

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 21-0591

JOSHUA F. CLARK,

Plaintiff/Appellant,

vs.

**MISSOULA COUNTY SHERIFF
TERRY J. MCDERMOTT, COUNTY OF
MISSOULA, MONTANA,
and HUMAN RIGHTS COMMISSION,**

Defendants/Appellees.

**RESPONSE BRIEF OF APPELLEES MISSOULA COUNTY SHERIFF
T.J. MCDERMOTT AND COUNTY OF MISSOULA**

**On Appeal from the Montana Fourth Judicial District Court
Missoula County, Cause No. DV-15-1290
Before Honorable Jennifer B. Lint**

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STATEMENT OF THE ISSUES

Clark's Principal Brief does not address the District Court's October 25, 2021, *Judgment* referenced in his Notice of Appeal. Consequently, this Court lacks jurisdiction to hear Clark's appeal as it was not properly noticed and is untimely. Because jurisdiction is at issue, Missoula County respectfully restates the issues as follows:

(1) Whether this Court has jurisdiction to hear Clark's appeal;

If the Court finds it has jurisdiction to consider Clark's appeal, the remaining issues are:

(2) Whether Clark's claim under 42 U.S.C. § 1983 is barred by *res judicata* and claim preclusion;

(3) Whether the District Court correctly dismissed Clark's *Amended Complaint* on the basis that his claims, to include his § 1983 claim, were subject to the exclusive remedy provision of the Montana Human Rights Act ("MHRA"); and

(4) Whether the District Court correctly concluded the MHRA did not deprive Clark of a right to a jury trial under the Montana or United States Constitutions in limiting him to judicial review of the Human Rights Commission's *Final Agency Decision*.

STATEMENT OF THE CASE

Clark's Notice of Appeal designates the District Court's October 25, 2021, *Judgment* as the final judgment he appeals to this Court. Clark's Principal Brief does not address that *Judgment*. It addresses the District Court's April 5, 2018, *Opinion & Order: Amended Complaint*, in which the Court granted Missoula County's motion to dismiss Clark's *Amended Complaint* with prejudice. That *Opinion & Order* was an appealable final judgment on the date it was entered, and Clark's time to appeal it ran four years ago. His appeal should be dismissed as it was improperly noticed and was not timely filed.

Clark's claim under 42 U.S.C. § 1983 is otherwise barred by *res judicata* and claim preclusion. The factual bases of the claim are Clark's allegations of political discrimination and retaliation in violation of the MHRA and the Montana and United States Constitutions. Those allegations were fully-vetted and adjudicated in the MHRA proceedings on Clark's *Human Rights Complaint*. Clark's Principal Brief does not address the District Court's October 12, 2021, *Opinion and Order*, affirming the *Final Agency Decision*. That *Opinion and Order* is now *res judicata*, and Clark is barred from relitigating the identical factual allegations and legal claims that were decided against him in the MHRA proceedings below.

If this Court finds it has jurisdiction to consider Clark's appeal, it should reject his statutory construction argument. His appeal seeks to duplicate nearly seven years

of proceedings on his *Human Rights Complaint*, which concluded with the District Court's October 12, 2021, *Opinion and Order*. Clark's statutory construction argument contravenes the Legislature's intent that the MHRA serve as the exclusive remedy for discrimination and retaliation in employment. It further attempts to flip this Court's review standard on its head, as the Court's review of the District Court's October 12, 2021, *Opinion and Order*, would be on a "clearly erroneous" basis. Clark attempts to impose a *de novo* review standard by contesting the District Court's April 5, 2018, *Opinion & Order: Amended Complaint*.

The District Court correctly concluded in its April 5, 2018, *Opinion & Order*, that Clark's *Amended Complaint* was barred by the MHRA's exclusive remedy provision, and that Clark was limited to review of his *Petition for Judicial Review* pursuant to § 49-2-505, MCA, and § 2-4-702, MCA. Missoula County argued, and the District Court agreed, that the gravamen of Clark's causes of action in the *Amended Complaint*, to include his § 1983 claim, were his allegations of political discrimination and retaliation in employment. The factual allegations he cites in support of his appeal have been decided against him.

The District Court also correctly held that the MHRA does not violate the Montana or United States Constitutions in limiting Clark to the District Court's review of his *Petition for Judicial Review*. Clark does not address the Court's holding on this issue, and the issue was not properly appealed. His appeal should be

dismissed. Clark’s Principal Brief further ignores that his § 1983 claim is duplicative of his political discrimination and retaliation claims. This is also fatal to his jury trial argument.

