

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

Tina Richards,)	
Charging Party,)	Human Rights Act Case No. 9801008491
vs.)	<i>Final Agency Decision</i>
Thunderchild Youth Home/)	
Intertribal Addictions Recovery)	
Organization, Inc.,)	
Respondent.)	

I. Procedure and Preliminary Matters

On March 24, 1998, charging party Tina Richards filed a notarized complaint with the Department of Labor and Industry. She alleged that the respondent, Thunderchild Youth Home Intertribal Addictions Recovery Organization, Inc. (“Thunderchild”) illegally discriminated against her on the basis of sex (pregnant female). She alleged that Thunderchild stopped scheduling her to work on or about May 30, 1997 because of her pregnancy and refused to reinstate her to her position on or about September 15, 1997, after her baby’s birth and her medical release to return to work. On December 15, 1998, the department gave notice Richards’ complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties mutually agreed to permit the department to retain jurisdiction of this case for more than 12 months after the complaint filing.

This contested case hearing convened on June 17, 1999, in Great Falls, Cascade County, Montana. Tina Richards attended with her attorney, Michael Scott Windsor. Thunderchild attended through its designated representative, Terry Beartusk, Executive Director, with Thunderchild’s attorney, Virgil G. Kinnard. The hearing examiner excluded witnesses on Thunderchild's motion. Ivy Wells, Jeff Currie, Lance Trimmer, Betty Price, Tina Richards, Melanie Falcon and Terry Beartusk testified. The parties stipulated to the admission of Richards’ exhibits 1 through 7 and Thunderchild’s exhibits A and B. The hearing examiner heard further argument on Thunderchild’s statute of limitations defenses on June 22, 1999, and at that time the hearing examiner admitted Richards’ exhibits 8 and 9 over objections of untimely identification and surprise. The parties then submitted written closing arguments. Richards’ filed her reply closing argument on August 12, 1999.

II. Issues

The legal issues in this case are whether Richards timely filed her complaint and whether Thunderchild unlawfully discriminated against her due to pregnancy or subjected her to sexual harassment. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Richards began working at Thunderchild's group home for adolescent children on June 3, 1996. Thunderchild promoted her to a lead worker position in February 1997. At the time of the promotion, Richards worked full-time and earned \$5.50 per hour. Final Prehearing Order, §IV. Facts and Other Matters Admitted, No. 1; Exhibit B; testimony of Richards.

2. Thunderchild promoted Richards to lead worker because it needed a lead worker for day shifts. Richards switched from her night shift position to take the day shift lead worker job. She was pregnant at the time. She worked 2 weeks in the day shift lead worker position, from February 3, 1997, through February 14, 1997. Exhibit B, pp. 49-50; Testimony of Richards.

3. Richards developed complications from her pregnancy in February 1997. Her physician restricted her from heavy lifting. On February 19, 1997, Thunderchild placed her on "on-call" status because of her pregnancy and the lifting requirements for the day shift lead workers. Final Prehearing Order, §IV. Facts and Other Matters Admitted, No. 2; Exhibits 1 and B, pp. 017 and 060.

4. As an "on-call" employee, Richards took 8 hours of sick leave and worked 8 hours from February 19 through February 26, 1997. She took 27.5 hours of sick leave and worked 7.5¹ hours from February 27 through March 12, 1997. She worked 6 hours from March 13 through March 26, 1997. She worked 11.5 hours from March 27 through April 9, 1997. She worked 21.5 hours from April 10 through April 23, 1997. She worked 2 hours from April 24 through May 7, 1997. She worked 42 hours² from May 8 through May 21, 1997. Exhibit B, pp. 029, 032, 033, 034, 037, 050, 051.

¹ The time record reflects 14 hours worked, but 6 of the hours have no time entry, just date entries of February 28 and March 1. Exhibit B, p. 051.

² The time record shows a total of 44 hours, but correct addition of the hours each day yields 42 hours. Exhibit B, p. 028.

5. On May 21, 1997, Richards' physician released her to an unrestricted return to work. She was still pregnant. She remained on "on-call" status and worked 24 hours from May 22 through May 25, 1997. Final Prehearing Order, §IV. Facts and Other Matters Admitted, No. 3; Exhibits 2 and B, pp. 030 and 069; testimony of Richards.

