BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NOS. 2024-2016 & 2025-2016:

KRISTEN NEWMAN,	)	
	)	
Charging Party,	)	
	)	
vs.	)	ORDER DISMISSING
	)	COMPLAINT
JACLYN KATZ AND ALL REAL ESTATE SERVICES IN MONTANA, LLC,	)	
	)	
Respondents.	)	

* * * * * * * * * *

The parties herein participated in a contested case administrative hearing on September 15, 2016. After that hearing and before any decision issued on this matter, the employment of the hearing officer who presided over that hearing ended. On November 3, 2016, the parties agreed upon a preliminary ruling by another hearing officer in the Office of Administrative Hearings regarding the timeliness of Kristen Newman's Human Rights Act ("HRA") complaint of retaliation herein, filed with the department on February 24, 2016.

The basis of the retaliation complaint is Newman's contention that Jaclyn Katz filed a factually and legally baseless counterclaim in federal litigation between the same parties, who had the same lawyers in that litigation as in the present proceeding. The parties agreed that Newman's complaint herein to the department had to be filed "within 180 days after the alleged unlawful discriminatory practice occurred or was discovered." Mont. Code Ann. §49-2-501(4)(a). They disagreed on when the 180 days started to run. Katz filed and served the counterclaim at issue on May 1, 2015. The federal court's order dismissing that counterclaim issued on September 8, 2015.

Katz argues that the 180 days began to run when the counterclaim was filed and served. If Katz is correct, Newman's complaint of retaliation was not timely filed and is time barred. Katz' counsel supported her motion to dismiss the present

retaliation complaint with *Hash v. U. S. West Communications Service* (1994), 268 Mont. 326, 886 P.2d 442. The pertinent portion of the decision reads:

> Did the District Court err in failing to hold, as a matter of law, that the date of notification of elimination constituted the date of discovery of the discriminatory acts, thus beginning the relevant time periods?
>
> A cause of action accrues under the Human Rights Act (Act) when "the alleged unlawful discriminatory practice occurred or was discovered." Mont. Code Ann. § 49-2-501(2)(a). On June 19, 1991, U.S. West notified Hash that on January 31, 1992 her position would be eliminated. Hash argues that the statutory period started at the termination date because she hoped and believed, up to the time of termination, that she would be given another U.S. West position. We disagree.
>
> If there was a discriminatory act in this case, it occurred when U.S. West notified Hash of its decision to eliminate her position. It was at that time that Hash discovered the alleged discriminatory practice. Hash's hopes and beliefs cannot contradict the fact that she discovered the alleged discriminatory act(s) on June 19, 1991. In this case, Hash did not support her position that her cause of action did not accrue on June 19, 1991. We hold that the District Court did not err in concluding that the alleged discriminatory practice was discovered and accrued on June 19, 1991 when Hash was advised that her position would be eliminated.

268 Mont. *at* 329-30, 886 P.2d *at* 444.

There is no dispute that when Katz filed the counterclaim in the federal proceeding her counsel served a true and complete copy of it upon counsel for Newman. If that filing constituted the retaliatory act, ordinarily the 180 days would begin to run. Newman (through her attorneys in both the federal case and the current case) knew of the filing of the allegedly baseless counterclaim and knew of its content, just as Hash knew of the allegedly discriminatory act when her employer told her it had decided to eliminate her position. Thus, according to Katz, Newman's current complaint is time barred.

Newman argued that the 180 days did not begin to run until the federal court dismissed the counterclaim. If Newman is correct, her complaint of retaliation was timely filed. Newman's counsel cited Admin. R. Mont., Rule 24.9.603(2)(a), the rule

fleshing out the statutory prohibition against retaliation in the Act. That rule does not prohibit filing of a "factually or legally baseless civil action" except when the action is filed in retaliation for protected activity. Mont. Code Ann. §49-2-305; Admin. R. Mont. 24.9.603(1)(c). Likewise, unless Katz' counterclaim was "baseless," filing it could not have been an adverse action.

Both the lack of merit of the counterclaim and the retaliatory motive for the filing of the counterclaim are essential elements in Newman's current charge. Absent special circumstances, there is no general requirement that the time for filing for a retaliation charge is tolled until an adjudication elsewhere of any of the essential elements of the charge.

Newman argued that an exception to that general rule applies to the present situation. The time for filing can be tolled for any claim or cause of action (for an injury to person or property) until the claim's essential facts have been discovered or, in the exercise of due diligence, should have been discovered by the aggrieved party. That tolling does not apply unless either (a) the facts constituting the claim are by their nature concealed or self-concealing; or (b) the respondent took action to prevent the charging party from discovering the injury or its cause before, during, or after the act causing the injury. If and only if those limited circumstances exist, the time limit is tolled. Mont. Code Ann. 27-7-102(3).

Newman argued that her retaliation complaint under the Act was analogous to a malicious prosecution claim. Basically, there are five essential elements of a malicious prosecution claim, to which can be added the requirement that a plaintiff pleading malicious prosecution must also prove consequent damages.

> . . . (a) That a judicial proceeding was commenced and prosecuted against him; (b) that the defendant was responsible for instigating, prosecuting or continuing such proceeding; (c) that there was a want of probable cause for defendant's act or acts; (d) that he was actuated by malice; (e) that the proceeding terminated favorably to plaintiff; and (f) that plaintiff suffered damage, with the amount thereof.

Stephens v. Conley, 48 Mont. 352, 360, 138 P. 189, 190 (1914). The time within which to file a malicious prosecution suit does not begin to run until all the essential elements of the claim exist.

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> The elements of the tort of malicious prosecution are:
> 1. A judicial proceeding commenced against the party alleging malicious prosecution;
> 2. the other party's responsibility for instigating the proceeding;
> 3. a want of probable cause for the other party's action;
> 4. the existence of malice as the motivator behind the other party's action;
> 5. the termination of the proceeding in favor of the alleging party; and
> 6. damages suffered by the party alleging malicious prosecution. (Emphasis added [*in Rouse opinion*].) *First Bank (N.A.) Billings v. Clark* (1989), 236 Mont. 195, 204-05, 771 P.2d 84, 90. The complaint alleges that Rouse was tried by a jury on March 13 and 14, 1986 and acquitted of the assault charge. The judgment is not part of the record. Assuming Rouse's allegations are true, his cause of action for malicious prosecution did not accrue until the acquittal.

Rouse v. Anaconda - Deer Lodge County (1991), 250 Mont. 1, 11-12, 817 P.2d 690, 693-94.

The Montana Legislature clearly knows how to include tolling provisions in a statute of limitations. The Legislature included a tolling provision in the time limit for filing complaints with the department under the HRA.

The time limit for filing retaliation or discrimination claims is tolled if the charging party has filed a grievance on the claimed retaliation or discrimination pursuant to any grievance procedure established by a collective bargaining agreement, contract, or written rule or policy. The 180-day period for filing the complaint with the department is tolled until the conclusion of the grievance procedure, if the grievance procedure concludes within 120 days after the claimed retaliation or discrimination was discovered. If the grievance procedure does not conclude within 120 days, the deadline for timely period for filing of the complaint with the department is extended to 300 days after the retaliatory or discriminatory practice occurred or was discovered, which means the complaint must be filed with the department within 180 days after the 120th day after the claimed retaliation or discrimination was discovered. Mont. Code Ann. § 49-2-501(4)(b).

In the 33 years since passage of the HRA in 1973, the Legislature has not amended that Act to toll the time limit for filing complaints (that the respondent

filed retaliatory claims against the charging party in other civil litigation) until the termination of the retaliatory claims in favor of the charging party.

A determination whether a civil action, including Katz' counterclaim, is factually or legally baseless is obviously a matter solely within the province of a tribunal and not within the purview of a party. That is true of every essential element of Newman's retaliation claim. Ordinarily, it would be sufficient for Newman to plead the essential elements of her claim, including the baselessness of the filing. Under ordinary circumstances, the time-limit for filing a retaliation claim with the department would not be tolled until one of the essential elements of that claim has been adjudicated elsewhere. The department is the gate-keeper for charges of discrimination and/or retaliation. If an aggrieved party could elect to wait until any or all of the essential elements of such charges were elsewhere adjudicated, the time limit for filing such charges would be meaningless and the exclusive remedy provisions of the Act would be vitiated. These are precisely the kind of reasons why extending a statute of repose is not favored, and may be why the Legislature has not enacted a tolling provision for charging parties in Newman's position.

There also are no Montana cases directly holding that the time limit for filing a retaliation claim with the department, based upon an allegedly baseless counterclaim against the charging party in other litigation, allegedly motivated by retaliatory animus, is tolled until such counterclaim is resolved favorably to the charging party. At the discretion of the department, with the parties agreeing, it might be a good idea to defer action on the administrative proceeding in such a situation, but there is no case applying tolling of the 180 day time for filing.

How the allegedly baseless counterclaim is resolved in the court exercising jurisdiction over it certainly could make a difference regarding the merits of any subsequent retaliation charge based upon it. Some outcomes could allow either charging party or respondent in the subsequent retaliation charge to assert judicial estoppel. Other outcomes might leave open the merits of the subsequent retaliation charge, which could continue forward. If the retaliation charge is filed and pursued without awaiting resolution of the counterclaim, there is a risk of conflicting rulings – the department contested case hearing might result in a determination that the counterclaim was baseless while the district court case in which the counterclaim was filed might result in a determination that the counterclaim had merit, or visa versa.

The same risk of conflicting rulings does not arise with regard to a malicious prosecution case and the underlying allegedly maliciously prosecuted case, because the malicious prosecution case cannot be filed until after termination of the

underlying allegedly maliciously prosecuted case, in favor of the party seeking to pursue the malicious prosecution claim.

There being no basis for creating a tolling requirement that neither the legislative nor the judicial branches of government have put in the HRA, Katz is correct that the complaint in this case was not timely filed. Therefore, dismissal of the complaint, as untimely, is proper.

Kristen Newman's Amended Charge of Discrimination/Retaliation is hereby dismissed with prejudice as untimely.

DATED: this 27th day of December, 2016.

David Scrimm, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, or by means of the State of Montana's Interdepartmental mail service, and addressed as follows:

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The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by means of the State of Montana's Interdepartmental electronic mail service.

MARIEKE BECK, BUREAU CHIEF
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TIMOTHY LITTLE
DOLI LEGAL SERVICES BUREAU

DATED this 27th day of December, 2016.

Sandra Page
Legal Secretary

Newman.Order Dismissing Complaint