DA 20-0353

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 48N

EDWARD ZABROCKI,

Petitioner and Appellant,

v.

THE TEACHERS' RETIREMENT SYSTEM
OF THE STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. DDV-2018-1009
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Scott M. Svee, Erin M. Lyndes, Jackson, Murdo & Grant, P.C., Helena, Montana

For Appellee:

Denise R. Pizzini, Teachers' Retirement System, Helena, Montana

Submitted on Briefs: January 20, 2021

Decided: February 23, 2021

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of non-citable cases published in the Pacific Reporter and Montana Reports.

¶2 Edward Zabrocki appeals from the order entered by the First Judicial District Court, Lewis and Clark County, denying his petition for judicial review and affirming the Final Decision and Order entered by Board of the Teacher Retirement System (TRS or Board). We affirm and address two issues: whether TRS erred by 1) determining Zabrocki failed to terminate all TRS-reportable employment prior to receiving TRS retirement benefits, and 2) concluding the action was not barred, nor the recovery limited, by the applicable statute of limitation.

¶3 Yellowstone Academy Elementary School District #58 (School District) is a public elementary school district serving grades K-8. Its boundaries trace the Yellowstone Boys and Girls Ranch (Ranch) property. The School District is administered by a three-member Board of Trustees.[1] A public high school is not operated on the Ranch, but, rather, a privately accredited high school (High School) provides educational services for students in grades 9-12. During the pendency of this matter concerning Zabrocki's employment

[1] The Hearing Officer found that the Ranch "compensated the School District to supplement the education" provided by the District.

status, educational staff working in the schools on the Ranch, regardless of how much time they provided for the High School, were reported to TRS as full-time employees of the School District.

¶4 Zabrocki began his career in public education in 1982, and was employed as Superintendent of the School District beginning in 2001. In this role, Zabricki reported directly to the Board of Trustees, although he also discussed all proposals with the Ranch. The Hearing Officer found he also spent some amount of time "providing services to grades nine through twelve." Zabrocki executed an administrator's contract with the School District annually for the years he was employed as Superintendent. During this time Zabrocki was reported to the Office of Public Instruction (OPI) as the full-time Superintendent of the School District, and to TRS as a full-time employee of the School District, which necessarily included the time he spent providing services to the High School.

¶5 Prior to ending his role as Superintendent, Zabrocki began delegating administrative tasks, including required OPI filings, to the School District's principal. On July 18, 2007, Zabrocki submitted a letter of resignation as Superintendent to the Board of Trustees. On July 23, 2007, TRS received Zabrocki's notarized Application for Retirement Allowance, which certified he would not be returning to a full-time position reportable to TRS the ensuing year, and that his last date of employment would be July 31, 2007, crediting him with just over 25 years of TRS reportable service. Earlier, Zabrocki had submitted a "termination pay irrevocable election," leading TRS to calculate his estimated retirement

benefits, and to provide notification that a "retired member" was defined, in part, as "a TRS member who has terminated all positions eligible to participate in the TRS[.]" A subsequent notice of this requirement was also given to Zabrocki by TRS. TRS processed Zabrocki's application for retirement benefits effective August 1, 2007, and, on the final business day of that month, issued to Zabrocki his first monthly retirement benefit payment, which continued thereafter.

¶6 Prior to his retirement date, Zabrocki executed a contract to be employed, effective August 1, 2007, as the Ranch's Director of Education for the High School, a position that did not exist prior to his arrival at the Ranch. Zabrocki was not thereafter reported to TRS by either the School District or the Ranch as a TRS employee. Zabrocki received his salary from the Ranch, which also withheld all required taxes and deductions and issued W-2 forms to Zabrocki. However, the Ranch contracted with the School District for reimbursement of the entirety of Zabrocki's salary and benefits. As Director of Education, Zabrocki continued to perform some of the same functions he had performed as Superintendent. During the fiscal years of 2008 through 2011, the School District reported Zabrocki as a 0.5 full-time-equivalent (FTE) district superintendent to OPI, and no other individual was reported as superintendent for the School District.

¶7 Following receipt of a report, in September 2011, from an individual concerned about the School District's apparent reimbursement of Zabrocki's full salary, TRS initiated an investigation regarding the reportability of Zabrocki's employment and his eligibility for retirement benefits. On October 6, 2011, three days after being notified of TRS'

investigation, the Ranch placed Zabrocki on administrative leave. Following an investigation, TRS issued a Final Staff Determination on July 12, 2012, which concluded that Zabrocki had not actually terminated employment with the School District prior to receiving TRS retirement benefits.

¶8 Zabrocki requested a contested case hearing, which was conducted by a Hearing Officer on May 3-4, 2017. In the Findings of Fact, Conclusions of Law, and Recommended Order issued on February 5, 2018, the Hearing Officer found that Zabrocki had never terminated his TRS-reportable employment and therefore had been employed in a TRS-reportable position while receiving TRS retirement benefits. The Hearing Officer also concluded that TRS' recovery action was not barred by the statute of limitations. In its August 9, 2018 Final Decision, the TRS Board adopted the Hearing Officer's recommended order for all substantive purposes, concluding that Zabrocki failed to terminate all TRS-reportable positions before receiving retirement benefits. Zabrocki filed a petition for judicial review in September 2018. The District Court denied the petition, and affirmed the Board's Final Decision. Zabrocki appeals.

¶9 A district court's review of an agency's findings is limited to a review of the record. Section 2-4-704(1), MCA. A district court may not substitute its judgment for that of the agency for determining weight of the evidence for questions of fact, but it may reverse or modify the agency decision if substantial rights have been prejudiced. Section 2-4-704(2), MCA. This standard of review applies not only to the District Court's review of the

agency's decision but to our subsequent review of the District Court's decision. *Ostergren v. Dep't of Revenue*, 2004 MT 30, ¶ 11, 319 Mont. 405, 85 P.3d 738.

¶10 "We review an order from a district court acting in an appellate capacity to determine whether the district court reached the correct conclusions under the appropriate standards of review." *In re Transfer Terr. from Poplar Elem. Sch. Dist. No. 9 to Froid Elem. Sch. Dist. No. 65*, 2015 MT 278, ¶ 10, 381 Mont. 145, 364 P.3d 1222. Statutory interpretation and application and all other legal conclusions are questions of law subject to de novo review. *Dick Irvin Inc. v. State*, 2013 MT 272, ¶ 18, 372 Mont. 58, 310 P.3d 524; *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 17, 387 Mont. 202, 394 P.3d 159.

¶11 To be eligible to draw TRS retirement benefits, one must "terminate[] employment in all positions" which are eligible for TRS active membership. Section 19-20-801, MCA (2007). Pursuant to § 19-20-302(1)(a), MCA, a person who is a district superintendent must be an active member of TRS. Active membership by an employee requires employment in the prescribed eligible capacity for at least thirty days during a given fiscal year and to have "the compensation for the [employee's] creditable service totally paid by an employer." Section 19-20-302(3), MCA; *see also* § 19-20-101(7), MCA (defining "employer" to include "any [] agency or subdivision of the state" that employs persons designated for the retirement system and no private sector employers).

¶12 Zabrocki contends he was employed by the Ranch, a private entity, and not the School District, during his time as the Ranch's Education Director. He argues he could not be employed by the School District, and thus be eligible for TRS, because he was an

employee in the private sector, and more, was employed by a school with sectarian goals. However, the realities of Zabrocki's position at the Ranch indicate otherwise, regardless of potential constitutional issues. While technically employed by the Ranch, Zabrocki continued to perform superintendent functions and was involved in administrative matters at both the private High School and the School District. The School District continued to report Zabrocki to OPI as a half-time superintendent for the fiscal years at issue, and Zabrocki's compensation, while paid by the Ranch, was completely funded through reimbursement from the School District. Ranch employees involved in education, whether at the K-8 Yellowstone Academy or the High School, were regularly reported to TRS, although Zabrocki was not. The reality reflected in the record is that, for purposes of this proceeding, Zabrocki, while technically an employee of the Ranch, remained in a reportable TRS position while serving as the Ranch's Education Director. "The law respects form less than substance." Section 1-3-219, MCA; *see also Epletveit v. Solberg*, 119 Mont. 45, 60, 169 P.2d 722, 730 (1946) ("Equity will not permit mere form to conceal the real position and substantial rights of parties"). Consequently, TRS correctly concluded that Zabrocki's employment for the School District did not terminate in August 2007, and, until October 2011, he improperly received TRS benefits while being employed in a TRS-reportable position.[2]

[2] Zabrocki argues he should have been granted a greater opportunity to challenge the legality or constitutionality of TRS' provision of public retirement benefits to persons employed by the Ranch. However, without regard to the legality of the structure of employee compensation implemented here, the issue in this proceeding is whether Zabrocki drew retirement benefits from TRS while also maintaining employment in a TRS-reportable position.

¶13 We next consider whether TRS was barred from initiating proceedings by the statute of limitations, or was limited in its recovery of the retirement benefits improperly paid to Zabrocki. It is uncontested that the applicable limitation period is two years. *See* § 27-2-211(1), MCA. The general rule in Montana is that the limitation period begins and the claim accrues "when all elements of the claim exist or have occurred." *Thieltges v. Royal All. Assocs.*, 2014 MT 247, ¶ 15, 376 Mont. 319, 334 P.3d 382 (citation omitted). This "accrual rule" has been codified and "[u]less otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation." Section 27-2-102(2), MCA. The Legislature has provided an exception to the accrual rule known as the "discovery rule," which "protects plaintiffs against the harsh results of having their claims barred before they even know they exist." *McCormick v. Brevig*, 1999 MT 86, ¶ 100, 294 Mont. 144, 980 P.2d 603. Under the exception, the period of limitation does not begin until "the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered" so long as "the facts constituting the claim are by their nature concealed or self-concealing" or "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." Section 27-2-102(3), MCA.

¶14 Citing *Thieltges*, Zabrocki argues the statute of limitations cannot be tolled, and thus expired prior to TRS' initiation of the proceeding, because the relevant facts could have

been discovered through public records and due diligence, noting that the School District reported Zabrocki as a 0.5 FTE superintendent to OPI for the fiscal years 2008-2011. In *Thieltges*, we refused to apply the discovery rule because whether someone was a licensed securities broker was a matter of public record that "could readily have [been] discovered" in the exercise of due diligence. *Thieltges*, ¶ 19. Zabrocki notes that TRS can and does review records submitted to OPI as part of its administration of the retirement system and, as in *Thieltges*, TRS failed to exercise due diligence to learn that Zabrocki was being reported as an employee.

¶15 However, this case involves more than a mere failure to diligently conduct a search of the public record. Zabrocki submitted documents directly to TRS, certifying he would not be returning the ensuing year to a full-time position reportable to TRS, and that his last date of TRS-employment would be July 31, 2007. TRS accepted and acted upon the assurances given by Zabrocki in the documents. Further, the Hearing Officer found that Zabrocki was never reported to TRS as an employee of the School District after 2007, despite the requirement to do so, leaving only the reports to OPI, which are not regularly monitored by TRS. Such notice to TRS, had it been provided as required, could well have placed TRS on notice to conduct a "further timely inquiry." *Thieltges*, ¶ 19. However, under these facts, it exceeds what "readily could have [been] discovered" by due diligence, *Thieltges*, ¶ 19, to require TRS, lacking in its own records the notice legally required, to also have continuously monitored OPI records in order to confirm that no recipient of TRS retirement benefits was being simultaneously reported as being employed in a TRS

position. We thus conclude that the discovery rule was properly applied by TRS, and that TRS timely initiated this proceeding.

¶16 The Hearing Officer also concluded that, given the application of the discovery rule because of concealment, "TRS can recoup all overpayments made to Mr. Zabrocki from August 1, 2007 through his date of termination of October 2011." This conclusion is consistent with our reasoning when applying the discovery rule in continuing violation cases, such as *Anderson v. BNSF Ry.*, 2015 MT 240, 380 Mont. 319, 354 P.3d 1248:

> Statutes of limitations "characteristically embody a policy of repose[,] . . . foster the elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Lozano v. Montoya Alvarez*, [572 U.S. 1, 14], 134 S. Ct. 1224, 1234, 188 L. Ed. 2d 200 (2014) (internal quotations and citations omitted). Where a plaintiff is alleging that the defendant negligently caused further injury within the limitations period, none of the interests the statute of limitations is meant to protect are implicated.

Anderson, ¶ 42 (emphasis added).

¶17 Though commonly associated with workplace harassment and discrimination claims, courts have extended the continuing violation doctrine to other continuous, tortious wrongs. *See generally* Kyle Graham, *The Continuing Violations Doctrine*, 43(2) Gonz. L. R. 271 (2007). We have likewise explained the variants of the doctrine. *See Anderson*, ¶ 24 (one application is "called a 'pure' continuing tort theory and states that so long as any of the negligent conduct occurred within the limitations period, the plaintiff may recover damages for all of the negligent conduct, even the portion of it that occurred outside the limitations period"); *see Benjamin v. Anderson*, 2005 MT 123, ¶ 43, 327 Mont. 173,

112 P.3d 1039 (citing *AMTRAK v. Morgan*, 536 U.S. 101, 117, 122 S. Ct. 2061, 2074 (2002)) (discussing Title VII hostile work environment claim).

¶18 Although a tort claim was not filed against Zabrocki here, his concealment continued over time and enabled him to receive continuous wrongful payments. Each wrongful retirement benefit received by Zabrocki while he was employed in a TRS position was a continuation of the original, incorrect certification that his TRS employment had been terminated. To limit the recovery to the two-year period prior to discovery of the injury would be to grant Zabrocki an "open-ended license to continue" his wrongful conduct with knowledge that doing so will not increase his penalty. *Page v. United States*, 729 F.2d 818, 823 (D.C. Cir. 1984); *see Taylor v. Meirick*, 712 F.2d 1112, 1119 (7th Cir. 1983). Applying the statute of limitations to circumscribe recovery of the improper payments where the discovery doctrine properly tolled the statute of limitations because of concealment is a case where "none of the interests the statute of limitations is meant to protect are implicated." *Anderson*, ¶ 42. Therefore, we conclude that TRS properly required recoupment of all improper payments from August 1, 2007.

¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶20 Affirmed.

/S/ JIM RICE

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR