found "ridiculous." There was no indication, however, that Buck ever expressed her feelings.

45. On August 30, 2019, Swanton, Standiford, and Hoveland met with Sorenson to go over an Accommodations Request form from their accommodations' discussion earlier in the month and Sorenson's job description. During the discussion, Sorenson requested that the previous work restriction of not more than two consecutive shifts be changed to not more than two shifts per week.

46. Following the accommodation discussion on August 30, 2019, Sorenson received a written Counseling Report suspending her for her shift on that date for her inappropriate conduct in the presence of customers and unprofessional communication with Standiford on August 28, 2019, which Sorenson refused to sign.

47. The schedule for the week of August 26, 2019, had been made prior to the discussion on August 30, 2019, about changing Sorenson's accommodation from two consecutive shifts to two shifts per week. Upon receiving the schedule for the

week of August 26, 2019, Sorenson contacted Standiford and Swanton to express concerns about the schedule. As a result of their discussion, Standiford changed the schedule.

48. During the week of August 26, 2019, Sorenson worked 7.7 hours on 8/26/2019, 2.26 hours on 8/28/2019, and .75 hours on 8/30/2019 while attending the meeting, for a total of 10.71 hours that week.

49. On September 1, 2019, Sorenson again called Standiford to ask why she was not scheduling her for shifts she had written down on her availability sheet when everyone else was getting the shifts they wanted. Sorenson stated it felt like she was being retaliated against, and also stated that other employees told her Standiford had been calling people to cover her shift. Sorenson was concerned other employees were aware she had been suspended for one shift, and told Standiford she wanted her to quit telling people about her suspension.

50. In response to Sorenson's concerns, Standiford told Sorenson she had not received her availability sheet from the employee who had been handling the scheduling. Standiford needed Sorenson to work that day, and asked if Sorenson was going to come in for her shift. Sorenson did not provide a direct response to the question. Standiford perceived Sorenson was arguing with her, and told Sorenson that she needed to get back to work to finish her paperwork, at which point Sorenson hung up.

51. Sorenson did not show up for her scheduled shift on September 1, 2019, and instead voluntarily resigned her employment with Town Pump by sending an e-mail to Swanton, giving her two-week notice.

52. On September 3, 2019, Sorenson worked a shift from 4:14 p.m. to 9:07 p.m., for a total of 4.88 hours.

53. Various allegations were made that Covey, Standiford, Wheeler and/or other employees referred to Sorenson as "crippled." At no time during her employment did Sorenson complain that co-workers or managers had referred to her as "crippled," nor did any employees ever hear anyone refer to Sorenson as a "cripple" or "crippled." With regard to Standiford in particular and allegations she used the term with regard to a discussion about dusting shelves, Standiford testified that "cripple" is not a term she would use, as she had previously been employed as a special education paraprofessional and finds the term is insulting.

54. Sorenson understood and was repeatedly reminded by Town Pump management that she was not expected to work outside of her restrictions, and Swanton made it known to Sorenson that intentional violation of her physical restrictions could subject Sorenson to discipline.

55. Some tasks asked of Sorenson, such as handling garbage, mopping, and vacuuming, were capable of being broken down into smaller tasks within Sorenson's restrictions. Sorenson acknowledged that individuals such as Crews offered advice on how to divide tasks. To the extent Sorenson believed assigned tasks were not within her restrictions, however, she was never required to perform those tasks.

56. Due to what presented as personality conflicts at hearing, Sorenson may have received what she perceived to be "static" from both Crews and Standiford when she did not complete certain tasks. As stated, however, Sorenson was never under any obligation to perform tasks outside her restrictions and never suffered any negative work consequences as a result of failing to perform tasks outside her restrictions.

57. Sorenson acknowledged that she understood her co-workers would perform tasks she was unable to perform. Sorenson rarely worked without a co-worker present, and only worked a total of eight shifts between August, 2018, and September, 2019, during which a co-worker was not present, and even then only during a small portion of most of those shifts:

November 21, 2018:	55 minutes
December 5, 2018:	18 minutes
December 17, 2018:	1 hour and 20 minutes
January 28, 2019:	1 hour and 19 minutes
January 30, 2019:	28 minutes
March 17, 2019:	25 minutes
July 11, 2019:	2 hours and 32 minutes
July 18, 2019:	4 hours and 2 minutes

Of the foregoing dates, Sorenson did not close alone on November 21, 2018, December 5 or 17, 2018, March 17, 2019, or July 11, 2019.

58. Sorenson contacted Swanton about being scheduled for four hours without a co-worker on July 18, 2019. Swanton assured Sorenson that her co-workers would perform closing tasks Sorenson was unable to perform, including mopping and vacuuming, and that she would not be disciplined for not performing

any floor runner tasks she was unable to do, and arranged for other employees to perform those tasks.

59. Sorenson's co-workers confirmed they performed tasks Sorenson was unable to perform.

60. In July, 2019, Swanton provided assurance to Sorenson that her co-workers would perform closing tasks Sorenson was unable to perform, including mopping and vacuuming, and that she would not be disciplined for not performing any floor runner tasks she was unable to do.

61. Sorenson was never counseled or disciplined for not performing tasks she was unable to do because of her restrictions.

62. All adverse action taken against Sorenson by Town Pump during her employment was for reasons unrelated to her restrictions or requests for accommodation.

63. Aside from their participation at accommodation meetings, Town Pump did not have a standardized system in place for managers to all be aware of Sorenson's specific restrictions and accommodations. Sorenson was, however, always aware that she could inform any manager if a task was outside her limitations with no reprisal.

64. Sorenson felt anxiety over comments from co-workers about her work, and felt mentally, emotionally, and physically exhausted by the end of August, 2019. Sorenson had spoken with her physician during the spring or summer of 2019 about anxiety and was prescribed a stronger anti-anxiety medication, which she either did not fill or stopped taking after a short time.

IV. DISCUSSION

Sorenson has only alleged two causes of action—discrimination based on failure to accommodate and hostile work environment. She has not alleged retaliation claims.

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A. Statute of Limitations

As an initial matter, Town Pump asserts Sorenson has not timely filed all of her claims, and that any discrete issue arising more than 180 days prior to the date the complaint was filed is barred from consideration by the applicable statute of limitations (i.e., 180 days prior to December 4, 2019). *See* Mont. Code Ann. § 49-2-501. Town Pump argues its assertion on the basis that Sorenson primarily cites to individual, discrete acts by Town Pump. Sorenson does cite to particular instances, but the gravamen of her claim is that the acts were part of a continuing situation. The Hearing Officer finds that where easily-identifiable acts are at issue, such as failure to promote, denial of transfer, or refusal to hire, the statute of limitations may apply to each discrete act. However, a charge alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. *See Benjamin v. Anderson*, 2005 MT 123, ¶ 41, 327 Mont. 173, 183, 112 P.3d 1039, 1047; *see also AMTRAK v. Morgan*, 536 U.S. 101, 108-122 (2002). Sorenson alleges, and the Hearing Officer agrees, that at least one act which created a hostile working environment falls within the filing period. As such, previous discriminatory or hostile acts towards Sorenson based on her disability may be considered in establishing hostile work environment. With regard to Sorenson's failure to accommodate claim, the Hearing Officer finds that, for the same reasons, Sorenson's claim is timely, and no discrete instances of conduct will be barred.

B. 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, Sorenson 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) Town Pump was aware of Sorenson's disability and she requested accommodations related to the disability;
> (3) a reasonable accommodation exists that would have been effective; and
> (4) Town Pump 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, Town Pump 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. Sorenson has not alleged a failure to engage in the interactive process, describing it as "adequate" in her post-hearing briefing.

Town Pump does not dispute that, during all the times relevant to this claim, Sorenson was disabled within the meaning of the MHRA as a result of her shoulder injury. It also does not expressly dispute that Sorenson was qualified and able to perform the essential functions of the job with or without reasonable accommodations. Given Sorenson's injury and her skillset, the Hearing Officer finds she has met the first element of her prima facie case.

Town Pump was also aware of Sorenson's disability. Sorenson and Town Pump extensively engaged in the interactive process, and Town Pump was well aware of the various accommodation requests made by Sorenson and agreed to by Town Pump. As such, Sorenson has also met the second element of her prima facie case.

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, 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).

Sorenson has shown that reasonable accommodations existed, and furthermore that Town Pump agreed to provide those accommodations. Thus, the primary dispute in this matter concerns whether Town Pump was actually offering and honoring the effective and reasonable accommodations to which it had agreed.

As Sorenson argues, she provided numerous Medical Status Forms that repeatedly emphasized lifting restrictions and to avoid repetitive overhead work. Sorenson asserts that, between accommodation meetings on December 18, 2018, and May 29, 2019, she experienced several instances of being assigned tasks that involved repetitive overhead work or were outside her weight restrictions. As a result, at the May 29, 2019, accommodation meeting, Sorenson made numerous specific requests to clarify her accommodations including requests that she not lift heavy trash cans, not mop with a heavy mop, not vacuum with a heavy vacuum, not clean mirrors above her shoulder, and not shovel heavy snow.

At hearing, Sorenson could only identify limited instances where she had been asked to perform tasks outside her restrictions, and could not identify any instances where she was unable to refuse to perform those tasks or where she had been reprimanded for failing to perform them. To the extent that Sorenson felt any duties were outside her capabilities, Town Pump left it within Sorenson's discretion to refuse to perform those duties at no penalty to her job. This was particularly true in situations cited to by Sorenson where equipment may have been insufficient to meet her restrictions, such as with the case of mops and sweepers. If Sorenson did not have equipment that allowed her to work within her restrictions, Town Pump did not expect her to perform the task.

