BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0101014582:

KATY LITTLE,	)	Case No. 1659-2011
	)	
Charging Party,	)	HEARING OFFICER DECISION
	)	GRANTING SUMMARY
vs.	)	JUDGMENT TO
	)	4B'S RESTAURANT AND
4B'S RESTAURANT,	)	DISMISSING CASE
	)	
Respondent.	)	

* * * * * * * * * *

The respondent has moved for summary judgment in this matter arguing that the charging party was not discriminated against based on her pregnancy because the employer took no adverse employment action against the charging party. The charging party's job remained open to her after she went on maternity leave and charging party was aware that it was open to her but the charging party never returned to her job.

The charging party, despite being directed to do so, has failed to respond. In addition, the charging party failed to appear for either the final pre-hearing conference or the oral argument on the motion despite having been timely advised of oral argument on the motion. Having read and considered the motion, the motion is well taken and granted for the reasons that follow.

FACTS:

1. 4B's restaurant hired Little as a server on July 7, 2009.

2. Little became pregnant. Toward the end of her pregnancy, Little decided she could no longer work during her pregnancy. On May 31, 2010, less than 24 hours prior to her next shift, Little left a hand-written note for her supervisor stating that she had "decided to go on maternity leave now" as she was extremely swollen and can hardly walk any more. She also stated that she would not be in "at all until after the babys [sic] born". Exhibit A.

3. On June 2, 2010, Leah Lott, Little's supervisor, and Donna Conover, payroll manager, approved a leave of absence for maternity from May 31, 2010 to August 31, 2010. Exhibit B.

4. Little had her child in late June, 2010. Little did not, however, contact her employer to advise of her desire to return to work.

5. Prior to August 14, 2010, Little contacted Conover to obtain wage and benefit information about her job at 4B's for purposes of Little's unemployment insurance claim. On August 14, 2010, Conover followed up on Little's contact in a letter (Exhibit C) to Little. The letter informed Little that she was "welcome to return to work at a time convenient to you." Id. The letter concluded by stating "Congratulations on your new family addition. Welcome Back." Id.

6. 4B's permitted Little to go on maternity leave and kept her job open for her until she returned from maternity leave.

SUMMARY JUDGMENT STANDARDS:

"Summary Judgment is proper only when no genuine issue of material fact exists and when the moving party is entitled to judgment as a matter of law." Rule 56(c) Mont .R. Civ. P.; Brown v. Demaree, 272 Mont. 479, 481-482, 901 P.2d 567, 569 (1995). The initial burden is on the movant to demonstrate that no material issue of fact exists. Once this burden is met, the non-moving party must then produce some evidence which shows a genuine issue of fact is in question. This can be done through sworn testimony or affidavits. First Security Bank of Anaconda v. Vander Pas, 250 Mont. 148, 152, 818 P.2d 384, 386 (1991). The Montana Supreme Court has explained that once the moving party has demonstrated that there is not an issue of material fact, "the opposing party must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact." Olympic Coast Inv., Inc. v. Wright, 2005 MT 4, ¶ 20, 325 Mont. 307, ¶ 20, 103 P.3d 743, ¶ 20.

THE CHARGING PARTY HAS FAILED TO DEMONSTRATE A PRIMA FACIE CASE OF DISCRIMINATION.

The Montana Human Rights Act prohibits discrimination against women on the basis of pregnancy. Mont. Code Ann. §49-2-310. In order to prevail, a charging party must first make a prima facie case of discrimination. Vortex

Fishing Sys. v. Foss, 2001 MT 302, ¶15, 308 Mont. 8, 38 P.3d 836. In the case of claims of pregnancy discrimination, a prima facie case is made out by showing that (1) the claimant is pregnant, (2) that her employer discharged her because of her pregnancy, refused to grant her reasonable leave of absence for her pregnancy, denied her compensation due to her from accrued disability or leave benefits because of her pregnancy, or required her to take an unreasonable leave of absence because of her pregnancy. Mont. Code Ann. §49-2-310. When a party files a motion for summary judgment and the opposing party fails to respond, summary judgment if appropriate must be entered. M. R. Civ. Pro. Rule 56 (e).

The evidence provided by the respondent in its motion shows that the respondent did not take any adverse employment action against the charging party in this case. To the contrary, the evidence accompanying the motion demonstrates that the employer never discharged the charging party but rather kept her server position open for her. The charging party, by not responding to the motion, has failed to rebut that. Thus, as the respondent's motion is properly supported and shows that the charging party does not have a prima facie case of discrimination, summary judgment in favor of the respondent is appropriate.

THE HEARING OFFICER, UNDER THE FACTS OF THIS CASE, DOES NOT FIND GOOD CAUSE TO CHANGE THE ORAL PRONOUNCEMENT MADE AT THE CONCLUSION OF THE FINAL PRE- HEARING CONFERENCE.

Immediately after hearing the motion for summary judgment on July 26, 2011, the hearings officer orally entered a decision in favor of the respondent. The charging party, despite having been repeatedly apprised at every turn of the proceeding of all dates, deadlines and pre-hearing and hearing dates, did nothing to prosecute this case until she finally contacted this office after office hours during the evening of July 26, 2011. She did not file a preliminary prehearing statement as required by the April 11, 2011 Notice of hearing. She did not respond to the respondent's motion even though she received a copy f that motion and she was directed not once but twice of the need to respond. She did not appear at the final prehearing conference despite having notice of it and notice of the fact that the respondent's motion would be considered at the final prehearing conference. However, the charging party has with no reasonable basis ignored every order that this tribunal has provided to her. She was apprised from the very beginning of the case (see, e.g., Order Setting

Contested Case Hearing, paragraph 8) that the failure to comply with this tribunal's orders might result in sanctions including dismissal of the case. Instead of acting diligently to prosecute her case, the charging party waited until after a decision had been rendered orally on the merits to even acknowledge a need to become involved in this case. In fairness to the timely administration of justice for all parties, the charging party's dilatory conduct cannot be countenanced by this tribunal. Accordingly, this tribunal will not set aside its oral pronouncement granting summary judgment in favor of the respondent.

The extent and chronology of the charging party's dilatory conduct in this matter supports the hearings officer's decision declining to set aside the oral pronouncement in this case. That factual background follows.

The charging party acknowledged receipt of the notice of hearing in this matter on April 11, 2011. That notice was sent to the charging party by U.S. Mail 1st Class postage prepaid at 2550 Moulton, Butte, Montana, 59701. The notice advised the charging party that a scheduling order would be sent to her setting forth the date and time for hearing and a pre-hearing schedule.

An order setting contested case hearing and pre-hearing schedule was sent to the charging party at her Moulton address in Butte by U.S. Mail, 1st Class postage prepaid on April 14, 2011. The notice stated that the final pre-hearing conference in this matter would be held on July 26, 2011 at 9:00 a.m. and that the hearing would be held in Butte on August 2, 2011. That letter was not returned to the Hearings Bureau and is presumed to have arrived at her address and been received by Little.

On July 6, 2011, the respondent filed the instant motion. On July 7, 2011, an order directing the charging party to respond to the motion and admonishing her of the consequences of failing to do so was sent to her Moulton address in Butte. That letter was not returned to the Hearings Bureau and is presumed to have arrived at her address and been received by Little.

On July 12, 2011 an order nunc pro tunc was sent to Little at her Moulton address in Butte to correct response and reply dates in the July 6, 2011 order. That letter was not returned to the Hearings Bureau and is presumed to have arrived at her address and been received by Little. Despite all of these notices, Little never filed a preliminary pre-hearing statement nor did she respond to the respondent's motion for summary judgment.

On July 21, 2011, the hearing officer's legal assistant telephoned the charging party at her cell phone number, (406) 491-4243 to inquire as to why the Hearings Bureau had not received either her preliminary pre-hearing statement or a response to the respondent's motion despite the hearings officer's orders. The charging party obviously received the phone message as she called the Hearings Bureau on Monday. July 25, 2011at 2:54 p.m. indicating that she "had her phone back" and the legal assistant should call Little back. At 3:17 p.m. that day, the legal assistant called Little back and left a message that Little must call her. Despite, this, Little did not call the legal assistant back.

As scheduled, the final pre-hearing in this matter proceeded on July 26, 2011. The hearings officer called the charging party at 9:00 a.m. but received only the charging party's voice mail. The hearings officer left a message informing the charging party that she needed to call back within 15 minutes or the hearings officer would presume she did not want to participate and would proceed to hold the final pre-hearing conference in her absence. After waiting fifteen minutes, the hearings officer again called the charging party and again she did not answer. The hearings officer then held the pre-hearing conference and, as the charging party was notified in the July 6, 2011 order directing a response, held oral argument on the motion for summary judgment. Based on the competent and uncontested evidence presented by the respondent, the motion was orally entered as a decision in the case in favor of the respondent within the meaning of Mont. Code Ann. 2-4-623 (1)(b).

On July 26, 2011 at 6:30 p.m., after Hearings Bureau office hours, Little left a voice mail for the hearings officer's legal assistant indicating that someone called her during the day and that she had just listened to the message when she got off of work at 6:00 p.m. and was not able to return the call any earlier. The legal assistant received the message on Wednesday, July 27, 2011 and at 8:07 a.m. called Little back and spoke with Little. The legal assistant was able this time to actually speak to Little and the legal assistant explained what happened on July 26, 2011. Little indicated that she would call the hearings bureau back at 1:30 p.m. to speak with the hearings officer about the situation. In reliance on this, the hearings officer had his legal assistant contact the respondent's attorney and the respondent's attorney agreed to be available at 1:30 p.m. 1:30 p.m. came and went and Little did not call. At approximately 1:40 p.m., the legal assistant called and left another message for Little reminding her that the hearings officer and respondent's counsel were awaiting her call. Approximately ten minutes later, Little called in and the hearings

officer, respondent's counsel and Little conferenced regarding her failure to appear at any stage of the proceeding (except for her return of her acknowledgment) or to respond in any manner to the respondent's motion to dismiss.

During the conference, Little contended that she never received the Order Setting Contested Case Hearing or the orders directing her to respond to the respondent's motion. The hearings officer is convinced that Little has intentionally misrepresented her alleged failure to receive the Order Setting Contested Case Hearing and the orders directing response to the respondent's motion. Little was aware of the hearing date of August 2, 2011 (which information must have come to her through her receipt of the Order Setting Contested Case Hearing) and neither the Order Setting Contested case Hearing or the orders directing her to respond to the respondent's motion was returned to the Hearings Bureau despite having been sent to Little through U.S. mail to the address which she signified in her acknowledgment was her correct address. Furthermore, Little would have this tribunal believe that she somehow received the respondent's motion to dismiss but that she never received any of this tribunal's orders despite the fact that all of these documents were sent to her Moulton address in Butte. Her contention is untenable. Moreover, Litte did nothing to respond to the motion for summary judgment which she acknowledges she received in a timely manner. Little has purposefully ignored every deadline and order in this case for three months and has done nothing about prosecuting the matter. Thus, the oral decision dismissing Little's case based upon the granting of summary judgment must stand.

ORDER:

Based on the foregoing, judgment is entered on behalf of the respondent 4B's Restaurant and against charging party Katy Little. Little's case is hereby dismissed. The hearing set for August 2, 2011 is vacated.

DATED: July 28, 2011
/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearings Officer
Hearings Bureau, Montana Department of Labor and Industry

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Katy Little, Charging Party; and 4B's Restaurant, Respondent, and its attorney, Cynthia Walker:

The decision of the Hearings 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).

SINCE THERE WAS NO HEARING, THERE IS NO HEARING TRANSCRIPT. HOWEVER, THERE ARE TWO RECORDINGS (THAT TOTAL LESS THAN EIGHT MINUTES) OF THE FINAL PRE-HEARING CONFERENCE.

Little.HODGSJ.ghp