

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1182-2022:

KELLIE FOREMAN,)	
)	
Charging Party,)	
)	
vs.)	ORDER GRANTING
)	MOTION TO DISMISS
FERGUS COUNTY - JUSTICE COURT,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Kellie Foreman (Foreman) filed a charge of discrimination against Fergus County - Justice Court (Fergus County) with the Human Rights Bureau of the Montana Department of Labor and Industry (HRB) on July 2, 2021. An investigation was conducted by HRB pursuant to Section 49-2-504, MCA. On January 7, 2021, HRB sent this matter to OAH and certified it for a contested case hearing.

On April 29, 2022, Fergus County filed a Motion to Dismiss and/or for Summary Judgment on the grounds that Foreman failed to pursue her claim before the Office of Administrative Hearings (OAH) and on the grounds that she was not discriminated against by Fergus County. Foreman sent an email responding on May 4, 2022, and email on May 10, 2022. On May 11, 2022, Fergus County filed a Motion for Summary Ruling, requesting that its prior motion be granted. Foreman responded with three emails on May 11, 2022. Fergus County's motion to dismiss is granted, for the reasons stated below. Because the motion to dismiss is granted based on Foreman's failure to properly participate, only the facts necessary to that motion are set out below.

II. BACKGROUND FACTS

1. On January 7, 2022, HRB certified this matter for contested case hearing and notified the parties and OAH.
2. On January 7, in response to counsel for Fergus County contacting Foreman to begin the contested case hearing proceedings, Foreman stated by email, "I will not be participating in the OAH process because the federal government is taking it over. The investigation thus, there will not be an OAH process."
3. On February 2, 2022, Sandra Page (Page), the OAH legal secretary for human rights matters, requested confirmation from Foreman regarding which email address Foreman would like to use for the proceedings. Foreman responded that same day by email, "... the United States Attorney in Billings Montana has taken over this investigation."
4. On February 2, 2022, Page then served the parties with the Notice of Hearing Packet by email. The packet included a cover letter which noted that the Acknowledgement of Service must be returned within 10 days. The packet also contained the information needed to submit the required Appearance and Preliminary PreHearing Statement.
5. On February 2, 2022, Foreman left the following voicemail for Page: "This is Kellie Foreman. Stop f__g contacting me. It's not my f__g problem that Montana, that Fergus County Montana refused to accept that po, that policy. I don't live in Montana anymore so if this stuff ends, ah, ah, service dog laws in the state of Montana, I don't give a f__ – because you know f__g why, because the United States Federal Government has already upheld that my dog is a service dog and I sent proof of that to ah the Fergus County Justice Court. And now Brendan McCarthy with the US Attorney's office in Billings, Montana is investigating Fergus County so you all can just f__k off."
6. On February 2, 2022, Foreman emailed Page and Brendan McCarthy at usdoj.gov the following: "hey Brendan this is Kelly I am forwarding this email to you from the state office of administrative hearing, I Fergus County has challenged the finding of the Montana Human Rights Bureau in court and as you are investigating Fergus County I will not be

participating in their investigation if the state of Montana up ends its service dog loss that's not my f__g problem I don't live there anymore that's their f__g problem and you know what I'm gonna say f__ all I want so don't let this f__ Montana so f__ Montana.”

7. On February 2, 2022, Foreman sent another email to Page which read in part as follows: “Sandra let me rephrase this and I'm still gonna use the word f__ please stop f__ emailing me I don't wanna f__ talk to Mark Higgins PERIOD . . . I will not be participating in this because if anybody lose their rights to service dog laws of Montana that's not on me I don't fng live there anymore!”

8. Based on her emails and at the request of Fergus County, on February 8, 2022, Page asked Foreman if she wished to withdraw her claim. Foreman did not answer yes or state in the affirmative that she wished to withdraw her claim. Foreman responded in part: “FERGUS COUNTY IS NOW being investigated, BY THE FEDS....AND AS SUCH THIS CASE NO LONGER EXISTS FOR THE OAH TO INVESTIGATE AS THE FEDS ARE STARTING THEIR OWN INVESTIGATION INTO FERGUS COUNTY ON MY BEHALF AS A DISABLED SERVICE DOG HANDLER

There is nothing here for the OAH to investigate as I will not be participating, my dog is a service dog and nothing i say will change this fact as the feds already upheld her once before and will be doing it again

Do not contact me over the matter related to Fergus County MT and my federally recognized service dog, the feds have opened their own investigation and if FC wants to pay Mark to defend them with this case while also representing them in the federal case that aint my f__g problem ITS THE TAX PAYERs PROBLEM...”

9. Because Foreman did not confirm in the affirmative that she wished to withdraw her claim, the claim was not withdrawn and counsel for Fergus County proceeded to work on the matter. On April 22, 2022, Foreman stated in an email to counsel for Fergus County, “I want to be clear, I will not agree to dismiss the fed investigation ... just the OAH case.” Neither party filed any agreement to dismiss.

10. Fergus County filed its motion to dismiss on April 29, 2022. On May 4, 2022, Foreman sent an email that stated, “Kelly Mantooth is a Republikkkon”.

11. By notice from OAH to the parties on May 4, 2022, the deadline for Foreman's response to Fergus County's motion was May 13, 2022. The notice stated in part "Failing to respond may result in the Hearing Officer granting the opposing party's motion and dismissing your claim."
12. Foreman sent three emails on May 11, 2022, in response to the motion and indicated among other things, "I asked YOU to not email me back at any of these emails and to communicate with me ONLY via the United States attorney and apparently Mark, you can't read this is why you're a shit attorney".
13. Foreman made other various allegations in her emails, but did not indicate she intended to participate or cooperate in the proceedings before OAH. And although Foreman sent numerous emails, Foreman never filed an Acknowledgement of Service, and never filed an Appearance and Preliminary Pre-Hearing Statement in this matter.