Sorenson attempts to make a particularly large issue out of Wheeler asking her to wash windows. The evidence shows that Wheeler and Sorenson did not work together for any significant periods during the time when this request was alleged to have happened in May, 2019, and that on the single day when they did, it was from midnight to 2:00 a.m. House, who claimed to have witnessed the incident, did not work any of the same hours as Sorenson and Wheeler together. Nonetheless, assuming the incident did occur, nothing prevented Sorenson from informing Wheeler that the task was outside her restrictions and refusing to perform it.

It is true Wheeler had the authority to assign tasks to Sorenson. Even to the extent Wheeler did not understand Sorenson's accommodations, however, there is

still no evidence Sorenson was mandated to perform tasks if they were outside her restrictions or that she ever would have been reprimanded for failing to perform those tasks. Furthermore, as pointed out by Sorenson herself, as soon as Sorenson complained about Wheeler to Harrell on May 23, 2019, Town Pump immediately launched an investigation and review of Sorenson's accommodations. Less than a week lapsed from the time of Sorenson's call to the Town Pump hotline to May 29, 2019, when Town Pump both held an accommodation meeting and employee interviews. There is no evidence Town Pump at any time condoned Sorenson working outside her restrictions.

It is also true that Standiford asked Sorenson to dust shelves and that they were still dirty following the request. Standiford asserts she did not ask Sorenson to dust everything—including shelves at five or six feet above ground level—and only asked that she dust items at levels which were within her restrictions. Sorenson asserts she was asked to do more. Regardless of the nature of Standiford's request, Sorenson did not provide any evidence she was required to dust in excess of her accommodation, that she actually did dust in excess of her accommodation, or that it resulted in a formal reprimand or other job action. Standiford was clearly inexperienced in handling employees, but Sorenson cannot point to anything involving this incident where her accommodations were not in place or where it resulted in disciplinary action.

Sorenson points out that there was a disconnect between the interactive process and communication with managers. Town Pump itself admitted that it did not have a set way of communicating accommodations with managers outside their presence at accommodation meetings and general awareness of accommodations forms. Nonetheless, because of the broad nature of her restrictions, Sorenson had a duty to communicate what tasks she felt she was able and unable to perform when she was asked to perform them. At risk of being repetitious, although Sorenson cites to comments made by Wheeler and Standiford in particular, it is undisputed that Sorenson was never formally reprimanded for a failure to perform tasks, and it is further undisputed that she never had to perform tasks she was unable to. To the extent equipment to help her with her tasks was unavailable (e.g., a Hoky sweeper), Town Pump did not expect Sorenson to complete those tasks if they required her to go outside her restrictions.

The Hearing Officer does recognize that Sorenson was a conscientious employee and did not wish to impose too much of a burden on her co-workers or appear lazy, so awareness of her restrictions was very important to her. In order to make out a claim for discrimination based on failure to accommodate, however, Sorenson must show Town Pump failed to provide a reasonable accommodation.

Nowhere does any evidence show Town Pump failed to provide Sorenson with her requested accommodations. Sorenson always had the ability to simply refuse tasks, and even had the ability to leave work as necessary. A preponderance of the evidence simply does not show that, even if Sorenson was asked to wash windows or dust tall displays, Town Pump failed to act in good faith as a whole in providing reasonable accommodations. Therefore, Sorenson fails to state a prima facie claim on failure to accommodate.

C. Hostile Work Environment

Normally, hostile work environment claims arise in cases of discrimination based on sex, and the majority of case law concerns such cases. Although it is an issue of first impression in Montana, hostile work environment claims are generally cognizable under the ADA, with the caveat that things such as *quid pro quo* claims are not applicable. *See Ford v. Marion Cnty. Sheriff's Office*, 942 F.3d 839, 851 (7th Cir. 2019) (citations omitted). A charging party in a hostile workplace claim based on disability harassment must prove elements similar to those of a Title VII (and therefore MHRA) claim:

> (1) that he or she belongs to a protected group;
> (2) that he or she was subject to unwelcome harassment;
> (3) that the harassment was based on disability;
> (4) that the harassment affected a term, condition, or privilege of employment; and
> (5) that the employer knew or should have known of the harassment and failed to take action.

See Flowers v. Southern Reg'l Physician Servs., 247 F.3d 229, 235–36 (5th Cir. 2001); *see also Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001); *Mont. State Univ.-Northern v. Bachmeier*, 2021 MT 26, ¶ 28, 403 Mont. 136, 480 P.3d 233 (regarding hostile work environment based on sexual harassment). To establish that a term, condition, or privilege of employment was affected, the charging party must show that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *See Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 445 (5th Cir. 2017) (citations omitted); *see also Jones v. All Star Painting Inc.*, 2018 MT 70, ¶ 18, 391 Mont. 120, 415 P.3d 986 (citations omitted; regarding hostile work environment based on sexual harassment). Sorenson, as the charging party has the burden of persuasion. Mont. Code Ann. § 26-1-402.

