

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

<u>Lori Williams-Stetson,</u>)	Human Rights Act Case No. 9903008587
Charging Party,)	
versus)	<i>Final Agency Decision</i>
<u>The Montana Power Company,</u>)	
Respondent.)	

I. Procedure and Preliminary Matters

Lori Williams-Stetson filed a complaint with the Department of Labor and Industry on July 13, 1998, and an amended complaint on January 22, 1999. She alleged the Montana Power Company (“MPC”) discriminated against her on the basis of her marital status and sex. On January 11, 1999, the department gave notice Williams-Stetson’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on April 23, 1999, in Butte, Montana, in Judge Whelan’s courtroom, 3rd floor, County Courthouse, 155 West Granite. Williams-Stetson and her attorney, Peter Michael Meloy, Meloy & Morrison, attended. MPC attended through its attorney/designated representative, Patrick T. Fleming. The hearing examiner excluded witnesses on Williams-Stetson’s motion. Williams-Stetson and Julie Pickett testified under oath. The hearing examiner admitted Exhibit A without objection.

At hearing MPC asserted that the department did not have subject matter jurisdiction. The hearing examiner set a briefing schedule. MPC declined to submit a brief, asserting that it reserved its jurisdictional challenge. The hearing examiner set June 1, 1999, as the time for any post-hearing submissions, noting that refusal to brief subject matter jurisdiction may not reserve the challenge. The parties filed no post-hearing briefs.

II. Issues

The legal issues in this case are (a) whether MPC unlawfully discriminated against Williams-Stetson because of her marital status by withholding its services and (b) whether the Department of Labor and Industry can dictate action by MPC even though the Public Service Commission regulates public

utilities. A full statement of the issues identified before the hearing appears in the final prehearing order.

III. Findings of Fact

1. Lori Williams-Stetson owns a residence and acreage at 4291 Hart Lane, Helena, Montana. She purchased the property in 1996, and is the sole owner. Before she bought the property, she owned and resided on similar property (residence and acreage) on Howard Road, Helena, Montana. She and her husband, Dr. Kirk Stetson, a Helena dentist, married while she owned and resided at the Howard Road property. Since they married, children from their prior marriages have resided with them either full-time or part-time. After their marriage, Williams-Stetson and Stetson resided, with the children, at the Howard Road property, and then moved to the Hart Lane property in 1996. Testimony of Williams-Stetson.

2. Williams-Stetson is a full-time employee of the Montana Department of Labor and Industry. She held that job at all times pertinent to this case. She also owns and operates a sole proprietorship with the business name "Genesis Farms." She operated this business at the Howard Road property and moved it to the Hart Lane property in 1996. The business of Genesis Farms is breeding, raising, selling and caring for horses. Stetson and the resident children help out in the business, but hold no ownership interests. Williams-Stetson intended to use and uses the acreage at Hart Lane to grow hay for the horses. She first used the acreage for hay in 1997. In 1996, the prior owners had already leased the acreage, so Williams-Stetson did not use or irrigate the acreage. Testimony of Williams-Stetson.

3. Stetson practices dentistry in Helena, Montana, doing business as "Stetson Dental Arts." Williams-Stetson owns no interest in his business. Testimony of Williams-Stetson.

4. The Hart Lane property has two accounts with MPC. MPC sells electricity for the residence, under one account. Under the other account, MPC sells electricity to run an irrigation pump that pumps water from a Helena Ditch Company ditch to the acreage. The Helena Ditch District (also called the Helena Irrigation District) sells the water to the irrigator. Until the water is available from the ditch, running the pump would burn it out. Testimony of Williams-Stetson and Pickett.

5. Irrigation pump electricity is "turned on" all year for the Hart Lane property. MPC does not physically interrupt the connections through which

electricity reaches the pump. In the fall, when irrigating ends, MPC classifies the account as inactive or deactivated, and requires the user to “sign up for service” in the spring. MPC then considers the account “active” or “activated,” and changes the account status in its computer system, so that it generates a bill to the customer for the electricity used. Testimony of Pickett.

6. Williams-Stetson initially signed up to buy electricity for the residence in 1996, when she bought the residence. She also signed up as the owner of the acreage in 1996, even though she did not buy electricity under that account until spring of 1997. She received no bills for the irrigation pump until MPC activated the Genesis Farms irrigation pump account in the spring of 1997. Testimony of Williams-Stetson.

7. MPC's customer service representatives are physically located in Butte, Montana. Calls for service at any location come to the Butte phone center. Customer service representatives utilize a computer system (the customer information system) to keep track of the various accounts. A particular customer's data in the customer information system remains as it was when last changed until further changes are made. Exhibit A is a print-out of data displayed on a work station screen in the phone center as of April 13, 1998, about the Genesis Farms irrigation pump account. The information retained in the system, displayed on the first line of Exhibit A, includes the account number assigned to the physical site of electrical use. The three digit number (“007”) following the account number simply indicates that as of the date on the print-out, the account had been activated 7 times, for any customer requesting electrical service to that irrigation pump. Testimony of Pickett, Exhibit A.

8. The first time a particular customer activates the account, the customer service representative inputs the identity of the person requesting activation (“signing up for service”). This information appears on the eighth typed line of the screen after “requested by,” followed in turn by the identity of the customer service representative. The name of the current customer as of April 13, 1998, Genesis Farms, is on the second line of Exhibit A. The name of the current customer appears a second time in the middle of the exhibit, on the line designated “customer.” Testimony of Pickett, Exhibit A.

9. Below the second identification of Genesis Farms in Exhibit A, the Social Security Number and date of birth of the customer appear, for verification purposes. The SSN and birth date on Exhibit A are those of Williams-Stetson. Testimony of Williams-Stetson, Exhibit A.

10. In the spring of 1997, while Williams-Stetson was out of state, she authorized Stetson to activate the irrigation account. He did so. Stetson did

not know Williams-Stetson's Social Security Number. She had previously contacted MPC and identified herself as the owner of the acreage and irrigation pump, so her SSN and date of birth were already in the MPC data base, and appear on Exhibit A. Testimony of Williams-Stetson, Exhibit A.

11. In 1997, MPC identified Stetson as the person requesting initial service for Genesis Farms. MPC also identified Stetson as Williams-Stetson's husband, placing this data in the space for the address of the customer's current employer. Stetson was not Williams-Stetson's current employer. Testimony of Pickett, Exhibit A.

12. On or about May 11, 1998, Williams-Stetson called MPC to activate electrical service to the irrigation pump. She did not know that the electricity was on year-round. She did know that to obtain electrical service for the pump each spring, MPC required a call to sign up for service. Testimony of Williams-Stetson.

13. Julie Pickett was the customer service representative who talked to Williams-Stetson during this first call on or about May 11, 1998. Pickett confirmed that MPC would activate electrical service to the irrigation pump. Pickett and Williams-Stetson did not discuss Williams-Stetson's sole ownership of the Hart Lane property, including the acreage and the pump. Testimony of Williams-Stetson and Pickett.

14. Later the same day as that telephone conversation, Pickett pulled up the data screen of which Exhibit A is a print-out. The screen appeared exactly as Exhibit A depicts it. Testimony of Pickett, Exhibit A.

15. Pickett considered Stetson to be another person responsible for the account. She saw he had requested Genesis Farms' initial service in 1997. She saw MPC had included his name in the space for current employer's address, with a note that he was Williams-Stetson's husband rather than her employer. She believed customer service representatives used that space to include other pertinent information, including additional responsible persons. Seeing that Stetson had requested Genesis Farms' initial service and that he was identified in the data base as another person responsible, she checked his business account and found it had a balance due. Pickett concluded that until Stetson's account was current, MPC would not activate Williams-Stetson's irrigation pump account. Testimony of Pickett.

16. An MPC employee called Williams-Stetson on that same day and told her that she could not have power for her irrigation pump until Stetson's account was current. Testimony of Williams-Stetson.

17. Although Williams-Stetson did not agree with MPC's position during that second May 11, 1998, telephone conversation, she did not tell MPC at that time that she disputed its position. She simply called her husband, and asked him to pay his power bill, which he did. No property damage resulted from any delay in activation of the pump account. Testimony of Williams-Stetson.

18. Williams-Stetson called MPC a few days after Stetson had paid his power bill. She could not recall the name of the MPC employee who spoke with her. Williams-Stetson wanted to explain that her husband was not properly on her business account and that she was not properly on her husband's business account. The MPC employee asserted that Montana was a "community property state" and that Williams-Stetson was responsible for her spouse's account. Williams-Stetson believed after that telephone conversation that MPC still asserted that her access to electricity depended in part upon her husband paying his power bill. Testimony of Williams-Stetson.

19. In early summer, after filing her Human Rights Act complaint, Williams-Stetson called MPC. She asked to speak to a supervisor, and Maureen Hoyne then spoke with her. Testimony of Williams-Stetson.

20. Williams-Stetson reiterated to Hoyne that her irrigation pump account should be entirely separate from her husband's business account. Hoyne agreed. Williams-Stetson has not had any further problems with MPC regarding the separation of the accounts. Testimony of Williams-Stetson.

21. Williams-Stetson suffered emotional distress as a result of MPC's conduct. Her testimony is credible, but demonstrates a minimal amount of frustration and emotional distress. She is entitled to recover \$500.00 for that distress. Testimony of Williams-Stetson.

22. Affirmative steps are necessary to ensure that MPC personnel do not reach the same conclusions, based upon the same kinds of data and the same kinds of reasoning, for other customers in the future.

IV. Opinion

The Department Has Jurisdiction

Before analyzing the merits of Williams-Stetson's complaint, the hearing examiner must address the jurisdictional question MPC raised. A party can

raise the question of subject-matter jurisdiction at any time, and cannot waive it. *Balyeat Law, P.C. v. Pettit*, 967 P.2d 398, 402, 1998 MT 252 ¶15 (1998). MPC has cited no authority in support of its challenge, but the challenge remains.

MPC argues that because the Public Service Commission regulates it, the Department of Labor and Industry cannot. The PSC has full power of supervision, regulation and control of public utilities. §69-3-102 MCA. It can inquire into any neglect or violation of the law of this state by any public utility in Montana. §69-3-110(1) MCA (“Enforcement of public utility law”).

Any person claiming to be aggrieved by a discriminatory practice can file a complaint with the Department of Labor and Industry. §49-2-501(1) MCA. If the department finds the respondent has engaged in the discriminatory acts alleged in the complaint, it must order the respondent to cease such action. §49-2-506(1) MCA. It can also prescribe conditions for the respondent's future conduct relevant to the discriminatory acts found, require any reasonable measure to correct the discriminatory practice and to rectify any harm to the complainant, pecuniary or otherwise, and require a report on the manner of the respondent's compliance. §49-2-506(1)(a),(b) and (c), MCA.

The provisions of the Human Rights Act establish the exclusive remedy for acts constituting alleged violations of the Act. §49-2-509(7) MCA. An aggrieved person cannot ask the PSC to inquire into neglect or violation of the prohibitions of the Human Rights Act and expect relief, because the PSC has no power to remedy any such neglect or violation. If MPC were immune from discrimination complaints before the department, it would be immune from the prohibitions of the Act. In adopting and amending the Act, the legislature did not manifest the intention to except MPC or public utilities generally from the statutory prohibitions against discrimination. The department has jurisdiction to decide the merits of Williams-Stetson's complaint, and take the appropriate statutory action upon a finding of discrimination.

Liability for Discrimination

Montana law prohibits discrimination in public accommodation based upon marital status. §49-2-304 MCA. Discrimination against a person based on the identity or occupation of her spouse is marital status discrimination. *Thompson v. School District*, 192 Mont. 266, 270, 627 P.2cd 1229, 1231 (1981).

MPC allegedly committed four acts of illegal discrimination. First, it allegedly entered data in the customer accounts that cross-referenced Stetson and Williams-Stetson because of their marital status. Second, it allegedly used that data to demand payment of Stetson's account as a condition of service to Williams-Stetson's irrigation pump account. Third, it allegedly refused to withdraw that demand even after notice that the accounts were not joint. Fourth, it allegedly refused to activate a woman's account until her husband paid his bill.

For each of the four assertions, the appropriate burden of proof involves direct evidence rather than circumstantial evidence. Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" proving a fact without inference or presumption. *Black's Law Dictionary*, p. 413 (5th Ed. 1979). Direct evidence of discrimination establishes a civil rights violation unless the defendant responds with substantial and credible evidence either rebutting the proof of discrimination or demonstrating a legal justification. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). In Human Rights Act cases, direct evidence relates both to the employer's adverse action and to the employer's discriminatory intention. *Foxman v. MIADS*, HRC Case #8901003997 (June 29, 1992) (race discrimination); *Edwards v. Western Energy*, HRC Case #AHPe86-2885 (August 8, 1990) (disability discrimination); *Elliot v. City of Helena*, HRC Case #8701003108 (June 14, 1989) (age discrimination). The same approach applies to this public accommodation case.

1. MPC Did Not Illegally Enter Marital Status Data in the Account Files

The first allegedly discriminatory act involves MPC employees entering information about both marital status and the customer's spouse in the customer accounts of Williams-Stetson and Stetson. Williams-Stetson did not prove that MPC illegally entered marital information in either Genesis Farms' account or Stetson's.

The parties offered almost no direct evidence regarding Stetson's business account, for his dental office. There is no evidence of how long Stetson has practiced in Helena, so there is no evidence of when he started getting electrical service. Stetson did not testify. No MPC employee testified to any conversations with Stetson.

Pickett testified that Williams-Stetson's name appeared on Stetson's business account, but this testimony was not credible. Williams-Stetson

testified that she was never responsible for Stetson's business account. MPC did not credibly rebut her testimony that, in the second telephone conversation about the denial of service, MPC led her to believe that until *Stetson* paid his account Genesis Farms could not obtain service. There is no evidence of any communications by MPC, except for those involved in this case, seeking payment of Stetson's account by or through Williams-Stetson. MPC's proven communications with Williams-Stetson are not consistent with the claim that the data base indicated she was herself responsible for Stetson's past due account.

According to Williams-Stetson, Hoyne (a supervisor in the Butte phone center) agreed later in 1998 that inappropriate information about marital status appeared in the computer account screens. However, Williams-Stetson did not establish precisely what information appeared in what screen. She herself did not see the screens. The record does not show what computer screens Hoyne may have meant.

Williams-Stetson further testified that Hoyne blamed the appearance of this information on the "Helena office," because all of the personnel in the Butte office "knew better." However, the gist of this testimony was inconsistent with MPC's evidence that all transactions to initiate accounts were by telephone with persons in the phone center in Butte. No credible evidence supports the contention that Helena employees were making any entries in the data base.

Evidence of what appeared in Stetson's account (other than a balance due in May 1998), and of how that information arrived in the data base is weak and unclear. Williams-Stetson has not proved any discriminatory acts regarding information in Stetson's account, because she has not proved that any information about her appeared in Stetson's account.

The heart of the evidence of this first allegedly discriminatory act is Exhibit A, depicting the Genesis Farms account information. When Pickett first pulled up the data screen that Exhibit A depicts, it could only have appeared exactly as Exhibit A depicts it--as it existed prior to the changes that resulted from Williams-Stetson's request for activation. Williams-Stetson volunteered, through counsel, that she had no objection to Exhibit A. No basis for arguing that it means anything other than what it says appears in this record.

Williams-Stetson did establish, through Exhibit A, that MPC had data referencing Stetson as her husband in the Genesis Farms irrigation pump

account. That information appeared in the space for identification of current employer. Williams-Stetson argued that MPC entered that data solely because Stetson was her husband. The data involved was basically the information that Stetson was Williams-Stetson's husband, as Exhibit A stated. Neither Stetson nor "B. Zobenica," the person identified in Exhibit A as talking to Stetson in 1997, testified. Pickett denied entering the information about Stetson. Williams-Stetson denied providing the information about her husband when she first contacted MPC about the irrigation pump account in 1996.

Williams-Stetson testified that Hoyne admitted to her that MPC had entered some inappropriate data about marital status in her customer account. But there was no credible evidence that the information Hoyne called inappropriate came from any source other than Stetson's communications with MPC. Hoyne did not testify to deny, admit or explain the statements Williams-Stetson said she made. Williams-Stetson did not establish through her testimony about Hoyne's statements that MPC entered the data because of the marital relationship.

MPC offered evidence that Williams-Stetson provided the information or ratified its presence in the Genesis Farms account. MPC offered Pickett's testimony that she asked Williams-Stetson if there was another "responsible adult." Pickett testified that she did not view the computer screens until after the call, so the data already in the system could not have prompted her question. Pickett did not testify that asking this question was a routine practice for activation calls. Without such a routine practice, asking the question for activation of an existing irrigation pump account was inexplicable.

Assuming for the sake of analysis that Pickett did ask the question, Pickett's testimony that Williams-Stetson identified Stetson as another person liable for the Genesis Farms' account was not credible. Williams-Stetson gave uncontroverted testimony of the separation she maintained between her business and her husband's business. She testified without impeachment that her business did not finance the family expenses. She testified without impeachment that the phone number on Exhibit A was her number, listed to her alone. All this unrebutted testimony severely challenged Pickett's account of what Williams-Stetson said to her. Without this account of "ratification," MPC offered no evidence that Williams-Stetson in any way provided or approved the provision of Stetson's name for her account.

Stetson contacted MPC to activate the pump account in 1997. Williams-Stetson authorized Stetson to activate the account (she was out of Montana at the time). At that time, spring 1997, MPC already had

information, from Williams-Stetson in 1996, that she owned the acreage. MPC already had access to Williams-Stetson's birthdate and Social Security number. The hearing examiner can reasonably infer that Stetson identified himself as Williams-Stetson's husband, and that the MPC employee to whom he spoke entered Stetson's name, identifying him as Williams-Stetson's husband, because someone other than the responsible party was requesting activation. MPC did not commit an illegally discriminatory act by recording the identity of the initial requester of service and his connection to the responsible party.

2. MPC Did Deny Activation to Collect the Account of Williams-Stetson's Husband

Montana has not adopted community property rules for the separate debts of spouses. *In re Butler*, 243 Mont. 521, 524, 795 P.2d 467, 469 (1990).

MPC did deny activation of Williams-Stetson's pump account until Stetson paid his power bill. In 1998, when Pickett received Williams-Stetson's request for activation, she checked the data base to find out the account status. Pickett testified both that she had, as of the time of hearing, worked as a customer service representative for 22 months or since January 1998. In May 1998 she thus had worked that position for either less than 11 months or less than 5 months, depending upon which answer was accurate. Based upon her experience, she concluded that Stetson, the initial requester of service and the husband of the operator of the business, was also responsible for the account. There was no evidence that MPC considered a secretary, office manager or other employee of a business as responsible for the account, simply because that employee called to activate the account. The only evidence that someone whose name appeared under "current employer/addr." would be responsible for the account was the testimony of Pickett.

Pickett did not have any information from which she could conclude that Williams-Stetson was responsible for Stetson's debt. Pickett's mistaken conclusion could only result from facts she knew. She knew that Stetson called to activate the first service for Genesis Farms and that Stetson was Williams-Stetson's husband. The only basis for MPC to withhold services from Genesis Farms' until Stetson paid his bill was the marital relation between Williams-Stetson and Stetson. When Pickett made the decision that Genesis Farms, owned and operated by Williams-Stetson, could not activate the irrigation

pump account until Stetson paid his separate business power bill, MPC illegally discriminated against Williams-Stetson based upon her marital status.¹

3. MPC No Longer Seeks to Collect Stetson's Account through Williams-Stetson

MPC never actually claimed that Williams-Stetson was responsible for Stetson's power bill. MPC apparently did have one or more employees who believed that spouses always both were responsible for either's power bills (the "community property" comment). Based on that erroneous legal conclusion, MPC's actual assertion was that since Stetson was one of the responsible parties for Genesis Farms, Genesis Farms would not be able to activate its account until he paid his bill. It appears from this record that MPC no longer asserts that Williams-Stetson cannot get power for her irrigation pump unless her husband is current on his separate business' power bill.

4. MPC Did Not Discriminate Against Williams-Stetson Because She Was Female

Williams-Stetson did not prove that MPC refused service to her because she was female. No evidence of record established that Stetson would have received different treatment had the identities of the spouses been reversed.

Damages

The department can require any reasonable measure to correct the discriminatory practice and to rectify any harm to the complainant, pecuniary or otherwise. §49-2-506(1)(b) MCA. Williams-Stetson did not prove any pecuniary harm. She could not testify to any actual losses resulting from the delay of days in activation of the account. The number of phone calls involved, coupled with her demeanor and credible testimony of emotional distress resulting from MPC's actions, supports an award for emotional distress of \$500.00. The hearing examiner finds this to be a reasonable measure for MPC to take to rectify the harm to Williams-Stetson.

Affirmative Relief

The department must order MPC to cease the discriminatory conduct found, and may also prescribe conditions on MPC's future conduct relevant to the discriminatory conduct found, require any reasonable measure to correct the discriminatory practice, and require a report on the manner of the

¹ Williams-Stetson suspected that the second conversation on May 11, 1998, was also with Pickett. Pickett denied having a second conversation with Williams-Stetson that day. This factual dispute is of no significance to the decision, and therefore the hearing *Final Agency Decision Page* 11

respondent's compliance. §§49-2-505(1),(1)(a) and (1)(c) MCA. Here, a cease and desist order, together with a mandate to MPC to provide written guidance to its employees about marital liability for separate accounts, satisfies the statute.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. MPC discriminated against Williams-Stetson by withholding activation of Genesis Farms' electrical account until her husband paid his power bill. §49-2-304(a) MCA.
3. Williams-Stetson is entitled to recover \$500.00 from MPC to compensate Williams-Stetson for emotional distress. §49-2-506(1)(b) MCA.
4. MPC must immediately cease and desist from withholding its services from an individual business customer if that customer's spouse is not current on separate business accounts with MPC. MPC must also give its employees written direction that identification of a customer's marital status or spouse in account information does not render either marital partner liable for the spouse's separate business accounts. §49-2-506(1) and (1)(a) MCA.
5. Within 60 days of the entry of this order, MPC must submit to the Human Rights Bureau a plan of action to assure compliance with the order here. Within 60 days after the Human Rights Bureau approves (with or without suggested modifications) the plan of action, MPC must file written proof with the Human Rights Bureau that it has adopted and is implementing the plan (with any suggested modifications). MPC must also comply with any additional conditions the Human Rights Bureau places upon its continued activity as a provider of public accommodation.

VI. Order

1. Judgment is found in favor of Lori Williams-Stetson and against MPC on her complaint that MPC discriminated against her on the basis of her marital status.
2. Williams-Stetson is awarded and MPC is ordered to pay to her the sum of \$500.00 to compensate her for emotional distress.

3. MPC must immediately cease and desist from withholding its services from an individual business customer if that customer's spouse is not current on separate business accounts with MPC.

4. MPC must give its employees written direction that identification of a customer's marital status or spouse in account information does not render either marital partner liable for the spouse's separate business accounts.

5. Within 60 days of the entry of this order, MPC must submit to the Human Rights Bureau a plan of action to assure compliance with this order. Within 60 days after the Human Rights Bureau approves (with or without suggested modifications) the plan of action, MPC must file written proof with the Human Rights Bureau that it has adopted and is implementing the plan (with any suggested modifications). MPC must also comply with any additional conditions the Human Rights Bureau places upon its continued activity as a provider of public accommodation.

Dated: August 2, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry