

**BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA**

<b>Ruth Sherburn,</b>	)	
<b>Charging Party,</b>	)	<b>HRC NO. #9509006557</b>
<b>v.</b>	)	<b>FINDINGS OF FACT, CONCLUSIONS</b>
	)	<b>OF LAW AND FINAL ORDER</b>
<b>Jan Reagor, Intermountain SIR,</b>	)	
<b>Respondent.</b>	)	
_____	)	

In July 1994, Ruth Sherburn filed a complaint with the Montana Human Rights Commission (HRC) and against Jan Reagor and Intermountain SIR. The complaint alleged that respondents had discriminated against charging party because of religion and in retaliation for her having participated in a human rights proceeding. Charging party claimed that Jan Reagor and Intermountain SIR had violated her rights under §49-2-301 and §49-2-303, MCA, causing wage and benefit losses and impairing her future earnings capacity.

The case was certified for hearing on March 13, 1995. By agreement of the parties, the hearing was held on September 6, 1995, at the conference room of the Job Services office in Great Falls, Montana.

The undersigned hearing examiner presided. Charging party was represented by attorney John Lynch of Great Falls, Montana. Respondent was represented by attorney Timothy McKittrick also of Great Falls, Montana.

The parties waived opening statements in the case. Closing arguments were timely filed in writing with the Commission three weeks after receipt of the evidence. The record of the hearing on this matter was closed on October 2, 1995.

A proposed order was issued in favor of the respondent on October 23, 1995. No Exceptions were filed. The Montana Human Rights Commission considered the Proposed Order on February 20, 1996, at Kalispell, Montana. All Commission members were present, and indicated they had reviewed the record, consisting of the Complaint and the Proposed Order.

Upon its review of the Findings of Fact, Conclusions of Law and Proposed Order as entered by the hearing examiner, the Montana Human Rights Commission now adopts the Findings of Fact, Conclusions of Law, and Proposed Order of the Hearing Examiner as its Final Order, as follows.

I.

**ISSUES**

1. Did respondents take adverse employment action against charging party or otherwise discriminate against her on account of religion and in violation of §49-2303(1), M.C.A.?

2. Did respondent take adverse employment action against charging party or otherwise discriminate against her in retaliation for her having engaged in protected human rights activity and in violation 49-2-303(1), M.C.A.?

3. Is charging party entitled to any relief under §49-2-506(1)(b), M.C.A., and if so, in what amount and what form?

4. Is respondent entitled to dismissal of the charge?

5. In the event respondent is found to have engaged in an unlawful discriminatory practice, is any affirmative relief necessary other than an order by the Human Rights Commission that the respondent refrain from engaging in such discriminatory conduct, as required by §49-2-506(1), M.C.A.?

II.

**FINDINGS OF FACT**

1. Charging party is Ruth Sherburn. She is a resident of Great Falls, Montana.

2. Respondents are Jan Reagor and Intermountain SIR. Jan Reagor is a resident of Great Falls, Montana. Intermountain SIR is a corporation, previously a sole proprietorship, with its principal place of business also in Great Falls, Montana. Jan Reagor is and has been the sole owner of Intermountain SIR.

3. Intermountain SIR is a market research and business consulting firm that conducts product tests, opinion surveys, customer identification and a variety of other services for its clientele. Many of its customers are involved in highly sensitive analyses of product efficacy, consumer satisfaction and public opinion.

4. Intermountain SIR was started by Jan Reagor in the 1970s and has established a reputation for reliability and accuracy. By 1993, the business employed a full-time staff of four persons. It also employs over 100 persons on a part-time basis each year. Parttime employees are engaged to perform tasks and services required to fulfill customer research, testing and opinion projects. Respondents perform research and polling services in six or seven states each year.

5. Respondent employed charging party as a bookkeeper from August 3, 1990, through July 15, 1994. Charging party's salary at the time her employment with respondents ended was \$1,140.52 per month.

