

Montana Department of  
**LABOR & INDUSTRY**  
Employment Relations Division

Steve Bullock, Governor  
Pam Bucy, Commissioner

**Human Rights Bureau**  
Marieke Beck, Bureau Chief

November 3, 2015

Robert Kolesar  
PO Box 594  
Bozeman MT 59771

Subject: Robert Kolesar v Discovery Ski Corp  
Case No. 0151017387

The Human Rights Bureau has concluded its investigation in this case and has found reasonable cause to believe unlawful discrimination occurred. A copy of the investigator's report is enclosed.

The Bureau is required to attempt to resolve this case through conciliation. I have assigned Clarice Beck as the conciliator in this case. The conciliation period will conclude 30 days from the date of this letter. Ms. Beck will contact you in the near future to discuss any individual relief you are seeking from the respondent. She will then relay your proposal to the respondent and work with each party to determine if conciliation is possible at this time.

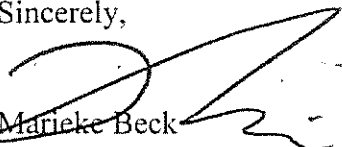
A worksheet identifying the types of damages usually awarded in employment discrimination cases is enclosed. You may use this worksheet to assist you in calculating your proposal.

In addition to any individual relief you are seeking, the Bureau will also require affirmative relief, to ensure any discrimination practices identified do not continue, before it will approve any conciliation agreement.

If the case cannot be resolved through conciliation within the next thirty (30) days, the case will be scheduled for a formal contested case hearing on the merits before a hearing examiner appointed by the Hearings Bureau of the Department of Labor and Industry.

Ms. Beck will attempt to contact you sometime during the next few days to discuss your conciliation proposal. Please contact her at (406) 444-1755 if you have any questions.

Sincerely,

  
Marieke Beck  
Bureau Chief  
Human Rights Bureau

Enclosure: Investigative Report, Damage Worksheet

**MONTANA DEPARTMENT OF LABOR & INDUSTRY  
EMPLOYMENT RELATIONS DIVISION  
HUMAN RIGHTS BUREAU**

<p>Robert Kolesar Charging Party vs. Discovery Ski Corporation Respondent</p>	<p style="text-align:center"><b>Final Investigative Report</b></p> <p style="text-align:center">HRB Case 0151017387</p>
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**Recommendation:** Based on my investigation, I find **reasonable cause** to believe unlawful discrimination occurred as alleged in Charging Party’s complaint.

**I. Issue Presented**

Did Respondent deny Charging Party reasonable accommodation for his disability, in violation of the Montana Human Rights Act, Title 49, Chapter 2, MCA?

**II. Summary of the Investigation<sup>1</sup>**

**A. Charging Party’s Position**

Charging Party, Robert Kolesar, said he has physical disabilities limiting his mobility, and cannot ski or snowboard standing up. He uses a ski bike – a “skibob” – which permits him to ski sitting down and use short “foot skis” for balance and braking. He said there are a variety of ski bikes on the market, but his is specifically designed for “adaptive skiing” – skiing for people with disabilities – and to accommodate his disabilities.

Kolesar said in a phone conversation with Respondent, on or about March 6, 2015, he was denied access to the Discovery Ski Area to ski with his wife, Ellyn Murphy, who is also disabled.<sup>2</sup> He said Respondent told him he should stay home or go somewhere else where ski bikes are allowed.

In an interview, Kolesar said skiing requires that participants focus on safety and use the best equipment available to them. He said skiing is regarded as an inherently dangerous sport, referencing a list of “inherent dangers” in § 23-2-702, MCA.

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<sup>1</sup> This report constitutes a summary of the investigation, and is limited to witnesses, documents and other evidence relevant to the analysis of the issue presented. The case file may contain additional evidence not included in this report.

<sup>2</sup> Ellyn Murphy filed a complaint with the HRB as well. It is the subject of a separate finding.

There is an array of equipment choices for those who aren't disabled, Kolesar said. "In an industry where most people pick their equipment, we should too," Kolesar said.

"We're meeting our duty in an inherently dangerous sport. . . which equipment best fits me," he said. As long as the individual is skiing safely and not in the way of others, they're allowed, he said. Lessons aren't typically required, and ski areas don't require a demonstration of ability in advance to ski.

Kolesar said Respondent has taken the position that "if you (skier with a disability) don't show up meeting certain conditions, you don't get to ski," and those conditions center around choice of equipment, which in turn leads to route selection and related restrictions. He said those with a disability should still be allowed to choose from an array of equipment and choose equipment "that best helps us ski safely."

"They don't demand you (person with no disability) use their skis." He said allowing ski bikes obviously would not fundamentally alter Respondent's programs or facility, since numerous ski areas allow ski bikes. He cited several prominent examples in the region.

Kolesar said after multiple surgeries, he wears a knee brace daily. He has difficulty standing, climbing stairs, and other daily activities, and is not strong enough or flexible enough to ski. He described extensive ski experience over several decades, and said skiing has been a major life activity for him.

Kolesar said he called Respondent in early March 2015 to inquire about skiing at its facility, and wanted to introduce an elderly skier to the ski bike at the same time. He said he called ahead because "(I wasn't) sure they're going to be pleasant about it." He said Respondent immediately told him no.

Kolesar briefly demonstrated his ski bike to this investigator, pointing out what he described as the inherent stability of the device, features to facilitate ski lift loading and unloading, and the very short skis with a substantial heel plate for his feet to facilitate balance and stopping. He said his ski bike gives him access to all the privileges and advantages other skiers receive. "I can still ski on my own," he said.

Kolesar said the sit ski Respondent offered as an alternative requires very good arm strength to control "outriggers." With the ski bike he's developed and refined, he said, his feet replace the outriggers, and the device doesn't require good balance. He said the sit ski is difficult to control, even for someone who is accomplished with the device. He said it is also difficult to load and unload from a ski lift, and requires assistance from the lift operator, while the ski bike he uses does not.

## B. Respondents' Position

Respondent, Discovery Ski Corporation, is privately owned and seasonally employs about 150 people.

Respondent said ski bikes are not manufactured and designed for skiing with a disability. It said while ski bikes were developed for skiers with little knee strength, they became popular among people with no disability, and are raced competitively.

Respondent's president, Ciche Pitcher, said one of the main attractions of the ski bike is that it can reach speeds over 100 miles per hour. He said in his six years in management for Respondent, he has never before had a disabled skier ask to use a ski bike, though several people who are not disabled have asked.

Pitcher said Respondent has experimented with allowing ski bikes. He said after multiple incidents of excessive speeds and questions over safety, Respondent decided not to allow ski bikes at its ski area.

Pitcher said he spoke on the phone with Kolesar and explained Respondent's policy. He told Kolesar that he and his wife would not be allowed to use ski bikes.

Pitcher said he offered Kolesar use of a "sit ski. . . adaptive device" but Kolesar declined, saying he did not like the device. Pitcher said he told Kolesar of two other Montana ski areas that allow ski bikes if that was his only interest.

Pitcher complained that much of the conversation with Kolesar "centered on the impact Discovery's decision to not allow (ski bikes) had on Kolesar's business of selling ski bikes."

In an interview, Pitcher said he did not get the sense Kolesar wanted to ski, but instead expressly stated that he had a customer who had a disability and wanted to ski. He said he told Kolesar Respondent has several "adaptive ski" devices it allows, but its policy does not allow ski bikes.

Pitcher said that over ten years ago, a group of people who do not have disabilities came to the ski area in the spring "when it was slow" and rode ski bikes. He said there were a series of "almost accidents" involving others. After one near miss, the decision was made not to allow the devices. Pitcher said the devices are "pretty easy to get going," but don't stop quickly, while most skiers can stop quickly.

More recently, in or about 2008 Pitcher said, he became aware ski bikes were being mentioned "in an adaptive capacity," but his subsequent research with other ski areas indicated they were still not being allowed. He said very recently, and since Kolesar filed the subject complaint, he has learned that for the first time ski bikes are being allowed "as part of the adaptive program" in other ski areas.

Pitcher presented a used ski bike he said he'd recently purchased for possible use at Respondent's ski area.

Pitcher said in addition to the prohibition on ski bikes, Respondent also has an equipment policy describing what's allowed and what's not. A ski with a "really high tip," for instance, may prompt some ad hoc scrutiny, he said, though "We don't inspect everyone's skis."

Pitcher said he has concerns with speed, stopping distances, and control with the ski bike Kolesar prefers. "It's the device that makes me concerned," he said. "(I'm) discriminating against the device; not. . . the person with a disability."

### **C. Charging Party's rebuttal**

In a written statement, Kolesar said "mere access is not enough; full and equal participation" of people with disabilities in all privileges and advantages of the public accommodation is required. Public accommodations cannot use eligibility criteria to screen out those with disabilities, he said, emphasizing that public accommodations must modify policies, practices and procedures when necessary to allow equal participation.

### **D. Other information**

The Administrative Rules of Montana, 24.9.609, states in relevant part:

(1) Except as provided in 49-2-304, MCA, it is unlawful for an owner. . . of a public accommodation to deny equal access to services, goods, facilities, advantages or privileges to a person because of membership in a protected class.

...

(3) Unlawful discrimination against a person with a disability in a public accommodation may include:

(a) failing to make reasonable modifications in policies, practices or procedures when the modifications are necessary to afford the goods, services, facilities, advantages or privileges to persons with disabilities unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of its goods, services, facilities, advantages or privileges;

### **E. Omissions**

Charging Party named numerous witnesses he said had experience, expertise or professional credentials relevant to skiing and to safe skiing using ski bikes. Given the specifics of the analysis that follows, these witnesses were not interviewed.

## **III. Analysis and Conclusion**

Charging Party alleges Respondent refused him reasonable accommodation for his disability when it refused to allow him to use certain ski equipment. Charging Party must show:

- he is a person with a disability;
- he requested an accommodation; and
- the respondent refused to provide reasonable accommodation.

Charging Party said his disability impairs his mobility. He provided no specific medical documentation, but he establishes his membership in the protected class for purposes of this informal investigation. Respondent did not dispute his disability.

He requested accommodation – use of a ski bike designed to accommodate his disability.

Respondent said much of the conversation with Kolesar “centered on the impact Discovery’s decision to not allow (ski bikes) had on Kolesar’s business of selling ski bikes.” Pitcher said he did not get the sense Kolesar wanted to ski, but instead had a customer who wanted to use the ski bike. However, Respondent clearly articulates that Kolesar and his wife “would not be allowed to use (ski bikes) at Discovery Ski Area.”

Respondent referenced its policy, and concerns about safety – speed and control of the devices – as basis for the denial. The concerns arose from previous experience with people using the devices who did not have disabilities, and an inquiry in 2008 in which Respondent found people with disabilities generally were not using the devices.

The administrative rule provides a basis for a denial of accommodation for a person with a disability in 24.9.609(3)(a), ARM:

“(u)nless the public accommodation can demonstrate that making the modifications would *fundamentally alter* the nature of its goods, services, facilities, advantages or privileges.” (Emphasis added.)

Here, I find Respondent failed to demonstrate that allowing Charging Party’s request for accommodation would fundamentally alter the nature of its business. It expressed safety concerns that arose with ski bike users who did not have disabilities – skiers arguably unlike Kolesar. Respondent referenced policy and past experience, but made no specific assessment of Kolesar’s particular request, and appears to have relied on generalized information, misperceptions and/or stereotypes in refusing to make an exception to policy.

Both parties said other ski areas in the region allow use of the ski bike, and made no mention of conditions that would suggest these ski areas are in some important way different than Respondent’s. This information suggests that demonstrating “fundamental alteration,” the legal standard here, appears unlikely.

I find the preponderance of the evidence in this matter shows Respondent unlawfully discriminated when it refused, out of hand, Charging Party’s request to use a particular piece of ski equipment at its ski area.

### Conclusion

Based on my analysis, I find there is **reasonable cause** to believe that unlawful discrimination occurred.



Dennis Unsworth, Investigator  
Montana Human Rights Bureau



Date

**HUMAN RIGHTS BUREAU  
EMPLOYMENT RELATIONS DIVISION  
MONTANAT DEPARTMENT OF LABOR AND INDUSTRY  
PO BOX 1728 HELENA MT 59624**

**DAMAGE SUMMARY WORKSHEET**

Please read carefully and fill in the information as completely and accurately as possible. Then sign and return the completed form to the address above within ten (10) days. If you have any questions, please contact the conciliator assigned to your case.

**DAMAGES**

Damages in a discrimination claim are determined on the basis of making the injured person whole: in other words, restoring to them all that was lost as a result of the illegal discrimination. The law provides that the Bureau may require any reasonable measure to rectify the harm, monetary or otherwise, suffered by the injured person. Such measures might include:

X Placement or reinstatement to the position in question. In some cases, front pay may be available in lieu of reinstatement (i.e., pay for a fixed period of time where reinstatement or employment is not offered or is impossible).

X Back pay, defined as those earnings and other monetary benefits the individual would have received but for the employment decision taken. This remedy covers the period from the date the alleged discrimination began to the date of a court order, settlement or an unconditional offer of employment. (Back pay calculations might include overtime pay, premium pay, shift differentials, incentive pay, bonuses, commissions, and tips that might reasonably have been expected as a part of employment.)

X Employer contributions to retirement and profit sharing plans, savings plans, paid leave plans, and out-of-pocket expenses incurred for premiums or medical costs that would have been covered by employer's health insurance plan.

X Special fringe benefits including training, travel or business expense benefits, employee discounts, and lost promotional opportunities.

X Miscellaneous expenses such as job-seeking expenses, moving costs, and any incidental costs incurred in pursuing this claim (telephone, travel, copying, and attorneys fees).

X In appropriate instances such as sexual or racial harassment, the Commission has awarded damages for actual humiliation, embarrassment, or emotional distress.

X Interest at the rate of 10% per annum may also be available.

X Please note that the law specifically prohibits awarding the payment of punitive damages, defined as those intended simply to punish the wrongdoer for its discriminatory act.

**SPECIFIC ITEMS OF DAMAGES (Please use additional pages if necessary.)**

**Lost Wages**

Lost Income	Earnings from other employment	Total
_____	_____	_____

**Lost Benefits**

Specify Items	Amount	Total
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

**Miscellaneous Expenses**

Specify Items	Amount	Total
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

**Total Monetary Damages** \_\_\_\_\_

Other Relief Sought (Please explain.)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

TO RESOLVE THIS CHARGE, I WILL ACCEPT:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Name (please print): \_\_\_\_\_