DA 21-0104

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 292

ERIC HATHAWAY,

Plaintiff and Appellant,

v.

ZOOT ENTERPRISES, INC.,

Defendant and Appellee.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV-19-809B
Honorable Rienne H. McElyea, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John M. Kauffman, Kasting, Kauffman & Mersen, P.C., Bozeman, Montana

For Appellee:

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Decided: November 9, 2021

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Eric Hathaway appeals two February 8, 2021 orders from the Eighteenth Judicial District Court in Gallatin County. One order resolved the parties' summary judgment motions, ruling in favor of Hathaway's former employer, Zoot Enterprises (Zoot), in Hathaway's wrongful discharge lawsuit. The other denied Hathaway leave to amend his complaint in that case to add an age discrimination claim.

¶2 We restate the issues on appeal as follows:

Issue One: Did the District Court err in finding Hathaway failed to exhaust internal grievance procedures and granting summary judgment to Zoot?

Issue Two: Did the District Court abuse its discretion in finding Hathaway's age discrimination claim futile and therefore denying his motion for leave to amend the complaint?

¶3 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Zoot hired Hathaway in December 2015 and fired him in June 2019. The company cited Hathaway's lack of adherence to standards of professional conduct and violation of company policies. The executive vice president of marketing and sales (Hathaway's supervisor), the vice president of human resources, and Zoot's president met with Hathaway together and told him their decision was final. They provided Hathaway with a packet of documents that included company policies on grievance procedures. Several weeks later, Hathaway filed a lawsuit claiming Zoot had wrongfully discharged him without good cause.

¶5 In December 2019, Hathaway also went to the Montana Human Rights Bureau (MHRB) and filed an age discrimination claim against Zoot. District courts can only hear such claims after the MHRB has decided on them. The MHRB dismissed Hathaway's claim in June 2020, and Hathaway immediately asked the District Court for leave to add his age discrimination claim to his ongoing case against Zoot.

¶6 Pending in that case were summary judgment motions. Zoot claimed that the uncontested facts showed he was fired for good cause, and in the alternative that Hathaway's failure to exhaust internal grievance procedures would also bar his claim. Hathaway argued that the District Court should dismiss Zoot's procedural defense and that the existence of good cause was a matter of factual dispute.

¶7 The District Court held a hearing to address all the motions and on February 8, 2021, issued its orders granting summary judgment to Zoot and denying Hathaway leave to amend. Hathaway appeals. The discussion below will include any additional relevant facts.

STANDARDS OF REVIEW

¶8 We review summary judgment rulings de novo, taking up the District Court's task anew and applying the same criteria. *Lucas v. Stevenson*, 2013 MT 15, ¶ 12, 368 Mont. 269, 294 P.3d 377. For summary judgment to be appropriate, there must be no genuine issues of material fact in dispute, and one party must be entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3).

¶9 We review a District Court's denial of a motion for leave to amend a pleading for abuse of discretion. *Peuse v. Malkuch*, 275 Mont. 221, 226, 911 P.2d 1153, 1156 (1996).

DISCUSSION

¶10 *Issue One: Did the District Court err in ordering summary judgment for Zoot by finding Hathaway failed to first exhaust internal grievance procedures?*

¶11 Hathaway sued Zoot under Montana's Wrongful Discharge from Employment Act (WDEA). The WDEA governs remedies for wrongful discharge, a term defined at § 39-2-904, MCA. Discharging a non-probationary employee is wrongful if it is "not for good cause" or if the employer violates the terms of its own personnel policy in doing so.

¶12 The WDEA also provides employers an opportunity to defend themselves against wrongful discharge claims. If an employer has written internal procedures through which an employee can appeal a discharge decision, then the employee must first exhaust those procedures before suing. Section 39-2-911(2), MCA. However, the employer cannot raise this defense unless it provides the fired employee notice of the procedures and supplies a copy of the procedures within 14 days. Section 39-2-911(3), MCA.[1] The District Court chose to resolve the summary judgment question based on the internal grievance requirement alone.

¶13 Zoot points to the packet of documents it gave Hathaway at the meeting at which he was fired. Included in the packet was a copy of the employee handbook with company policies. One section of the handbook, the "Resolving Differences Policy," described how to file complaints. It included the rule that "[c]omplaints for corrective action and terminations must be filed within five days of the action." Another section of the policies

[1] The 2021 Montana Legislature changed the time limit from seven to 14 days; a seven-day rule applied at the time of Hathaway's firing, but Zoot's actions here on the day of the firing would have satisfied either timeline. *See* 2021 Mont. Laws ch. 117, § 5.

noted the opportunity to appeal decisions by a manager. And the handbook's "Guidelines" section noted that its "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."

¶14 Zoot argues that the written policies given to Hathaway notified him of the internal grievance process as required by § 39-2-911(3), MCA. Hathaway did not follow the process to appeal his termination, and thus, Zoot argues, cannot succeed in a suit under the WDEA.

¶15 In response, Hathaway argues there are three different reasons Zoot cannot raise this defense. First, he argues that Zoot's written policies for complaints do not clearly apply post-termination. Second, he argues that being given the written policy handbook cannot *also* be the notice of the procedures that the law requires; Hathaway asks us to hold that employers must give notice of the procedures through another act in addition to providing the employee a copy. Third, Hathaway argues that appealing his firing would have been futile, or that requiring him to do so would be an absurd legal result, exempting him from the grievance procedure requirements of the WDEA.

Applicability to Termination

¶16 Hathaway's first argument is belied by the plain text of Zoot's employee handbook. The policy handbook contained several references to termination and noted the requirement that complaints about termination must be filed within five days. Hathaway argues that the process was vague. He questions why these references were in the "Resolving Differences Policy" section and not the "Employee Termination Policy." And he says that

the people with whom the policy asks him to file a complaint are the same people who attended his firing, wondering why he should have to petition them again. Hathaway does not, however, raise evidence that Zoot *did not have* a termination grievance process; his arguments aim more at doubting whether the process was well-organized or effective. We generally grant personnel policies their express meaning, if reasonable. *See Kuszmaul v. Sterling Life Ins. Co.*, 2012 MT 154, ¶ 26, 365 Mont. 390, 282 P.3d 665 (rejecting a "speculative and unsupported" allegation of an employer policy violation). Hathaway's speculation that the process was disorganized does not eliminate its existence as an express policy. The District Court was correct to find that Zoot's grievance policies applied to terminations.

Notice and Written Copy

¶17 Hathaway's second argument fails because it rests on the non sequitur that obtaining a personal copy of a policy document fails to provide a party notice of the policies in it. Hathaway points out that to raise the defense in § 39-2-911(3), MCA, employers must notify employees of their procedures "and" supply a copy. Hathaway posits that because of the conjunction "and," we should require verbal notice or some additional conspicuous warning in addition to the copy provided. Hathaway says Zoot's comments at his firing that the "decision was final" and the lack of direct reference to the attached grievance procedures in his termination letter gave him the impression he need not read through the other documents to find such procedures.

¶18 In past cases, we have enforced the law's separate requirement that employers provide a copy of the policy within a week of termination, dismissing the employer's

defense when the employer had given some kind of notice but did not supply a written copy. *Casiano v. Greenway Enterprises, Inc.*, 2002 MT 93, 309 Mont. 358, 47 P.3d 432; *Eadus v. Wheatland Mem'l Hosp. & Nursing Home*, 279 Mont. 216, 926 P.2d 752 (1996). In those cases, we read the law as placing special emphasis on employee access to the details of how to satisfy the procedures after a firing—mere knowledge they exist is insufficient.

¶19 However, the extra emphasis on the writing does not mean that the writing cannot also constitute notice. Hathaway's argument falls into the same type of categorization trap as the "both a square and a rectangle" lesson of early geometry. Notice is not itself necessarily a written copy of the specifics, but the written copy is also notice. When Hathaway cites *Casiano* and *Eadus* and references other cases in which we have read meaning into a statutory "and," he points to cases where such overlap was not possible, where one rectangle was not also a square. *See Melton v. Speth*, 2018 MT 212, ¶¶ 9-11, 392 Mont. 409, 425 P.3d 700 (addressing a requirement that a medical expert be licensed *and* routinely do the treatment at issue); *State v. Miller*, 231 Mont. 497, 757 P.2d 1275 (1988) (requiring five years without a felony *and* a court inquiry into danger to society for a parolee to qualify for "non-dangerous offender" status).

¶20 Imagine, for example, the common two-part instruction to "show up, and don't be late!" If we know someone was not late, it is clear they satisfied the task to "show up" without further inquiry. If all we know is that they arrived, we must inquire into the more specific request of timeliness. Here, the law requires Zoot to give notice and supply a copy, and just as a timely arrival must comprise attendance, a written copy must comprise notice.

"Notice" has a specific legal meaning that includes possessing "express information of a fact." Section 1-1-217, MCA. A written policy is the clearest form of "express" language, which is likely why the Legislature required it in the WDEA. Hathaway cannot redefine "notice" to excuse his failure to read those express terms (he did consult an attorney within the time he could have followed Zoot's grievance process), and the District Court was correct to find Zoot's WDEA requirements satisfied.