6. On May 25, 1997, Richards made a log entry stating she could not work any week shifts and could only work graveyard shifts on weekends because her boyfriend was starting a different job and she had two small children at home. Final Prehearing Order, §IV. Facts and Other Matters Admitted, No. 4; Exhibit B, p. 012; testimony of Richards.

7. On May 26, 1997, Clayton Quiver, the program administrator for Thunderchild, called Richards to discuss her note. He told her that being available for only 2 shifts per week was not sufficient for "on-call." Richards responded that she was letting Thunderchild know she was available for those 2 shifts. Quiver replied that Thunderchild did not need an "on-call" employee who was only available for weekend nights. Testimony of Richards.

8. On May 30, 1997, Quiver wrote to Richards, confirming that she was no longer an "on-call" employee. Quiver also addressed safety concerns that Richards had previously raised with members of the staff at Thunderbird. Exhibits 4 and B, pp. 006.

9. On June 1, 1997, Richards filed a written grievance with Thunderchild regarding no longer being on the work schedule. Although the letter is less than precise, Richards' grievance was that Thunderchild was not going to consider her for on-call work during weekend nights. Exhibits 5 and B, p. 010; testimony of Richards.

10. At various times Richards came to Thunderchild without being scheduled, as a self-defined "volunteer," to visit with resident clients and their families. In June 1997 Thunderchild requested that she not visit the facility unless scheduled to work.³ Exhibit B, pp. 076, 084 and 088; testimony of Richards.

11. On June 4, 1997, Richards signed a request for leave of absence from Thunderchild. Thunderchild credited her accumulated leave to her in June 1997. The hours of leave accumulated were 59.53, or less than 2 weeks' time. An employee of Thunderchild could obtain payment of accumulated

³ In April 1997, Thunderchild asked Richards in writing to stop coming to the facility when she was not scheduled to work, and to stop "counseling" clients. Exhibit B, p. 068.

leave by taking leave and being paid over the period of leave accrued, by quitting or in the event Thunderchild terminated the employee's employment. Exhibit B, pp. 030 and 031; testimony of Richards and Beartusk.

12. On June 9, 1997, Richards applied for unemployment insurance benefits, effective June 1, based on the assertion that Thunderchild had "let [her] go". Exhibit B, p. 057.

13. On June 12, 1997, executive director Terry Beartusk, house manager Pat Cobell and Quiver had a telephone conference with Richards regarding her grievance. Thunderchild then notified Richards in writing that it had resolved her grievance by returning her to on-call status. Thunderchild gave the same report in response to Richards' unemployment claim. Exhibits 6 and B, pp. 007 and 056 (back side of page); Testimony of Richards.

14. On June 24, 1997, Thunderchild received a hand-written letter from Richards, asserting that Quiver was violating various Thunderchild policies. Included in that letter were written assertions that Thunderchild no longer employed Richards and that she had not quit. Exhibit 7; testimony of Richards.

15. In August 1997, Richards gave birth. Thunderchild never called her for any on-call shifts after May 25, 1997, either before or after the birth of her child. Exhibit B, pp. Testimony of Richards.

16. On January 27, 1998, the Montana Human Rights Bureau received a hand-written letter from Richards. Richards denominated it a "letter of complaint." In her letter, Richards wrongly dated events pertaining to her grievance of June 1, 1997, stating they occurred in August and September 1997. In her letter, Richards complained of discrimination in employment due to pregnancy. In her letter, Richards did not indicate that she sought work with Thunderchild after giving birth to her child. Exhibit 8; testimony of Richards.

17. The Human Rights Bureau responded to Richards' letter on February 3, 1998, forwarding a formal complaint form. In its letter, the bureau told Richards that based on her letter (with the erroneous August and September dates) she had until March 25, 1998, to file her formal complaint. Exhibit 9; testimony of Richards.

18. On March 24, 1998, Richards filed her notarized formal complaint with the bureau. In the materials accompanying that complaint, Richards made the first allegation of sexual harassment by Quivers. Exhibit A.

IV. Opinion

Montana law prohibits an employer from discriminating by requiring an unreasonably long maternity leave and requires the employer to reinstate an employee following a pregnancy related leave of absence, once the employee signifies her intention to return to work. §§49-2-310 and 311 MCA. Thunderchild could not treat Richards less favorably for "commencement and duration of leave" because she was pregnant. 24.9.1206 A.R.M.

Richards Did Not Timely File Her Claim

Thunderchild argued that Richards did not timely file her claim. This argument is well-taken, for reasons neither party directly addressed during hearing.

Richards alleged discriminatory acts in August and September 1997. Based on those allegations, in her letter of complaint, the Human Rights Bureau staff advised her she had until March 25, 1998, to file. Richards filed her verified complaint on March 24, 1998.

The bureau's advice was in error. However, the error resulted from Richards' dating. Had Richards accurately reflected the date of the resolution of her grievance (June 12, 1997), the HRB staff probably would not have identified this erroneous filing deadline. The HRB staff expressly based the filing deadline on the information provided by Richards.

Since Richards earlier filed a written complaint, the March 24, 1998 filing relates back to that earlier filing.⁴ The timeliness issue relates to the date of the initial filing, not to the date of the verified complaint's filing.

Richards filed her initial "letter of complaint" on January 27, 1998. By law, she had 180 days from the most recent incident of alleged discrimination to file her complaint. §49-2-501(4) MCA 1997. Richards filed a timely complaint if an incident of discrimination occurred on or after July 31, 1997.

⁴ Richards filed her verified complaint on March 24, 1998. The hearing examiner views the verified complaint as an amendment to the "letter of complaint." The amendment relates back to the original filing date. *Simmons v. Mountain Bell*, 246 Mont. 205, 806 P.2d 6 (1990) (doctrine of relation back applies to amendment of human rights complaint adding retaliation claim filed more than 180 days after alleged act of retaliation). In *Simmons*, the claimant added a retaliation claim based on acts subsequent to the original complaint. The Court both allowed the amendment and related it back to the original filing date, in order to find the amendment timely. *Simmons* controls.

Richards asserted that because Thunderchild never called her to work after May 25, 1997, she was the victim of continuing illegal pregnancy discrimination. However, she offered no credible evidence that being “on-call” for only the weekend night shifts ever entitled her to work a shift. She did not prove that she ever let the employer know she wanted to work shifts other than weekend night shifts. She offered no credible evidence that after her leave of absence ended, if indeed she took a leave of absence rather than quitting, the employer ever had any notice either of her desire to work “on-call” or of her subsequent alleged desire to return to full-time work. She did not prove that Thunderchild refused to reinstate her to her position on or about September 15, 1997, after her baby’s birth and her medical release to return to work. Thus, she offered no credible evidence of discrimination within the applicable statute of limitations.

Richards’ complaint of sexual harassment is likewise untimely. Her complaint of March 24, 1998, even relating back to January 27, 1998, still refers to events at work, occurring necessarily on or before May 25, 1997. Richards had to present her complaint to the Human Rights Bureau within 180 days after the last possible incident of such alleged harassment, or by November 21, 1997.⁵

Richards Failed to Prove Her Case

Richards failed timely to file because Richards failed to prove any acts upon which she could predicate a claim of discrimination occurring after July 31, 1997. However, even if she had filed timely, Richards failed to prove any illegal discrimination by Thunderchild either before or after that date.

Richards failed to prove any discriminatory forced leave of absence resulting from her pregnancy. The employer’s records reflected that due to lifting restrictions and possibly other complications of pregnancy⁶, Thunderchild switched Richards to “on-call” status. Richards did not prove disability, only a temporary restriction. Richards offered no credible evidence that Thunderchild offered other employees with similar temporary restrictions

⁵ Even if Richards’ grievance related to a complaint of sexual harassment (it did not), Thunderchild resolved the grievance on June 12, 1997, and Richards’ 180 days expired on December 9, 1997. Her January 27, 1998, letter to the Human Rights Bureau was too late, for all of her claims.

⁶ Richards testified that she had some pain and bleeding following an episode at work in February 1997 when she helped carry garbage out of the facility. Her time records reflect some days missed “sick” in this same time-frame. Thus, there may have been more than a simple lifting restriction involved.

better accommodations.⁷ Richards failed likewise to prove that the number of hours she worked before May 25, 1997 was somehow less than she should have worked as an “on-call” employee.

It was only after she restricted her availability to two shifts a week (weekend night shifts) that problems arose. Quiver told Richards he could not use an “on-call” employee available for only two shifts a week. After Richards filed a grievance, Thunderchild put her back on “on-call” status, but Richards knew or reasonably should have known that few, if any, shifts would be available within those limitations. From the evidence adduced, it is entirely reasonable to foresee that Thunderchild would only call Richards to cover a weekend night shift, should one become available, if all other “on-call” alternatives failed to cover the shift. This preference for other on-call options resulted not from any discriminatory motive, but from the limited utility of Richards’ restrictive availability.

In addition, Richards took her annual leave, either by going on leave or by quitting. Richards herself characterized her status as that of a former employee of Thunderchild, both in her claim for unemployment insurance benefits and in her June 24, 1997, letter to Beartusk. She could not reasonably expect calls for shifts unless and until she took some further action to notify Thunderchild of her renewed availability. Richards failed to prove by credible evidence that she took any such action. Thus, Richards failed to prove adverse action by Thunderchild at any time based upon her pregnancy.

Richards testified that she sent a letter to Beartusk rescinding her request to work only weekend night shifts. No documentary evidence of that letter exists. Richards testified that she expected to receive on-call shifts after Thunderchild restored her “on-call” status on June 12, 1997. Richards testified that she contacted Thunderchild in September to return to work and was never returned to work. Richards is not credible in any of this testimony. There is no other evidence that Richards ever rescinded her request to work only weekend nights. There is no evidence that Richards viewed her status as even “on-call”—she continued to term herself a former employee after Thunderchild resolved her grievance on June 12, 1997. There is no evidence that Richards rescinded her leave request (in fact, she apparently was paid for her accrued leave). There is no credible evidence that Richards ever contacted Thunderchild to return to work. The only medical release Richards presented came in May 1997, not after the birth of her child. There is no credible

⁷ In Montana, an employer who accommodates an employee’s limitations *for any reason* must accommodate an employee’s pregnancy-related limitations in the same fashion. *Auchenbach v. Community Nursing, Inc.*, Mont.H.R.C., No. 9401006303 (1997).

evidence that Richards acted prior or after filing her Human Rights complaint to re-obtain work at Thunderchild.

Given the plethora of paper she generated in May and June 1997, it is not credible that Richards attempted to return to work in August or September 1997, but did not generate one scrap of paper in the course of that effort. There is insufficient evidence to sustain the claims that Thunderchild stopped scheduling Richards to work on or about May 30, 1997 and refused to reinstate her to her position on or about September 15, 1997, after her baby's birth and her medical release to return to work, because of her pregnancy.

Richards called Betty Price to testify that when Price worked at Thunderchild she knew of a policy not to hire pregnant women. Terry Beartusk denied any such policy. There was evidence that Thunderchild did not accept female clients pregnant and in their third trimester, because of lack of maternity facilities and likely interruption of treatment protocols. However, the unsubstantiated testimony of Price is rebutted by the credible denial of Beartusk. Richards did not prove a practice of discriminating against pregnant females seeking employment, as evidence of an animus toward pregnant employees.

Richards' belated complaint of sexual harassment is likewise unsubstantiated by any credible corroborative evidence. Richards readily complained to Thunderchild about acts that she considered inappropriate. She never included any complaints of sexual harassment or hostile work environment. Her subsequent assertions that she endured a barrage of such conduct⁸ are not credible.

Richards was not alone in displaying a faulty memory for details such as dates and times. Melanie Falcon, testifying by deposition, presented a story in which Thunderchild did schedule Richards to work after the birth of her baby. According to Falcon, Richards failed to come to work for ten straight days and Thunderchild dropped her from the schedule. Falcon also had problems with dates, referring to August and September rather than June for the grievance proceeding. Given the absence of any corroboration, such as records of the schedule, or testimony of the supervisor who supposedly scheduled Richards, Falcon's testimony is incredible.

⁸ Richards detailed the alleged harassment in her EEOC complaint, filed with her Human Rights Complaint of March 24, 1998. Exhibit A.

Richards, had she timely filed her complaint, failed to sustain it with substantial credible evidence. On this record, it is more likely than not that Thunderchild never subjected Richards to illegal discrimination.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Richards did not prove that Thunderbird discriminated against her in employment on the basis of her sex (pregnant female).

VI. Order

1. Judgment is found in favor of Thunderchild Youth Home/Intertribal Addictions Recover Organization, Inc., and against Tina Richards on the charges that Thunderbird discriminated against Richards on the basis of sex (pregnant female), when it stopped scheduling her to work on or about May 30, 1997 because of her pregnancy and refused to reinstate her to her position on or about September 15, 1997, after her baby's birth and her medical release to return to work.

2. The complaint is dismissed.

Dated: January 11, 2000.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

