IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0104

ERIC HATHAWAY,

Plaintiff and Appellant,

vs

ZOOT ENTERPRISES, INC.,

Defendant and Appellee.

APPELLANT'S BRIEF

On Appeal from the
Montana Eighteenth Judicial District Court, Gallatin County
The Honorable Rienne H. McElyea Presiding

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Eric Hathaway ("Eric") hereby appeals from two district court decisions: Order Re: Motions for Summary Judgment dated February 8, 2021 (misdated 2020) (the "***Summary Judgment Order***") and Order Re: Plaintiff's Motion to Amend Complaint dated February 8, 2021 (the "***Order Denying Leave to Amend***"). Copies of the Orders are attached as *Appendix A* and *B,* respectively. (Case Register Report ("CR") 95 and 94, respectively).

I. STATEMENT OF THE ISSUES

Summary Judgment Order - Did the district court err by dismissing Eric's wrongful discharge claim as a matter of summary judgment for a failure to exhaust an internal grievance procedure when his employer, and all of its decision makers, unequivocally communicated to him that his termination was final?

Order Denying Leave to Amend - Did the district court err when it denied Eric's motion for leave to amend his complaint to add a discrimination claim as futile based upon contested facts?

II. STATEMENT OF THE CASE

Appellee Zoot Enterprises, Inc. ("Zoot") hired Eric in December of 2015 to be its director of marketing and thereafter gave him several raises.

On June 24, 2019, Zoot terminated Eric at a meeting attended by his supervisor, the president of Zoot and the vice-president of human resources (collectively, the "Decision Makers"). At the termination meeting, Zoot

specifically told Eric: "Our decision is final". The Decision Makers represent 100% of Zoot personnel that could decide Eric's fate.

At the conclusion of the meeting, Zoot gave Eric a letter advising him that he was terminated, as well as seven other documents including one of its employment policies. The letter itself made no reference to any grievance procedure nor did Zoot advise Eric of any grievance procedure during the meeting.

On July 17, 2019 Eric brought a wrongful discharge claim against Zoot in the Eighteenth Judicial District Court claiming, in part, it had fired him without good cause in violation of Montana's Wrongful Discharge from Employment Act §39-2-901 et seq. MCA. *Complaint,* CR 1. While his civil action was pending, Eric filed an age discrimination claim against Zoot on December 10, 2019 with Montana's Human Rights Bureau (the "HRB"). *Motion to Amend,* CR 66 at Ex. F. Eric could not bring his discrimination claim in the civil action until the HRB ruled on his claim. The HRB issued Eric an adverse decision on June 9, 2020 (*id.* at Ex. H) and two days later, on June 11, 2020, Eric filed a motion for leave to amend his Complaint to add a discrimination claim, as well as make other amendments. *Id*.

On June 2, 2020, Zoot moved to dismiss Eric's Complaint as a matter of summary judgment claiming (a) it had good cause and (b) Eric failed to exhaust its internal grievance procedures. Zoot also opposed Eric's motion to amend as being untimely and futile. *Zoot's Motion for Summary Judgment*, CR 59. On June 5,

2020, Eric moved to dismiss Zoot's third affirmative defense (failure to exhaust) as a matter of summary judgment. *Hathaway's Motion for Partial Summary Judgment,* CR 64. On October 14, 2020 the district court held a hearing on the parties' pending motions, including the cross motions for summary judgment. *Order Setting Hearing*, CR 87.

On February 8, 2021, the Court issued its Summary Judgment Order dismissing Eric's Complaint for failure to exhaust an internal grievance procedure. *Appendix A.* It did not address the conflicting facts as to whether or not there was good cause for his termination. Also, on February 8, 2021, the district court issued its Order Denying Leave to Amend on the grounds that it would be futile. *Appendix B.* The district court issued its judgment on February 12, 2021 and Eric appealed both of the district court's orders on March 1, 2021.

III. STATEMENT OF THE FACTS

A. Hiring Through Termination

Eric grew up in Bozeman and, after receiving advanced degrees, returned to Bozeman with custody of his two children as a single father. CR 69 at 4. Zoot hired Eric in December of 2015 to be the director of marketing at the rate of $115,000 per year. *Appendix A* at 1 and *Eric's Opposition*, CR 69 at 4. The following year, Zoot elevated him to vice-president of marketing and gave him a salary increase. *Appendix A* at 1 and *Eric's Opposition* CR 69 at 4.

Eric's supervisor was Travis Tuss ("Tuss"), the executive vice-president of sales and marketing, who reported to Tony Rosanova ("Rosanova"), Zoot's president, who in turn reported to Zoot's CEO and owner, Chris Nelson ("Nelson"). *Appendix A at 1* and *Eric's Opposition* CR 69 at 3.

There are factual disputes regarding Eric's performance, with his personnel file reflecting both positive and negative reviews and putative tension with his superiors. *Appendix A at 1*. Nevertheless, it is undisputed that the marketing department under Eric's leadership was the only department at Zoot that was meeting 100 percent of its deliverables and it was doing so under budget. *Eric's Opposition* CR 69, Ex. A (*Zoot's Rule 30(b)(6) Deposition*) at 175:10-21.

During his tenure, Zoot gave Eric two raises: September of 2016 and September 2018. *Id.* at 4 and at Ex F. According to Zoot, it gives employees raises for the purpose of rewarding acceptable behavior and retaining the employee. *Id.*, Ex. A (*Zoot's Rule 30(b)(6) Deposition*) at 74:9-20. Eric was a well-liked, transparent, productive, efficient, respectful employee who was fun to work with. *Id.* Ex J at 9-12 and Ex. K at 9 and 18 (*Deposition of co-workers*).

Following Eric's raise in September of 2018 and sending him as a Zoot representative to a conference in 2019, Zoot identified two policies it claimed Eric violated that gave rise to his termination: (1) he allegedly spent more than $75 on a single meal while on a multiday trip for Zoot and (2) he used his own vehicle,

rather than renting a vehicle, to attend a Montana Chamber of Commerce meeting in Big Sky. *Eric's Opposition,* CR 69 at 6-9 and *Eric's Opposition* CR 69, Ex. D (*Eric's Aff.*), ¶ 7. Eric had been told he could average the meals over a trip's total time frame; and, with respect to driving his own vehicle, he was not staying overnight in Big Sky for the meeting Zoot wanted him to attend, but rather simply returning to his home in Bozeman. *Id.* There was no policy dictating when (i.e. how far the travel must be) before a Zoot employee was required to rent a car as part of his job functions - e.g. no one had to rent a car to meet for lunch in Bozeman or to travel to work. *Id.* at 8-9. A copy of Zoot's personnel policies were provided to the district court and the travel policy was §2.1.21. CR 69, Ex. L ("Zoot's Policies").

Eric disputed the accuracy of those parts of his reviews by Tuss that were negative with specific facts demonstrating the inaccuracy of the same. *Eric's Aff. Appendix C,* ¶¶12-21.

Given the district court did not reach the factual question of whether or not there was good cause to terminate Eric, no additional information about his performance is provided here.

B. Termination

On June 24, 2019 Tuss called Eric into a room with Zoot's president, Rosanova and its vice-president of human resources ("HR"), Jordan Komoto

("Komoto"). It was at this meeting that Zoot terminated Eric's employment, as reflected in a statement read to him at the meeting. *Appendix A* at 1; *Hathaway Affidavit, Appendix C*, ¶22. A copy of Zoot's statement to Eric was produced and its final sentence made Zoot's position unequivocal: "Therefore, today will be your last day at Zoot. **Our decision is final**." *Eric's Opposition*, CR 69, Ex. N, attached as *Appendix D* (emphasis added).

Every Zoot employee who was superior to Eric, and who might have had a say in his termination, participated in, and approved of, terminating Eric before the June 24, 2019 meeting, including the head of HR and Zoot's owner (Nelson). *Id.*, Ex. A (*Zoot's Rule 30(b)(6) Deposition*) at 18:6-20:9; 34:24-35:6 and *Appendix A* at 2. After Zoot terminated Eric, it handed to him a letter dated June 24, 2019 (the "Termination Letter"). *Zoot's Motion for Summary Judgment*, CR, 62 at Ex. 21.

On the same day he received the Termination Letter, Zoot also gave Eric seven (7) additional documents: (1) a proposed severance agreement, (2) information on loss of benefits, (3) Zoot's Policies, 2.1.6 entitled "Resolving Differences Policy"; (4) a page on finding a job; (5) information on unemployment insurance; (6) a copy of his confidentiality agreement; and (7) a copy of Zoot's "Code of Conduct". *Id.* A copy of the Termination Letter and the 7 documents provided to Eric is attached as *Appendix E.*

The Termination Letter stated Eric was being fired for documented "policy violations", though no particular policy violation was identified nor was any particular violation identified during the meeting. *Id.* and *Eric Aff,, Appendix C,* ¶*22.* While the Termination Letter made specific mention of Eric's confidentiality agreement and noted it was enclosed, it made no mention of a grievance procedure. CR, 62 at Ex. 21.

Following his firing, Zoot escorted Eric out of the building and he was not permitted to retrieve any documents. CR 69, Ex. A (*Zoot's Rule 30(b)(6) Deposition*) at 36:14-37:3 and 134:5-136:16. On June 28, 2019, Eric, through counsel wrote Zoot notifying it that Eric believed the termination was wrongful and requested a copy of Eric's personnel file. CR 69, Ex. O. Zoot refused to provide any documents. *Id.*, Ex. P.

C. Facts Relevant to Discrimination Claim

While his civil action was pending, Eric filed an age discrimination claim against Zoot on December 10, 2019 with the HRB and stated that he was replaced by someone more than 20 years younger. *Motion to Amend,* CR 66 at Ex. F. Following an investigation by the HRB, it notified Eric on June 9, 2020 that the HRB had not found reasonable cause to believe discrimination had occurred. *Id.*, Ex H.

In his proposed amended complaint, Eric alleged all of the essential elements of an age discrimination claim. He alleged he was in a protected age group (53 years old); he was performing his job satisfactorily; he was discharged, and he was replaced by someone substantially younger, with less experience and at a lower salary. (CR 66 , Ex. A (*draft Amended Complaint*), ¶¶15 and 27; ¶¶7 and 28; ¶¶16 and 29. Eric could not have brought his discrimination claim before the district court until the HRB issued its right to sue letter. *See* §49-2-512 (1) (3), MCA.

The district court improperly denied Eric's motion for leave to amend based upon disputed facts stating the amendment would be futile. *Appendix B* at 3-5.

IV. STATEMENT OF THE STANDARD OF REVIEW

This Court reviews an order granting summary judgment based on the same criteria applied by the district court pursuant to Rule 56, M.R.Civ.P. *Motarie v. N. Montana Joint Refuse Disposal Dist.,* 274 Mont. 239, 242, 907 P.2d 154, 156 (1995)(internal citations omitted).

The standard of review with respect to the Court's denial of leave to amend will be based upon an abuse of discretion standard. *Aldrich & Co. v. Ellis*, 2002 MT 177, ¶ 12, 311 Mont. 1, 52 P.3d 388.

V. SUMMARY OF THE ARGUMENT

Summary Judgment Order: Zoot expressly told Eric its decision to terminate his employment was final and all Zoot employees that could review the decision had joined in that communication. Zoot's actions thereafter reinforced that position. The district court erred in dismissing Eric's wrongful discharge claim for failure to exhaust an internal grievance procedure. The law does not, and did not, require Eric to engage in a meaningless act. This Court has long recognized that courts will not foolishly bind themselves to the plain language of a statute where doing so would compel an odd result. The district court erred in failing to recognize and apply the uncontested facts to §39-2-911, MCA, compelling an odd result. The *Summary Judgment Order* should be reversed, and the case remanded.

Order Denying Leave to Amend: In light of the HRB's exclusive jurisdiction, Eric timely moved to amend his complaint to add his discrimination claim and alleged all necessary elements of the claim. Instead of using the motion to amend standard under Rule 15, the district court abused its discretion when it improperly resolved disputed material facts and found the discrimination claim would be futile. Eric's proposed amended complaint sets forth the necessary and essential allegations to state such a claim for age discrimination. Under Rule 15, his *Motion to Amend* should have been granted. The *Order Denying Leave to Amend* should be reversed with instructions that leave to amend be granted.

VI. ARGUMENT

A. Zoot Never Had An Internal Grievance Procedure For Eric

Section 39-2-911(2), MCA provides that if an employer maintains written internal procedures under which an employee may appeal a discharge within its organizational structure, the "employee shall first exhaust those procedures prior to filing action …. The employee's failure to initiate or exhaust the "**available** internal procedures is a defense to an action brought under this part…" (emphasis added).

In order to invoke this defense, the employer must "within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures **and** shall supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2). §39-2-911(3), MCA (emphasis added).

The district court determined that Zoot's policy 2.1.6 entitled "Resolving Differences Policy" ("Policy 2.1.6") created an internal grievance procedure that applied when Zoot terminated Eric. *Appendix A* at 3-4. Policy 2.1.6 includes a statement advising Zoot employees that "[i]n the ordinary course of business, you may feel dissatisfied with an aspect of your employment and request corrective action." *Appendix C*, §2.1.6 "Policy Statement". After listing types of actions that may give rise to a complaint, albeit not exhaustive, the policy goes on to state:

> Filing a complaint is voluntary. Failure to file a complaint doesn't mean that you agree with the action or the circumstances that resulted in the action. However, failing to file a grievance in a timely manner may act as a waiver by you to pursue any future legal or equitable proceedings or remedies available as a result of such complaints.

Id.

Following the foregoing statements, Policy 2.1.6 advises employees that if they have completed their probationary period, they "should follow the guidelines below to **resolve difference**:" (emphasis added). Thereafter, there are a series of recommendations – A through G - that the district court cites in its Summary Judgment Order. *Appendix A* at 4. They begin with a recommendation that the employee talk to their immediate manager, but if the "concern" is about the manager, to talk to the HR department. *Id*. and Policy 2.1.6 (*Appendix E* and CR 69, Ex L). Eric had twice tried contacting human resources to make complaints about his superior, but the vice-president of HR was too afraid of his own job to take such a complaint. *Appendix C, Eric Aff.* ¶24.

The next step describes to the employee what a complaint should include, if an employee choses to complain. *Appendix A* at 4 and *Appendix E.* Following that recommendation is the only reference in Policy 2.1.6 to termination; it provides: "Complaints for corrective action and terminations must be filed within five days of the action.". *Id.* If an employee decides to complain, Zoot represents the employee's manager or HR will investigate "your concerns" and communicate

a decision, but if the employee is not satisfied with how the problem is resolved, **then** the employee should put the complaint in writing to be resolved by the HR department. If the employee would like to appeal "the ruling" of the director of human resources, then such an appeal is made to the president (Rosonova) and his decision is "final and binding". *Id.*

As reflected in the record, Eric's troubles were with the inaccurate and baseless claims and allegations made by his supervisor Tuss and Zoot's president Rosanova. *See e.g. Appendix C, Eric Aff.*, ¶¶ 3, 6, 10, 12, 14, and 24. Eric's efforts to complain to HR were historically rejected. *Id.*, ¶24.

More to the point, every person identified in the chain in Policy 2.1.6 (manager, HR and president) agreed with the decision on June 24, 2019 to terminate Eric and were in the room with Eric when Zoot terminated him. In addition, Zoot stated, unequivocally, that its decision was "final". *Appendix D, Zoot's termination script* and *Appendix C, Eric Aff.,* ¶22. The district court also pointed out that he did not "submit a written complaint to his supervisor Tuss or Zoot's Human Resources Office to grieve his termination" or a document "stating what steps he took to address the circumstances of his complaint or the actions he would like taken to correct the situation concerning his termination. *Appendix A* at 5. The latter point appears to be a reference to subpart C of Policy 2.1.6 – which does not call for a written complaint. *C.f. subpart F of Policy 2.1.6 (*if HR does not resolve the issue, then "the complaint should be put in writing…").

Even if Policy 2.1.6. constituted an internal grievance procedure for terminated employees,[1] and even if subpart C required a written complaint, there was no person or group of persons to whom Eric could complain or appeal that had not already made a "final" decision to terminate him on June 24, 2019. To whom would Eric complain/grieve that had not already made up their mind?

Within 4 days of his discharge, Eric's counsel sent Zoot a letter on June 28, 2019 stating that Eric believed his discharge was wrongful, asked it for a complete copy of his file and notified Zoot to retain its records. CR 66, Ex. O and *Appendix A* at 5. Eric had none of his own records and Zoot refused to provide any of his personnel file. *Appendix A* at 5. Zoot's refusal further confirmed that Zoot had no interest in providing Eric any sort of appeal or grievance forum – how could he support his position without any documents to show the Decision Makers' memories of events or beliefs were in error?

Based upon the foregoing facts, there was simply no internal grievance procedure for Eric to exhaust within Zoot's Policy 2.1.6.

B. The Law Does Not Require Useless Acts and This Court Interprets Statutes to Avoid Absurd Results

The district court determined that because Eric had not filed a written complaint with his manager or the HR department following his termination, his

[1] Zoot has a policy entitled "2.1.19 Employee Termination Policy" but nowhere in that policy is there any reference to an internal grievance or appeal procedure upon termination. CR 69, Ex. L.

wrongful discharge claim was barred under §39-2-911, MCA for failure to exhaust an internal grievance procedure. *Appendix A.* It cited several cases for the proposition that a party's failure to exhaust his employer's internal grievance procedure bars a wrongful discharge claim. *Id.* at 3. The case most directly on point is *Russell v. Masonic Home of Montana, Inc.* 2006 MT 286, 334 Mont. 351, 147 P.3d 216, which Eric addressed in his motion for partial summary judgment to dismiss Zoot's exhaustion defense and his opposition to summary judgment. *See* CR 65 at 10 and, by incorporation into CR 69 at 18-20.

Eric argued that in light of the undisputed facts, engaging in any internal grievance procedure following his termination would be futile, but the district court rejected the futility argument light of *Russell*. *Appendix A* at 9. *Russell* involved an employee who worked as an administrative assistant to Janet Gale Evans and resigned claiming Evans had created an "intolerable work environment." *Id.,* ¶6. In her resignation letter, Russell stated that "a grievance would be pointless because Masonic's grievance policy provided that the very same administrator who forced her discharge, Evans, would rule on the grievance." *Id.* Evans accepted the resignation, and in response, mailed Russell the company's "Employee Complaint Resolution Procedure". *Id.*, ¶7. Russell then claimed she was constructively discharged and that constituted a wrongful

discharge, but the district court dismissed her complaint for failure to exhaust Masonic's internal grievance procedure. *Id.*, ¶8.

Russell argued exhausting Masonic's policy would have proven futile "because the policy provided that Evans, the person responsible for the wrongful discharge, issue the final decision." *Id.*, ¶15. In rejecting this argument, the *Russell* Court noted that while Masonic's policy provided for Evans to issue the decision, "the policy also provides that the administrator may designate another person to investigate the dispute." *Id.* ¶16.

Russell is distinguishable from the case at bar. In this matter, and unlike *Russell*, there is no provision within Policy 2.1.6 that allows for any person to investigate Eric's termination other than the very people that terminated him. Moreover, 100% of the Decision Makers, representing 100% of the persons referenced in Policy 2.1.6, represented to Eric that Zoot's decision was "final". Finally, the person with the last say in any putative appeal under Policy 2.1.6 (Zoot president Rosanova) was part of the Zoot group that notified Eric that Zoot's decision ("**our** decision") was final. *See Appendix C*, ¶22, *Appendix D.* Zoot's words and actions, from telling Eric its decision was final to making no mention of any grievance procedure in its Termination Letter, were designed to discourage and foreclose any grievance by Hathaway and to send the message that the decision was, in fact, final. There was no reason why Eric should not rely upon

Zoot's unequivocal representation. While Zoot provided him a copy of Policy 2.1.6 at the time he was terminated, Zoot made it abundantly clear from its express words and acts there was no appealing its decision. The notion that someone at Zoot existed who would reconsider its decision to terminate Eric is fictitious.

This Court has long recognized that a failure to exhaust does not bar an action if the exhaustion would have been futile. "[N]either law nor equity require[s] useless acts." *DeVoe v. Dept. of Revenue,* 263 Mont. 100, 115, 866 P.2d 228, 238 (1993); *Montana Trout Unlimited v. Montana Dep't of Nat. Res. & Conservation*, 2006 MT 72, ¶ 20, 331 Mont. 483, 489, 133 P.3d 224; *Petition of Williams*, 155 Mont. 226, 229, 466 P.2d 90, 92 (1970); *see also* §1-3-223, MCA. In sum, §39-2-911, MCA should not be read in a vacuum, but rather in the context in which it is being applied to avoid absurd results.

To highlight the point, consider if Zoot were to state to Eric that the owner of Zoot had told Tuss, Komoto and Rosanova (all of the Decision Makers) that they would be fired if they were to entertain any complaint made by Eric should he file one after being terminated and they each disclosed to Eric that, as a result, they simply could not and would not entertain a complaint should he file one. Would the law still require Eric to engage in the fiction of filing a complaint under Policy 2.1.6 to pretend that his grievance would be meaningful? Eric respectfully submits the answer is no. Such an uncritical application of the statute, which

would result in the loss of access to the courts, defies common sense and would result in an absurdity – a result the law abhors.

1. An uncritical Application of §39-2-911, MCA, without recognition of uncontested facts results in an absurdity and is unwarranted

This Court has long recognized that: "Courts will not foolishly bind themselves to the plain language of a statute where doing so would 'compel an odd result'." *In re Marriage of Syverson*, 281 Mont. 1, 19, 931 P.2d 691, 702 (1997) *quoting Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1529 (11th Cir.1996) (citing *Green v. Bock Laundry Mach. Co*, 490 U.S. 504, 509, 109 S.Ct. 1981, 1984, (1989)).

> While courts should in general interpret and apply statutes as they are written, they also have a duty to look beyond the language of a statute if literal application would lead to an absurd result.

Id.; see also, *Prindel v. Ravalli Cty.*, 2006 MT 62, ¶ 33, 331 Mont. 338, 353 P.3d 165 ("We construe, interpret and apply the law so as to avoid absurd results.")

As noted in *Syverson*, this Court has previously construed, interpreted, and applied the law in order to avoid absurd results. *Id. citing State v. Schnittgen*, 277 Mont. 291, 922 P.2d 500, 510 (1996) (double jeopardy case wherein we stated that "applying the [*U.S. v.*] *Halper* [(1989) 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487] test to the instant case would work an obviously absurd result not intended by the Court"); *Stroop v. Day*, 271 Mont. 314, 318–19, 896 P.2d 439, 441–42 (1995)

(we refusing to literally interpret the word "provocation" as found in the "Dog Bite" statute, § 27-1-715, MCA, because to do so would "yield unjust and absurd results"); *Hafner v. Conoco, Inc.*, 268 Mont. 396, 403, 886 P.2d 947, 951 (1994) (employment discrimination case in which our determination that the district court erred in finding Hafner qualified for his position with Conoco was "guid[ed]" by the court's reasoning in *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir.1993), *cert. denied* 511 U.S. 1011, 114 S.Ct. 1386 (1994), that a literal reading of "otherwise qualified" was not favored "because of the absurd results that would be produced"); *Montana Dept. of Revenue v. Kaiser Cement Corp.*, 245 Mont. 502, 506, 803 P.2d 1061, 1063 (1990) (tax case in which we agreed with the Department of Revenue's interpretation of the applicable tax statutes, stating "that to hold otherwise would lead to absurd results"); *State v. Trimmer* (1985), 214 Mont. 427, 432–33, 694 P.2d 490, 493 ("It has long been a rule of statutory construction that a literary application of a statute which would lead to absurd results should be avoided whenever any reasonable explanation can be given consistent with the legislative purpose of the statute").

Requiring an employee to exhaust an internal grievance procedure under any and all circumstances, regardless of uncontested facts and without exception, requires courts to turn a blind eye to actual uncontested facts and would lead to absurd results. Unlike any case this Court has considered, the contested facts here

show Zoot unequivocally told Eric his termination was final and such a decision was made with 100% of the persons who could review a "complaint" under Zoot's Policy 2.1.6. Added to that is the uncontested fact that Zoot refused to allow Eric any of his emails or documents at Zoot to defend himself.

Eric respectfully submits the district court erred by failing to recognize the odd and absurd result of applying §39-2-911, MCA in the context of Zoot's, and its Decision Makers', unequivocal acts and statements that the decision on June 24, 2019 to terminate Eric was final.

C. Zoot Wants Strict Compliance with its Policy But Did Not Strictly Comply with the Dual Requirements in §39-2-911, MCA

Eric respectfully submits the arguments set forth in subparts VI.A. and B. above are dispositive but also submits that Zoot has not strictly complied with §39-2-911, MCA. The plain language of the §39-2-911(3), MCA imposes two obligations on Zoot in order to seek refuge behind a failure to exhaust defense: it must notify the employee "of the existence of such procedures ***and*** shall supply the discharged employee with a copy of them." (emphasis added). Zoot argues that since it provided Hathaway with a copy of its policy as part of a group of other documents, it satisfies the statute. This, however, would require the Court to omit the word "and" from the statute, which is not the role of a court when interpreting a statute. *Melton v. Speth,* 2018 MT 212, ¶ 6, 392 Mont. 409, 425 P.3d 700 citing §1-2-101, MCA. When the legislature uses the conjunctive "and", it clearly

indicates an intent to require two acts. *State v. Miller*, 231 Mont. 497, 517, 757 P.2d 1275, 1288 (1988) .

While it is true Zoot gave Eric Policy 2.1.6 the same day he was terminated, it is also true that it was one among the seven documents given to him at the time he was terminated. While Zoot referenced one of the other seven documents given to him in the Termination Letter, it chose to omit any reference to Policy 2.1.6 in the Termination Letter. CR 62, Ex. 21. This, coupled with the unequivocal statement that his termination was final, would lead any reasonable person to believe there was no opportunity to have Zoot's decision changed.

Thus, the plain and express language of §39-2-911(3), MCA takes on heightened importance. By its express words and action, Zoot led Eric to believe there was no appeal and, therefore, if it truly believed such an avenue existed, it should have provided Eric the policy ***and*** notified Eric he could appeal the decision. It did not.

This Court has recognized that §39-2-911(2), MCA has two components. In *Casiano v. Greenway Enterprises, Inc.*, this Court affirmed the district court's dismissal of an employer's failure to exhaust defense even though the employer *notified* the terminated employee "of its internal grievance procedures on the day of his discharge, [because it] failed to provide him a written copy of the procedures within seven days of his discharge." 2002 MT 93, ¶ 21, 309 Mont. 358, 47 P.3d

432, *overruled on other grounds by Giambra v. Kelsey*, 2007 MT 158, ¶ 21, 338 Mont. 19, 162 P.3d 134; *see also Eadus v. Wheatland Memorial Hospital & Nursing Home*, 279 Mont. 216, 220, 926 P.2d 752 , 755 (1996) (reversing district court summary judgment decision on exhaustion even though employee had notice of existence of procedure, employer did not comply with other requirement to provide a copy.).

Eric appreciates the foregoing cases involve notice without a copy of the policy. Here, Eric had a copy of the policy without notice. Zoot did not comply with the express language of §39-2-911(3), MCA, because it did not provide Eric with *both* a copy of its policy *and* notice of his right to use the same. The district court rejected this argument and determined Eric had effective notice because he received the policy at the time he was terminated and, later, a copy was sent to his counsel.[2] *Appendix A* at 7 citing §1-1-217 MCA. It further concluded that because of this Eric's argument was disingenuous. *Id*. However, the district court misspoke when it stated "Zoot … referred to it in other termination paperwork he was provided at the time of termination*." Appendix A* at 7. Zoot did not "refer" to the Grievance Policy in its Termination Letter and it is not clear what other paperwork given to Eric at the time of his termination the court is referencing.

[2] Zoot's letter to counsel is dated July 3, 2019; thus dated after the 5-day period for filing a complaint allegedly required in Policy 2.1.6. *See* CR 69, Ex P. Zoot terminated Eric June 24.

Eric respectfully submits that applying the strict requirement that he engage in a fictitious internal grievance procedure with exactly the same people who rendered the ***final*** decision and without any documentation to be more tortured than applying the plain language of §39-2-911(3), MCA. The import of the dual obligation in the statute becomes clear where an employer leads its employee to believe one thing with its words and acts and relies upon another to avoid liability, thereby attempting to deprive that person of an important right – access to the courts.

Based upon the foregoing, the Court's Summary Judgment Order should be reversed, and the case remanded to the district court for trial.

D. The District Court Erred in Denying Eric's Timely Motion to Amend By Resolving Contested Facts

The Montana Human Rights Act ("MHRA") protects the right of an employee to "hold employment without discrimination." §49-1-102(1)(a), MCA. The MHRA declares that it is an "unlawful discriminatory practice" for an employer "to discriminate against a person in compensation or in a term, condition, or privilege of employment because of ... age when the reasonable demands of the position do not require an age… distinction". §49-1-303(1)(a), MCA. As a matter of law, Eric was required to first file his age discrimination claim with the HRB before filing it in district court. *Appendix B* at 2 citing §49-2-512 (1), MCA.

Eric timely filed his complaint with the HRB on December 10, 2019. (CR 66, Ex. F) and §49-2-510 (1), MCA (Complaint must be filed within 180 days of wrongful act.). On June 9, 2020 the HRB issued Eric an adverse decision. *Appendix B* at 2-3 and (CR 66 at Ex. H). Thereafter, Eric had 90 days to file his discrimination claim in district court.

> If the charging party's complaint is dismissed by the Department, the party is permitted to "commence a civil action for appropriate relief on the merits of the case in the district court in the district in which the alleged violation occurred." However, if "the charging party fails to commence a civil action within 90 days after the dismissal has been issued, the claim is barred."

Lay v. State Dep't of Mil. Affs., Disaster & Emergency Servs. Div., 2015 MT 158, ¶ 12, 379 Mont. 365, 351 P.3d 672 *quoting* Section 49-2-512(3), MCA. If a timely complaint is made within the 90 days, "the district court must hold a trial on the merits of the case and may provide the relief outlined in § 49-2-506, MCA, in addition to awarding attorney fees and costs. *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 34, 358 Mont. 193, 244 P.3d 321. Eric timely moved to amend his complaint on June 11, 2020 to add his age discrimination claim. *Motion to Amend,* CR 66.

To establish a prima facie case of age discrimination, Eric must prove: (1) he was in the protected age group; (2) he was performing his job satisfactorily; (3) he was discharged; and (4) he was replaced by a substantially younger person. *Tonack v. Montana Bank of Billings*, 258 Mont. 247, 253, 854 P.2d 326, 330 (1993). Thereafter, the burden shifts to Zoot to articulate a nondiscriminatory

reason for the discharge and then back to Eric to prove the reasons articulated by Zoot are merely a pretext for discrimination. *Id.* at 253, 854 P.2d at 330. [3]

As noted in Section III.C above, Eric's proposed amended complaint contained allegations for each of the necessary elements for his age discrimination claim. *Motion to Amend*, CR 66, Ex A at ¶¶7, 15, 16, 27, 28 and 29.

Though the district court recognized Eric had moved for leave to amend under Rule 15 M.R.Civ.P., it proceeded to discuss his discrimination claim in the context of what must be shown to "survive a motion for summary judgment". *Appendix B* at 2-3. Eric's motion should have been analyzed under Rule 15 not the summary judgment standard of Rule 56.

While a court can properly deny leave to amend for futility, "it is an abuse of discretion to deny leave to amend" when the facts asserted in the proposed amendment potentially entitle the pleader to the relief sought. *Ally Fin., Inc. v. Stevenson*, 2018 MT 278, ¶ 21, 393 Mont. 332, 430 P.3d 522 (citation omitted). This Court has long held that "it is an abuse of discretion to deny leave to amend where it cannot be said that the pleader can develop no set of facts under its proposed amendment that would entitle the pleader to the relief sought." *Griffin v.*

---

[3] Eric need not choose between a wrongful discharge claim and an age discrimination claim at the motion to amend stage. The right to plead age discrimination and wrongful discharge, in the alternative, was squarely addressed and approved in *Salvagni v. Placer Dome U.S. Inc.*, No. CV 97-74-BU RWA, 1997 WL 34611472 at 2; s*ee also Vettel-Becker v. Deaconess Med. Ctr. of Billings, Inc.*, 2008 MT 51, ¶ 37, 341 Mont. 435, 444, 177 P.3d 1034 (reversing district court summary judgment and holding that claims of discrimination and wrongful discharge are not mutually exclusive and can be brought together).

Moseley, 2010 MT 132, ¶22, 356 Mont. 393, 234 P.3d 869. Thus, Eric should be permitted to amend if he can develop facts under the proposed amendment that would entitle him to relief. *Id.* "[I]t is the rule to allow amendments and the exception to deny them." *Lien v. Murphy Corp.*, 201 Mont. 488, 492, 656 P.2d 804, 806 (1982)

The district court concluded the proposed amendment "would be futile", though ostensibly refraining from addressing the validity of Zoot's alleged rationale for discharging Eric. *Appendix B* at 5. The Court stated that while it declined "to determine whether these reasons constitute "good cause" under the WDEA, they are non-discriminatory, and Hathaway cannot establish that he would not have been terminated but-for his age". *Id.* This analysis necessarily involved the Court resolving contested facts such as whether Zoot's reasons were discriminatory or a pretext, and whether Hathaway would have been terminated but for his age. Both are fact intensive inquiries which involve disputed facts in this matter. By its decision, the Court departed from the Rule 15 standard by improperly making a decision about disputed facts – namely that Zoot's rationale for terminating Eric was not a pretext. *See id.* at 3-5. The district court could not have made this determination without resolving contested facts; an exercise that it should not have engaged in at the motion to amend stage.

For example, the district court improperly determined that Eric "believe[d] he was terminated, at least in part, for a non-discriminatory reason. *Id.* at 4. Eric

did not know why he was terminated. The actual passage from Eric's deposition began with him stating he did not know why he was fired and ended with "that would be my guess". *Id.* Eric also filed a discrimination claim; thereby further evidencing his belief that Zoot's decision was wrongful based upon his age.

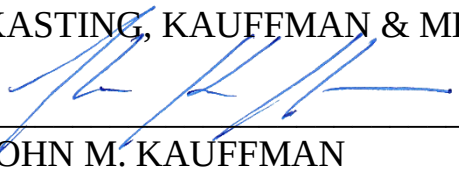
In addition, the district court mistakenly took as true the disputed allegations about Eric's performance. *See, id* (The district court noted that it was not deciding if Zoot even had good cause to terminate Eric. *Id.* at 5; *see also Eric Aff., Appendix C*; and *Moe v. Butte-Silver Bow Cty.*, 2016 MT 103, ¶ 57-58, 383 Mont. 297, 371 P.3d 415. (An employee raises "sufficient factual disputes that would support a conclusion that the reason for her discharge was not "good cause" in and of itself or that the given reason was "a pretext and not the honest reason for the discharge", summary judgement is improper. As such, there remains a disputed issue of material fact as to whether Zoot's putative reasons for discharging Eric were a pretext. The district court, therefore, abused its discretion when it denied Eric leave to amend his complaint.

VI. CONCLUSION

Based upon the foregoing, Eric respectfully requests that the Court (1) reverse the district court's *Summary Judgment Order* and remand Eric's wrongful discharge claim for trial; and (2) reverse the district court's *Order Denying Leave to Amend* with instructions that leave to amend be granted.

DATED this 7th day of June, 2021.

KASTING, KAUFFMAN & MERSEN, P.C.



JOHN M. KAUFFMAN
counsel for Eric Hathaway

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is proportionately spaced, together with Times New Roman, 14 point font with a word count calculated by Word of 6,533 excluding the title page, tables and certificates.

DATED this day 7th of June , 2018.

KASTING, KAUFFMAN & MERSEN, P.C.

JOHN M. KAUFFMAN

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 7th day of June, 2021 a true and correct copy of the foregoing OPENING BRIEF was served, (**X**) by U.S. Mail, postage prepaid,( ) by hand,( ) by facsimile (**X**) email, as indicated:

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IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0104

APPELLANT'S APPENDIX

APPENDIX A Order Re: Motions for Summary Judgment 2/8/21

APPENDIX B Order Re: Plaintiff's Motion to Amend Complaint 2/8/21

APPENDIX C Affidavit of Eric Hathaway (CR 69, Ex. D)

APPENDIX D Zoot's Termination Statement (CR 69, Ex. N)

APPENDIX E Zoot's Termination Letter & Documents (CR 62, Ex 21)

APPENDIX A

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

ERIC HATHAWAY, Plaintiff, vs. ZOOT ENTERPRISES, INC., Defendant.	Cause No. DV-19-809B **ORDER RE: MOTIONS FOR SUMMARY JUDGMENT**

Before the Court is Defendant Zoot Enterprises, Inc.'s, ("Zoot") Motion for Summary Judgment and Plaintiff Eric Hathaway's ("Hathaway") Motion for Partial Summary Judgment. The Motions have been fully briefed, and oral argument was held on October 14, 2020. From the oral arguments and its review of the briefs, the Court is fully advised.

BACKGROUND

Zoot is a global provider of advanced origination, acquisition, and decision management solutions for financial institutions, retailers, and payment providers. Hathaway began working for Zoot as the Director of Marketing on December 21, 2015. He became Vice-President of Marketing in September 2016. Travis Tuss, Exec. Vice-President, Sales & Marketing, was his supervisor. While there are factual disputes as to the specifics of Hathaway's job performance, his employment file reflects both positive and negative performance reviews as well as tension between Hathaway and his superiors. On June 24, 2019, after a dispute related to Zoot's travel policy, Hathaway's employment was terminated.

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At the termination meeting, Hathaway's supervisor informed him his employment was terminated, that President Tony Rosanova and CEO Chris Nelson agreed with the termination, and that the decision was final. Zoot provided Hathaway a copy of Zoot's internal grievance policy along with his termination paperwork at the termination meeting. Def.'s Ex. 21, ZOOT004357-4358; Def.'s Ex. 23, Plf.'s Resp. to 1st RFAs, Resp to RFA No. 5. Hathaway did not submit a written grievance but contends both that he did not have to comply with the grievance policy and that he did comply through his verbal disagreement with the termination and his counsel's letter demanding Zoot preserve documents for litigation purposes.

SUMMARY JUDGMENT STANDARD

Summary judgment is only proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), Mont. R. Civ. P. Summary judgment is an extreme remedy which should not replace a trial on the merits where there are material factual disputes. The party moving for summary judgment has the initial burden of establishing the absence of genuine issues of material fact. The burden then shifts to the party opposing summary judgment to show, by more than mere denial or speculation, that there are genuine issues of material fact to be resolved. "[A]ll reasonable inferences which can be drawn from the evidence presented should be drawn in favor of the non-moving party." *Lee v. Great Divide Ins. Co.*, 2008 MT 80, ¶ 10, 342 Mont. 147, 182 P.3d 41.

DISCUSSION

Zoot moved the Court for summary judgment on two grounds: 1) it had good cause to terminate Hathaway's employment; and 2) Hathaway's claim is barred for his failure to grieve. Hathaway moved the Court for partial summary judgment requesting Zoot's failure to grieve

defense be stricken.

I. Failure to Grieve.

A party's failure to exhaust his employer's internal grievance procedure acts as a "complete bar" to a WDEA claim so long as the employer provided notice and a copy of the policy upon termination. § 39-2-911, MCA; *Russell v. Masonic Home of Montana, Inc.*, 2006 MT 286, ¶ 16, 334 Mont. 351, 147 P.3d 216; *Haynes v. Shodair Children's Hosp.*, 2006 MT 128, ¶ 14, 137 P.3d 518, 332 Mont. 286 (citing *Offerdahl v. State*, 2002 MT 5, 308 Mont. 94, 43 P.3d 275); *Hoffman v. Town Pump, Inc.*, 255 Mont. 415, 843 P.2d 756 (1992). The employee is not excused from utilizing the process or from having his WDEA claim barred even if he believes the process would be futile. *Russell*, at ¶¶ 15-16 (citing *Mountain Water Co. v. DPSR*, 2005 MT 84, ¶ 16, 326 Mont. 416, ¶ 16, 110 P.3d 20, ¶ 16).

Here, the following facts concerning Hathaway's failure to grieve are undisputed:

1. Hathaway's employment was terminated on June 24, 2019.

2. Hathaway received a copy of Zoot's internal grievance policy along with his termination paperwork at the termination meeting on June 24, 2019.

3. Travis Tuss, Vice-President, Sales & Marketing, Tony Rosanova, President, Jordon Komoto, Vice-President, Human Resources, and Hathaway, attended the termination meeting where Tuss read a statement notifying Hathaway he was terminated effective immediately.

4. Tuss, Rosanova, Komoto, and CEO Chris Nelson, approved the termination, prior to the termination meeting.

5. Zoot's internal grievance policy is set forth in its employee handbook as "2.1.6 Resolving Differences Policy." It provides in relevant part:

You have the opportunity to present your concerns, questions and complaints, as well as appeal decisions by your manager through this procedure.

...

Employees who have completed their probationary period should follow the guidelines below to resolve differences:

A. When an issue arises, your immediate manager is in the best position to help solve it. A discussion with your manager will normally solve your concern. At this stage, the complaint may be presented verbally or in writing.

B. If your concern is about your manager, you may discuss your concerns with the Human Resources Department. The Human Resources Department is always available to help with the preparation, presentation, and handling of complaints.

C. Your complaint should include the following items:

1. Your name and department.

2. A statement of the reason for filing the complaint.

3. A brief discussion of the circumstances that led to filing a complaint. This should be as specific as possible. It should also include any steps you took prior to the action to address the situation.

4. A statement of what you would like to do to correct the situation.

D. Complaints for corrective action and terminations must be filed within five days of the action.

E. Your manager or the Human Resources Department will investigate your concerns within ten business days, attempt to resolve them, and communicate a decision to you.

F. If the problem is still not resolved to your satisfaction, then the complaint should be put in writing and presented to the Director of Human Resources within five days of the manager's or Human Resources representative's decision. The Director of Human Resources will review your statement, investigate your concerns, attempt to resolve them, and communicate a decision to you.

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G. To appeal the ruling of the Director of Human Resources, you need to present a written statement to the company president within ten days of the decision. The president will review your statement, investigate your concerns, and communicate a final decision to you. The decision of the president is final and binding.

Def.'s Ex. 21, ZOOT004357-4358 ("Grievance Policy").

6. Hathaway admits he did not submit a written complaint to his supervisor Tuss or Zoot's Human Resources Office to grieve his termination.

7. Hathaway also admits he did not submit a written document to anyone at Zoot stating what steps he took to address the circumstances of his complaint or the actions he would like taken to correct the situation concerning his termination.

8. Hathaway's attorney mailed a letter to Nelson and Rosanova on June 28, 2019. That letter was received by Zoot on July 1, 2019. The purpose of the letter was "two-fold," with the first purpose being to request Hathaway's employee file, and the second purpose being to put Zoot on notice of its duty to preserve documents relating to Hathaway's performance.

9. Zoot declined to provide Hathaway's personnel file in response to the attorney's letter.

A. Zoot's Compliance with the Statute

Hathaway argues he was not required to comply with the Zoot's Grievance Policy because Zoot did not both (1) notify him of the existence of its Grievance Policy and (2) give him a copy of it.

The statute provides:

> If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the

> existence of such procedures and shall supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).

§ 39-2-911(3), MCA.

Hathaway cites to *Offerdahl* suggesting verbal notice of the policy is required. However, *Offerdahl* does not address verbal notification nor suggest a written cover letter accompanying a copy of the grievance policy is required. *Id.*, ¶¶ 5, 16-20. In *Offerdahl*, the employer asked Offerdahl to attend a pre-termination meeting, but Offerdahl declined. *Id.*, ¶ 5. The employer then sent him a letter terminating his employment and directing him to the grievance procedure, a copy of which was enclosed. *Id.*, ¶¶ 5-6. While the grievance procedure was specifically called out in Offerdahl's termination letter, the Supreme Court's opinion does not hold that such a practice is required to give proper notice. The Court ultimately held Offerdahl's claim was barred for failure to comply with the internal grievance procedures. *Id.*, ¶¶ 16-20.

In *Russell v. Masonic Home of Mont., Inc.*, 2006 MT 286, 334 Mont. 351, 147 P.3d 116, Russell sent her employer a resignation letter claiming she was constructively discharged. *Russell*, ¶ 6. In response, the employer mailed Russell a letter accepting her resignation and included a copy of the employer's grievance policy. *Id.*, ¶¶ 6-7. While the employer's letter "did not inform Russell that she needed to comply with the Policy before filing a wrongful discharge action," the Court found the employer met the requirements of § 39-2-911(3), MCA. *Id.*, ¶¶ 7, 14

Hathaway's reliance on *Eadus v. Wheatland Meml. Hosp. & Nursing Home* and *Casiano v. Greenway Enterprises, Inc.*, is misplaced. In those cases, the employers were denied the affirmative defense because, while they argued the employees knew about the grievance procedures, the employers did not provide copies of them within 7 days of termination. *Eadus*, 279 Mont. 216, 219-22, 926 P.2d 752, 754-56; *Casiano*, 2002 MT 93, ¶ 21, 309 Mont. 358, 362-

63, 47 P.3d 432, 435, *overruled on other grounds by Giambra v. Kelsey*, 2007 MT 158, ¶ 21, 338 Mont. 19, 162 P.3d 134.

Here, Hathaway was notified of the existence of the Grievance Policy when Zoot provided him a copy and referred to it in other termination paperwork he was provided at the time of the termination. Montana law defines notice as follows:

> (1) Notice is:
> (a) actual whenever it consists of express information of a fact;
> (b) constructive whenever it is imputed by law.
> (2) Each person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting the inquiry, the person might have learned the facts.

§ 1-1-217, MCA.

It is disingenuous for Hathaway to claim he did not have "notice" of the Grievance Policy, when he received actual notice of it through the copy delivered to him at the termination meeting and also delivered to his attorney a few days later. The undisputed facts demonstrate Zoot complied with the statute and is entitled to assert the defense.

B. Application of the Grievance Policy to Terminations

Hathaway next contents Zoot's Grievance Policy does not apply to terminations, so he had no obligation to comply with it.

Courts interpret employer personnel policies to determine their reasonable meaning. *See Putnam*, ¶¶ 29-32 (holding employer's policies did not require progressive discipline); *Speer v. Dept. of Corrections*, 2020 MT 45, ¶¶ 28-30, 399 Mont. 67, 82-84, 458 P.3d 1016, 1026-27 (holding employer policies not violated by meeting with the employee); *Kuszmaul v. Sterling Life Ins. Co.*, 2012 MT 154, ¶ 26, 365 Mont. 390, 397, 282 P.3d 665, 670-71 (holding personnel policies allow for immediate termination depending upon the seriousness of the situation).

A reading of the plain language of the Policy makes it clear it applies to terminations:

- "You have the opportunity to present your concerns, questions and complaints, as well as appeal decisions by your manager through this procedure." (Contained in the "SCOPE/OBJECTIVE" portion of the Policy) (Hathaway agrees his manager, Tuss, made the decision to terminate him. Plf.'s MPSJ, p. 6).

- "D. Complaints for corrective action and **terminations** must be filed within five days of the action." (Emphasis added).

- "The complaint procedure supersedes any verbal or written communication regarding an employee's grievance rights that may have been provided prior to or at the time of the **termination**." (Emphasis added) (Contained in the "*Guidelines*" portion of the Policy).

Id., ZOOT004357-4358.

The only reasonable interpretation of the Grievance Policy is that it is applicable to terminations.

C. Futility

Hathaway, relying on cases that do not involve claims under the WDEA[1], argues that because Rosanova, Tuss, and Nelson agreed with the decision to terminate him, he was not required to grieve because a grievance would have been futile. His reliance on non-WDEA precedent is not persuasive because the statutory language is clear, and the Montana Supreme Court has squarely addressed and rejected the futility argument with respect to the complete bar afforded to employers under the WDEA.

The WDEA requires an employee to exhaust his internal remedies prior to filing a lawsuit and offers no exception for employees who believe the process would be futile. § 39-2-911, MCA. Even if an employee believes the termination decision is final, or the process futile, that

[1] *DeVoe v. Dept. of Revenue* involves a tax appeal claim. 263 Mont. 100, 106, 866 P.2d 228, 232 (1993). *Montana Trout Unlimited v. Montana Dept. of Nat. Res. & Conservation* involves a groundwater application before the DNRC. 2006 MT 72, 331 Mont. 483, 133 P.3d 224. *Stockman Bank of Mont. v. Mon-Kota, Inc.*, involves an agricultural lien. 2008 MT 74, 342 Mont. 115, 180 P.3d 1125. *Petition of Williams* involves a petition for writ of habeas corpus. 155 Mont. 226, 466 P.2d 90.

does not excuse him from participating in the grievance procedure or having his claim barred. *Russell*, at ¶¶ 15-16 (citing *Mountain Water Co. v. DPSR*, 2005 MT 84, ¶ 16, 326 Mont. 416, 110 P.3d 20).

Zoot's Grievance Policy provides, in the opening paragraph, that it is intended to afford individuals with "the opportunity to present your concerns, questions and complaints, as well as appeal decisions by your manager." While it's true that Rosanova and Nelson approved of Tuss's decision to terminate Hathaway, that in no way eviscerates Hathaway's opportunity to present his concerns or appeal the decision. Indeed, the Grievance Policy specifically sets forth numerous steps that will be taken upon the filing of a grievance, including, among others, that it will be investigated by the manager, Human Resources, and/or the President. Grievance Policy, Sections A-G.

D. Hathaway's Compliance with the Policy

"Failure to exhaust such an internal process is 'a complete bar to pursuing a claim under the [WDEA].'" *Haynes*, ¶ 14 (*quoting Offerdahl*, ¶ 20). In order for an employee to have exhausted his employer's internal procedures, he must fully comply with an employer's internal grievance procedures with respect to timeliness and form. *Id.*, ¶¶ 15, 17. In *Haynes*, the employer's policy required the grievance to be submitted within 5 days and that it be filed on a specific form and signed by the employee. *Haynes*, ¶ 5. Counsel for the employee submitted a grievance letter 8 days after the separation from employment, but the Court held the employee's claims were barred because the letter was not in compliance with the employer's grievance procedures, did not follow the specific form required, was not signed by the employee, and was untimely. *Id*, ¶¶ 6, 14-15, 17.

Here, like in *Haynes*, the undisputed facts demonstrate Hathaway did not exhaust his internal remedies under Zoot's grievance procedures. Zoot's policy requires complaints concerning terminations to be in writing and made within 5 days of the termination. The complaint must state the employee's name and department, the reason for the complaint, a brief discussion of the circumstances that led to the complaint, including "any steps [the employee] took prior to the action to address the situation" and "a statement of what [the employee] would like to do to correct the situation." Hathaway admits he did not submit a written complaint to his manager or Zoot's Human Resources Office and that he did not submit a written document to anyone at Zoot stating what steps he took to address the circumstances of his complaint or the actions he would like taken to correct the situation concerning his termination.

Further, like in *Haynes*, the attorney's post-termination letter cannot be considered his complaint for purposes of satisfying the grievance procedure. Hathaway's counsel plainly stated the "two-fold" purpose of his letter with the first purpose being a request for Hathaway's employment file, and the second purpose being to put Zoot on notice of its duty to preserve documents in the case of litigation. The letter does not state it is intended as Hathaway's grievance, and even if it had, it is not addressed to Tuss or the Human Resources Department, as is required under Section E, and does not include the name of Hathaway's department or a discussion of the circumstances that led to the complaint, an outline of steps Hathaway took to resolve the issues prior to the complaint, and a statement of what Hathaway would like done to correct the situation, as is required under Section C. Moreover, the letter was mailed, not received within 5 days of the termination as is required under Section D.

Finally, citing § 1-3-208, MCA, for the notion that a party may not take advantage of its own wrong, Hathaway contends Zoot should be estopped from asserting the failure to grieve

defense because it did not provide him a copy of his personnel file in response to his attorney's June 29, 2019 letter requesting it. However, Hathaway does not cite to any law requiring an employer to provide former employees a copy of their personnel file or explain how Zoot's failure to provide his personnel policy was a wrong justifying estoppel. Regardless, the attorney's letter, as detailed above, was not a grievance, and even if Zoot had responded with the file, the time for timely filing a grievance under the policy would have already passed.

The undisputed facts demonstrate Zoot provided Hathaway notice and a copy of its Grievance Policy and that Hathaway failed to exhaust his remedies under that policy. Hathaway's failure to grieve is a complete bar to his WDEA claim. § 39-2-912, MCA; *Russell*, ¶ 16; *Haynes*, ¶ 14 (citing *Offerdahl*, ¶ 20). As such, Zoot is entitled to summary judgment as a matter of law.

The Court's ruling herein is dispositive. Therefore, the Court declines to address Zoot's argument concerning good cause.

IT IS HEREBY ORDERED as follows:

1. Zoot's Motion for Summary Judgment is GRANTED.
2. Hathaway's Motion for Partial Summary Judgment is DENIED.
3. Counsel for Zoot shall submit a separate proposed judgment consistent with this Order within 14 days of the date of this Order.

DATED this 8 day of February, 2020.

Hon. Rienne H. McElyea
District Judge

c: Jill Gerdrum
John Kauffman
emailed 2/9/21 - SD

APPENDIX "A"

APPENDIX B

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

ERIC HATHAWAY, Plaintiff, vs. ZOOT ENTERPRISES, INC., Defendant.	Cause No. DV-19-809B **ORDER RE: PLAINTIFF'S MOTION TO AMEND COMPLAINT**

Before the Court is Plaintiff Eric Hathaway's ("Hathaway") Motion for Leave to File Amended Complaint. The motion has been briefed, and the Court is fully advised.

BACKGROUND

Zoot is a global provider of advanced origination, acquisition, and decision management solutions for financial institutions, retailers, and payment providers. Hathaway began working for Zoot as the Director of Marketing on December 21, 2015. He became Vice-President of Marketing in September 2016. Travis Tuss, Exec. Vice-President, Sales & Marketing, was his supervisor. While there are factual disputes as to the specifics of Hathaway's job performance, his employment file reflects both positive and negative performance reviews as well as tension between Hathaway and his superiors. On June 24, 2019, after a dispute related to Zoot's travel policy, Hathaway's employment was terminated.

Hathaway initiated this action in July 2019 asserting he was terminated from Zoot without good cause in violation of the Wrongful Discharge from Employment Act (WDEA), §

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39-2-904(1)(b), MCA. Hathaway now moves to amend his Complaint to add two new claims: (1) that Zoot violated its own written personnel policy in terminating Hathaway in violation of the WDEA and (2) a claim for age discrimination.

DISCUSSION

A party may move the court for leave to file an amended pleading and the court should freely grant leave when justice so requires. Rule 15(a)(2), Mont. R. Civ. P. The Montana Supreme Court interprets the rule allowing amendment of pleadings liberally, "allowing amendment of pleadings as the general rule and denying leave to amend as the exception." *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 325, 815 P.2d 1153, 1155 (1991). Further:

> In the absence of any apparent or declared reason – such as undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'

Prentice Lumber Co. v. Hukill, 161 Mont. 8, 17, 504 P.2d 277, 282 (1972).

I. Additional WDEA claim

In its Order Re: Motions for Summary Judgment, the Court found Hathaway's failure to comply with Zoot's internal grievance procedure was fatal to his WDEA claim pursuant to § 39-2-911(2), MCA. Therefore, amending the Complaint to add a new WDEA claim would be futile as that claim would also be barred pursuant to § 39-2-911(2), MCA.

II. Age discrimination claim

In December 2019, Hathaway filed a complaint with the Montana Human Rights Bureau (HRB) alleging Zoot discriminated against Hathaway in his employment because of his age. Hathaway was required to exhaust his remedies before the HRB prior to commencing a discrimination action in district court. § 49-2-512, MCA. In June 2020, the HRB issued a Notice

of Dismissal and Notice of Right to File Civil Action in District Court. As a result of the HRB's decision, Hathaway now moves to add his age discrimination claim to his pending Complaint before this Court.

Pursuant to the Age Discrimination in Employment Act (ADEA), "It shall be unlawful for an employer...to discharge any individual...because of such individual's age." 29 U.S.C. § 623(a)(1); *see also* § 49-2-303(1)(a), MCA. Prior to 2009, to survive a motion for summary judgment in an age discrimination case, a plaintiff was required to establish a prima facie case by producing direct evidence of discrimination or producing evidence that (1) plaintiff was in the protected age group (over 40); (2) plaintiff was performing their job satisfactorily; (3) plaintiff was discharged; and (4) plaintiff was replaced by a substantially younger person. *Mysse v. Martens*, 279 Mont. 253, 264, 926 P.2d 765, 772 (1996). Once the plaintiff established a prima facie case of age discrimination, the burden shifted to the employer to demonstrate a legitimate non-discriminatory reason for the termination. The burden then shifted back to the plaintiff to produce evidence which raised an inference that the employer's proffered reason for the termination was a pretext. *Id.*, 279 Mont. at 263, 926 P.2d at 771.

In 2009, the United States Supreme Court rejected the burden shifting approach for ADEA claims. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009); *see also Cooper v. Ferguson Enters.*, 2010 U.S. Dist. Lexis 158207 (D. Mont. 2010). The Supreme Court held that to prevail in an age discrimination claim, the plaintiff bears the "burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action." *Gross*, 557 U.S. at 177. "The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision." *Id.*, 557 U.S. at 180. "[T]he ordinary meaning of the ADEA's requirement that an

APPENDIX "B"

employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act. To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.*, 557 U.S. at 176 (internal citations omitted).

In this case, Hathaway cannot establish, by a preponderance of the evidence, that he would not have been fired but-for his age. When asked during his deposition why he believed he had been terminated, Hathaway responded:

> Again, I believe that Travis Tuss and Tony Rosonova – maybe Tony. I don't know, but Travis Tuss got upset because I basically had found this problem that existed within sales that they were not responding to leads. So it was difficult for – we can provide the leads. That's all we can do. They weren't responding. And I basically provided that. Nothing was done. I went to, again, Chris and then subsequently Tony. And I think there was – basically he was very upset about that. He was threatened, and that's – I don't – I – honestly, that would be my guess.

Depo. Eric Hathaway, 192:2-15 (Feb. 11, 2020). Thus, Hathaway believes he was terminated, at least in part, for a non-discriminatory reason. Hathaway did not mention that he believed his age played any role in Zoot's termination decision.

Further, throughout Hathaway's employment, Zoot documented certain concerns about his behavior. In 2017, Zoot formally coached Hathaway about inappropriate conduct on a business trip and notified him that further inappropriate or disrespectful behavior could lead to his termination. Hathaway also received yearly performance reviews, each of which documented concerns with Hathaway's communication with management, and many of which documented his need to improve in the following areas: accountability, integrity, time & attendance, and professionalism. In 2018, in the last review before his termination, Hathaway scored a "needs improving" in communication, integrity, and professionalism.

According to both Zoot and Hathaway, Zoot had other, non-discriminatory, reasons for terminating Hathaway. While the Court declines to determine whether these reasons constitute "good cause" under the WDEA, they are non-discriminatory, and Hathaway cannot establish that he would not have been terminated but-for his age. As a result, allowing Hathaway to amend his Complaint to add an age discrimination claim would be futile.

IT IS HEREBY ORDERED that Hathaway's Motion for Leave to File Amended Complaint is **DENIED.**

DATED this 8 day of February, 2021.

Hon. Rienne H. McElyea
District Judge

c: John Kauffman
Jill Gerdrum

emailed 2/9/21 - SD

CERTIFICATE OF SERVICE

I, John M. Kauffman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-07-2021:

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Dated: 06-07-2021