

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

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 680-2018:

TRICIA MYERS,)	HRB Case No. 0170363
)	
Charging Party,)	
)	HEARING OFFICER DECISION
vs.)	AND NOTICE OF ISSUANCE OF
)	ADMINISTRATIVE DECISION
PAMELA SCHROEDER,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Charging Party Tricia Myers (Myers) brought this complaint alleging that Respondent Pamela Schroeder (Schroeder) discriminated against her and her sons with regard to their housing. Myers requested summary judgment prior to the hearing, but it was denied.

Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter in Butte, Montana. Attorney J. Ben Everett represented Myers, and Schroeder represented herself.

At hearing, Schroeder and Myers testified under oath. Charging Party's Exhibits 1-4 were admitted into evidence. Respondent's Exhibit 6 was also admitted. The underlying Investigative file was also admitted as an exhibit because it contained many of the documents the parties sought to introduce at hearing, though the Hearing Officer erroneously overlooked exclusion of the Final Investigative Report of the Human Rights Bureau (HRB). That oversight is hereby corrected, and the HRB's Final Investigative Report is excluded from the Investigative file entered into evidence. *Boude v. Union Pac. R.R. Co.*, 2012 MT 98, ¶ 18, 365 Mont. 32, 277 P.3d 1221 (citing *Stevenson v. Felco Indus.*, 2009 MT 299, ¶ 30, 352 Mont. 303, 216 P.3d 763; *Crockett v. Billings*, 234 Mont. 87, 98, 761 P.2d 813, 820 (1988)).

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely

received in the Office of Administrative Hearings. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did Schroeder discriminate against Myers in housing on the basis of her sons' disabilities as alleged in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If Schroeder did illegally discriminate against Myers in housing on the basis of her sons' disabilities as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If Schroeder did illegally discriminate against Myers in housing on the basis of her sons' disabilities as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

III. FINDINGS OF FACT

1. Myers signed a lease agreement as lessee to rent property located at 2116 Walnut Street, Butte, Montana, on June 27, 2016 (the Property).

2. The lease agreement allowed Myers to have two pet dogs. Nowhere in the lease agreement did Myers request any form of accommodation related to the dogs.

3. When Myers initially leased the Property, she paid a \$1,000.00 deposit plus the first month's rent, for a total of \$2,075.00.¹ Thereafter, Myers was responsible for rent of \$1,000.00 and a \$35.00 charge per pet, for a total of \$1,070.00 per month to lease the Property. (Myers Exs. 1-2.)

4. Myers claims she paid a \$200.00 pet deposit. Myers was unable to provide any actual proof she paid a pet deposit, whereas Schroeder provided evidence of a June 30, 2016, \$2,075.00 payment to Giant Sky Rentals, LLC (Schroeder's rental company at the time), American Express Bluebird Transaction ID KM8QLMSC7Z, that did not include a pet deposit. (Schroeder Ex. 6.)

¹ Although the initial deposit should have been for \$2,070.00 (\$1,000.00 deposit + \$1,070.00 one month's rent (including \$70.00 pet rent)), for reasons which were never made clear, Myers wrote a check for \$2,075.00. Schroeder testified that it was not unusual for Myers to make out checks for odd amounts.

5. Myers and her daughter, Z., two sons, W. and O.², and two dogs, a Yorkshire Terrier and a Pekingese, lived at the Property. (Myers Exs. 1-2.)

6. Schroeder was aware at the time she leased the Property to Myers that W. and O. may have had difficulties with social interaction, but was not aware of any specific disabilities requiring accommodation.

7. At the time she leased the Property, Myers gave Schroeder the impression that the Yorkshire Terrier belonged to her and the Pekingese belonged to Z. Myers' later assertion that the dogs belonged to her sons was not credible.

8. Schroeder conducted regular inspections of the Property, approximately every other month.

9. Schroeder issued a 3-day notice to pay rent or quit to Myers on or about September 21, 2016, for charges related to late payments, late charges, and cost of repairs to a storm door and toilet water supply. Myers' disputed that her family caused some of these problems.

10. In October, 2016, carpets at the Property were cleaned because of a urine smell and feces from the dogs.

11. Schroeder issued a 14-day notice to correct or quit to Myers on March 25, 2017. The notice stated in relevant part as follows:

YOU ARE HEREBY NOTIFIED pursuant to Section 70-24-422(1 (a) [sic], M.C.A., that you are in violation of the rental agreement by which you hold possession of the above described premises. Your violation(s) is set forth as follows:

The property is not being maintained in a clean manner in accordance with your lease agreement (copy of specific page/paragraph is attached). Food stuffs under burners pose a fire hazard, spilled/dried liquids on kitchen walls, dried foods and labels on kitchen floor, dried spilled food stuffs on cabinet fronts. Strong odor of urine within and throughout the household, bathroom has extreme urine odor as well as large amount of dried toothpaste on floor and vanity, indication of water from shower not being contained properly as evidenced on baseboard across from sink. Utility area in basement is littered with an abundance of laundry on floor as well as bags covering area from bottom

²In the interests of privacy, the names of Myers' minor children have been redacted.

of stairs across to opposite wall, scattered other debris throughout basement area. Garbage debris in yard inside back gate and alley area at gate and fence. Painting was performed in living room, hall and closet doors of south east bedroom. No written authorization was given.

Please correct the violation(s) [sic] in the following manner:

Walls in kitchen must be cleaned and urine odor must be remedied. If professional cleaning is required, only dry chemical cleaning by a licensed professional may be performed. Clean up garbage debris at back gate and along fence area. Clean noted areas above specifically kitchen and bathroom. Repainting of living room, hall and closet doors must be completed by a professional only upon the written approval of landlord following submission of licensing and insurance from said professional at tenant's expense.

You are hereby notified that you have fourteen (14) days from the date of this notice in which to correct the violation(s) as set forth above or vacate the premises. In the event you fail to correct the violation(s) or vacate the premises, action shall be commenced against you for possession of said premises including all monies, penalties and other recourse allowed by law.

(Myers Ex. 3.)

12. Myers did not correct the issues addressed in the March 25, 2017, notice to correct or quit. Instead, she vacated the Property and rented elsewhere at a lesser rate of approximately \$850.00 per month.

13. Myers's explanation that the urine smell at the Property came from her son's bed wetting did not discuss the issue of cleaning urine until after receiving the March 25, 2017, notice. The strongest odor of urine was in Myers' daughter's room, where it appears one or both dogs were kept.

14. Although Myers claimed the source of the urine was her son's bed wetting, the urine was in the carpets.

15. A letter from Dr. Catherine White (Dr. White) dated May 22, 2017, only directly addressed an assessment of W.. To use the nomenclature of Dr. White, [W.] had diagnoses of "ADHD, ODD autism, and 22q11 chromosomal anomaly." Dr. White stated W.'s "brother has similar issues." The letter also stated [W.] had a dog

for emotional support, and requested he be allowed to have a dog if possible. (Myers Ex. 4.)

16. Although Myers claimed she offered a doctor's letter at the time she rented from Schroeder, this assertion makes no logical sense and is not credible in light of the uncontroverted fact that pets were welcome at the Property and Myers' own testimony that she was unaware of any laws regarding service animals. It is more likely that, given its date roughly two months after Myers had already vacated the Property, the letter was produced in association with her new rental and/or for the present litigation.

17. Myers' testimony was generally inconsistent. Her explanations regarding when and how she informed Schroeder that the dogs were service animals for her sons changed continuously throughout her testimony. Myers ultimately testified under oath that she did not ask about an accommodation related to service dogs until March, 2017, at the earliest, after the issues arose that gave rise to the notice to correct or quit.

18. There was no credible evidence showing that Myers brought the issue of service animals to Schroeder's attention prior to the March 25, 2017, notice to correct or quit.

IV. DISCUSSION³

The Montana Human Rights Act (MHRA) prohibits discrimination in housing. "It is an unlawful discriminatory practice for the owner, lessor, or manager having the right to sell, lease, or rent a housing accommodation or improved or unimproved property or for any other person . . . to discriminate against a person because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of the housing accommodation or property. . . ." Mont. Code Ann. § 49-2-305(1)(b). For purposes of the foregoing, "discrimination because of physical or mental disability includes . . . refusal to make reasonable accommodations in rules, policies, practices, or services when the accommodations may be necessary to allow the person equal opportunity to use and enjoy a housing accommodation or property. . . ." Mont. Code Ann. § 49-2-305(5)(a)(ii).

With regard to service animals, "[a] person with a disability who has a service animal or who obtains a service animal is entitled to full and equal access to all

³ Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

housing accommodations as provided in 49-2-305 and 49-4-212 [(regarding entitlement of full and equal access to housing by blind, visually impaired, and deaf persons)]. The person with a disability may not be required to pay extra compensation for the service animal but is liable for any damage done to the premises by the service animal” Mont. Code Ann. § 49-4-214(2). A “housing accommodation” is defined as “any real property or portion of real property that is used or occupied or is intended, arranged, or designed to be used or occupied as the home, residence, or sleeping place of one or more human beings. The term does not include any single-family residence the occupants of which furnish for compensation not more than one room within the residence.” Mont. Code Ann. § 49-4-203(1). “Service animal” means a dog or other animal individually trained to provide assistance to an individual with a disability.” Mont. Code Ann. § 49-4-203(2).

Here, Myers has alleged discrimination on two bases. First, she alleges she was unlawfully charged pet rent by Schroeder. Second, she alleges she was forced out of the Property by Schroeder because of her children’s disabilities.⁴ There does not appear to be any dispute that Myers’ sons qualify as persons with disabilities. The only questions concern Schroeder’s awareness that the dogs were service animals and her reasons for issuing the March 25, 2017, notice to correct or quit.

A. Pet Rent

With regard to pet rent, there is no evidence Myers was ever charged a \$200.00 pet deposit as she claims. At hearing, Schroeder provided evidence of a June 30, 2016, \$2,075.00 payment to Schroeder's rental company at the time, that did not include a pet deposit. Notwithstanding that nothing in the law prohibits requiring a pet deposit regardless of the circumstances, Myers’ repeated, unsupported insistence that she paid a \$200.00 deposit without any proof of having done so in the face of unrefuted evidence to the contrary rose to the level of intentionally perjurious testimony in the mind of the Hearing Officer. Therefore, both because a pet deposit is not prohibited and also because it does not appear she paid one, Myers is not due any remuneration with regard to a pet deposit. See Mont. Code Ann. § 49-4-214(2) (only prohibiting payment of “extra compensation”—not refundable deposits—for service animals, and allowing for remuneration for damages caused by them (such as could be accomplished through a deposit)).

Myers’ pattern of unreliable testimony continued with her assertions that she informed Schroeder of her dogs’ status as service animals for her sons at the time she

⁴ Although Myers does not allege she suffers from a disability herself and did not bring suit on behalf of her minor children, the definition of “person” includes legal representatives. Mont. Code Ann. § 49-2-101(18).

rented the Property. When she first rented the property, Myers gave the impression to Schroeder that the dogs belonged to her and her daughter. This impression was borne out by the concentration of urine and feces in Myers' daughter's room. Furthermore, it makes no logical sense that Myers would have informed Schroeder of a need to eliminate rent for the dogs as service animals at a time when Myers would not have even known to do so. As Myers herself testified, she knew nothing of laws regarding a prohibition on charging additional rent for service animals until researching the matter at a much later date, and did not ask about an accommodation related to service dogs until March, 2017, at the earliest, after the issues arose that gave rise to the notice to correct or quit.

Furthermore, Myers presented no evidence, aside from her own belated assertions, that the dogs were, in fact, service dogs for her sons. Myers presented a generic letter from Dr. White dated May 22, 2017, which was drafted two months after Myers left the Property. Based on what appears to be Myers' own report to Dr. White, the letter stated W. had a dog for emotional support, and requested he be allowed to have a dog if possible. The letter did not state what "dog" (in the singular) W. had for emotional support, nor did it place any timeframe on when W. had the dog. It also did not address W.'s brother, O., had an emotional support dog or even a need for such a dog.

In light of the foregoing, the evidence shows Myers did not inform Schroeder that she considered the dogs service animals until after receiving the notice to correct or quit in March, 2017, at the earliest, nor did she make any request that her rent be reduced accordingly prior to that time. Schroeder could not fail to accommodate reduced rent for Myers when she was totally unaware of the need for a rent accommodation for the dogs as service animals. Because no pet deposit was paid and Myers moved out before paying additional rent after receiving the notice to correct or quit, there is no remuneration due Myers for paying additional pet rent.

B. March 25, 2017, Notice to Correct or Quit

Schroeder issued a 14-day notice to correct or quit to Myers on March 25, 2017. The notice set forth several different issues with the Property which needed remediation, and required that Myers take the following measures to clean and repair the Property:

Walls in kitchen must be cleaned and urine odor must be remedied. If professional cleaning is required, only dry chemical cleaning by a licensed professional may be performed. Clean up garbage debris at back gate and along fence area. Clean noted areas above specifically kitchen and bathroom. Repainting of living room, hall and closet doors

must be completed by a professional only upon the written approval of landlord following submission of licensing and insurance from said professional at tenant's expense.

(Myers Ex. 3.) Myers alleges that the notice itself, specifically including the requirement that some of the work be professionally done, amounted to disparate treatment because of her sons' disabilities.

A prima facie case of discrimination or retaliation based on disparate treatment generally consist of proof that: (1) the charging party is a member of a protected class or engaged in protected activity; (2) the charging party sought and was qualified for housing made available by the respondent; and (3) the charging party was denied the opportunity, or otherwise subjected to adverse action by respondent in circumstances raising a reasonable inference that charging party was treated differently because of membership in a protected class or because of protected activity. Admin. R. Mont. 24.9.610(2)(a)(I)-(iii). As stated above, there is no dispute that Myers' sons were disabled and therefore members of a protected class. This satisfies the first element of a prima facie case of disparate treatment. Furthermore, Myers was qualified for housing at the Property. She has therefore satisfied the second elements of a prima facie case of disparate treatment. Lastly, based on her allegations concerning her sons' bed wetting and the need for professional cleaning, she has raised a reasonable inference that she was treated differently because of her sons' disabilities. This satisfies the third and final element of a prima facie disparate treatment claim.

"Once a charging party establishes a prima facie case of unlawful discrimination or illegal retaliation based on circumstantial evidence of disparate treatment, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the challenged action." Admin. R. Mont. 24.9.610(3). Schroeder has raised evidence of several legitimate, nondiscriminatory reasons for issuance of the 14-day notice. As an initial point, Schroeder was not aware of any specific disabilities of Myers' sons at the time the 14-day notice was issued. Even if she had been, though, it was reasonable for Schroeder to want the urine odor removed from the Property, regardless of its source. In this case, the urine odor described as needing cleaning did not stem from Myers' sons' room. By all accounts, it came from Z.'s room as well as the bathroom where the dogs were kept at times. Contrary to Myers' assertion, Schroeder did not require professional cleaning of the urine-affected areas. As the 14-day notice stated, "[if] professional cleaning is required, only dry chemical cleaning by a licensed professional may be performed." (Emphasis added.) If the urine odor was so bad that professional cleaning was, in fact, deemed necessary by Myers, it was not unreasonable that Schroeder mandated the use of a professional. The only mandate for professional work concerned repainting of the living room, hall,

and closet doors. It was again reasonable for Schroeder to want these items fixed, and they had absolutely nothing to do with Myers' sons or their disabilities. They instead concerned unrelated, active waste brought upon the Property by Myers without any authorization from Schroeder. Similarly, it was reasonable for Schroeder to request that garbage and debris at the Property be cleaned, there was no connection between the cleaning of garbage and debris and Myers' sons. If there was anything unreasonable, it was Myers' belief that she should not be responsible for cleaning or repairing the items listed by Schroeder.

In light of the foregoing, although Myers established a prima facie case of disparate treatment based on her allegations, Schroeder was successfully able to rebut those allegations. She had legitimate, nondiscriminatory reasons for all of the items in need of cleaning and repair. Schroeder did not require professional work for anything other than the re-painting, which was necessitated by Myers' own actions. And, rather than even attempt to work with Schroeder on any of the repairs (or even complete them), Myers instead vacated the Property for a less expensive rental. Simply put, nothing in the March 25, 2017, notice amounted to disparate treatment.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-510.

2. Myers failed to prove that Schroeder discriminated against her illegally by requiring a pet deposit or charging pet rent. Mont. Code Ann. §§ 49-2-305, 49-4-214.

3. Myers failed to prove that Schroeder engaged in illegal disparate treatment when she issued the March 25, 2017, Notice to Correct or Quit. Admin. R. Mont. 24.9.610.

4. For purposes of Mont. Code Ann. § 49-2-505(8), Schroeder is the prevailing party.

VI. ORDER

Judgment is granted in favor of Schroeder and against Myers, whose complaint is dismissed with prejudice as meritless.

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DATED: this 28th day of March, 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: Tricia Myers, Charging Party, and her attorney, J. Ben Everett; and Pamela Schroeder, Respondent:

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).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard at (406) 444-4356 immediately to arrange for transcription of the record.