

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

Case No.: 0059011536

EARLE NEVINS,

Charging Party,

-v-

LES SCHWAB TIRE OF MONTANA,

Respondent.

ORDER

INTRODUCTION

On May 13, 2005, Charging Party, Earle Nevins (Nevins) filed a retaliation complaint against his former employer, Les Schwab (Schwab), with the Department's Human Rights Bureau (Department). Following an informal investigation, the Department found "cause" to believe that a preponderance of the evidence supported Nevins's allegations of unlawful discrimination. After attempts at conciliation failed, the Department certified the matter for hearing before the Department's Hearings Bureau.

On November 21, 2005, Les Schwab Tire of Montana (Schwab) filed "Respondent's Objection to Department's Refusal to Dismiss Complaint under A.R. M. 24.9.1714" (Objection to Refusal to Dismiss). In briefing, Schwab asserted that Charging Party, Earle Nevins (Nevins) had failed to state a *prima facie* case of discrimination based on retaliation for engaging in a protected activity and therefore the discrimination complaint "must fail." *Schwab Brief in Support at 7*. On December 16, 2005, Schwab filed an additional objection to the Department's Certification of Case for Hearing. In this objection, Schwab asserted that the Human Rights Bureau improperly certified the above-entitled case for hearing. The Commission considered Schwab's objections following oral argument on January 23, 2006.

DECISION

As noted in briefing and argument, Schwab submitted its objection to the Department's refusal to dismiss pursuant to the Commission's administrative rules. The administrative rule that allows a party to proceed with an objection to the Department's refusal to dismiss provides the following:

OBJECTIONS TO DISMISSAL OF COMPLAINT OR REFUSAL TO DISMISS COMPLAINT (1) A party who is dissatisfied with a department decision to dismiss a complaint or to refuse to dismiss a complaint **pursuant to 49-2-509, MCA**, may seek commission review of the decision by filing a written objection within 14 days after the decision is served. . .

Admin. R. Mont. 24.9.1714(1)(emphasis added)

As noted by the rule, the Commission considers a refusal to dismiss a complaint "pursuant to 49-2-509, MCA." The statute states as follows:

Conclusion of complaint -- filing in district court. (1) Except as provided in subsection (2), the department shall, at the request of either party, conclude the administrative proceedings if:

(a) the department has completed its investigation of a complaint filed pursuant to 49-2-305; or

(b) 12 months have elapsed since the complaint was filed.

(2) The department may not refuse to conclude the administrative proceedings unless:

(a) the party requesting the conclusion of the administrative proceedings has waived the right to request filing in the district court;

(b) more than 30 days have elapsed since service of notice of hearing under 49-2-505, unless the department fails to schedule a hearing to be held within 90 days of service of notice of hearing; or

(c) the party requesting conclusion of the administrative proceedings has unsuccessfully attempted through court litigation to prevent the department from investigating the complaint.

Mont. Code Ann. § 49-2-509.

Here, Schwab is not asserting that the Department refused to dismiss its complaint pursuant to Section 49-2-509(1)(a) or (b). The underlying complaint for discrimination is

not a housing case filed pursuant to Section 49-2-305. *Mont. Code Ann. § 49-2-509(1)(a)*. Furthermore, the underlying complaint was filed on May 13, 2005, and therefore, 12 months have not passed. *Mont. Code Ann. § 49-2-509(1)(b)*. The Commission finds that Schwab's objection to the refusal to dismiss (which was arguably an interlocutory decision of the Department) does not satisfy the requirements of Section 49-2-509.¹

Additionally, the Commission notes the provisions of the Montana Human Rights Act (MHRA) provide the exclusive remedy for acts constituting discrimination (under the MHRA). *Mont. Code Ann. § 49-2-509(7)*. Under the statutory framework, once a complaint is filed it "shall" be investigated by the Department's Human Rights Bureau. *Mont. Code Ann. § 49-2-504(1)(a)*. As part of the administrative process, the Department "shall" make a finding on the merits of that complaint. *Mont. Code Ann. § 49-2-504(4)*. If the Department determines that a preponderance of the evidence supports the allegations of unlawful discrimination then the Department "shall" attempt to conciliate the matter. *Mont. Code Ann. § 49-2-504(1)(a)*. If the informal efforts to eliminate the discrimination are unsuccessful, then the Department "shall" hold a hearing on the complaint. *Mont. Code Ann. § 49-2-505*. Here, Schwab has failed to exhaust the appropriate administrative remedy.

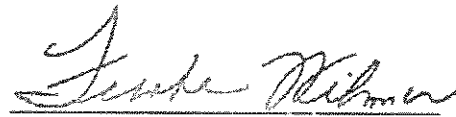
In conclusion, the Commission finds that Schwab's Objection to Refusal to Dismiss is not properly before the Commission pursuant to Section 49-2-509. Schwab's argument that Nevins failed to establish a prima facie case of retaliation is similar to a Rule 12(b)(6) Motion to Dismiss provided for in the rules of civil procedure. If Schwab

¹ Currently, only the provisions for the enforcement of housing discrimination complaints allow both the Charging party and the Respondent to "elect" out of the Department's hearings process. *Mont. Code Ann. 49-2-510(4)(a)*.

chooses, it will have the opportunity to file such a dispositive motion before the Department's Hearings Bureau.

IT IS HEREBY ORDERED, that Les Schwab Tire of Montana's objection to the refusal to dismiss is **overruled**. Having ruled on the initial objection, Schwab's objection to the Department's certification of this matter for hearing is moot.

DATED this 3/5th day of January 2006.


Chair Franke Wilmer
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 31st day of January 2006.

SCOTT HAGEL & DANIEL JOHNS
CROWLEY HAUGHEY HANSON TOOLE & DEITRICH
PO BOX 759
KALISPELL MT 59903-0759

SANTANA KORTUM-MANAGHAN
MANAGHAN & KORTUM-MANAGHAN LAW FIRM
PO BOX 938
KALISPELL MT 59903

MARIEKE BECK
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF LEGAL SERVICES
PO BOX 1728
HELENA MT 59624-1728


Montana Human Rights Bureau