Under the MHRA, a totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *See Stringer-*

Altmaier v. Haffner, 2006 MT 129, ¶ 21, 332 Mont. 293, 138 P.3d 419 (regarding hostile work environment based on sexual harassment; quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (also regarding hostile work environment based on sexual harassment)). The relevant factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23; *see also Fox*, 247 F.3d at 178. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (regarding hostile work environment based on sexual harassment); *see also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113-14 (9th Cir. 2004) (citations omitted; regarding hostile work environment based on sexual harassment)).

The Hearing Officer finds both that Sorenson was a member of a protected group based on her disability and that she was at least subject to unwelcome remarks and conduct based on her disability. Whether these remarks and conduct actually rose to the level of harassment is irrelevant for purposes of this decision, however, as Sorenson has failed to prove that the harassment was sufficiently severe or pervasive to alter the conditions of the her employment and create an abusive working environment. She furthermore cannot show Town Pump failed to take any action with regard to those things brought to its attention.

Sorenson's allegations of a hostile work environment primarily concern tasks she was asked to perform that violated her restrictions. Other than loose allegations, Sorenson does not provide actual evidence of frequent discriminatory conduct, nor does she show it was threatening or humiliating or interfered with her work performance. *See Fox*, 247 F.3d at 178. As argued by Town Pump, the case cited to by Sorenson in support of her claim—*Fox v. GMC*—does not at all comport with the facts of her case. In Fox, the evidence showed that supervisors used vulgar and profane language and constantly berated and harassed Fox and other disabled workers at least weekly. *Id*. at 174-75. The supervisors encouraged other employees to ostracize disabled workers to prevent them from doing their assigned tasks by refusing to give them necessary materials, and exposed the plaintiff to physical harm by requiring him to perform tasks that were too physically demanding and by requiring him to sit at a table in a hazardous area. *Id*.

Here, Sorenson was repeatedly told by Town Pump that she was not to perform tasks outside her restrictions. It was also repeatedly made clear and that Sorenson would never be—and, in fact, never was—disciplined for failing to complete a task that was outside her restrictions. When Sorenson did complain to upper

management about issues she was having with her supervisors, Town Pump would intervene to investigate and address the issues. Simply put, none of the tasks alleged by Sorenson to have violated her restrictions rose to the level of a sufficiently severe or pervasive amount of harassment sufficient to alter the conditions of her employment and create an abusive working environment.

Sorenson also alleges an isolated instance of the use of the term "cripple," particularly by Standiford on August 26, 2019. Isolated offensive remarks and instances of unfair treatment are insufficient to support a hostile work environment claim. *See Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 653-54 (9th Cir. 2003). Taken on its own, this behavior, if it occurred, was admittedly bad and in poor taste, but did not rise to the level of a hostile work environment.

Sorenson's own role in creating an unpleasant working environment, which she perceived as hostile, cannot be ignored. As stated in the findings herein, the general atmosphere and interpersonal interactions among employees at Sorenson's specific work locations could best be described as juvenile at times, and appeared to be the result of inexperience and conflicting personalities at local stores. The fact that Sorenson did not get along with several individuals and made it known she had issues with them did not help her work environment. That interpersonal conflicts led to bickering and confrontation does not, however, evidence a hostile work environment based upon a disability. It merely evidences a dysfunctional workplace to which Sorenson contributed.

Sorenson has, at a minimum, ultimately failed to show both elements four and five of her prima facie case. With regard to the fourth element, she has not shown that the harassment affected a term, condition, or privilege of employment, and has therefore failed to show that, under the totality of the circumstances, the harassment within Sorenson's work environment was so severe or pervasive to alter the conditions of employment and create an abusive working environment. With regard to the fifth element, Sorenson has further not shown that Town Pump failed to take action with regard to any harassment of which it was aware. Sorenson has therefore failed to establish her prima facie case.

IV. CONCLUSIONS OF LAW

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

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

5. The accommodations sought by Sorenson were both effective and reasonable. Admin R. Mont. 24.9.606(3)(b).

6. Town Pump reasonably accommodated Sorenson'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. Sorenson failed to establish a hostile working environment at Town Pump. *See Flowers*, 247 F.3d at 235–36.

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

VI. ORDER

Judgment is granted in favor of Town Pump and against Sorenson.

DATED: this 28th day of May, 2021.

/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: Tiffany Sorenson, Charging Party, and her attorney, Joe Nevin; and Town Pump, Respondent, and its attorney, Cynthia Walker:

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.