6. Ruth Sherburn was trained in bookkeeping practices at the Vo-Tech program of the College of Great Falls. She completed the program and received a certificate of training in May 1990. Her job with respondents was the first time that charging party was employed full time as a bookkeeper. Respondents provided her with general training and orientation concerning their bookkeeping practices.

7. As respondents' staff bookkeeper, Ruth Sherburn had responsibility for billing, accounts receivable, accounts payable, payroll and preparation of quarterly and annual reports for submission to various government agencies. As part of her payroll responsibilities, charging party also assisted in maintaining current lists of full and part time employees.

8. In addition to a staff bookkeeper, respondents engage the services of a certified accounting firm to prepare annual financial statements and tax returns for Intermountain SIR. On occasion, Ruth Sherburn would consult with members of the accounting firm engaged by respondents concerning appropriate bookkeeping practices for the company.

9. While charging party was employed at Intermountain SIR, staff meetings were held on a weekly basis. It was the respondents' practice to spend a few minutes praying to begin each meeting. According to Jan Reagor, the prayers were voluntary and optional and no employee was pressured to join in the praying. Reagor acknowledged that she personally would inform each new employee about the staff meeting prayers and would

ask if that would present any problem. According to Reagor, prior to July 1993, neither the charging party nor any other employee had complained about the prayer period preceding staff meetings.

10. In January 1994, Ruth Sherburn informed respondents of her discomfort at being present for the prayer period immediately preceding the staff meetings. As a result, charging party stayed at her desk while prayers were said prior to the beginning of the meeting. The staff meeting was held in the conference room of respondents' offices. Charging party's desk was located at the other end of the offices. Sherburn was comfortable with that accommodation to her religious beliefs.

11. After she stopped going to the prayer period before the weekly staff meeting, charging party sensed some "coolness" by other members of the staff. She testified that conversations between her coworkers would stop when she approached them. She recalled that experience occurred primarily at the beginning of staff meetings.

12. On cross examination, charging party testified that it was not unlikely that conversations between her coworkers stopped when she approached at the beginning of staff meetings because the staff was waiting for her arrival before beginning the meeting. She also acknowledged that, other than the "coolness" she perceived from her coworkers, she was not aware of being treated in any different manner than employees of respondent who did attend the prayer period preceding staff meetings.

13. On June 24, 1992, Jan Reagor advised Ruth Sherburn in an "employee letter of concern and reprimand" that charging party had made mistakes in her job involving errors and omissions in certain reports she had filed with government agencies, failing to advise Reagor of customers changing an expense charge rate on a billing, late payments by customers, the timeliness of billing customers, and excessive visits with coworkers in the office. In the letter, Reagor instructed Sherburn how to improve her performance. No adverse action was taken against Sherburn other than placing the June 24, 1992, letter in her personnel file.

14. On August 31, 1992, Jan Reagor advised Ruth Sherburn in a second "employee letter of concern and reprimand" that she was not billing customers on a timely basis. The letter advised charging party to organize her time better in order to bill customers more quickly. Respondent made available time management audiotapes for charging party's use in developing better time management practices. Again, no adverse action was taken against Sherburn other than placing the August 31, 1992, letter in her personnel file.

15. In early March 1993, respondents engaged the services of an employment agency to locate applicants for the position of a full charge bookkeeper at Intermountain SIR. Jan Reagor testified she sought a replacement for charging party because she was dissatisfied with the quality of her work. The agency sent applicants to be interviewed for the job on March 4 and March 15, 1993. Reagor did not consider any of the applicants qualified and decided to retain Ruth Sherburn in her position as staff bookkeeper at Intermountain SIR.

16. In June 1993, one of charging party's coworkers, Robert Brand, left the employ of respondents. Shortly thereafter, Brand filed a human rights complaint against respondents alleging religious discrimination and disability discrimination.

17. After Robert Brand filed a human rights complaint against respondents, Jan Reagor asked employees at Intermountain SIR not to have any contact with Brand without first informing her.

18. On September 7, 1993, Ruth Sherburn provided to Robert Brand a short written statement concerning her knowledge that Brand had undergone eye surgery in January 1993 and in June 1993. The writing also described a statement made by Jan Reagor to Ruth Sherburn concerning the employment status of Brand in June 1993.

19. On November 2, 1993, Ruth Sherburn provided to Robert Brand a letter on Intermountain SIR stationery summarizing his wages paid by respondent in 1993 and in October, November and December of 1992. The final sentence of the letter sent by Sherburn states "Hope this helps." The November 2 letter was provided by Sherburn in the ordinary course of performing her duties as bookkeeper for respondents.

20. On November 8, 1993, Ruth Sherburn provided to Jan Reagor a short written statement concerning charging party's knowledge and lack of knowledge about certain events which occurred at Intermountain SIR while Robert Brand was employed there.

21. In the first quarter of 1994, Jan Reagor made notes of a discussion she had with Ruth Sherburn concerning year end financial information that charging party had prepared for respondents. The notes, identified and admitted as Exhibit C, indicate that Reagor had questions for Sherburn about commissions paid to one of the staff during the third quarter of 1993, the failure to report bank charges and service fees, the absence of information on 1993 license fees, the amount of payroll taxes paid for that year, and the reporting of consulting expenses for the month of September 1993.

22. After the charging party filed her complaint in this action, Jan Reagor added a self-serving note to Exhibit C indicating that it was a "memo ...regarding errors" by the charging party. The notes taken by Jan Reagor in the first quarter of 1994 reveal only that Reagor had questions concerning various accounting items for the 1993 year end financial reports. The notes do not indicate a complaint about charging party's performance in preparing year end financial information for 1993. Reagor did testify that she considered the matters cited in Exhibit C to reflect errors and omissions by charging party in the performance of her work.

23. While employed by respondents as a full time bookkeeper, Ruth Sherburn did make errors in her work. The overall quality of charging party's work for respondents was not high. The quality of the work of charging party was sufficient to meet the basic bookkeeping needs of the respondents during the period she was employed there, except on those occasions when the company was having cash flow problems and needed efficient and timely billing and collection practices.

24. At the end of April 1994, Jan Reagor placed a classified ad in the Great Falls Tribune seeking a "Full Time Bookkeeper" for Intermountain SIR. The ad was published on May 1, 1994, and on other dates. Respondents were not identified in the ad. Interested applicants were directed to a mail box number at the Great Falls post

office. Respondents did not hire any of the persons inquiring about the bookkeeper position advertised in the Tribune in May 1994.

25. In May 1994, respondents also engaged the services of an employment agency to locate applicants for the position of full charge bookkeeper at Intermountain SIR. Jan Reagor testified she again sought a replacement for charging party because she was dissatisfied with the quality of her work. Reagor did not hire any of the applicants sent by the agency.

26. In June 1994, charging party received a raise in her rate of pay. The raise made permanent a bonus that respondent had paid to charging party regularly for several months. Jan Reagor testified that, as a practice, she did not immediately raise an employee's pay but did so over a period of time through bonuses. Reagor testified that she would not make an increase permanent until she was certain that the company could afford the raise. She also testified that the increase was solely a cost-of-living increase, unrelated to the quality of the performance of the charging party, and was not a merit raise.

27. Charging party testified that, sometime during the period July 1 to July 11, 1994, she observed Jan Reagor receive a letter from the Human Rights Commission concerning the claim of Robert Brand. Charging party also testified that she was aware that respondent received a telephone call from Lynette Lee, the human rights investigator assigned to the Brand case, during the same period of July 1 to July 11, 1994.

28. Charging party did not read the letter from the Commission received by respondents in July 1994. Charging party also was not privy to the subject matter of the phone conversation in July 1994 between Jan Reagor and the HRC investigator.

