

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0059011514:

KEVIN KICKING WOMAN,)	Case No. 1164-2006
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
COP CONSTRUCTION,)	
)	
Respondent.)	

* * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

Kevin Kicking Woman filed a complaint with the Department of Labor and Industry on April 28, 2005. He alleged that COP Construction discriminated against him in employment by retaliating against him because he resisted discriminatory comments about his race (Native American). On November 29, 2005, the department gave notice Kicking Woman’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing was held on March 23, 2006, in Missoula, Montana. Kevin Kicking Woman attended and participated on his own behalf. COP Construction’s designated representative, Georgia Lukkes, Human Resources Specialist and EEO Officer, attended with the company’s attorney, W. Anderson Forsythe, Moulton Bellingham Longo & Mather, PC.

Joni Kicking Woman, Kevin Kicking Woman, Georgia Lukkes, Lissa Peel and Dennis McPherson testified. Lissa Peel was accompanied by legal counsel for the Consolidated Salish and Kootenai Tribes of the Flathead Nation, making a limited and special appearance for the sole purpose of protecting the interests of the Tribes, non-parties to this proceeding and desirous of remaining non-parties and outside of the department’s jurisdiction in this matter.

The parties stipulated to the admission of exhibits 1-4 into evidence.

Kicking Woman filed the last post-hearing argument on May 9, 2006. A copy of the hearing examiner's docket accompanies this decision.

II. ISSUES

The issue presented in this case is whether COP Construction laid off Kicking Woman because he complained to COP Construction (indicating that he would pursue his complaint through the Indian Preference Office) about what he considered to be illegal discriminatory racial references and comments on the work site. A full statement of the issues appears in the "Final Prehearing Order."

III. FINDINGS OF FACT

1. COP Construction entered into a contract with Consolidated Salish and Kootenai Tribes of the Flathead Nation to provide construction to the Pablo Dam project in February through early May 2005. The construction project included a contract provision requiring hiring of Native American labor, as outlined in the contract and the Consolidated Salish and Kootenai Tribes' Indian Preference Ordinance, Tribal Ordinance 101A.¹ The ordinance and the contract required hiring through the Salish-Kootenai Tribal Indian Preference Office (IPO), obtaining an IPO waiver to hire other workers if and only if the IPO had no qualified workers available. The primary contact for COP Construction at the IPO was the Indian Preference Coordinator, an employee of the Tribes.

2. COP Construction complied with this contract requirement, hiring almost exclusively qualified workers referred by the IPO, with the exception of occasional hires (crane operators and carpenters) when the IPO had no qualified workers available.

3. While performing the contract during the weeks ending from February 5 to April 30, 2005, COP Construction employed a maximum of 20 and a minimum of five laborers.² At weekly management meetings, COP Construction made decisions about the need to keep, to add or to lay off laborers depending upon the demands of the work schedule. Throughout the work, COP Construction employed a different total number of laborers each succeeding week, so that the total number of laborers employed was different each week from both the preceding and the following weeks.

¹ The ordinance and contract required first preference for enrolled members of the Consolidated Salish and Kootenai Tribes and second preference for enrolled members of other federally recognized tribes.

² COP employed no laborers during the last week of their work, ending on May 7, 2005.

4. When laying off workers, COP Construction typically selected the last hired workers as the first workers laid off, but also considered worker performance.

5. Kevin Kicking Woman is an enrolled member of the Blackfeet Tribe, who sought work through the IPO in early March 2005.

6. COP Construction hired Kicking Woman on or about March 14, 2005, to fill a laborer vacancy on the Pablo Dam project. The IPO referred Kicking Woman for that vacancy.

7. Kicking Woman performed his job satisfactorily. The hours were long and the work was heavy. During the two weeks of his employment, Kicking Woman worked more than 90 total hours.

8. At the weekly management meeting addressing upcoming work for the week beginning March 27, 2005 (which took place near the beginning of the week ending March 26, 2005), COP Construction decided to lay off three laborers, including Kicking Woman, who was at that time among the last laborers hired. The lay offs would occur on or about March 26, 2005, and to reduce the number of laborers on the job for COP Construction. One of the other two laborers selected for the lay off had “attendance problems” on the job, but both Kicking Woman and the third laborer were selected for the lay off based upon their hire dates rather than any performance problems.

9. Following its customary practice under the contract, COP Construction notified the Indian Preference Coordinator, Lissa Peel, of the upcoming lay offs.

10. On March 25, 2005, Kicking Woman asked his COP Construction supervisor, Roger Ross, to step away from the other employees for a private conversation. Kicking Woman told Ross that another worker on the site had made repeated derogatory comments to Kicking Woman about his race. The comments included making fun of his name (suggesting that Kicking Woman physically abused his wife) and blaming inclement weather on rain dancing by Indian workers the previous night. Kicking Woman told Ross, “I don’t rain dance and I don’t beat my wife.” Kicking Woman also said that he did not appreciate Ross calling him a “fucker” while giving him work directions.³

³ Ross did not argue with Kicking Woman that day, but did not agree that he had addressed the epithet to Kicking Woman. At hearing, he denied using the epithet toward Kicking Woman.

11. Ross met with COP Construction's general supervisor on the project, Dennis McPherson, about Kicking Woman's complaints. The worker about whom Kicking Woman complained, Bill Ciccarelli, was not a COP Construction employee, being working for the Bureau of Reclamation, inspecting COP Construction's concrete work on behalf of the Tribes (under a Bureau of Reclamation contract with the Tribes). Nonetheless, Ross and McPherson called a meeting of the entire COP Construction crew that same morning.

12. At the meeting, Ross told the entire crew that obscenity directed toward fellow workers and derogatory comments about race were not proper and should stop. He told them that a worker was sensitive about such remarks (without identifying which worker). Kicking Woman, who thought that at least some of the workers would know he was the sensitive worker because they observed him talking privately with Ross, spoke up. He said he was proud of his heritage, was a veteran and a father, and wanted to be treated with respect. Ross interrupted him, saying, "You had your chance to talk, now you need to listen." Ross completed his directions to the workers to cease any racial comments or jokes and to avoid directing obscenities toward fellow workers.

13. Kicking Woman did not believe the meeting addressed his concerns. He called the IPO and talked with Peel, complaining that Ross was "disrespecting him on the job site." Kicking Woman accused Ross, rather than Ciccarelli, of making fun of his name by calling him "Woman Kicker" as well as repeating the allegation that Ross was calling him "fucker." Kicking Woman also told Peel that Ross had "singled him out in front of the crew" during the meeting that morning.

14. With Peel in attendance, another meeting convened. Kicking Woman was not satisfied with this meeting, either, making new allegations that Ross' apology was not sincere and that COP supervisors Dennis McPherson and Gary Erickson would walk by him and wouldn't talk to him (although they didn't work in the same area as he did), and stating that he would write up a complaint and get it to Peel.

15. Peel then interviewed the COP employees one by one and could not verify any of Kicking Woman's complaints except as to Ciccarelli. After completing her interviews, Peel talked with the COP supervisors, who told her Kicking Woman was one of the workers being laid off the next day. Peel did not object to the lay off of Kicking Woman because he was at that point the last laborer hired.

16. Having verified that Peel did not see any issues, from the point of view of the Tribes, with the company's handling of Kicking Woman's complaint as well as the layoffs, COP Construction laid off Kicking Woman on March 26, 2005, along

with two other laborers, all Native American, as planned prior to Kicking Woman's complaint.

17. Kicking Woman threatened to sue, and subsequently filed the Human Rights complaint that is the subject of this contested case proceeding.

IV. OPINION⁴

Montana law prohibits retaliation against an individual who opposes any practice forbidden by the Human Rights Act. Mont. Code Ann. § 49-2-301; *Mahan v. Farmers Union Central Exch., Inc.* (1989), 235 Mont. 410, 768 P.2d 850, 857-58. Montana law prohibits employment discrimination because of race. Mont. Code Ann. § 49-2-303(1)(a). Thus, if COP Construction laid off Kevin Kicking Woman because he complained of derogatory comments about his race that would be illegal retaliation.

To establish his *prima facie* case of unlawful retaliation for opposition to illegal discrimination, in violation of Mont. Code Ann. § 49-2-301, Kicking Woman must prove that: (1) he acted to oppose illegal discrimination; (2) COP Construction subjected him to a significant adverse action and (3) there was a causal connection between his opposition to illegal discrimination and the employer's adverse action. Admin. R. Mont. 24.9.603(1) and 24.9.610; *Beaver v. Montana D.N.R.C.* (2003), ¶ 71, 2003 MT 287, 318 Mont. 35, 78 P.3d 857; *Foster v. Albertson's, Inc.* (1992), 254 Mont. 117, 127, 835 P.2d 720, *citing* *Holien v. Sears, Roebuck & Co.* (Or. 1984), 689 P.2d 1292; *Schmasow v. Headstart* (6/26/92), Case #8801003948; *accord*, *Laib v. Long Construction Co.* (August 1984), HRC Case #ReAE80-1252, *quoting* *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982), 686 F.2d 793.⁵

The uncontroverted evidence established that before Kicking Woman complained, COP Construction had already decided he would be laid off work. Thus, even if the evidence supported the first two elements of his *prima facie* case of unlawful retaliation, the third element is missing. COP Construction had already decided to lay off Kicking Woman before his discrimination complaint. That decision could not have been caused by his subsequent complaint, and there is no evidence that COP implemented their prior decision because of that complaint.

⁴ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

⁵ This is the first tier of the three-tier indirect evidence test adopted by Montana from *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. *E.g.*, *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813, 816; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209.

In his post hearing filings, Kicking Woman also intimated that the Tribes may subsequently have discriminated against him because of his complaint, but that is not an issue within the department's jurisdiction over this complaint. On the only issue raised by the current complaint, Kicking Woman failed to prove a causal connection between his opposition to what he considered illegal discrimination and COP Construction's adverse action.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).
2. COP Construction did not retaliate against Kevin Kicking Woman for his opposition to race discrimination in employment when it laid him off from work on March 26, 2005. Mont. Code Ann. §§ 49-2-301 and 49-2-303(1)(a).
3. COP Construction did not engage in the discriminatory practices alleged by Kicking Woman. The complaint must be dismissed. Mont. Code Ann. § 49-2-507.

VI. ORDER

1. The department grants judgment against charging party, **Kevin Kicking Woman**, and in favor of respondent, **COP Construction**, on the allegations of illegal retaliation.
2. The department dismisses the complaint.

Dated: May 23, 2006

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry