

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0105014495:

ROBERT DICKINSON #22524,)	Case No. 1245-2011
)	
Charging Party,)	
)	ORDER GRANTING
vs.)	SUMMARY JUDGMENT
)	AND DISMISSING;
MONTANA DEPARTMENT OF)	NOTICE OF ISSUANCE OF
CORRECTIONS, MONTANA STATE)	ADMINISTRATIVE DECISION
PRISON,)	
)	
Respondent.)	

* * * * *

Charging party Robert Dickinson filed a discrimination complaint against the Montana Department of Corrections, Montana State Prison (DOC), charging that DOC denied him certain kinds of assistance or accommodation without which he was unable to meet requirements to maintain his pre-release status and therefore was returned to incarceration in Montana State Prison. The department’s Human Rights Bureau investigation resulted in a finding of reasonable cause to believe that discrimination had occurred, and the case was transferred to the Hearings Bureau.

Dickinson has acted on his own behalf throughout this contested case. He has had difficulty conforming his filings to the requirements applicable to all parties. His incarceration does not entitle him to a waiver of any of the procedural or substantive requirements that all parties in Human Rights contested case proceedings must meet. For example, despite written and telephonic directions to follow the orders herein and send copies of documents he filed with the Hearings Bureau to counsel for DOC at the same time, putting a certification of such service on the documents. Dickinson has filed documents that do not contain any such certification and have not been served on counsel for DOC. Those documents are “lodged” and not filed, and of no effect in these proceedings. Those documents are found on the left side of the Hearings Bureau file, with correspondence and other documents related to the case, which are not part of the record for purposes of adjudicating this case.

The parties agreed to extend the deadline for filing motions from May 9, 2011, to May 16, 2011. On May 16, 2011, DOC filed and served a motion, with supporting materials, for summary judgment, on the grounds that Dickinson had not

met the essential requirements for placement in a pre-release center, and therefore was not a qualified individual with a disability. Dickinson had ten business days after service of that motion to respond in opposition to it. Adding three days for service by mail, Dickinson's response was due on or before June 2, 2011. "Order Setting Contested Case Hearing Date and Prehearing Schedule," Feb. 9, 2011, pp. 3-4, "MOTIONS."

On May 31, after a telephone conference with Dickinson and counsel for DOC, the hearing officer issued an order vacating the hearing and setting a further schedule for proceedings should summary judgment be denied. During that telephone conference, the hearing officer gave Dickinson an extra day for filing his response to the summary judgment motion, and the order confirmed that extra day. Dickinson was specifically notified in that telephone conference that he had not yet responded to the motion and that his deadline for responding was now June 3, 2011.

During the May 31, 2011, telephone conference, the hearing officer also pointed out that Dickinson had failed to file a final prehearing statement, due on May 20, 2011. "Order Setting Contested Case Hearing Date and Prehearing Schedule," Feb. 9, 2011, p. 4, "EXHIBITS, WITNESSES, DISCOVERY TO USE AT HEARING, ISSUANCE OF SUBPOENAS, CONTENTIONS, REQUESTS FOR RELIEF AND PROPOSED UNCONTESTED FACTS." He was told that failure to file meant that his preliminary prehearing statement, filed February 7, 2011, controlled what evidence he could present at hearing.

On June 2, 2011, Dickinson filed a handwritten document that appears to be titled "Contentions, Request for Relief and Proposed Uncontested Facts." The Hearings Bureau confirmed with counsel for DOC that she had received a copy of this filing, which did not include a certification of service. As far as the hearing officer can discern, the filing did not address the summary judgment motion. Dickinson has not filed any other documents since.

On June 10, 2011, DOC filed and served a reply brief on its summary judgment motion, noting that it was replying to the June 2, 2011, filing even though that filing did not appear to be a response opposing summary judgment.

With that filing, the motion was submitted for ruling. It is granted.

The facts supporting summary judgment are set forth in DOC's initial brief in support of the motion. The following facts are not subject to any legitimate dispute.

Dickinson was incarcerated at Montana State Prison on November 18, 2009. He had been sentenced to six years and one month in prison for felony DUI, with five years suspended. On November 10, 2009, before he was transported to prison,

Dickinson's suspended sentence on a prior offense was revoked and he was sentenced to five years, with no time suspended.

In December 2009, DOC calculated Dickinson's sentence discharge and parole eligibility dates. Due to a clerical error, the revocation sentence was not included in the calculation. In March 2010, Dickinson applied for transfer to a pre-release. Because his prison release date, which DOC had erroneously calculated, appeared to be in August 2010, Dickinson appeared to be eligible for pre-release placement, and was placed in the Great Falls pre-release on March 23, 2010. Thereafter, the events occurred that Dickinson alleges were discriminatory. On March 25, 2010, DOC recalculated Dickinson's sentence discharge and parole eligibility dates, and discovered he was not yet eligible for placement in a pre-release center.

On or about March 31, 2010, the Great Falls pre-release notified DOC that Dickinson had informed the pre-release that he could not work, could not sit long enough to participate in group sessions, and was unable to attend self help support groups for his chemical dependency issues. All three were requirements for his continued placement at the pre-release (although the work requirement could be met, for an inmate incapable of working, by participation in school, vocational school, or volunteer work). Since he could neither work nor participate in the programs that could be substituted for work, Dickinson was also unable to pay the required daily fee for living at the pre-release center. Before his placement, Dickinson had told DOC that he was able to do what the pre-release required him to do to maintain his placement.

Based upon his inability to do what the pre-release required, Dickinson's placement in the pre-release program was terminated on April 8, 2010. Even if he had been able to do what the pre-release required, Dickinson would nonetheless have been removed from the pre-release program and returned to prison, because he was not eligible for the pre-release program.

Dickinson also alleged discriminatory refusal to provide "special needs" funding to him to assist in paying his daily fee. At the time of Dickinson's request, DOC had exhausted the available funding for that program on others, and had no money left to provide that assistance to Dickinson.

Subsequent to his return to prison, Dickinson again applied for the pre-release program in September 2010. He again represented that he was able to do what the pre-release required him to do to maintain his placement, even though he had refused to do those things, based on his disability, just six months earlier when he was erroneously placed in the pre-release.

Based upon those facts, Dickinson is not entitled to any relief as a matter of law, and dismissal is proper. Pursuant to Mont. Code §49-2-505(3)(a), the department holds contested case hearings in accord with applicable portions of the Montana Rules of Civil Procedure. See also Mont. Code Ann. §49-2-204(2). In the scheduling order in this case, the department adopted the Montana Rules of Civil Procedure and Montana Rules of Evidence for all of the prehearing procedures and the hearing in this case. Under the Rules, the party moving for summary judgment has the initial burden of establishing both the absence of genuine issue of material fact and the entitlement to judgment as matter of law, and if that burden is met, the opponent must then present evidence to show a genuine issue of material fact. *Bowen v. McDonald* (1996), 276 Mont. 193, 915 P.2d 201, 204; Rule 56(c), Mont. R. Civ. P.

Showing a genuine issue of material fact requires more than mere denial or speculation, but requires “facts sufficient to raise a genuine issue.” *Cecil v. Cardinal Drilling Co.* (1990), 244 Mont. 405, 797 P.2d 232, 235, quoting *Gamble Robinson Co. v. Carousel Properties* (1984), 212 Mont. 305, 688 P.2d 283, 287; accord, *S.M. v. R.B.* (1993), 261 Mont. 522, 862 P.2d 1166, 1168. The burden of proof of the opponent, once the movant has met its initial burden, is well-stated in *Abraham v. Nelson*, ¶26, 2002 MT 94, 309 Mont. 366, 46 P.3d 628:

Once a movant for summary judgment satisfies the burden that no material question of fact exists, the non-moving party cannot merely point to lack of evidence as the factor creating a material question. . . . [A] suspicion, regardless of how particularized, is insufficient to sustain an action or to defeat a motion for summary judgment. Unsupported conclusory or speculative statements do not raise a genuine issue of material fact. *Gentry [v. Douglas Hereford Ranch, Inc.]* ¶32 [1998 MT 182, 290 Mont. 126, 962 P.2d 1205] (citing *Gates v. Life of Mont. Ins. Co.* (1982), 196 Mont. 178, 182, 638 P.2d 1063, 1066).

DOC presented evidence that it would have taken the same action without any illegal consideration of his disability, because he was not entitled to placement in a pre-release. Even if Dickinson had proved illegal discrimination by DOC, DOC would still avoid liability to him. *Laudert v. Richland County Sheriff’s Dept.*, 2000 MT 218, 301 Mont. 114, 7 P.3d 386. In this case, with Dickinson’s failure to show any genuine issue of material fact, DOC is entitled to summary judgment on the entire complaint. The complaint is dismissed with prejudice. The rights of the parties to review are set forth in the following Notice of Issuance of Administrative Decision.

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Robert Dickinson, Charging Party, and Brenda Elias, Esq., Attorney for DOC :

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.
Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Katherine Kountz
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

DATED: June 22, 2011.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer