

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

Case No.: 0065011638 and  
0065011639

MARLENE MCGILLIVRAY,  
Charging Party,

-v-

DEPARTMENT OF PUBLIC HEALTH  
AND HUMAN SERVICES and MEDICAID  
SERVICES DIVISION,

Respondent.

**ORDER AFFIRMING  
AGENCY DECISION**

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Marlene McGillivray (McGillivray) filed a complaint of discrimination against the Department of Public Health and Human Services (DPHHS) with the Department of Labor and Industry. The Hearings Bureau (Bureau) held a contested case hearing pursuant to § 49-2-505, MCA. Following the hearing, the Bureau issued a decision that determined DPHHS did not discriminate against McGillivray based on her disability of morbid obesity when it eliminated certain treatments for that condition. McGillivray filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on September 18, 2007. Beth Brenneman appeared and argued on behalf of McGillivray. Geralyn Driscoll appeared and argued on behalf of DPHHS.

McGillivray argued that the hearing officer was clearly erroneous in failing to make findings of fact and corresponding conclusions of law regarding DPHHS' elimination of coverage for nutritional services, dietary supplements and dietician services. She further argued that because of this failure, the hearing officer failed to

consider whether the cumulative effect of DPHHS' decision to eliminate all treatments for morbid obesity was discriminatory. McGillivray also asserted the hearing officer erred in concluding that DPHHS had legitimate reasons for eliminating coverage for gastric bypass surgery and weight loss medications. She argued that cost cannot be the sole justification for a state action that discriminates and that DPHHS failed to prove it had any other legitimate reason to eliminate coverage for the treatments. Finally, she argued the hearing officer erred in admitting exhibit QQ.

DPHHS asserted the hearing officer's decision was correct on all points. It argued that it does cover some treatments for morbid obesity. DPHHS also asserted the hearing officer correctly determined it had legitimate reasons for eliminating coverage for gastric bypass and weight loss medications. DPHHS also argued the Department of Labor and Industry and the Human Rights Commission do not have jurisdiction to review its policy decisions concerning medical coverage because the legislature gave DPHHS discretion to make those decisions.

After careful and due consideration, the Commission concludes the Bureau's decision in this matter is supported by competent substantial evidence and the conclusions of law are correct. The Commission **affirms** the Bureau's decision and hereby adopts and incorporates the decision in its entirety.

A person who has exhausted all administrative remedies available within an agency and who is aggrieved by a final agency decision in a contested case is entitled to file a petition for judicial review within 30 days after service of the final agency decision. Mont. Code Ann. § 2-4-702. The petition must be filed in the district where the petitioner resides or has the petitioner's principal place of business, or where the agency maintains its principal office.

DATED this \_\_\_\_ day of September, 2007.

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Acting Chair Allen Secher  
Human Rights Commission

## **CERTIFICATE OF SERVICE**

The undersigned employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission ORDER was served on the following persons by U.S. mail, postage prepaid, on September \_\_\_\_, 2007.

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Montana Human Rights Bureau