

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0069012021:

RONDA CHERRY,)	Case No. 1011-2007
)	
Charging Party,)	
)	ORDER DISMISSING
vs.)	COMPLAINT
)	
STATE OF MONTANA, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	

* * * * *

On May 11, 2007, counsel for the parties filed a "Stipulation for Dismissal" (Stipulation) requesting that the hearing examiner conclude administrative proceedings and dismiss Charging Party, Ronda Cherry's complaint. The parties assert that this case cannot be fully and fairly heard in three days (as the hearing is currently scheduled) or by June 25, 2007, the date counsel for the parties believe the 12 months in which the hearing must be held expires.

The Stipulation also asserts that over 20 witnesses and 1250 exhibits may be offered at the hearing in this matter, yet neither party has asked for additional days for the hearing prior to the filing of the Stipulation. While the Montana Department of Transportation (MDT) did file a motion for additional days in January, that motion was granted and provided for an additional day for the hearing.

The Stipulation also discloses that counsel for Cherry has failed to conduct any discovery in this matter. The Stipulation further discloses that counsel for the Cherry has failed to conduct an agreed upon review of MDT personnel files due to "press of business, schedules and illness." When counsel for Cherry took on this case various deadlines were extended to allow counsel additional time to prepare for hearing. Yet, counsel failed to take advantage of the additional time. Counsel for Cherry submitted a motion to continue based on discovery of a new witness and limited time on the case. That motion was granted and the hearing was continued until the last three possible days a hearing could be held. Charging Party's complaint

was filed on June 6, 2006. The hearing had to be concluded by June 6, 2007 pursuant to Mont. Code Ann. § 49-2-509.

The Stipulation also states that MDT agrees to not “not raise as a procedural bar to the district court’s jurisdiction a failure of the Charging Party to exhaust administrative remedies or comply with the provisions of Mont. Code Ann. Title 49, Chapter 2.” This agreement is made in spite of the fact that it appears that Cherry failed to reasonably pursue her administrative remedies. The stipulation does not contemplate the possibility that the department may intervene in any district court proceeding and raise the exhaustion issue. The Stipulation likewise does not contemplate that the district court may raise the failure to exhaust sua sponte.

The Human Rights Act clearly requires parties to comply with orders of the hearing examiner and to make a good faith effort to resolve the matter at the administrative level. The parties in this matter have not made that effort. Instead they have combined their efforts to avoid an administrative hearing, preferring to seek their remedies and defenses in district court.

The hearing examiner cannot force the parties to participate in the hearing currently scheduled for June 4-6, 2007. It is foreseeable that the parties could raise a number of objections at hearing that might prevent it from going forward or they could present their cases in a manner that would prevent the hearing from being completed in the allotted time. The hearing examiner therefore concludes that in the peculiar circumstances of this case, the department cannot hold a hearing within 12 months after the filing of the complaint. The department will continue to do everything in its power to ensure that the intent of the Human Rights Act is fulfilled by providing contested case hearings as the exclusive remedy for complaints of discrimination.

IT IS THEREFORE ORDERED THAT:

1. The contested case hearing in this matter is vacated, and
2. Complaint # 0069012021 is dismissed.

DATED: May 16, 2007



David A. Scimm, Hearing Examiner
Hearings Bureau, Montana Department of Labor and Industry

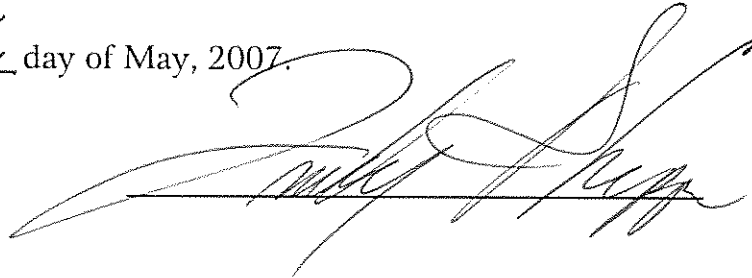
CERTIFICATE OF MAILING

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, and addressed as follows:

ROBERT J WHELAN
DAVID L VICEVICH
JOSEPH VICEVICH & WHELAN
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BUTTE MT 59701

SUSAN J REBECK
DEPT OF TRANSPORTATION
LEGAL SERVICES
PO BOX 201001
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DATED this 14 day of May, 2007.

A handwritten signature in black ink, appearing to read "Susan J. Rebeck", written over a horizontal line.

cc: Marieke Beck