BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0101014335:

JERRY WALKER,	)	Case No. 788-2011
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**GRANTING SUMMARY**
	)	**JUDGMENT TO LPI**
LOVELAND PRODUCTS INC.,	)	**AND DISMISSING CASE**
f/k/a TRANSBAS,	)	
	)	
Respondent.	)	

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Procedure

On May 2, 2011 (April 29, 2011, for email filing and service), respondent Loveland Products, Inc., formerly known as Transbas ("LPI"), filed and served a motion and memorandum for summary judgment, on the basis that charging party Jerry Walker failed timely to file his charges of illegal disability discrimination.

Also on May 2, 2011 (April 29, 2011, for email filing and service), Walker filed and served a motion for partial summary judgment on liability and brief, on the grounds that LPI failed and refused to make reasonable accommodations for Walkers' disability.

On May 16, 2011 (May 13, 2011, for email filing and service), Walker filed and served a response brief and supporting documents in opposition to LPI's motion.

Also on May 16, 2011 (May 13, 2011, for email filing and service), LPI filed and served a response brief in opposition to Walker's motion.

On May 17, 2011 (May 16, 2011, for email filing and service), LPI filed its reply brief in support of its motion for summary judgment.

On May 18, 2011 (May 17, 2011, for email filing and service), LPI filed its "addendum" to its reply brief, supplying an exhibit inadvertently omitted from the affidavit of Holly Amundsen in support of the motion for summary judgment.

On May 18, 2011, the Hearings Bureau notified counsel by email that the Hearing Officer was vacating the May 26-28 hearing dates to take more time on the summary judgment motions (in addition to the motion decided by this order, Walker

had filed a motion for partial summary judgment on liability on May 2, 2011 (April 29, 2011, for email filing and service).

Also on May 18, 2011, counsel for Walker notified the Hearings Bureau (but not counsel for LPI) that a reply brief would be forthcoming, since the hearing had been vacated and time now allowed for that reply.

On May 25, 2011 (May 24, 2011, for email filing and service), Walker filed his reply brief in support of his partial summary judgment motion.

On May 26, 2011 (May 25, 2011, for email filing and service), Walker filed and served his "supplemental affidavit," asserting that, his recollection refreshed by looking at additional documents, he now remembered that after October 29, 2009, he had another telephone conversation with De La Fuente in which they discussed why he was terminated and that LPI had refused to accommodate him. The affidavit also asserted that De La Fuente said to Walker that LPI could not accommodate the existing restrictions, but if there was anything new to let him know. Walker also asserted that at the Human Rights Bureau fact finding-finding, De La Fuente had agreed that was what he told Walker.

On May 27, 2011 (May 26, 2011, for email filing and service), LPI filed and served a motion to strike Walker's supplemental affidavit and portions of his original affidavit, with an attached memorandum.

Also on May 27, 2011 (May 26, 2011, for email filing and service), Walker filed and served a response brief in opposition to the motion to strike.

On June 3, 2011 (June 2, 2011 for email filing and service), LPI filed and served a reply brief in support of the motion to strike.

LPI's Summary Judgment Motion Is Well-Taken and Granted

Addressing LPI's motion for summary judgment, it is premised upon Walker's claims being barred by the applicable statute of limitations. Walker filed the complaint herein on April 6, 2010. Any discriminatory action taken by LPI before October 8, 2009, would be barred because it occurred more than 180 days before complaint filing. Mont. Code Ann. §49-2-501(4)(1).

If the department finds that the complaint is untimely, it shall dismiss the complaint. Mont. Code Ann. § 49-2-501(5). If there were discriminatory acts taken within 180 days before complaint filing, and earlier discriminatory acts can provide context for valid hostile work environment claims based upon the more recent acts maintaining that hostile work environment within the 180 days before complaint filing. *Nat'l. R. R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S.C. 2061, 153

L.Ed. 2d 106 (2002), ***interpreted in*** *Benjamin v. Anderson*, ¶46, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039.

In theory, Walker might also be able to establish that he did not discover the discriminatory acts until a date less than 180 days before filing, and thereby pursue his claims. ***Cf.***, *Morgan* ***at*** 114, n.7, (refusing to decide whether a "reasonable discovery" theory might apply).

554 days before Walker filed his discrimination charges in this case, on September 29, 2008, LPI's Regional Human Resources Manager Jennifer Hopkins wrote a letter to Walker, stating that LPI would not be able to accommodate Walker's return to work because the medical restrictions in his September 18, 2008 return to work note was inconsistent with performance of essential functions of his job.[1] In her letter, Hopkins also asked Walker to continue to provide updates on his restrictions (presumably meaning when and if his condition improved). There is no evidence in this summary judgment record that Walker ever thereafter provided LPI with any updates regarding his restrictions or any change in his condition. There is no evidence in this record that Walker ever thereafter presented a new application for employment to LPI. There is no evidence in this record creating a genuine issue of material fact as to whether LPI ever made decision, took an action or refused to take an action about Walker's employment status after September 29, 2008.

Under the best interpretation for Walker of the facts of record (as opposed to the arguments), Walker called Lee Schwalenberg, Billings Plant Manager, on October 29, 2009, to ask if he still had his job with LPI. Schwalenberg told him he did not, and referred him to Holly Amundsen, Human Resources Clerk at the Billings facility. Walker next talked to Amundsen, who told him that his status was terminated, and may also have inaccurately said that "there was a letter of resignation." Amundsen referred Walker to Ale De La Fuente, Human Resoures Manager in Colorado. Walker then talked to De La Fuente about his employment status. De La Fuente told him that he was "on termination status." Walker's own deposition testimony did not include any assertion that he (a) asked to go back to work, (b) asked for any renewed assessment of his ability to work or (c) provided any new information about his work limitations.

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[1] Walker argued that LPI supported its motion for summary judgment with inadmissible hearsay. This particular letter was an essential part of Walker's claim and part of the underlying transaction between the parties at issue herein. It is admissible evidence of what LPI, through Hopkins, said at the time, for which purpose it is not hearsay, since it is not being used as proof of the truth of what LPI said.

There was no new decision, based upon any new facts about limitations or even any new application for employment, in October 2009. There was nothing new for Walker to discover about what LPI had done 13 months before in deciding that it could not employ him with his then current limitations.

Subsequent to submission of both motions for summary judgment (the last permissible filing on which was Walker's reply brief in support of his motion for summary judgment on liability, received by email on May 24, 2011), Walker submitted a supplemental affidavit, without leave of the Hearing Officer (received by email on May 25, 2011), apparently relating to his motion for summary judgment, but also apparently relating to LPI's motion for summary judgment. The substantive contents of that supplementary affidavit are set forth at page 2 of this order.

Again, under the very best interpretation for Walker of the alleged facts (as opposed to the arguments) in that tardy affidavit, Walker now remembered that after October 29, 2009, he had another telephone conversation with De La Fuente in which they discussed why he had been "terminated" (back in 2008) and that LPI had refused to accommodate him (back in 2008). The affidavit also asserted that De La Fuente reiterated the 2008 decision (that LPI could not accommodate the 2008 restrictions), but if there was anything new to let him know.

On this record, Walker has not timely filed his complaint. All he obtained in late October 2009, within the 180 days before he filed his complaint, under the very best interpretation of the facts herein, was confirmation of the action LPI took on September 29, 2008. Even if it had taken that action on September 29, 2009, his complaint was still too late. In late October 2009, Walker did not find out anything either new or previously unknown to him about what LPI had done in September 2008. He did not ask LPI to take any new action, and he was not notified that LPI had taken any new action. The statute of limitations on any actionable failure to accommodate Walker in late September 2008 or before had long since run.

Benjamin is not applicable to these circumstances. The most that Walker did, in an effort to revive his stale claim, was to ask his former employer, "What did you do back in 2008?" He did not even really ask, "Do you still mean it now?" Had he actually asked that question, this Hearing Officer is not satisfied that question would have required any new decision by the former employer. Confirming that LPI stood by what it had done in 2008 would not allow Walker litigate the 2008 decision as if it had been made anew in October 2009.

Walker did not come close, in late 2009, to saying, "Here's my current medical restrictions and an application for work – please look and see if you can put me to

work now?" All that he asked for was all he got – a confirmation of what he already knew had happened in 2008.

LPI is entitled to summary judgment and dismissal of this action. Therefore, the other motions before this Hearing Officer, including Walker's motion for partial summary judgment (on liability), LPI's motion to strike the late affidavit, LPI's motion to quash a records subpoena served on Schwalenberg, and LPI's motion in limine to exclude certain testimony and other evidence, are all moot.

Order Dismissing

In accord with the foregoing, the complaint is dismissed as untimely.

DATED: June 30, 2011.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Hearings Bureau, Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Patricia A. Peterman, attorney for Jerry Walker, and William J. Mattix, attorney for Loveland Products, Inc., f/k/a Transbas:

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).

SINCE THERE WAS NO HEARING, THERE IS NO HEARING TRANSCRIPT.