

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

CHRIS BORGEN,

Charging Party,

-v-

JAY'S MART, INC.,

Respondent,

Case # 0101014621

ORDER

Charging Party, Chris Borgen, (Borgen) filed a complaint with the Department of Labor and Industry (Department) alleging discrimination in employment on the basis of physical disability. Following an informal investigation, the Department determined that a preponderance of the evidence did not support Borgen's allegations that Respondent Jay's Mart, Inc., discriminated against Borgen. The Department issued a Notice of Dismissal. Borgen filed an objection with the Montana Human Rights Commission (Commission). The Commission considered the matter on July 20, 2011.

The Commission reviews a decision of the Department to dismiss a complaint using an abuse of discretion standard. *Section 49-2-511(2), MCA*. Borgen pointed out that due to his disability, he experiences difficulty standing and walking for long periods of time. Borgen requested that a chair be provided for him at the cash register so that he could rest his feet during his shifts. Borgen argued that the accommodation the employer provided, which consisted of taking breaks from standing at the cash register by going outside or to the back office to sit, was not reasonable because the store generally was so busy. Borgen claimed that he rarely had time to leave his post at the register and rest. Borgen also argued that the investigator abused his discretion by failing to interview any of the witnesses listed by Borgen. Although the investigator noted that he had repeatedly tried to contact Borgen's witnesses by telephone, Borgen argued that the failure to secure their testimony limited Borgen's ability to dispute the employer's stated non-discriminatory reasons for terminating Borgen's employment.

After careful consideration, the Commission unanimously concludes that the determination of the Department to dismiss the complaint in this case was an abuse of

discretion. Therefore, the Commission sustains the objection and remands the case to the Hearings Bureau for a hearing, pursuant to § 49-2-505, MCA.

Nothing in this order precludes the parties from engaging in the mediation or other settlement negotiations that would normally occur if the Department's investigative report had found cause. See, § 49-2-504(2)(b), MCA.

IT IS HEREBY ORDERED, that Borgen's objection is **sustained**. The Commission reopens and remands the case to the Hearings Bureau for hearing.

DATED this 1st day of August 2011.

L.M. Minich, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 1st day of August 2011.

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