III. DISCUSSION

Administrative Rule of Montana 24.8.704 adopts the Montana Rules of Civil Procedure for purposes of this proceeding. Montana Rule of Civil Procedure 1 indicates the rules must "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Administrative Rule of Montana 24.8.743(4) reads in part: "The failure to file an answer brief may be treated as an admission the motion is well taken and should be granted." Administrative Rule of Montana 24.8.734(3) reads in part: "In the event a party fails to . . . prosecute or defend the case, [or] fails to engage in discovery, . . . , the hearing officer may enter an appropriate order terminating the contested case . . . Such orders may include dismissal of a complaint." Similarly, Montana Rule of Civil Procedure 41(b), reads in part "Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits."

In *ECI Credit v. Diamond S Inc.*, 392 Mont. 178 (2018), the Montana Supreme Court affirmed a Rule 41(b) dismissal for failure to prosecute. The Court set out the following four factors to determine if a Rule 41(b) dismissal is an abuse of discretion: (1) the plaintiff's diligence in prosecuting the claims; (2) the prejudice caused to the defense by the plaintiff's delay; (3) the availability of alternate sanctions; and (4) whether the plaintiff was warned that the case was in danger of dismissal. *ECI Credit*

v. Diamond S Inc., 392 Mont. 178, ¶ 16 (2018). The court held, “In Montana the law is well established that an action may be dismissed for failure of the plaintiff to prosecute if the action is not prosecuted with due diligence, absent a sufficient showing of excuse.” *Id.*, ¶ 25 (omitting citing cases).

In this matter, Fergus County argues Foreman’s claim should be dismissed with prejudice. Fergus County asserts Foreman is “not interested in legitimately utilizing the resources of this tribunal in order to address” her concerns. Counsel for Fergus County further declared that Foreman will not work with him in order to move the case forward. Finally, Fergus County points out Foreman has indicated she wants the U.S. Attorney in Billings to address her issues. Counsel for Fergus County also declares that he is cooperating with the U.S. Attorney.

Based on Fergus County’s motion, Foreman’s various responses by email, and the facts of record, Fergus County’s motion is well taken. Foreman has repeatedly indicated she does not wish to pursue this matter before OAH. In *In re C.R.C.*, 350 Mont. 211, ¶ 24 (2009), the Montana Supreme Court concluded that when a party shows an “unwavering refusal to participate in any stage of the proceedings” a dismissal of the cause is proper. While Foreman has responded, she has consistently responded with her active refusal to participate. She has proactively indicated she does not wish to proceed with this matter in this forum. In *Xu v. McLaughlin Research*, 328 Mont. 232 (2005), the Court held it was proper to dismiss a case where a party frustrates, rather than facilitates the process. Similarly, in this matter, Foreman’s participation has been to frustrate rather than facilitate the process.

Turning to the factors under Rule 41(b), under the first factor, Foreman has failed to show any diligence in pursuing her claim. Although she has sent numerous emails which might be considered a form of acknowledgement of service or appearance, she has failed to submit a Preliminary Pre-hearing Statement. She has failed to properly participate in discovery. She has repeatedly indicated she does not want to pursue this matter in this forum. Under the second factor, Fergus County is prejudiced in this proceeding by Foreman’s failure to participate because it cannot proceed through the normal steps of a contested case hearing. Under the third factor, Foreman also has an alternative remedy with alternative sanctions that she is pursuing because she has contacted the U.S. Attorney to proceed under federal law. Finally, under the fourth factor, Foreman was warned by OAH’s Notice which stated: “Failing to respond may result in the Hearing Officer granting the opposing party’s motion and dismissing your claim.” Taking the four factors together, Foreman has not just failed to prosecute her claim, she has actively resisted following the steps needed to proceed. Therefore, dismissal on the merits is granted on the grounds that Foreman has actively frustrated and shown an unwavering refusal to prosecute her

case in these proceedings. Because this is an adjudication on the merits based on Foreman's actual responses and her repeated indications she does not wish to prosecute her claim in this forum, Foreman is not entitled to show good cause for relief for this dismissal under Administrative Rule of Montana 24.8.734(4). Further, the Department is not entitled to notice to intervene under Administrative Rule of Montana 24.8.734(6).

Finally, Fergus County also made a motion for summary judgment based on the facts of the underlying matter. Because Foreman's claim is dismissed with prejudice based on her failure to properly participate by her active refusal, the Hearing Officer does not need to reach the underlying discrimination claim. Further, as discussed above, one of the factors to be considered under Rule 41(b), is whether alternative sanctions are being pursued. Foreman has made clear she is pursuing federal avenues available for her claim. Therefore, the underlying issues presented by her claim will be addressed in that forum.

IV. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-505.
2. Foreman has failed to prosecute her case by refusing to properly participate.

V. ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondent's Motion to Dismiss is GRANTED.
2. Foreman's claim is DISMISSED WITH PREJUDICE.

DATED this 17th day of May, 2022.

/s/ JUDY BOVINGTON
Judy Bovington, Hearing Officer
Office of Administrative Hearings
Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Kellie Foreman; and Respondent Fergus County - Justice Court, and its attorney, Mark Higgins:

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)

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 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 A 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).