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

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0141016851:

ROBERT D. HAY,	)	Case No. 1100-2015
	)	
Charging Party,	)	
	)	**HEARING OFFICER DECISION**
vs.	)	**ON REMAND AND NOTICE OF**
	)	**ISSUANCE OF ADMINISTRATIVE**
ST. PETER'S HOSPITAL,	)	**DECISION**
	)	
Respondent.	)	

* * * * * * * * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

On October 11, 2013, Robert D. Hay filed a Montana Human Rights Act ("HRA") complaint with the Montana Department of Labor and Industry's Human Rights Bureau ("HRB") against St. Peter's Hospital of Helena, Montana ("SPH"), alleging that SPH discriminated against him on the basis of disability under the Montana Human Rights Act by denying him a reasonable accommodation for his service dog, Ozzie, to remain with him while he was in SPH, in March 2011 and in September 2011. HRA No. 0141016536.

On March 26, 2014, Robert D. Hay filed a "substituted" HRA complaint with the HRB against SPH, alleging that SPH discriminated against him on the basis of disability under the HRA by denying him a reasonable accommodation for his service dog, Ozzie, to remain with him during his visits to SPH for an approximately four-year period.[1] HRB No. 0141016851. He further alleged that SPH retaliated against him when he complained by formalizing their rejection of Ozzie, by denying him rights under HIPAA to review relevant hospital records, and by maintaining a hostile environment concerning his use of Ozzie.

[1] Hay also alleged violations of federal civil rights laws, over which the department has no contested case jurisdiction.

Hay formally withdrew his original complaint on March 26, 2014, and HRB approved the withdrawal the same day. HRB No. 0141016851 states that "In substance, this substituted complaint, filed in compliance with §49-2-101, ARM, simply updates Mr. Hay's previous complaint to include more contemporary events." "Substituted Complaint on behalf of Robert D. Hay v. St. Peter's Hospital," p. 1.

Hearing Officer Terry Spear held a contested case hearing on June 29-30, 2015 in Helena, Montana. Roy Andes represented Hay and David M. McLean of McLean & Associates, represented SPH. Hay, his wife Christina Hay, Detective Nathan Casey of the Helena Police Department, Michelle Rush, SPH's Patient Safety and Risk Management Officer (and its designated representative for this hearing), Dr. Darice Henry-Ford, D.V.M., Susan Noem, R.N., Keith Harbour, Adv. E.M.T., and Anna Jayne Pentecost, R.N., testified under oath. Exhibits 1 - 18, 101, 105 - 111, 113 - 115, 117 and 118 were admitted into evidence. The Hearing Officer's reasoning for admitting Exhibit 15 is discussed herein. Exhibit 1 was sealed in its entirety. Exhibits 2, 4 - 5, 9, 11, 17, 101, 106 - 107, 117 and 118 as admitted had confidential information sealed. A sealing order describing these matters more specifically accompanied this decision, and that sealing order remains in effect.

Following issuance of Hearing Officer Terry Spear's decision in this matter, the Human Rights Commission (HRC) issued a corrected remand order on June 7, 2016. In the remand order, the HRC modified Hearing Officer Terry Spear's findings and conclusions. It rejected Finding of Fact No. 19 because it determined it stated a conclusion of law; it modified Finding of Fact No. 21; and it modified Conclusion of Law No. 2. The HRC directed the Office of Administrative Hearings to make a determination of damages and appropriate relief in light of the revised findings. SPH petitioned for judicial review of the HRC decision, and the Hon. Kathy Seeley of the Montana First Judicial District Court, Lewis and Clark County, affirmed.

Upon remand and full briefing of the parties associated therewith, and based on the arguments, authorities and evidence adduced, the Hearing Officer makes the following findings, conclusions and final agency decision, consistent with the HRC's changes and District Court's Memorandum and Order on Petition for Judicial Review.

II. ISSUE

Did SPH discriminate against Hay because of disability in violation of Title 49, Chapter 2, Mont. Code Ann., by denying Hay a reasonable accommodation for his service dog or by retaliating against him for his opposition to be requests for

accommodation for Ozzie? Also, is there a valid legal and factual basis for extending the 180-day statute of limitations based upon equitable estoppel or based upon the substitution of the current complaint for the original complaint?

III. FINDINGS OF FACT

1. Charging Party Robert D. Hay ("Hay"), at all pertinent times, resided in the City of Helena, Montana. As of hearing, Hay was a blind 63-year old Vietnam war veteran, considered by the VA as "catastrophically disabled" because of various medical conditions. These medical conditions require frequent hospitalizations, often make Hay a difficult and volatile patient, and substantially limit him in most major life activities. He has a disability pursuant to Mont. Code Ann. § 49-2-101(19)(a)(i).

2. Respondent SPH is a full service medical care facility located in Helena, Montana and is the only public hospital in Helena.

3. Hay's dog Ozzie, a Rottweiler, accompanied Hay everywhere. Hay was dependent on Ozzie both physically and emotionally. Ozzie had no professional training as a service dog, but Hay and his wife, Christina Hay ("Ms. Hay") trained Ozzie to assist Hay. Ozzie assisted Hay in safely moving about from place to place. Without Ozzie's assistance, Hay had to have guidance from another person to get around everywhere except in the most familiar surroundings (*e.g.*, his home). Ozzie served as his guide, his "seeing eye" dog. Ozzie was often dressed in a red vest designating him as a service dog, and Ozzie, from Hay's perspective, was always under the control of Hay or his wife when he, with Ozzie, sought medical care as well as while he received medical care. Ozzie was Hay's service dog.

4. Dr. Darice Henry-Ford, D.V.M., treated Ozzie (Ozzie died some time ago). Dr. Henry-Ford testified that in four years of treating Ozzie, Ozzie was never aggressive. Dr. Henry-Ford also testified that Ozzie's growling was his form of communication.

5. On January 12, 2010, Anna Jayne Pentecost (Pentecost), a registered nurse at SPH, was working in the emergency room where Hay was a patient. While in Hay's room, Pentecost was trying to hook Hay up to a monitor. Ozzie stood up on all four legs and growled as she approached him. At the time of this incident, Ozzie was on his leash and in Hay's control. Hay pulled Ozzie back and assured Pentecost that Ozzie was not hostile and was not a threat to her. Nonetheless, Pentecost went around the bed to the side away from Ozzie to complete connection of the monitor, to avoid proximity with Ozzie. Ozzie did not exhibit any further behavior that could

alarm a person unfamiliar with him. Pentecost did not document the event when it occurred. She eventually confirmed it to SPH Patient Safety/Risk Management Officer Michelle Rush (Rush), when Rush asked her about it during an investigation into any problems with Ozzie at SPH in the past. This incident happened 1,534 days before Hay filed his current complaint.

6. On March 8, 2011, Susan Noem (Noem), a registered nurse at SPH, was working in the emergency room where Hay was a patient. While in Hay's room, Noem walked around Hay's gurney to get a medication list from Ms. Hay. Ozzie stood up on all four legs and growled at Noem. At the time of this incident, Ozzie was on his leash and in Ms. Hay's control. Ms. Hay pulled Ozzie back, and she and Hay both assured Noem that Ozzie was not hostile and was not a threat to her. Noem gave Ozzie as wide a berth as possible and carefully got the medication list from Ms. Hay. Ozzie did not exhibit any further behavior that could alarm a person unfamiliar with him. This incident happened 1,143 days before Hay filed his current complaint.

7. On March 29, 2011, Hay came to the SPH Emergency Room ("ER"). He was in one of the ER rooms. His wife, with Ozzie, was waiting to the told she could go into the room where Hay was situated. One of the nurses told Ms. Hay that she could not take Ozzie back to where Hay was situated, because, according to the nurse, Ozzie had bit a nurse. Ms. Hay became very upset. Either Ms. Hay or SPH staff called the Helena police. Detective Nathan Casey responded. Casey did not recall seeing Ozzie, and believes that the dog was, by that time, in Hay's car. Casey verified that Hay agreed to receive treatment without Ozzie accompanying him. Casey then left SPH, considering the incident closed. This incident happened 1,093 days before Hay filed his current complaint.

8. After the March 29, 2011, incident, SPH began an internal investigation with respect to Ozzie's conduct on his visits with Hay to SPH. At hearing, there was no first-hand testimony that Ozzie had ever bitten anyone, at SPH or elsewhere. The only competent and credible evidence of Ozzie's "aggressive" behavior at SPH involved the incidents described in Findings 5 and 6, *supra*.

9. On September 27, 2011, SPH Patient Safety/Risk Management Officer Michelle Rush sent Hay a letter stating that Hay was no longer allowed to bring Ozzie on visits to SPH due to Ozzie's aggressive behavior on more than one occasion. Had SPH ever received a report that an employee had been bitten by Ozzie, an immediate and very thorough investigation would have been undertaken. There is no evidence of any such immediate and very thorough investigation about Ozzie by

SPH. There is no evidence that Rush ever found anyone who reported seeing Ozzie bite anyone or being bitten by Ozzie. This letter was sent 912 days before Hay filed his current complaint.

10. From September, 2011, to February 13, 2013, the Hays brought Ozzie with Hay on visits to SPH approximately twenty different times–essentially every time he came to SPH. SPH did not attempt to exclude Ozzie on any of those visits. It is incredible and unworthy of belief that the Hays were able to "sneak" Ozzie into SPH that many times, particularly in light of Rush's investigation, which involved contacting the personnel most involved in interactions with Hay and Ozzie. The credible and substantial evidence of record requires a finding that, for approximately 18 months after barring Ozzie from the facility in writing, SPH made no attempt to enforce the decision. Management reasonably should have known and probably did know the Hays were bringing Ozzie with them to the facility.

11. On February 13, 2013, Hay left SPH against medical advice because Ozzie was not allowed into the ICU where Hay was receiving care and treatment. This is the first substantiated instance of SPH enforcing its written decision not to allow Ozzie in the facility. Hay credibly testified that one of the reasons he truly needed Ozzie while in SPH was that he had trouble controlling his bowels and Ozzie could assist him to a bathroom in time to reduce the risk of incontinence. His testimony also suggested that, without Ozzie in SPH with him, he had not always been able to reach a bathroom in time. There is no evidence regarding whether Hay was allowed to use a bathroom, as opposed to being confined to his bed and required to use a bed pan, at the time that Ozzie was not allowed into the ICU. This incident happened 407 days before Hay filed his current complaint.

12. After February 13, 2013, until March 13, 2014, Hay brought Ozzie on all of his visits to SPH, of which there were several. Hospital personnel did not challenge Ozzie's presence. It is incredible and unworthy of belief that, after SPH enforced its eighteen-month-old written decision on February 13, 2013, for the first time, SPH management did not notice that the Hays were bringing Ozzie into the facility with them. After barring Ozzie from the premises on February 13, 2013, SPH did not again try to enforce its decision. This erratic enforcement of its decision barring Ozzie from its premises weakened the credibility of SPH's safety concerns.

13. On March 13, 2014, Hay was at home. His wife noticed blood in his urine, and they called 911. Keith Harbour (Harbour), part-time advanced EMT for SPH (for ten years) and EMT Instructor at the Helena College of Technology (for

eleven years), and his paramedic partner, Shari Graham (Graham), responded with their ambulance.

14. At the Hay residence, Harbour evaluated Hay and told him that he needed to be seen and treated at SPH. Hay said that he would go in the ambulance to SPH but stated that he had a federal lawsuit against SPH because they would not let Ozzie in SPH. Harbour told Hay that the crew would not transport Hay with Ozzie in the ambulance. There is no evidence that Ozzie's presence in the ambulance would have resulted in the removal of any barriers to Hay's equal use and enjoyment of health care facilities during his ambulance ride.

15. Hay seemed irritated when Harbour asked him about his primary complaint.

16. When Graham started to ask Hay a question, Hay interrupted her and cut her off, and became aggressive with her. Hay told Graham to get out of his apartment and called her a "bitch." (Hr. Tr., 362:5-14.) Specifically, Graham was attempting to address transport options with Hay, which would have included either coming in the ambulance or going by private vehicle. However, Hay cut her off and started to move toward the front of his seated position toward Graham, which prompted Harbour to intervene. Harbour told Hay to calm down, that Graham was only there to help him, and that he was also there to help. Hay continued to yell at Graham to get out, and she complied.

17. Hay was irate and also told Harbour to get out.

18. Harbour got out a refusal form, but Hay stated he was not signing anything and that everyone needed to leave.

19. Harbour credibly testified under oath that neither he nor Graham said anything to Hay about SPH telling them that Ozzie was not allowed at SPH and that nobody at SPH had told the ambulance crew that Ozzie was not to be placed in the ambulance or said anything at all to them about Hay and Ozzie. Harbour credibly denied any knowledge of any problem with Ozzie accessing or not accessing SPH. Harbour credibly testified that this was his first time ever dealing with Hay and/or Ozzie and his first call ever at that residence. He credibly denied having any discussion with Graham about Hay and Ozzie on the way to the residence.

20. Harbour also credibly testified that there were a number of factors to be considered in deciding whether to allow an animal into the ambulance for the

transport of a patient. He credibly testified that every primary patient care provider working in an ambulance made their own decisions, based upon the law as well as their individual feelings, about safety and other concerns. He credibly testified that he had never allowed an animal in "his" ambulance because of safety concerns for himself and for his partner, as well as for cleanliness and infection control. He credibly testified that he was not a dog handler and that Hay or any other patient in the back of an ambulance and secured for transport would not be able to handle the dog while receiving emergency care. He credibly testified that he had never and would never allow an animal in the front or the back of "his" ambulance. He credibly testified that if a patient's dog was in the ambulance (front or back) and the patient screamed in pain as Harbour or his partner performed emergency medical procedures on the patient, the dog could react by trying to "protect" the patient from the emergency health care provider. This, Harbour credibly testified, left him concerned for his partner's safety and his own safety in their work environment.

21. Harbour also credibly testified that Hay, as a blind patient, would not be moving or walking around from the time he was placed in the ambulance for transport until the time he was admitted into the ER, and that the ambulance crew would directly provide all services Hay needed. Harbour told Hay that:

(1) The ambulance crew would take care of everything that Hay would need;
(2) His crew frequently took patients who were completely unresponsive and unconscious and couldn't care for themselves at all, sometimes could not even breathe on their own, and that the crew provided every service the patients needed; and
(3) His crew safely got patients onto the ambulance stretcher, into the ambulance, into SPH, and all the way to SPH bed, where the nurse and doctors could care for them.

22. Harbour gave Hay two options. Harbour and Graham could transport Hay to SPH for evaluation and treatment, and Ms. Hay could bring Ozzie to SPH and meet him there. In the alternative, since Hay's condition was stable at the time, Ms. Hay could drive Hay and Ozzie to SPH in the car, and the ambulance crew would follow her car to SPH. Hay declined transport by ambulance, and agreed that he was refusing further care, against medical advice, although he refused to sign the form acknowledging it.

23. Thirteen days later, Hay filed his current complaint with HRB and withdrew his original complaint.

24. Hay was combative and aggressive toward ambulance staff on March 13, 2014, when he was not allowed to take Ozzie with him.

25. Although Hay had previously received counseling for PTSD, at the time of the contested case hearing on June 29, 2015, he had not seen his counselor for two years. Thus, to the extent Hay testified about suffering from stress and speaking with his counselor about it, the stress he testified to could not have been related to the March 13, 2014, incident.

26. Hay was not taking any medication for stress at the time of the hearing.

27. Hay did not provide any evidence of emotional distress regarding the March 13, 2014, incident.

28. The Hearing Officer respectfully suggests that SPH would be well-advised to train its management, its care-giving employees and its independent contractors about the current scope of service animal accommodations applicable in Montana. HRB would undoubtedly cooperate in suggesting the appropriate scope of the training and identifying persons or entities who could provide the training.

IV. OPINION

A. Ozzie Was a Service Animal under Mont. Code Ann §49-4-203.

Mont. Code Ann. §49-4-203(2) defines a service animal as "a dog or other animal individually trained to provide assistance to an individual with a disability." Mont. Code Ann. §49-4-214 provides, in pertinent part:

> (1) A person with a disability has the right to be accompanied by a service animal . . . (4) in any of the places mentioned in 49-4-211(2) [includes "all public accommodations"] . . . .

Pursuant to Admin. R. Mont. §37.90.449(6), "a service animal is an animal trained to undertake particular tasks on behalf of a recipient that the recipient cannot perform and that are necessary to meet the recipient's needs for accessibility, independence, health, or safety." Ozzie met this definition of "service animal." Montana case law appears consistent with federal law regarding service dogs. *McDonald v. Dept. of Environmental Quality*, ¶62, 2009 MT 209, 351 Mont. 243, 214 P.3d 749 (a reasonable accommodation under the ADA and the Montana Human Rights Act is best understood as a means of removing barriers to equal use and

enjoyment of facilities, which a service dog can do). Obviously, in litigation when the person with the disability is claiming he or she was subjected to illegal discriminatory treatment by restriction of service dog use, the claimant bears the burden of proving that dog is a service dog. *Prindable v. Ass'c. Apartment Owners*, 304 F.Supp 2d 1245, 1256-57 (D. Hawaii 2003) *aff'd* 453 F.3d 1175 (9th Cir. 2006), *cert. den.* 549 U.S. 1216; *Brown v. Cowlitz Cnty*, 2009 WL 4824010 (W.D.Wash. Dec 09, 2009); *Timberlane Mobile Home Park v. Washington State Human Rights Com'n,* 95 P.3d 1288, 1291 (App. Div. 2 2004). The showing must establish the animal is useful to help its owner overcome or lessen barriers to equal access. *E.g., McDonald*, *supra*; *see gen.* 28 CFR 36.104.

Provision of emotional support, well-being, comfort, or companionship does not necessarily constitute work or tasks for a service dog. *Id.* But how much proof can reasonably be required when a man who cannot see has a dog that the family has trained to guide him? Ozzie definitely was Hay's primary means of overcoming barriers to equal use and enjoyment of facilities.

Under the Americans With Disabilities Act, service dogs are to be trained for their tasks, but the ADA prescribes no particular training regimen or certification. "Frequently Asked Questions about Service Animals and the ADA." Appendix B, *infra*. In this case, the evidence established that Ozzie had been trained as a service animal, within the meaning of the law, by Hay and his wife. There was no legal justification for SPH to require proof that Ozzie was trained as a service animal. Hay and his wife trained Ozzie to assist Hay in daily life activities. These activities included, but were not limited to, helping Hay navigate streets and obstacles and go to restaurants with friends, as well as providing a "support barrier" to catch Hay in the event of a fall. Due to Hay's severe physical impediments, he relied upon Ozzie as a means to remove or to lessen any impediment to equal access in all facets of his daily life. Ozzie may have been big and he may have looked mean, but he qualified as a service dog.

B. SPH Did Discriminate/Retaliate Within 180 Days Before Complaint Filing

There was only one denial of access to Hay's service dog within the 180 days before the current complaint was filed, which was refusing to transport Ozzie with Hay in the ambulance on March 13, 2014. This led to Hay refusing to be transported in the ambulance, despite EMT Harbour's advice that he needed evaluation and treatment at SPH.

Whether a public accommodation may exclude a service animal on the basis of its behavior is prescribed by federal regulations, which state:

> A public accommodation may ask an individual with a disability to remove a service animal from the premise if:
>
> > (i) The animal is out of control and the animal's handler does not take effective action to control it; or
> > (ii) The animal is not housebroken.

28 C.F.R. §36.302(c)(2)(i)-(ii). SPH has not proved that either of the two bases for removing a service dog applied to Ozzie.

With regard to the ambulance incident, Harbour did not know that Ozzie was "barred" from SPH. Harbour had a policy of not allowing any animals to ride in the ambulance because of safety concerns for the patient, his partner, and himself. Harbour had concerns about who would handle the animal in the event the patient was not in a condition to do so, about how Harbour would provide treatment to the patient and control the animal at the same time, along with concerns about ambulance sterility.

Harbour's concerns were valid. However, while Harbour stated concerns about safety, infection, and whether Hay could maintain control of Ozzie, Harbour also testified that he had never and would never allow an animal in the front or back of his ambulance. This was in spite of the fact that Harbour had no prior interaction with either Hay or Ozzie. There is no evidence that, on the date in question, Ozzie acted in any threatening or out-of-control manner while the ambulance crew was interacting with Hay. It appears that Harbour's decision to refuse to transport Ozzie with Hay would have been the same no matter the patient, the patient's condition, or the service dog at issue. This amounts to discrimination, and SPH violated Hay's rights under the MHRA by denying Hay the accommodation he demanded, having his service dog with him on the ambulance. SPH failed to establish a legitimate, non-discriminatory reason for the action.

Having established liability, the Hearing Officer is empowered to take any reasonable measure to rectify any harm, pecuniary or otherwise, to Hay as a result of the illegal discrimination. *See* Mont. Code Ann. § 49-2-506(1)(b); *Vainio v. Brookshire*, 258 Mont. 273, 280-81, 852 P.2d 596, 601 (1993)(the Department has the authority to award money for emotional distress damages). The freedom from unlawful discrimination is clearly a fundamental human right. *See* Mont. Code Ann.

§ 49-1-102. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right, without reasonable measures to rectify that harm. *See Vainio*, 258 Mont. at 280-81, 852 P.2d at 601. The severity of the harm governs the amount of recovery. *See Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.3d 836 (citations omitted).

Here, Hay has not shown that the severity of the harm was substantial. Although Hay has asserted he produced substantial evidence of serious emotional distress caused by SPH's conduct, reasonably supporting an award to him of $100,000 in compensatory damages, he has not even argued that he suffered emotional distress related to the refused ambulance ride on March 13, 2014. Hay's claims for emotional distress all stem from SPH's ban of Ozzie, which was both never enforced and, more importantly, is time-barred. However, because it has been found that SPH violated Hay's rights when Harbour barred Ozzie from the ambulance, the Hearing Officer finds some damages are appropriate. Because the severity of the harm to Hay was not significant in the case of this sole violation, the Hearing Officer finds that $2,500 is an appropriate award for the humiliation and emotional distress caused by SPH. *See Emel v. Anmol, Inc., et al.*, OAH Case No. 1594-2015, HRB Case No. 0141017055 (awarding $2,500 in damages for emotional distress when hotel improperly demanded that charging party furnish documentation proving that his dog was a service animal, and refusing to assign him a handicap accessible room without payment of the pet deposit and/or documentary proof of his service animal).

The law requires affirmative relief enjoining further discriminatory acts and may further prescribe any appropriate conditions on SPH's future conduct relevant to the type of discrimination found. Mont. Code Ann. §49-2-506(1)(a). In this case, appropriate affirmative relief is an injunction and an order requiring SPH's management to consult with HRB to identify appropriate training to ensure that the organization does not commit, condone, or otherwise allow further acts of discrimination.

C. Admission of Charging Party's Exhibit 15.

Exhibit 15 is a series of letters between counsel regarding various disagreements in this matter. The main reason for its admission was as evidence of the position SPH was taking, as shown largely through the August 22, 2013, letter from SPH's counsel to Hay's counsel. SPH objected, primarily on hearsay grounds, then expanding the objection into more arcane matters.

As the Montana Supreme Court has noted: "Often the hearing examiner in a formal contested case hearing will admit the evidence and will consider the weight to be given to such evidence when preparing findings and conclusions from all the evidence." *In re Renewal of Teaching Certificate of Thompson*, 270 Mont. 419, [no point cite available in Mont. on Lexis], 893 P.2d 301, 305 (1995). The Hearing Officer admitted the entire exhibit.

M.R.Evid. 801(d)(2) provides:

> (d) Statements which are not hearsay. A statement is not hearsay if:
> . . . .
> (2) Admission by a party-opponent. The statement is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject . . . .

The August 22, 2013 letter is a statement by an authorized agent of SPH, within the scope of the authorization. The author of the letter states "this firm" represents SPH in the dispute. Thus, the letter is self-authenticated as an admission by a party-opponent's agent. SPH did not offer testimony that McLean was not authorized by it to make the statements in the letter, and given McLean's role as counsel, SPH should not be heard to proffer such testimony. McLean's statements are admissions. *State. v. Ahmed*, 278 Mont. 200, 214-15, 924 P.2d 679, 687-88 (1996) (attorney communications are admissible as statements of a party made through an agent).

SPH also contends that Exhibit 15 is inadmissable because ". . . it contains communications surrounding compromise and offers to compromise." M. R. Evid.. 408 in relevant part states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing

> a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Portions of this letter simply address resolutions of informal discovery disputes. The letter does not address the underlying claims in this case, let alone being an offer in furtherance of possible compromise on the case itself. Admitting the letter into evidence does not require the author and/or the recipient of the letter to testify in order to "clarify" statements therein.

Further, the Montana Pattern Jury Instructions do not apply. MPI2d, 1.01 involves telling the jurors that opening and closing arguments to the jury by attorneys are not evidence. That instruction has no application to statements of counsel as an authorized agent of SPH in a prehearing letter regarding SPH's response to Hay's requests about Ozzie.

Lastly, SPH asserts that Hay is trying to force McLean into being a witness by using documents he has authored. Neither McLean nor Andes were listed on either side's witness list. Failure timely to identify either of them as hearing witnesses obviates any potential need to replace them as counsel because of the alleged necessity of their testimony about the letter. No such testimony is needed anyway – the letter speaks for itself.

Exhibit 15 is admitted. SPH's objections to the admission of the August 22, 2013 letter are again overruled. Of course, it also should be said that Exhibit 15 does not contain crucial evidence that changed the outcome in this case.

D. Events Occurring More than 180 Days Prior to Complaint Filing Are Irrelevant.

On remand, Hays attempts to relitigate the issue of timeliness and damages associated with claims previously found to be time-barred. The findings of Hearing Officer Spear still stand, and will not be disturbed except as to comport with the findings of the Human Rights Commission and District Court. SPH argues persuasively that the department may only consider complaints filed within 180 days after occurrence or discovery of the alleged unlawful discriminatory practices. Mont. Code. Ann. §49-2-501(4)(a). Further, SPH argues that the department has no jurisdiction over a complaint that fails to allege acts of unlawful discrimination within the 180 days. *Skites v. Blue Cross/Blue Shield of Montana*, 297 Mont. 156, 161, 991 P.2d 955, 958, (1999) (when the administrative complaint on its face indicated that the last act of alleged discrimination occurred more than 180 days before complaint filing, summary judgment in favor of the employer was proper).

Obviously, the department has jurisdiction over a complaint that does allege acts of unlawful discrimination within the 180 days. The refusal of ambulance transport with Ozzie on board was an incident within 180 days of filing the current complaint, alleged by Hay to be an act of disability discrimination and/or retaliation on behalf of SPH. Under Montana law, the period of limitation begins when the facts constituting the claim have or should have been discovered. For the ambulance incident, the period began immediately, and the current complaint was timely. Hay filed his current complaint in this matter on March 26, 2014. Timely claims of illegal discrimination stated by that complaint must involve events occurring on or after September 26, 2013, 180 days before March 26, 2014. There can be no hostile environment or other kind of claim under the HRA without at least one event within 180 days of complaint filing. Even if SPH committed a series of acts to effect Ozzie's exclusion over four years, there can be no "hostile environment" claim without a proven discriminatory act within 180 days. Essentially, each illegal act of barring Ozzie was a "discrete event" and thus a new statute of limitations period began, with evidence of illegal acts of the same genre admissible as evidence, but not for damages if they were time-barred. Without at least one illegal act that is not barred by the statute of limitations, there can be no timely discrimination or retaliation claim, and any time-barred evidence is meaningless. *AMTRAK v. Morgan*, 536 U.S. 101, 113 (2002).

Hay withdrew his original complaint. Had he amended it, perhaps he might have preserved his claims about the earlier incidents. He chose not to do that and all claims on the earlier incidents are time-barred. Arguments about relation back of amendments are irrelevant. Hay is not trying to add additional events more than 180 days old to an older original complaint, so the amendment can relate back. His additional events are the newer claims. Withdrawing the original complaint on March 26, 2014, when he filed his current complaint, rendered all of the claims about incidents more than 180 days before March 26, 2014 time-barred.

Finally, Hay argued that the statute of limitations should be equitably tolled. Equitable tolling may be applied if, despite all due diligence, a plaintiff "lacks vital information bearing on the existence of his claim." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). This doctrine "focuses on a plaintiff's excusable ignorance and lack of prejudice to the defendant." *Leong v. Potter*, 347 F.3d 1117, 1123 (9th Cir. 2003). As Judge Posner has explained, "[e]quitable tolling is frequently confused . . . with the discovery rule . . . . It differs from the [discovery rule] in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the

defendant." *Garcia v. Brockway*, 526 F.2d 456, 465, (9th Cir. 2008) (citing *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 451 (7th Cir. 1990)).

Mont. Code Ann. § 27-2-102(3) provides:

> (3) The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if:
>
> (a) the facts constituting the claim are by their nature concealed or self-concealing; or
>
> (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

Montana's Supreme Court has restated this law, quoting itself in two earlier cases.

> "When the statute of limitations issue involves the time at which the plaintiff, through the use of reasonable diligence, should have discovered the facts, 'the test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation.'[2]"[3]

Osterman v. Sears, §27, 2003 MT 327, 318 Mont. 342, 80 P.3d 435 (quoting *Johnson* quoting *Peschel*).

Hay claims that since SPH took over 102 days to give him the names of SPH employees (in response to what he dubiously claims was a "formal HIPPA request") the statute of limitations should be equitably tolled for that length of time. The information about what SPH did or did not know about Ozzie's aggressiveness and which employees provided the information might have a bearing on the strength of Hay's case, but not upon its existence and not upon the identity of the defendant. Hay's case was about Ozzie being barred from SPH. The defendant was SPH.

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[2] *Peschel v. Jones* (1988), 232 Mont. 516, 525, 760 P.2d 51, 56.

[3] *Johnson v. Barrett*, §11, 1999 MT 176, 295 Mont. 254, 983 P.2d 925 (***quoting*** *Peschel*).

Hay has no meritorious equitable tolling arguments. He knew from January 2010 that SPH was the party barring Ozzie from SPH premises. By October, 2013, Hay had a suit pending, which he could have filed sooner and in which he could have used formal discovery to get information. SPH was equivocating about whether it was going to bar Ozzie, or just say it was barring Ozzie, but there was no concealing what it wanted or who it was.

V. CONCLUSIONS OF LAW

1. The Montana Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-512(1).

2. Robert D. Hay's charges alleging disability discrimination in public accommodation and retaliation against St. Peter's Hospital regarding incidents on January 12, 2010, March 29, 2011, September 27, 2011 and February 13, 2013, and any other incidents occurring before September 26, 2013, are all time-barred. Mont. Code Ann. § 49-2-501(4)(a). His charges alleging disability discrimination in public accommodation against St. Peter's Hospital regarding an incident on March 13, 2014, are meritorious because the hospital failed to prove that Hay's service animal was out of control, that Hay's condition was such that he was unable to control it, or that allowing a service animal to accompany Hay would "fundamentally alter the nature" of the services provided. *See e.g., BNSF Railway Co. v. Feit*, 2012 MT 147, 8, 365 Mont. 359, 281 P.3d 225 (indicating that the MHRA should be interpreted consistently with federal discrimination law under the Americans with Disabilities Act); 28 C.F.R. § 36.302(a), (c)(1), (c)(2), and (c)(7) ("Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go.").

3. Hay is entitled to compensatory damages in the amount of $2,500.00.

4. The circumstances of the discrimination in this case mandate the imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

VI. ORDER

1. Judgment now issues in favor of St. Peter's Hospital and against Robert D. Hay on Robert D. Hay's charges alleging disability discrimination in public accommodation and retaliation regarding incidents on January 12, 2010, March 29, 2011, September 27, 2011 and February 13, 2013, and any other incidents occurring before September 26, 2013. The charges in the complaint pertaining to these incidents are dismissed with prejudice as without merit.

2. Judgment is granted in favor of Robert D. Hay against St. Peter's Hospital on Robert D. Hay's charge alleging disability discrimination in public accommodation regarding the incident on March 13, 2014.

3. St. Peter's Hospital must pay the sum of $2,500.00 in damages to Robert D. Hay.

4. St. Peter's Hospital must consult with an attorney with expertise in human rights law to develop and implement policies for the identification, investigation and resolution of complaints of discrimination that includes training for its board members, managers, and supervisors to prevent discrimination. Under the policies, St. Peter's Hospital employees will receive information on how to handle service animals. The policies must be approved by the Montana Human Rights Bureau. In addition, St. Peter's Hospital shall comply with all conditions of affirmative relief mandated by the Human Rights Bureau.

Dated: February 22, 2019.

/s/ CHAD R. VANISKO
Chad R. Vanisko, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Robert Hay, Charging Party, and his attorney, Roy Andes; and St. Peter's Hospital, Respondent, and its attorney, David McLean:

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) and (4).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505 (4), WITH ONE DIGITAL COPY, with:

Human Rights Commission
c/o Annah Howard
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 ONE DIGITAL COPY 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 Office of Administrative Hearings, 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).

THIS IS A DECISION ON REMAND WITH NO NEW HEARING TRANSCRIPT. If your appeal requires review of the original hearing transcript, please include a request for that review in your notice of appeal. The appealing party or parties must then assure that the original transcript is moved to the current appellate file for Commission review. Contact Annah Howard, (406) 444-4356 immediately to arrange for availability of that original transcript.