STATEMENT OF THE FACTS

Clark filed a *Human Rights Complaint* with the Montana Human Rights Bureau (“HRB”), on March 10, 2015, naming Missoula County Sheriff T.J. McDermott (“McDermott”), Undersheriff Jason Johnson, and County of Missoula, Montana (“Missoula County” or “the County”) as Respondents. Clark’s Appendix of Record (“CAR”), 00107 - 00128 - *Human Rights Complaint*, March 10, 2015, HRB Case 0151017366 - 68. Clark asserted claims of Unlawful Discrimination, Unlawful Retaliation, and Wrongful Discharge in violation of the Montana Human Rights Act (“MHRA”). *Id.* Clark alleged he was “constructively discharged” in violation of “*the 14th Amendment of the [United States] Constitution,*” and that his discharge was “*actionable under 42 U.S.C. § 1983.*” *Id.*, pp. 00122 - 00123 (emphasis added).

Clark alleged he was a member of a “protected class” under the MHRA because of his “political beliefs and activities.” He requested that HRB “enjoin McDermott and the County of Missoula from discriminating and retaliating against others like him in the Sheriff’s Office who might disagree with McDermott’s politics.” *Id.*, p. 00123, ¶ 54. He prayed for an award of “compensatory damages,

including special damages,” general damages “*for infringement upon rights of free speech* and privacy, humiliation, and emotional distress,” and costs and attorney fees. *Id.*, p. 00123, ¶¶ 55 - 56 (emphasis added).

After conducting an informal investigation of Clark’s *Human Rights Complaint*, HRB certified the complaint for a contested case hearing pursuant to § 49-2-504(7)(c) and -505, MCA. County’s Ex. 1, attached. Clark did *not* receive the requisite “notice of dismissal” under § 49-2-504(7)(b), MCA, that would allow him to file a complaint in District Court.

Clark nevertheless filed a *Complaint and Jury Demand* on December 18, 2015, in the Montana Fourth Judicial District Court, Missoula County. District Court Record (“DCR”), Doc. 1. The *Complaint* recited the factual allegations from his *Human Rights Complaint* verbatim. It included the identical Wrongful Discharge claim from his *Human Rights Complaint*, which Clark again asserted was actionable under 42 U.S.C. § 1983. *Id.*, pp. 16 - 19; Clark’s Appendix of Record, pp. 00108 - 118.

The Office of Administrative Hearings conducted a three-day, contested case hearing on the *Human Rights Complaint*, from June 21 - 23, 2016. CAR, pp. 00044. Thirteen witnesses testified and nearly 60 exhibits were admitted along with two depositions. *Id.*, p. 00044 - 00046. In his Pre-Hearing Statement, Clark contended he was: (1) discriminated against based on his political beliefs; (2) retaliated against

based on his political beliefs; and (3) retaliated against for his adverse position in McDermott's and Johnson's [own] HRB complaints. *Id.*, p. 00139. Clark further alleged "Respondents failed to comply with applicable state *and federal laws.*" *Id.*

On March 27, 2017, the Hearing Officer issued a 47-page *Decision*, in which she concluded Clark "failed to prove that [Missoula County] discriminated against him illegally because of political belief [or] retaliated against him for participating in a Human Rights complaint against his employer." *Id.*, p. 00090. The Hearing Officer granted Judgment in favor of the County Defendants and dismissed Clark's *Human Rights Complaint* with prejudice as lacking merit. *Id.*

On April 7, 2017, Clark filed a Notice of Appeal pursuant to § 49-2-505(4), MCA. *Id.*, p. 00170. The parties briefed the appeal and the Montana Human Rights Commission ("HRC") heard oral arguments. *Id.*, pp. 00170 - 216. HRC issued its *Final Agency Decision* on August 14, 2017, concluding the Hearing Officer's "findings of fact were supported by competent substantial evidence in the record and [her] conclusions of law were correct." *Id.*, pp. 00171. HRC informed the parties that either "may petition the district court for judicial review of the Final Agency Decision" pursuant to § 2-4-702, MCA, and § 49-2-505, MCA. *Id.*, p. 00172.

Clark then filed a combined *Amended Complaint and Petition for Judicial Review and Demand for a Jury Trial*, on September 12, 2017. *Id.*, pp. 00001 - 00039.

Clark stated his *Amended Complaint* was being filed “in the alternative and in addition” to his *Petition for Judicial Review*. *Id.*, p. 00001.

The *Amended Complaint* includes the same claims Clark asserted previously, along with his re-framed 42 U.S.C. § 1983 claim. *Id.*, pp. 00015 - 00022. The factual allegations are identical to those in his *Human Rights Complaint* and initial *Complaint*, and they are the same “facts” Clark cites in support of his Principal Brief on appeal to this Court. *Id.*, pp. 00002 - 00015, 00107 - 00128; DCR, Doc. 1, pp. 1 - 16; Appellant’s Principal Brief, pp. 5 - 20. The salient facts have been rejected by the Hearing Officer, the Human Rights Commission, and the District Court. Clark has not appealed the adverse factual findings.

On November 13, 2017, Missoula County filed its Rule 12(b)(6) Motion to Dismiss Clark’s *Amended Complaint* on the basis that the gravamen of his tort claims, including his § 1983 claim, were his allegations of retaliation and political discrimination in violation of the MHRA. CAR, pp. 00094 - 00105. The County argued Clark’s claims were barred by the MHRA’s exclusive remedy provision and that his *Amended Complaint* should be dismissed, with “all further proceedings in [the] matter . . . limited to the [District] Court’s judicial review of the Final Agency Decision as provided under § 49-2-505(9), MCA, and § 2-4-704, MCA.” *Id.*, p. 00102.

Clark responded that the MHRA does not “preempt[] his state law wrongful discharge and tort claims, as preemption under the circumstances of this case violates the Montana Constitution.” DCR, Doc. 13, p. 3. With regard to his § 1983 claim, Clark argued only that “whatever the law of the state of Montana regarding [his] right to a jury trial on issues of Montana law, on the § 1983 Free Speech claim, federal law controls.” *Id.*, pp. 19 - 20.

On April 5, 2018, the District Court (Hon. Judge Haynes) entered its *Opinion & Order: Amended Complaint*, granting the County’s motion to dismiss the *Amended Complaint* with prejudice. CAR, pp. 00217 - 00230. The Court observed that Clark “entirely ignores the [County’s] gravamen analysis,” and that Clark “never refutes that the gravamen of his [*Amended Complaint*] claims are based upon political discrimination.” *Id.*, p. 00223. The Court observed that “Clark also concedes . . . [this] Court’s constant rulings uphold that the MHRA’s prohibition against a jury trial in discrimination claims does not violate the right to trial by jury guaranteed by the Montana Constitution.” *Id.* p. 00224. Clark does not address these observations in his Principal Brief.

The parties thereafter briefed Clark’s *Petition for Judicial Review*, and the District Court (Hon. Judge Lint) heard oral argument. DCR, Docs. 34, 40, 41, and 47. The Court issued its *Opinion and Order* on October 12, 2021, affirming the *Final Agency Decision* and the Hearing Officer’s findings of fact and conclusions of

law on Clark's *Human Rights Complaint*. DCR, Doc. 50.1. Notably, the Court observed Clark's claims of political discrimination and retaliation implicated the "exercise of first amendment rights, including 'political association, expression and debate, and participation in political ideas and government policies.'" *Id.*, p. 8 (quoting *Taliaferro v. State*, 235 Mont. 23, 764 P.2d 860, 865 (1988)). The Court further noted that "not every action or statement necessarily derives from a matter of public concern," and that "[Clark's and McDermott's] feelings of mutual animosity are matters of personal interest rather than public concern, regardless of whether those feelings began during the election." *Id.*, p. 9 (citing *Ray v. Montana Tech of the University of Montana*, 2007 MT 21, ¶¶ 34, 37, 335 Mont. 367, 152 P.3d 122).

Clark filed his Notice of Appeal with this Court on November 19, 2021, indicating he was appealing the "Judgment dated October 25, 2021." *Clark v. Missoula County Sheriff, Terry J. McDermott, et al.*, Supreme Court of the State of Montana, Case No. DA-21-0591, *Notice of Appeal*, p. 2; County's Ex. 2, attached. That *Judgment* specifies that it was entered on the District Court's October 12, 2021, *Opinion and Order*, and the underlying MHRA proceedings on Clark's *Human Rights Complaint*.

Clark filed his Principal Brief on February 28, 2022, in which he substantively develops his § 1983 argument for the first time on appeal. Appellant's Principal

Brief, pp. 24 - 38. Critically, Clark does not contest the District Court’s October 12, 2021, *Opinion and Order* affirming HRC’s *Final Agency Decision*. The *Order* is now *res judicata* and determinative of Clark’s political discrimination and retaliation claims, to include his § 1983 claim.

STANDARD OF REVIEW

Under the unique circumstances of this case, the salient facts Clark cites in support of his appeal have been found against him. Clark’s Notice of Appeal indicates he’s appealing the District Court’s October 12, 2021, *Order and Opinion*, in which the “facts” cited in his Principal Brief were rejected for the third and final time.

If this Court was reviewing the October 12, 2021, *Order and Opinion*, it would employ the same standards the District Court employed in reviewing HRC’s *Final Agency Decision*. *McDonald v. Dept. of Environ. Quality*, 2009 MT 209, ¶ 38, 351 Mont. 243, 214 P.3d 749. Those standards “are whether [HRC’s] findings of fact are clearly erroneous and whether its interpretation and application of law are correct.” *McDonald*, 2009 MT 209, ¶ 38 (citing § 2-4-704(2)(a), MCA; *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, 198 P.3d 284). “Review of the decision is confined to the record, . . . and the reviewing court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” *Id.* at ¶ 38 (citing §§ 2-4-704(1) and (2), MCA).

However, Clark's Principal Brief solely addresses the District Court's April 5, 2018, *Opinion & Order: Amended Complaint*, granting Missoula County's Rule 12(b)(6) motion to dismiss. The County agrees that under normal circumstances, this Court would review that order *de novo*. *Wise v. CNH America, LLC*, 2006 MT 194, ¶ 6, 333 Mont. 181, 142 P.3d 774 (citation omitted).

A *de novo* review standard would ignore that the allegation underlying Clark's § 1983 claim have been found against him and have not been appealed.

SUMMARY OF ARGUMENT

Clark does not contest the October 25, 2021, *Judgment* designated in his Notice of Appeal, and he did not timely appeal the District Court's April 5, 2018, *Opinion & Order: Amended Complaint*. This Court lacks jurisdiction to hear Clark's appeal and it should be dismissed.

Clark's § 1983 claim is otherwise barred by *res judicata* and claim preclusion. There is no daylight whatsoever between the § 1983 claim and Clark's MHRA claims from a factual or legal perspective. The facts were fully-adjudicated on their merits in the past seven years of MHRA proceedings and Clark's claims were resolved against him. The fact-finding is complete. The MHRA proceedings are now *res judicata* and Clark's § 1983 claim is barred as a matter of law.

In *Edwards*, this Court rejected the statutory construction argument Clark submits, and it should do so again. *Edwards v. Cascade Sheriff's Dept.*, 2009 MT

451, ¶¶ 71, 73, 354 Mont. 307, 223 P.3d 893. Clark provides no explanation as to how his § 1983 claim differs from his MHRA claims. He hasn't because he can't. Clark nevertheless asks this Court to endorse a second trial, on the same factual allegations, with the same witnesses and exhibits, with the hope of a different outcome. This would be unprecedented. It would further contravene the Legislature's mandate that the MHRA provide the exclusive remedy for claims sounding in discrimination and retaliation in employment.

The District Court correctly applied this Court's gravamen analysis in concluding Clark's § 1983 claim was subject to the MHRA's exclusive remedy provision. Notably, the Court did *not* conclude that Clark's § 1983 claim was preempted by the MHRA. It correctly identified the claim as a political discrimination claim with a § 1983 label on it. Nor did the Court conclude that Clark had to exhaust his administrative remedies before filing his § 1983 claim in District Court. The Court concluded the MHRA barred Clark's § 1983 claim as it "arise[s] from underlying allegations of . . . discrimination," regardless of how he framed the claim. DCR, Doc. 31, pp. 6 - 8 (citing *Arthur v. Pierre Ltd.*, 2004 MT 303, ¶ 18, 323 Mont. 453, 100 P.3d 987; *Edwards*, 2009 MT 451, ¶ 74).

The District Court also concluded, based on 30 years of this Court's *stare decisis*, that the MHRA's exclusive remedy provision did not violate the Montana

or United States Constitutions in limiting Clark to judicial review of HRC's *Final Agency Decision*.

ARGUMENT

I. THE COURT DOES NOT HAVE JURISDICTION TO HEAR CLARK'S APPEAL AND SHOULD DISMISS IT.

A. Clark's Appeal Is Not Properly Before This Court as He Did Not Reference the District Court's April 5, 2018, *Opinion & Order: Amended Complaint* in His Notice of Appeal.

This Court "will not consider an appeal from an order not designated in the notice of appeal." *Lewis v. Puget Sound Power & Light Co.*, 2001 MT 145, ¶ 27, 306 Mont. 37, 29 P.3d 1028; *Carl v. Chilcote*, 255 Mont. 526, 534, 844 P.2d 79, 84 - 85 (1992) (district court's grant of summary judgment not properly before this Court where appellants "failed to designate the . . . summary judgment order in their notice of appeal," and the order was otherwise "an order from which an appeal was available").

A party's "notice of appeal . . . shall specify the party or parties taking the appeal . . . and designate the final judgment or order or part thereof from which the appeal is taken." Rule 4(4)(a), Mont. R. App. P. "An appeal from a judgment draws into question all previous orders and rulings excepted or objected to which led up to and resulted in the judgment." *Id.* An order or ruling "which led up to and resulted in the judgment" is one that "involves the merits, or necessarily affects the judgment,

except a decision or order from which an appeal might have been taken.” *Carl*, 255 Mont. 526, 534, 844 P.2d 79, 85.

Again, Clark’s Principal Brief concerns the District Court’s April 5, 2018, *Opinion & Order: Amended Complaint*, which is not designated in his Notice of Appeal. The District Court’s dismissal of the *Amended Complaint* had no bearing on its judicial review of HRC’s *Final Agency Decision*. Its April 5, 2018, *Opinion & Order* did not “involve the merits, or necessarily affect the judgment” Clark designated in his Notice of Appeal.

The *Judgment* designated in the Notice of Appeal was entered on the District Court’s October 12, 2021, *Opinion and Order*, and the HRC proceedings that “led up to and resulted in” the Court’s affirming of HRC’s *Final Agency Decision*. In affirming the *Final Agency Decision*, the District Court exclusively reviewed the Hearing Officer’s findings of fact and conclusions of law regarding Clark’s *Human Rights Complaint*. See, DCR, Doc. 50.1. Its corresponding *Opinion and Order* makes no reference whatsoever to its *Order* dismissing Clark’s *Amended Complaint*. See *id.* The law applied in the two orders is entirely distinct.

Clark made a strategic decision to not address the *Judgment* designated in his Notice of Appeal. This is presumably because the “clearly erroneous” review standard was not favorable to him. Regardless, his appeal was not properly noticed and it should be dismissed.

B. The Court Does Not Have Jurisdiction to Consider Clark’s Appeal as He Did Not Timely Appeal the District Court’s April 5, 2018, *Opinion & Order: Amended Complaint*.

“The time limits for filing an appeal are jurisdictional and exclusive.” *Foster Apiaries, Inc. v. Hubbard Apiaries, Inc.*, 193 Mont. 156, 159, 630 P.2d 1213, 1215 (1981). “An appellant has a duty to perfect its appeal in the manner and time provided in [Rule 4(5)(a)(i), Mont. R. App. P.]” *Foster Apiaries*, 193 Mont. 156, 159, 630 P.2d, 1215. “Absent this compliance, this Court lacks jurisdiction to hear the appeal.” *Id.*

An appealable “final judgment” is one that “conclusively determines the rights of the parties and settles all claims in controversy in an action or proceeding, including any necessary determination of the amount of costs and attorney fees awarded or sanctions imposed.” Rule 4(1)(a), Mont. R. App. P. This Court has held that “an order dismissing a complaint . . . is equivalent to a final judgment for purposes of appeal,” as the order has “denied [the plaintiff] relief just as completely as if judgment had been entered against it.” *Prentice Lumber Co., Inc. v. Hukill*, 161 Mont. 8, 12 - 13, 504 P.2d 277, 279 (1972); *See also, Sadowsky v. City of Glendive*, 259 Mont. 419, 856 P.2d 556 (1993) (district court’s denial of “request for an extension of time to file a notice of appeal” is an appealable order where it “concludes [the] case just as finally as any final judgment”); *Ensey v. Mini Mart, Inc.*, 2013 MT 94, ¶ 10, 369 Mont. 476, 300 P.3d 1144 (although not listed in Rule

6(3), Mont. R. App. P.’s list of “appealable orders,” district court’s order dismissing amended complaint was appealable where “court’s order denied [plaintiff] relief on her . . . claims just as if judgment had been entered against her”) (citations omitted); *Seamster v. Musselshell County Sheriff’s Office*, 2015 MT 84, ¶¶ 9 - 12, 374 Mont. 358, 321 P.3d 829 (order granting motion to dismiss *without* prejudice appealable where “statute of limitations prevent[ed] [plaintiff] from refiling his complaint [and] the practical effect of the court’s order acts as a final judgment”).

In this case, the District Court’s April 5, 2018, *Opinion & Order: Amended Complaint*, was an appealable order as of the date it was entered. The *Order* dismissed Clark’s *Amended Complaint* with prejudice, and denied Clark all relief on his claims “just as if judgment had been entered against him.” It “conclusively determine[d] the rights of parties and settle[d] all claims in controversy,” particularly where the statute of limitations under § 27-2-204, MCA, bars Clark from filing an amended complaint. The County was not entitled to recover costs or attorney fees on its motion to dismiss, and no sanctions were imposed. The *Order* was thus final and appealable as of April 5, 2018.

Under Rule 4(5)(a)(i), Mont. R. App. P., Clark had “30 days from the date of entry of the . . . order” to file his notice of appeal with this Court, designating the District Court’s April 5, 2018, *Opinion & Order: Amended Complaint*, as the order

from which he appealed. Clark filed no such notice. His appeal is untimely and this Court lacks jurisdiction to consider it.

II. CLARK’S § 1983 CLAIM IS BARRED BY *RES JUDICATA* AND CLAIM PRECLUSION.

Now that Clark has abandoned his appeal of the District Court’s October 12, 2021, *Opinion and Order*, the Court’s *Order* is final, and Clark’s § 1983 claim is barred by *res judicata* and claim preclusion.

“The doctrine of *res judicata* prevents a party from relitigating a matter that the party has already had an opportunity to litigate.” *Loney v. Milodragovich, Dale & Dye, P.C.*, 273 Mont. 506, 905 P.2d 158, 161 (1995) (citation omitted). “It is based on the public policy that there must be some end to litigation.” *Loney*, 273 Mont. 506, 905 P.2d 158, 161 (citation omitted). “A claim is *res judicata* when four criteria are met: the parties or their privies are the same; the subject matter of the claim is the same; the issues are the same and relate to the same subject matter; and the capacities of the persons are the same in reference to the subject matter and the issues.” *Id.* (Citation omitted.)

The United States Court of Appeals, Seventh Circuit, applied this doctrine (under the “claim preclusion” moniker) in upholding dismissal of the appellant’s federal court action under 29 U.S.C. § 623(a)(1) of the ADEA, after she was discharged from her employment. *Walczak v. Chicago Board of Education*, 739 F.3d 1013 (7th Cir. 2014). Walczak filed an ADEA age discrimination charge with

EEOC, but received an administrative hearing on her discharge while the EEOC charge was pending. *Walczak*, 739 F.3d 1013, 1015. The hearing officer issued a report “making extensive factual findings and recommending that Walczak be reinstated to her tenured position.” *Id.* The school Board rejected the hearing officer’s recommendation and terminated Walczak’s employment. Walczak sought judicial review of the Board’s decision, arguing the Board violated Illinois law and her right to due process. *Id.* The circuit court upheld the Board’s decision, and Walczak appealed to the Illinois Appellate Court, which affirmed the circuit court. *Id.*, 739 F.3d at 1016.

Walczak thereafter received a right-to-sue letter from EEOC “notifying Walczak that it had ceased processing her charge and she had 90 days to file suit.” *Id.* Walczak then filed her ADEA action in federal court, which the Board moved to dismiss on the basis “that claim preclusion barred the ADEA suit because it arose out of the same set of facts as the action in Cook County Circuit Court.” *Id.*

The *Walczak* court affirmed dismissal of the ADEA claim, noting that under the “claim preclusion” doctrine, “a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action.” *Id.* (Citations omitted.) The court observed that “separate claims are considered the same cause of action for claim-preclusion purposes ‘if they arise from a single group of operative facts, regardless

of whether they assert different theories of relief.” *Id.* at 1017 (citation omitted). The court confirmed Walczak “could have joined her federal employment-discrimination claim with her complaint for judicial review,” and that “the circuit court’s decision in the judicial-review proceedings constitutes a final judgment on the merits” that barred the claim. *Id.*

The court noted the preclusion doctrine “doesn’t involve a case-specific cost-benefit analysis assessing which court is better situated to decide the claim,” but instead “seeks ‘to minimize the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions.’” *Id.* at 1020 (citing *Matrix IV, Inc. v. Am. Nat’l Bank & Trust Co.*, 649 F.3d 539, 547 (7th Cir.2011) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979))). The court observed that in disallowing “claim-splitting,” claim preclusion “is founded on the premise that litigation should come to an end and that no person should unnecessarily be harassed with a multiplicity of lawsuits.” *Id.* (Citation omitted.)

Here, Clark’s § 1983 claim was fully-adjudicated in the context of his MHRA action. He specifically plead it under his “constructive discharge” claim in his *Human Rights Complaint*. The § 1983 claim is based on the identical set of facts Clark alleged in his *Human Rights Complaint*, and the District Court specifically found that his claims of political discrimination and retaliation implicated the

“exercise of first amendment rights, including ‘political association, expression and debate, and participation in political ideas and government policies (i.e., the right to free speech).” DCR, Doc. 50.1, p. 8.

The District Court’s October 12, 2021, *Opinion and Order* became final and *res judicata* when Clark declined to contest it on appeal. In addition to being barred under this Court’s MHRA precedent, Clark’s § 1983 claim is now barred by *res judicata* and claim preclusion, and his appeal should be dismissed.

III. CLARK’S STATUTORY CONSTRUCTION ARGUMENT SHOULD BE REJECTED.

Clark argues the MHRA’s exclusive remedy provision at § 49-2-512, MCA, cannot encompass his § 1983 claim because the statute does not expressly reference the United States Constitution’s Bill of Rights. Clark’s Principal Brief, pp. 28 - 29. This Court previously rejected a similar argument under nearly identical facts. *See, Edwards*, 2009 MT 451, ¶¶ 71, 73 (rejecting argument that MHRA does not extend to “constitution-based claims” asserted in District Court, where “gravamen” of claims is political discrimination and retaliation in employment, and “Section 49-2-509(7) . . . extends the . . . MHRA to any violation of Article II, Section 4 of the Montana Constitution,” which “forbids discrimination against any person for exercising his or her political rights or expressing their political ideas”).

Additionally, this Court interprets a statute “so as to give effect to the legislative will, while avoiding an absurd result.” *City of Great Falls v. Morris*,

2006 MT 93, ¶ 19, 332 Mont. 85, 134 P.3d 692. The *Walczak* court’s discussion of the preclusion doctrine, *supra*, speaks to the absurdity of what Clark asks of this Court. The underlying allegations of Clark’s § 1983 claim have been the subject of a contested case hearing before OAH, an appeal to HRC, and the District Court’s judicial review of the *Final Agency Decision*. Allowing a jury trial on the identical factual allegations would increase the expense of litigation, waste judicial resources, undermine the public’s trust in the MHRA and the judiciary, and allow litigants to “unnecessarily be harassed with a multiplicity of lawsuits.”

Clark’s suggested interpretation of the MHRA further ignores that “litigants can frequently employ tort terminology to improperly re-characterize’ what is at the heart of their complaint,” and that “permitting a party to bypass the MHRA’s procedures . . . ‘would be to eviscerate the mandate’ of the MHRA, requiring that it provide the exclusive remedy for acts constituting violations thereof.” *Lay v. State Dep’t of Military Affairs*, 2015 MT 158, ¶ 15, 379 Mont. 365, 351 P.3d 672 (citations omitted).

IV. THE DISTRICT COURT CORRECTLY DISMISSED CLARK’S § 1983 CLAIM ON THE BASIS THAT IT WAS SUBJECT TO THE EXCLUSIVE REMEDY OF THE MHRA.

A. The District Court Correctly Determined that Clark was Limited to Judicial Review of the *Final Agency Decision*.

The County cited *Edwards* in its briefing on this issue below, and the District Court cited it in holding that Clark’s § 1983 claim was barred by the MHRA’s

exclusive remedy provision. *Edwards*, 2009 MT 451. Indeed, the District Court (Hon. Judge Haynes) delivered this Court’s opinion in *Edwards*, and was presumably “no stranger to attempts to characterize a claim in such a way so as to avoid the exclusive procedures set forth in the MHRA.” *Lay*, 2015 MT 158, ¶ 15 (citations omitted).

The District Court correctly applied this Court’s gravamen analysis in determining Clark’s § 1983 claim was merely a re-characterization of his political discrimination and retaliation claims. This Court has historically “look[ed] to the gravamen of the party’s complaint, as opposed to the party’s characterization of [his] claims” in determining whether the MHRA’s exclusive remedy applies. *Lay*, 2015 MT 158, ¶ 15.

In *Edwards*, the appellants sued the newly-elected Sheriff, his Undersheriff, and Cascade County “on constitutional and tort theories related to political retaliation.” *Edwards*, 2009 MT 451, ¶ 1. The appellants asserted various claims “in proceedings at the local administrative level, before the Montana Human Rights Bureau (HRB), and in both state and federal courts.” *Id.*, 2009 MT at ¶ 6. All but one filed “complaints of discrimination with [HRB] alleging that they were subjected to employment discrimination based on their political beliefs.” *Id.* at ¶ 17.

Before the HRB investigations were completed, the appellants filed a complaint in District Court “alleging violations of their constitutional rights of

freedom of speech and freedom of association under the Montana Constitution and 42 U.S.C. § 1983.” *Id.* at ¶ 22. The County removed the § 1983 claims to federal court and moved to stay the federal court proceedings “on the ground that the administrative proceedings under the [MHRA] had not been exhausted and finalized.” *Id.* at ¶ 23. The County argued “the gravamen of [appellants’] claims was grounded in discrimination,” and that the MHRA “provide[d] the exclusive remedy for illegal discrimination.” *Id.* Significantly, the appellants responded by seeking leave to dismiss their § 1983 claims on the basis that “*they were redundant with their claims under the Montana Constitution,*” and the case was remanded to District Court. *Id.* at ¶ 24 (emphasis added).

The County then moved to dismiss the appellants’ tort claims. *Id.* at ¶ 29. The appellants “alleged various constitutional violations” and claimed they were “retaliated against . . . ‘on the basis of their exercise of their freedom to associate with others of similar political beliefs and their *exercise of their freedom of speech,* when they supported [the former Sheriff], and in retaliation for their political ideas and activity.’” *Id.* at ¶ 30 (emphasis added). They further alleged that “the defendants made employment decisions which caused these Appellants to suffer damages, and that these decisions were motivated by the Appellants’ ‘exercise of their constitutional rights to freedom of association *and freedom of speech.*’” *Id.* (Emphasis added.)

In affirming the District Court’s dismissal of the appellants’ tort claims, this Court agreed that “the constitutional claims of interference with assembly, speech, privacy and due process . . . [were] actually components of [the] underlying political discrimination claims.” *Id.* at ¶ 56. The Court further observed:

All of the [a]ppellants alleged that their damages, including for severe emotional distress, were ‘a direct and proximate result of the discrimination.’ [Two of the] MHRA complaints before the Department alleged discrimination and retaliation in employment based upon political ideas, beliefs, and activity, all in violation of the MHRA, the Montana *and United States Constitutions, and the ‘Civil Rights Act of 1964 and 1991, as amended.’* Each of the [a]ppellants except [one] sought damages under the MHRA, including for emotional distress. Before the District Court, [several] alleged that the County and Sheriff’s office ‘employees acting at their direction began to retaliate against [a]ppellants . . . on the basis of their exercise of their freedom to associate with others of similar political beliefs . . . in retaliation for their political ideas and activity’ and that the County ‘employed hiring, promotion, and transfer procedures which altered [a]ppellants’ terms and conditions of employment, and which retaliated against [a]ppellants.’

Id. at ¶ 74 (emphasis added). The Court confirmed “the essence of the [appellants’] constitution-based claims . . . [and] their emotional distress claim . . . is . . . their allegations of politically-motivated discrimination that was initiated by the sheriff,” and that the “exclusive remedy for this form of alleged political discrimination is the MHRA.” *Id.* at ¶ 75. Importantly for this case, the Court held that Edwards, whose “discrimination claim was resolved by the HRB and has not been appealed,” was

barred from pursuing any of his tort claims in District Court. *Id.* at ¶ 82. This is exactly what we have here.

Similar to the *Edwards* appellants, Clark claimed in his *Human Rights Complaint* that he was constructively discharged in violation of the MHRA and “the 14th Amendment of the United States Constitution,” and that those violations were “actionable under 42 U.S.C. § 1983.” The *Human Rights Complaint* sought damages for “infringement upon rights of free speech.” Clark’s right to free speech, and the factual bases for his § 1983 claim, were considered and adjudicated in the MHRA proceedings and District Court’s review of the *Final Agency Decision*. Clark omits that the District Court found his allegations largely concerned “personal attacks,” “bad feelings,” and campaign mud-slinging that were “not relevant to public concern,” and showed McDermott “found Clark’s behavior questionable, not Clark’s political beliefs. DCR, Doc. 50.1, pp. 9 - 11.

Clark’s § 1983 claim is a naked repackaging of his MHRA claims in an attempt to circumvent the MHRA’s exclusive remedy provision. The claim is barred under this Court’s holding in *Edwards*, and its long-standing precedent regarding the MHRA’s exclusive remedial scheme. The District Court’s dismissal of the claim should be affirmed.

B. The District Court Correctly Concluded that Clark Does Not Have a Constitutional Right to a Jury Trial on His § 1983 Claim Where That Claim Is Subject to the MHRA’s Exclusive Remedy.

First, Clark did not perfect an appeal of the jury trial issue. Second, the case law Clark cites in support of his jury trial argument is not applicable to the facts and procedural posture of this case.

In *Spillers*, the petitioner filed state and federal discrimination claims in District Court after receiving a notice of dismissal and “right to sue” letter from HRB. *Spillers v. Mont. Third Judicial Dist. Court*, 2020 MT 8, ¶¶ 1, 9, 398 Mont. 323, 456 P.3d 560 (citing Mont. Code Ann. § 49-2-511(3)). That is not the case here. A contested case hearing was held on Clark’s *Human Rights Complaint* under §§ 49-2-504(7)(c) and -505(1) - (3), MCA (2015). His claims were adjudicated under the “specific procedures and remedies established in the MHRA,” which limited Clark to judicial review of the *Final Agency Decision* under § 49-2-505(9), MCA, and § 2-4-702, MCA. *Spillers*, 2020 MT 8, ¶ 9 (citation omitted).

Further, *Spillers* concerned the Civil Rights Act of 1991 (“1991 Act”), which specifically provides a “right to demand a jury trial” in cases involving “intentional violations of Title VII of the ADA.” *Id.* at ¶ 7 (citing 42 U.S.C. § 1981a(c)). This is not such a case. Nor does this case involve a FELA claim, a takings claim under the Fifth Amendment, or a state notice-of-claim statute. The related cases Clark cites are not applicable to this case.

The County agrees a claim under § 1983 generally sounds in tort. However, Clark alleged he was “subjected to acts which constitute unlawful discrimination in employment,” and he “may not maintain a traditional tort action based on that conduct.” *Saucier ex. rel. Mallory v. McDonald’s Restaurant of Montana, Inc.*, 2008 MT 63, ¶ 39, 342 Mont. 29, 179 P.3d 481. He was instead “limited to the specific procedures and remedies established in the MHRA.” *Saucier*, 2008 MT 63, ¶ 39.

The District Court correctly held the MHRA does not violate the Montana or United States Constitutions in limiting Clark to judicial review of the *Final Agency Decision*. CAR, p. 00224 (citing *Romero v. J & J Tire*, 238 Mont. 146, 151, 777 P.2d 292, 295-96 (1998); *Harrison v. Chance*, 244 Mont. 215, 224, 797 P.2d 200, 206 - 07 (1990)). Clark’s “free speech” claim was constitutionally adjudicated under the MHRA’s exclusive remedial scheme, and he was afforded judicial review of the *Final Agency Decision*.

Clark does not have a right to a jury trial on discrimination claims that are subject to the MHRA’s exclusive remedy.

CONCLUSION

This Court should dismiss Clark’s appeal as it was not properly noticed and is untimely. The Court should otherwise affirm the District Court’s dismissal of Clark’s § 1983 claim for the reasons stated above.

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DATED this 12th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(d), I certify that this brief is printed with proportionately spaced text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2019 is 6,422 words long, excluding Caption, Certificate of Compliance, and Certificate of Service.

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