29. On July 5, 1994, Jan Reagor placed a job order with the Great Falls Job Service office advising that Intermountain SIR was seeking a full charge bookkeeper. The Job Service office was advised by respondent not to identify the prospective employer in its posting of the job vacancy notice. The Job Service office was informed

by Jan Reagor that she did not want the name of Intermountain SIR listed in order to avoid upsetting people in respondents' offices.

30. On July 8, 1994, Jan Reagor prepared a letter terminating the employment of Ruth Sherburn with Intermountain SIR. The letter gave Sherburn four reasons for her termination: (1) "Frequent errors and mistakes"; (2) "Poor attitude"; (3) "Discussion of internal information, without first clearing it with your employer, with former employees after they had left this employment"; and (4) "Frequently using Shawna's computer once our office staff were out of this office."

31. Reagor delivered the letter to Sherburn on July 11, 1994, at a meeting in respondents' offices. At the meeting, Jan Reagor and Ruth Sherburn discussed the reasons for the termination decision and Sherburn offered her response to each of the reasons cited. Respondent then terminated the employment of charging party at Intermountain SIR effective July 15, 1994.

32. Charging party did not dispute that on occasion she did make errors and mistakes in her work and that on occasion she did have a poor attitude about her job. She contended that the errors were not so serious and any attitude problems were not so frequent as to warrant termination from employment.

33. Ruth Sherburn did dispute that she used respondents' computer equipment for personal reasons or personal gain. Respondent had no basis in fact for concluding that Sherburn abused her privileges to work at the computer equipment in the offices of Intermountain SIR.

34. The third reason cited by respondent in the 7/8/94 termination letter concerned the charging party's having provided information to Robert Brand about the wages he earned in 1993 and in the final quarter of 1992. The information was solicited by Brand for use in his presentation of a wage and hour claim against respondents. The wage and hour claim of Robert Brand was a separate proceeding from Brand's human rights complaint against the respondents. There was a substantial dispute between respondents and Robert Brand concerning the amount of wages he received while employed at Intermountain SIR.

35. Respondents' witnesses who are current or former employees at Intermountain SIR confirmed that Ruth Sherburn did occasionally exhibit a poor attitude toward her work with respondents, especially when )an Reagor was not present in the office.

36. Other witnesses called by respondent, including Kay Esther and Dorothy Behling, confirmed that there were a number of errors and omissions in charging party's work as bookkeeper for Intermountain SIR. Behling has worked as respondents' bookkeeper since August 5, 1994. Esther trained and oriented Behling to the respondents' bookkeeping practices. Shortly after charging party left the employ of respondents, both Behling and Esther reviewed the company's accounts and ledgers for the period when Ruth Sherburn worked as its bookkeeper.

37. As a result of her termination by respondents, charging party experienced a great deal of anxiety and distress concerning her ability to earn a living for herself and her young daughter.

38. After charging party's termination from employment with respondent, Ruth Sherburn applied for and received unemployment benefits. She obtained other employment, at a lesser wage rate, in September 1994. Since September 1994, Sherburn has continuously been employed or diligently seeking employment.

39. Since termination from employment at Intermountain SIR on July 15, 1994, charging party has earned \$6,404.12 in wages from other employment. III.

## OPINION

### Religious Discrimination Claim

The Montana Human Rights Act prohibits an employer from taking adverse action against an employee because of religion. X49-2-303(1), M.C.A. The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer is unable to reasonably accommodate an employee's religious practice or belief without substantial hardship. *Kundert v. City of Helena*, HRC Case #9301005512 (Final Order dated May, 1995), citing 42 U.S.C. §2000e(j).

The proscription against religious discrimination in the workplace includes protection for employees who decline to participate in devotional activities promoted or mandated by their employer. *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988). To prevail on such a claim, the charging party must prove that she had a bona fide objection to a religious based employment policy or practice, her employer was informed of or otherwise aware of the conflict, and charging party suffered adverse employment action as a result. *Townley*, 859 F.2d at 614, citing *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979).

In this case, charging party failed to prove the elements of a prima facie case of employment discrimination based on religion. Ruth Sherburn testified that she informed Jan Reagor of a conflict between respondents' practice of holding a prayer period before staff meeting and charging party's religious beliefs. An accommodation was made whereby Sherburn would not be present or exposed to the prayer period. Sherburn admitted the accommodation was acceptable.

There was insufficient evidence to show that charging party was subject to any adverse employment action or was otherwise discriminated against because she declined to attend the prayer session before staff meetings or any other religious activity sponsored or promoted by respondents. The testimony that coworkers were "cool" to Ruth Sherburn after she stopped attending the prayer sessions was too vague and indefinite to constitute substantial evidence of disparate treatment. Ruth Sherburn acknowledged that her assumption that coworkers treated her with "coolness" may have been a misperception.

At the close of charging party's case in chief, respondents moved for a directed dismissal of the charge of religious discrimination in violation of §49-2-303(1), M.C.A. The motion was granted.

#### Retaliation Claim

The Montana Human Rights Act also prohibits employers from taking adverse action against an individual because she has "assisted or participated in any manner in an investigation or proceeding" before the Human

Rights Commission. §49-2-301, M.C.A. See, among others: Feragen v. Bozeman Horse World, Human Rights Commission Case #9301005477 (February 1995); Ivers v. Sanders County Commissioners, Human Rights Commission Case #9401006047 (July 1994). If illegal retaliation is proved, respondent is liable for the resulting harm. §49-2-506(1)(b), M.C.A.

A retaliatory discharge claim is reviewed under the three stage analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and adopted by the Montana Supreme Court in Martinez v. Yellowstone County Welfare Dept., 626 P.2d 242 (Mont. 1981). To prevail on a claim of illegal retaliation in violation of the Human Rights Act, the charging party must first establish a prima facie case with proof that: a) she engaged in protected conduct; b) she was subjected to adverse employment action; and c) there is a causal link between the protected activity and the adverse action. Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir. 1994); Jennings v. Tinley Park Comm. School Dist., 864 F.2d 1368, 1371-1372 (7th Cir. 1988); EEOC v. Crown Zellerbach, 720 F.2d 1008, 1012 (9th Cir. 1983).

If the prima facie case is established, then the burden is on the employer to produce admissible evidence of a legitimate, nonretaliatory reason for the adverse action. *Id.* If the respondent carries that burden, then the claimant must be afforded the opportunity to prove that the proffered justification is a pretext for unlawful retaliation. McDonnell Douglas, 411 U.S. at 408.

Ruth Sherburn did establish a prima facie case that she was subjected to illegal retaliation by respondents as a result of her participation in the investigation into the human rights complaint of Robert Brand. On September 7, 1993, Sherburn provided Brand with a written statement concerning facts which were relevant to his disability discrimination claim against respondents. Jan Reagor was aware that Sherburn provided Brand with a written statement and in November 1993, Reagor also obtained a written statement from Sherburn concerning her knowledge of Brand's employment. In July 1994, respondents received a letter and a phone call from the HRC.

On or about the same time that respondent received the letter and the phone call, Jan Reagor terminated the employment of Ruth Sherburn.

The proximity in time between the HRC letter, the call from the investigator, and the discharge of Ruth Sherburn evidenced a causal link between the Brand human rights investigation and adverse action against charging party. In addition, one of the statements in the termination letter referred to improper disclosures of information to former employees which also suggested a link between the discharge and the Brand charge. Although the absence of evidence concerning the content of the HRC letter or phone call and the exact wording of the termination letter failed to demonstrate the respondents' exact motives in discharging Sherburn, the evidence was sufficient to establish a prima facie case of retaliation.

In defense against the charge, there was substantial evidence presented by Jan Reagor concerning her ongoing dissatisfaction with charging party's work and the repeated efforts to find a replacement unrelated to any human rights activity by Ruth Sherburn. Respondents proved conclusively that they sought a full time bookkeeper in April and May of 1994 to replace Sherburn. Respondents had manifested a clear intention to terminate the charging party's employment months before the receipt of the July letter and phone call from the Human Rights Commission.

Two of the reasons cited by respondents in the letter terminating charging party's employment were proven to be true: Ruth Sherburn had made a number of errors and omissions in the performance of her job and she did display a poor attitude about her work on occasion.

A third reason, involving improper disclosure of information to former employees, suggested that Sherburn was fired in part for providing information to Robert Brand on his pending claim. The evidence at the hearing however established that Reagor had objected to Sherburn's disclosure of wage records to Brand for use in his wage and hour claim against respondents. Reagor had requested prior consultation before releasing information to Brand. Her request was legitimate in light of the dispute between Brand and Intermountain SIR over the

amounts he had been paid while employed. Charging party did not establish that her termination was linked to disclosure of information concerning Robert Brand's human rights complaint.

The final reason offered by respondents in the 7/8/94 termination letter, concerning abuse of computer privileges, was not based on fact but simply on speculation or supposition by Jan Reagor. The charging party did not prove however that respondents' error in that conclusion was related to Sherburn's participation in the investigation of the Brand human rights complaint. It was at least as likely that the erroneous conclusion had been drawn from Jan Reagor's fears about losing sensitive information contained on the computer or about Sherburn wasting her working time at a cost to the company. Charging party did not prove that any of the reasons listed on the 7/8/94 termination letter were a pretext for retaliating against her for assisting or otherwise participating in the investigation into the human rights complaint of Robert Brand.

Ruth Sherburn failed to prove by a preponderance of the evidence that she was terminated from employment with Intermountain SIR in retaliation for her having participated in human rights activity. Pursuant to §49-2-507, M.C.A., her complaint against respondents alleging a violation of §49-2-301, M.C.A., must also be dismissed. IV.

#### CONCLUSIONS OF LAW

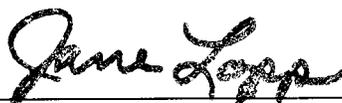
1. Respondents did not take adverse action or otherwise discriminate against charging party on account of religion and in violation of §49-2-303(1), M.C.A.
2. Respondents did not take adverse action or otherwise retaliate against charging party because she engaged in protected human rights activity and in violation of §49-2-301, M.C.A.
3. Charging party is not entitled to relief under §49-2-506(1)(b), M.C.A.
4. Respondent is entitled to dismissal of the charge in this matter pursuant to §49-2-507, M.C.A.

V.

FINAL ORDER

1. Judgment is hereby found in favor of respondents and against charging party on her charge that respondents discriminated against her on account of religion.
2. Judgment is hereby found in favor of respondents and against charging party on her charge that respondents retaliated against her because she engaged in protected human rights activity.
3. The complaint in the above captioned matter is hereby dismissed.

DATED this 29<sup>th</sup> day of February, 1996.



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S. Jane Lopp, Chair

Montana Human Rights Commission

Commissioners Etchart, Ogren, Stevenson, and Svec concur

CERTIFICATE OF SERVICE

The undersigned employee of the Montana Human Rights Commission certifies that a true copy of the foregoing Findings of Fact, Conclusions of Law and Final Order was mailed to the following persons by U.S. Mail, postage prepaid, on this 29<sup>th</sup> day of February, 1996.

Tim McKittrick, attorney for respondent, P.O.Box 1184, Great Falls, Montana 59403

Jack Lynch, attorney for charging party, P.O.Box 2265, Great Falls, Montana 59403

Montana Human Rights Commission