Futility

¶21 Hathaway's third argument fails because it contradicts our precedent applying the WDEA. In *Russell v. Masonic Home of Mont., Inc.*, 2006 MT 286, ¶¶ 15-16, 334 Mont. 351, 147 P.3d 216, we declined to waive the WDEA's internal grievance requirement for an employee when she speculated that her boss would simply affirm her own firing decision. The "mere possibility of an adverse outcome" does not render the process futile. *Russell*, ¶ 16.

¶22 Hathaway makes the same speculation, protesting that all the decision-makers at his firing meeting would also be atop the chain of authority addressing any grievance he filed. He distinguishes *Russell* by noting that the policy in that case contemplated the option of having someone other than the boss review the decision. However, as Zoot points out, its policies refer complaints to the "Human Resources Department," which also raises the possibility of review by people other than the leader that participated in the complained-of decision.

¶23 Hathaway cites a series of cases in which we have declined to apply a statutory rule to absurd or unjust ends, but he raises none in the WDEA context. *See, e.g.*, *Prindel v.*

Ravalli County, 2006 MT 62, ¶ 33, 331 Mont. 338, 133 P.3d 165 (refusing to apply a technical district court paperwork deadline in a way that excused the jail from booking a violent offender). Because the WDEA speaks plainly about the need to appeal a decision internally before turning to the courts, as we already held in *Russell*, we do not find the likelihood of the appeal's denial to raise such futility as to render the requirement a legal absurdity. It would be more absurd to essentially read the internal grievance requirement out of the law: if all an employee had to do to was argue that the higher-ups would probably affirm the firing, then the power of that speculation would grant almost any employee trivially easy means to evade the WDEA's rules.

¶24 Because Hathaway's arguments fail to justify why the WDEA's internal grievance requirement should not apply to him, we affirm the District Court's holding that Hathaway's failure to pursue Zoot's internal grievance process precludes his wrongful discharge case as a matter of law.

¶25 *Issue Two: Did the District Court abuse its discretion in finding Hathaway's age discrimination claim futile and therefore denying his motion for leave to amend the complaint?*

¶26 We generally favor freely allowing parties to amend their pleadings, but we have found district courts justified in denying leave to amend when "the proposed amendment would be futile as a matter of law." *Peeler v. Rocky Mountain Log Homes Can., Inc.*, 2018 MT 297, ¶ 29, 393 Mont. 396, 431 P.3d 911. The District Court denied Hathaway leave to add an age discrimination claim to his wrongful discharge case against Zoot because the District Court found it would be futile. We agree, but we also discern futility based on different grounds than the District Court.

¶27 Hathaway's age discrimination case could arise under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1), and a provision of the Montana Human Rights Act (MHRA), at § 49-2-303(1)(a), MCA. These statutes provide a cause of action for someone over age 40 who is fired without good cause and replaced by a substantially younger person. The MHRA is an omnibus anti-discrimination statute that covers a variety of protected characteristics, while the ADEA is specific to age and sits apart from similar provisions in the federal Civil Rights Act. Federal case law interpreting the ADEA has removed the possibility of mixed-motive claims; even with direct evidence of age discrimination, a claim will fail if a non-discriminatory justification is demonstrated. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 129 S. Ct. 2343 (2009). However, our case law applying the MHRA does permit mixed-motive analyses developed by reference to cases under the federal Civil Rights Act. *See Laudert v. Richland Cnty. Sheriff's Dep't*, 2000 MT 218, ¶ 27, 301 Mont. 114, 7 P.3d 386; *Martinez v. Yellowstone Cnty. Welfare Dep't*, 192 Mont. 42, 625 P.2d 242 (1981); *Stevenson v. Felco Indus.*, 2009 MT 299, ¶¶ 23-25, 352 Mont. 303, 216 P.3d 763.

¶28 The District Court here found that Hathaway's proposed age discrimination claim would be futile as a matter of law because it would necessarily have to be a mixed-motive case: Hathaway had admitted in a deposition that he thought nondiscriminatory factors were at play, and Zoot had provided ample evidence in the WDEA case of nondiscriminatory reasons for the firing. While this reasoning would settle the matter regarding Hathaway's claim under the federal law, it would not necessarily foreclose Hathaway's case under the MHRA; past the pleadings stage, Hathaway could have an

opportunity to present direct evidence of age discrimination or to establish that Zoot's justifications for his firing were pretextual.

¶29 However, Hathaway already faced the same issue—good cause for his firing—when addressing Zoot's summary judgment motion on his WDEA claim. There, Hathaway had an opportunity to raise evidence of discrimination or show that Zoot's explanations were pretextual, and Hathaway failed to do so. The District Court analyzed the WDEA claim based on "failure-to-grieve," as we affirmed above, and did not proceed to assess Zoot's primary argument that summary judgment was appropriate on the grounds of "good cause," but the record and the briefing on good cause were more than sufficient to establish summary judgment on that ground as well. And the existence of good cause as a matter of law, which we discern from the record, also renders the proposed age discrimination claim futile as a matter of law. Hathaway's required showing for his MHRA claim would depend on this same factor that was well-settled by the evidence and briefing in the WDEA case, and thus, it was within the District Court's discretion to deny him leave to amend.

¶30 We have held that summary judgment for an employer is appropriate in WDEA cases when the employer can point to legitimate business reasons and reasonable job-related grounds for terminating an employee. *Putnam v. Cent. Mont. Med. Ctr.*, 2020 MT 65, ¶¶ 16-17, 399 Mont. 241, 460 P.3d 419. We have also noted that an employer's firing decision is afforded the broadest discretion when applied to an employee in a managerial position. *Putnam*, ¶¶ 15-17. When the issue of good cause is raised on a motion for summary judgment, the record must include uncontested evidence demonstrating the employer's good cause for the discharge; the burden then shifts to the employee to present

"evidence establishing either that the given reason for the discharge is not good cause in and of itself, or that the given reason is a pretext and not the honest reason for the discharge." *Putnam*, ¶ 17 (quoting *Bird v. Cascade County*, 2016 MT 345, ¶ 11, 386 Mont. 69, 386 P.3d 602) (internal quotations omitted). Note, importantly, the parallels between this analysis and that for Hathaway's proposed MHRA claim.

¶31 Here, Hathaway was a vice president at Zoot, managing marketing teams. Zoot pointed to his lack of professionalism and violation of company policies as reasons it had lost trust in his ability to maintain this role. Zoot provided the District Court ample documentary evidence to back up its decision, demonstrating email exchanges in which Hathaway disregarded requests to follow company travel procedures, performance reviews regarding areas where Hathaway's conduct fell short, his failure to address direct feedback about his performance, and unexplained absences from work.

¶32 Hathaway does not contest what Zoot's evidence showed as a matter of fact. And our summary judgment analysis under the WDEA, especially for managerial positions, need not necessarily consider whether an employer proves the truth of each allegation about its reasons for the firing. *Sullivan v. Cont'l Constr. of Mont., LLC*, 2013 MT 106, ¶ 35-36, 370 Mont. 8, 299 P.3d 832. Instead, we consider whether the employer's decision was arbitrary or capricious based on the established information that informed the employers decision. *Sullivan*, ¶ 35. To survive a motion for summary judgment, the employee must raise credible evidence just like that under the MHRA—that the employer's reasons amounting to "good cause" were mistaken or a pretext. *Putnam*, ¶ 17. *See also Moe v. Butte-Silver Bow County*, 2016 MT 103, ¶¶ 50, 58-59, 383 Mont. 297, 371 P.3d 415 (in

which an employee submitted detailed explanations about why factual assertions about her performance were incorrect).

¶33 Here, Hathaway only made a general denial of the existence of good cause and raised no evidence to show Zoot's stated reasons were pretextual. Hathaway's arguments on the subject were more interpretive than factual: he contested whether his performance evaluations cast him in the right light, and he argued about the meaning of Zoot's policies that Zoot said he violated. Hathaway also provided some evidence of good aspects of his performance, such as a past promotion, meeting budgetary and project expectations, and being liked by some other Zoot employees. However, these materials do not amount to evidence that Zoot's justifications were in error or pretextual; to the extent that Hathaway contested Zoot's cited and documented reasons for the firing, he only *said* they were manufactured reasons and not actually good cause. Hathaway raised no evidence to support these statements, other than his own speculation, and he did not dispute the actual contents of the performance evaluations, email exchanges, or other evidence Zoot presented. "Conclusory statements, speculative assertions, and mere denials are insufficient to defeat a motion for summary judgment." *Davis v. State*, 2015 MT 264, ¶ 7, 381 Mont. 59, 357 P.3d 320.

¶34 Thus, the undisputed facts in the record before the District Court were sufficient to support summary judgment in favor of Zoot on the "good cause" grounds. "Summary judgment remains an appropriate remedy where there are facts not in dispute that provide 'good cause' for discharge from employment." *Putnam*, ¶ 26. Hathaway failed to meet his burden to bring evidence that would dispute the good cause Zoot raised.

¶35 Because the existence of good cause for Hathaway's firing was apparent as a matter of law, it is equally apparent that subsequently pursuing his age discrimination claim under the MHRA would be futile. It was therefore within the District Court's discretion to deny Hathaway leave to amend his complaint.

CONCLUSION

¶36 The District Court's February 8, 2021 orders granting summary judgment to Zoot and denying Hathaway's motion for leave to amend are affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE