

DA 21-0591

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 186

JOSHUA F. CLARK,

Plaintiff and Appellant,

v.

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

Defendants and Appellees.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-15-1290
Honorable Jennifer B. Lint, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Quentin M. Rhoades, Rhoades & Erickson PLLC, Missoula, Montana

For Appellees Missoula County Sherriff T.J. McDermott and County of Missoula:

Steven S. Carey, David T. Lighthall, Carey Law Firm, P.C. Missoula,
Montana

For Appellee Human Rights Commission:

Quinlan L. O'Connor, Montana Department of Labor & Industry, Helena,
Montana

Submitted on Briefs: July 27, 2022
Decided: September 27, 2022

Filed:


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Joshua Clark appeals a Fourth Judicial District Court Judgment rejecting his appeal of the Montana Human Rights Commission’s (“Commission”) Final Agency Decision on his Human Rights Complaint. Clark argues that the District Court erroneously dismissed his related 42 U.S.C. § 1983 claim when it ruled that the Montana Human Rights Act was the exclusive remedy for Clark’s claims grounded in political discrimination. We agree with Clark on this point but affirm nonetheless because the District Court’s later ruling upholding the Final Agency Decision—which Clark does not challenge—has preclusive effect against Clark’s attempt to reinstate his § 1983 claim.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 In 2014, Clark ran against Terry McDermott for the office of Missoula County Sheriff. After McDermott won the election, he reassigned Clark from Undersheriff—Clark’s title prior to the election—to the position of Senior Deputy. The record reflects a tense relationship between Clark and McDermott. In 2013, McDermott filed a human rights complaint, alleging discrimination and retaliation based on his political beliefs, against the Missoula County Sheriff’s Office, the Sheriff at the time, and a captain. Clark spoke critically of McDermott’s character and fitness in an adverse witness statement to McDermott’s complaint. During the 2014 Sheriff’s campaign, Clark openly criticized

¹ We draw the facts from Clark’s Amended Complaint and Petition for Judicial Review, taking the allegations as true for the purpose of the analysis. *See Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316 (when considering a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff and take all allegations of fact within the complaint as true).

McDermott's ethics and filed a political practices complaint against McDermott. Clark alleges that, shortly before the 2014 election, McDermott approached him for a "closed-door talk," where he told Clark to "control [Clark's] wife" due to her outspoken remarks regarding McDermott, that McDermott planned to retire if he lost the election, and that he expected Clark to do the same.

¶3 On January 1, 2015, McDermott, after winning the election, demoted Clark five ranks to a Senior Deputy position—the lowest position for which Clark was eligible based on total law enforcement experience and seniority. McDermott appointed Jason Johnson as Undersheriff. Johnson reported to the media that Clark turned down a detective position, that Clark was satisfied with his move to Senior Deputy, and that "[Clark] felt like that was the fairest decision." Clark denied Johnson's statement. He reached out to both McDermott and Johnson to complain about Johnson's inaccurate portrayal of the situation. Neither McDermott nor Johnson corrected Johnson's public statement.

¶4 Clark's new position removed the benefits he enjoyed from his previous rank—weekends and nights off, a more flexible vacation schedule, and wearing plain clothes during the workday. Clark was assigned to the "graveyard" patrol shift with only two days' notice. Clark complained that he was unprepared for such a change, having not needed to qualify with his handgun "in duty gear" for over three years and not yet requalifying with his rifle. Further, Clark's new position did not include any supervisory duties despite his status as the "third most senior patrol deputy, and the most senior deputy without any rank on patrol."

¶5 Clark alleged that he suffered deterioration of his physical and emotional health and took a leave of absence on advice from his physician. Clark “learned that his medical leave was . . . the topic of open speculation at the sergeant’s meeting the week of January 14, 2015.” When Clark complained of this behavior to the Missoula County Human Resources Department Head, the specifics of his complaint were forwarded to McDermott and Johnson. Citing the “hostility” of McDermott and Johnson, Clark retired on January 30, 2015.

¶6 Clark filed a Human Rights Complaint with the Montana Human Rights Bureau (HRB) against Missoula County, McDermott, and Johnson in March 2015. In his Human Rights Complaint, Clark alleged that his reassignment to Senior Deputy violated prohibitions against retaliation and discrimination under §§ 49-2-301, -303, and -308, MCA; that his reassignment constituted a constructive discharge under § 39-2-903, MCA; that his reassignment violated the tenure of his previous position and the appropriate procedure for reassigning Undersheriff duties under §§ 7-32-2107 and -2102(2), MCA; that his reassignment implicated the Fourteenth Amendment to the United States Constitution; that his reassignment was actionable under § 1983; and that his reassignment was actionable under theories of negligence per se and intentional infliction of emotional distress. He based these claims on his demotion, his assignment to patrol during the graveyard shift without proper training or preparation, the efforts of McDermott and Johnson to “humiliate and belittle” him, and the treatment by McDermott and Johnson that he interpreted to be an “intimidating message” to others who might oppose their leadership.

¶7 While his Human Rights Complaint was pending, Clark filed a District Court complaint in December 2015 against Missoula County, McDermott, and Johnson. He alleged one claim for Wrongful Discharge and another claim for Intentional Infliction of Emotional Distress. Under his Wrongful Discharge claim, Clark alleged that the “acts and omissions” of the defendants amounted to “discrimination and retaliation in the workplace, wrongful discharge, negligence per se, intentional infliction of emotional distress,” and actionable claims under § 1983. His complaint alleged nearly verbatim the factual background of the Human Rights Complaint with only minor, seemingly stylistic, changes.

¶8 In June 2016, following a three-day contested case hearing, the Hearing Officer presiding over Clark’s Human Rights Complaint concluded that Clark failed to prove his alleged claims. The Hearing Officer granted judgment in favor of Missoula County, McDermott, and Johnson and dismissed Clark’s Human Rights Complaint with prejudice. Clark appealed the Hearing Officer’s decision to the Commission. The Commission held oral argument and issued a Final Agency Decision on the matter denying Clark’s complaint. It concluded that the Hearing Officer’s findings of fact were supported by competent substantial evidence in the record and her conclusions of law were correct. The Commission informed the parties they could petition the District Court for judicial review of the Final Agency Decision.

¶9 In September 2017, Clark filed an Amended Complaint with the District Court against Missoula County and McDermott (collectively the “County”) and, “in the alternative and in addition,” petitioned the District Court in the same pleading to review the Commission’s Final Agency Decision. In his Amended Complaint, Clark realleged his

Wrongful Discharge and Intentional Infliction of Emotional Distress claims. He added one count alleging Unlawful Political Discrimination and one count alleging Unlawful Retaliation. He also sought declaratory action on the legal interpretation of § 7-32-2102(2), MCA. Clark further claimed that McDermott violated his rights protected by the First Amendment to the United States Constitution; accordingly, he alleged a separate count under 42 U.S.C. § 1983. To support his § 1983 claim, Clark argued that McDermott “deprived [him] of his particular rights under the United States Constitution” because “Clark’s speech was a subsequent or motivating factor for the adverse employment action” that McDermott took against Clark. Again, the factual allegations in Clark’s Amended Complaint were nearly verbatim to his Human Rights Complaint.

¶10 The County moved to dismiss Clark’s Amended Complaint for failure to state a claim upon which relief could be granted under Rule 12(b)(6), M. R. Civ. P. The County argued that the factual basis for Clark’s Amended Complaint was identical to the factual basis for his Human Rights Complaint—political discrimination and retaliation. Therefore, the Montana Human Rights Act (“MHRA”) provided the “exclusive remedy” for Clark’s Amended Complaint. The County argued that Clark could proceed in District Court only on his claim for judicial review of the Commission’s Final Agency Decision.

¶11 In response, Clark did not refute that all of his claims centered on political discrimination and retaliation. Clark argued that if the MHRA did bar his claims, its exclusive remedy provision should be void because it would violate his fundamental right to a jury trial on his § 1983 claim. He argued also that Montana law did not bar the right to a jury trial for violations of First Amendment rights. Clark gave notice of a constitutional

issue regarding the validity of the MHRA; he argued that the “MHRA preemption of [his] fundamental right to a trial by jury on these claims cannot satisfy the rigors of strict scrutiny.” The Commission, having previously noticed the parties of its intent to not partake in the District Court’s judicial review, filed a reply brief to defend the MHRA against Clark’s constitutional argument.

¶12 The District Court found that Clark’s collective claims centered on theories of discrimination. It accordingly held that the MHRA was Clark’s exclusive remedy and thus dismissed his Amended Complaint in April 2018. In the same order, the court concluded that Clark’s constitutional challenge regarding his right to a jury trial lacked merit. The court proceeded on judicial review of the Commission’s Final Agency Decision. In October 2021, the District Court rejected Clark’s appeal from the Commission’s Final Agency Decision and entered judgment in favor of the County.

STANDARD OF REVIEW

¶13 “The correct interpretation of a statute is a question of law that we review de novo.” *Bates v. Neva*, 2014 MT 336, ¶ 9, 377 Mont. 350, 339 P.3d 1265 (citation omitted).

DISCUSSION

¶14 We begin by clarifying the scope of Clark’s appeal. Clark appealed the District Court’s final judgment on the Commission’s Final Agency Decision. He provides arguments on appeal, however, against only the District Court’s dismissal of his § 1983 claim. For this reason, the Commission correctly argues that Clark concedes his Petition for Judicial Review. Clark offers no argument that the District Court’s judicial review of the Final Agency Decision was erroneous or that it should be reviewed by this Court.

Clark, accordingly, has waived any claim that the District Court erred when it upheld the Final Agency Decision. We accordingly affirm the District Court's judgment rejecting Clark's appeal of the Final Agency Decision.

¶15 The County argues that this Court does not have jurisdiction over this appeal because Clark did not timely appeal the dismissal of the Amended Complaint. The County maintains that, because Clark did not explicitly designate the dismissal of the Amended Complaint in his notice of appeal and because the Amended Complaint "had no bearing" on the District Court's judicial review of the Final Agency Decision, Clark waived this issue on appeal.

¶16 A notice of appeal must "designate the final judgment or order or part thereof from which the appeal is taken." M. R. App. P. 4(4)(a). "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." M. R. App. P. 4(4)(a). In his notice of appeal, Clark designated the "Judgment dated October 25, 2021; and any final and appealable judgments that may enter related thereto, and all proceeding that led up to the foregoing." This language meets the standard of Rule 4(4)(a); Clark's notice of appeal encompassed the dismissal of his Amended Complaint.

¶17 The time for filing an appeal does not begin to run until notice of entry of judgment has been served pursuant to M. R. Civ. P. 77(d). M. R. App. P. 4(5)(a)(i). A notice of entry of judgment was not filed regarding Clark's case until after the District Court entered its final judgment on October 25, 2021. The County filed the Notice of Entry of Judgment

on October 28, 2021. Clark then filed a notice of appeal on November 19, 2021. Clark appealed within the statutory time limits; this Court has jurisdiction to consider his appeal.

¶18 *1. Did the District Court correctly hold that the MHRA is the exclusive remedy for Clark’s 42 U.S.C. § 1983 claim that McDermott violated his federal constitutional right to free speech?*

¶19 Clark contends that the District Court erred when it ruled that the MHRA barred his § 1983 claim, that he was denied his right to a jury trial on his § 1983 claim, and that he was not required to exhaust his federal § 1983 claim in state court. The District Court dismissed Clark’s Amended Complaint, including his § 1983 claim, because it found that the “gravamen” of Clark’s claim in District Court was “political discrimination”—the same as his Human Rights Complaint. The District Court ruled that “Clark’s collective claims [were] subject to the MHRA, which constitutionally limit[ed] him to judicial review of the Final Agency Decision.” It reasoned that Clark conceded the MHRA as the exclusive remedy for all his claims rooted in political discrimination because he did not effectively refute the “gravamen” analysis.

¶20 The MHRA establishes “the exclusive remedy for acts constituting an alleged violation of chapter 3 or [chapter 2], including acts that may otherwise also constitute a violation of the discrimination provision of Article II, section 4, of the Montana constitution or 49-1-102.” Section 49-2-512, MCA. If the HRB dismisses a party’s discrimination claim and issues a notice of right to sue, the party may take its case to district court “for a trial on the merits.” *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 36, 358 Mont. 193, 244 P.3d 321. If the claim proceeds to a contested case, the losing party may seek judicial review of the Commission’s final decision. Section 49-2-505(9), MCA;

§ 2-4-702, MCA. When determining whether the MHRA applies to a tort claim brought under state law, and thus whether the MHRA offers the exclusive remedy to that claim, we “look to the gravamen of the . . . complaint, as opposed to the . . . characterization of . . . claims.” *Lay v. State Dep’t of Military Affairs*, 2015 MT 158, ¶ 15, 379 Mont. 365, 351 P.3d 672.

¶21 The Supreme Court of the United States has held that “exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.” *Patsy v. Bd. of Regents*, 457 U.S. 496, 516, 102 S. Ct. 2557, 2568 (1982). Our precedent regarding § 1983 and principles of exhaustion is consistent with this ruling. We held in *Jones v. Montana University System* that a party generally need not exhaust “available state administrative remedies” prior to bringing a federal constitutional or statutory claim through a § 1983 action in state district court. 2007 MT 82, ¶ 39, 337 Mont. 1, 155 P.3d 1247. Parties must, however, exhaust “available administrative remedies before pursuing a *state law* discrimination claim in district court.” *Jones*, ¶ 39 (emphasis added). When we have concluded that § 1983 plaintiffs must exhaust administrative remedies, it was not because their § 1983 claims had to be pursued under state administrative acts but because their claims were not viable under federal law.²

² See, e.g., *Jones*, ¶ 39 (appellants failed to present a claim of political discrimination through § 1983—“[a]t best, Petitioners... alleged a claimed violation of the antidiscrimination provisions contained in § 49-3-205(a), MCA.” Therefore, appellants needed to pursue their state discrimination claims through “available administrative remedies”); *Shields v. Helena Sch. Dist. No. 1*, 284 Mont. 138, 142, 146-50, 943 P.2d 999, 1001, 1004-06 (holding that under federal law a party must exhaust its claims under the federal Individuals with Disabilities Education Act, pursuant to 20 U.S.C. § 1415(f) before bringing other civil claims, including a § 1983 claim. We

¶22 Citing *Edwards v. Cascade Cty. Sheriff's Dep't*, 2009 MT 451, 354 Mont. 307, 223 P.3d 893, the County argues that the District Court “correctly dismissed Clark’s § 1983 claim on the basis that it was subject to the exclusive remedy of the MHRA.” It labels Clark’s § 1983 claim “a naked repackaging of his MHRA claims in an attempt to circumvent the MHRA’s exclusive remedy provision.” In *Edwards*, the plaintiffs filed their § 1983 claims in state court before the HRB investigation was completed. *Edwards* ¶ 22. The defendants removed the action to federal court and moved to stay pending completion of the administrative proceedings. *Edwards*, ¶ 23. Plaintiffs dismissed the § 1983 claims as redundant, and the case was remanded to state district court. *Edwards*, ¶ 24. Because those claims had been dismissed, this Court did not address § 1983 claims brought under federal law; therefore, our discussion of exhaustion under the MHRA has no application here. *Edwards*, ¶¶ 23-24, 31, 35.

¶23 The District Court erred when it concluded that Clark was required to exhaust his § 1983 claim under the MHRA when “the gravamen of all of [his] claims reside entirely within his theories of discrimination.” The MHRA is the exclusive remedy for discrimination actions brought under state law. *Lay*, ¶ 12; *see Jones*, ¶ 37 (“Absent any basis in federal law to support its claim of political discrimination under § 1983, we turn then to Petitioner’s claims of political discrimination based on Montana law.”). The MHRA does not automatically foreclose a federal § 1983 claim by requiring the exhaustion of state law remedies simply because the bases of the federal and state law claims are the

concluded that the plaintiff’s remaining state tort claims, grounded in discrimination, must be exhausted pursuant to the MHRA).

same. *See Patsy*, 457 U.S. at 516, 102 S. Ct. at 2568. We agree with Clark that the District Court improperly dismissed his § 1983 claim on this basis. This conclusion does not, however, end the analysis.

¶24 2. *Is Clark precluded from litigating his § 1983 claim now that the agency decision is final?*

¶25 The County argues that the District Court’s judicial review of the Final Agency Decision should preclude Clark’s § 1983 claim because Clark has not contested the District Court’s judicial review on appeal and it therefore became final. Section 1983 claims are not exempt from principles of res judicata. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84, 104 S. Ct. 892, 897-98 (1984). “When the exhaustion of administrative remedies produces an administrative decision that is upheld on judicial review, principles of issue and claim preclusion properly may be applied to redundant claims made under other laws.” *Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 17, 365 Mont. 375, 286 P.3d 241 (citation omitted). Once an administrative judgment is final, it can preclude a § 1983 claim. *See Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9th Cir. 2007). “Claims under 42 U.S.C. § 1983 are subject to claim preclusion even if the litigants did not actually litigate the federal claim in state court.” *Holcombe*, 477 F.3d at 1097 (citation omitted).

¶26 In *Holcombe*, the Ninth Circuit held that a plaintiff’s § 1983 claim, based on political discrimination under the First Amendment, was precluded by a final state administrative decision on her wrongful termination claim because the plaintiff testified about the underlying facts of the § 1983 claim, the same set of facts as her administrative claim, at her administrative hearing. *Holcombe*, 477 F.3d at 1098-99. “Therefore, [the plaintiff’s]

claim that the defendants fired her in retaliation for exercising her First Amendment rights [was] the same as her claim that she was wrongfully terminated.” *Holcombe*, 477 F.3d at 1098-99. The Ninth Circuit concluded that because the plaintiff litigated her wrongful termination claim before an administrative agency and the state court affirmed the agency’s decision, her § 1983 claim based on the “same set of facts” was precluded by the final judgment on the administrative decision. *Holcombe*, 477 F.3d at 1099-1100.

¶27 Res judicata and collateral estoppel are doctrines used “to prevent parties from incessantly waging piecemeal, collateral attacks against judgments.” *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267. “*Res judicata*, or claim preclusion, bars the re-litigation of a claim that the party has already had an opportunity to litigate.” *Baltrusch*, ¶ 15 (citation omitted). Under Montana law, when the following elements are satisfied, a claimant is barred from relitigating a matter:

1. The parties or their privies are the same;
2. The subject matter of the action is the same;
3. The issues related to the subject matter are the same;
4. The capacities of the person are the same in reference to the subject matter and the issues between them; and
5. A final judgment has been entered.

Baltrusch, ¶ 15-16.

¶28 “Collateral estoppel [or issue preclusion] bars litigants from reopening all questions essential to the judgment which were determined by a prior judgment.” *Baltrusch*, ¶ 18

(citation omitted). Under Montana law, when the following elements are satisfied, a plaintiff is barred from relitigating an issue:

1. The identical issue raised was previously decided in a prior adjudication;
2. A final judgment on the merits was issued in the prior adjudication;
3. The party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication; and
4. The party against whom preclusion is asserted was afforded the opportunity to obtain a full and fair adjudication of the issue in the original action.

Baltrusch, ¶ 18.

¶29 While similar, res judicata and collateral estoppel are used in separate instances. Typically, res judicata will bar a claim when a party has “already had an opportunity to litigate.” *Baltrusch*, ¶ 15. Collateral estoppel will bar an issue “that has been litigated and determined in a prior suit.” *Baltrusch*, ¶ 15. “Finality is accorded to the disposition of all issues that were raised or could have been raised; [parties], therefore, [are] prohibited from relitigating a claim that [they have] already had an opportunity to litigate.” *Parini v. Missoula Cty. High Sch.*, 284 Mont. 14, 23, 944 P.2d 199, 204 (1997).

¶30 Clark challenged the Commission’s Final Agency Decision appropriately by seeking judicial review. But, as noted, he does not challenge the District Court’s judgment affirming that decision, and it is now a final judgment. We consider Clark’s § 1983 claim under a claim preclusion analysis because he now tries to bring it after he had the opportunity to litigate it. The facts underlying the claims in Clark’s HRB proceedings and in District Court are the same. Clark’s situation is similar to that in *Holcombe*, where an administrative decision upheld on judicial review by a state court precluded a § 1983 claim

because the underlying facts for both claims were the same. *See Holcombe*, 477 F.3d at 1096-99.

¶31 In both the HRB proceedings and Clark's District Court proceedings the parties and the parties' capacities were the same. Additionally, the subject matter of both actions was the same, as were the issues that Clark raised in both matters. Clark alleged, in both proceedings, that the County took adverse employment action against him because he was McDermott's political rival and because of his political stance. The factual allegations in both proceedings were nearly identical, the only differences being minor and stylistic. For example, Clark's Human Rights Complaint alleging Unlawful Discrimination stated:

43. McDermott summarily and immediately demoted Clark by four full ranks below captain, and demoted him to a graveyard patrol shift in which he had no supervisory duties, was neither properly refreshed and retrained, nor properly or fully equipped, and lost valuable benefits such as day-shift, weekdays, holidays-off, flexible vacation time, civilian duty clothes and eligibility for the prestigious FBI national academy.

Clark's Amended Complaint for Unlawful Political Discrimination realleged to support his § 1983 claim stated:

60. McDermott summarily and immediately demoted Clark by four full ranks below captain, and demoted him to a graveyard patrol shift in which he had no supervisory duties, was neither properly refreshed and retrained, nor properly or fully equipped, and lost valuable benefits such as day-shift, weekdays, holidays-off, flexible vacation time, civilian duty clothes and eligibility for the prestigious FBI national academy.

¶32 We conclude that the District Court entered a final judgment on Clark's administrative proceedings when it rejected his appeal of the Commission's Final Agency Decision. Clark did not challenge this judgment affirming the Final Agency Decision. It accordingly is a final order with preclusive effect. Because the underlying facts at issue in

Clark's Amended Complaint are the same as his Human Rights Complaint, the claims in his Amended Complaint are precluded by the final judgment of the administrative proceedings. *See Holcombe*, 477 F.3d at 1098-99; *Rooney*, ¶ 17.

¶33 Finally, Clark argues that he had the right to a jury trial on his § 1983 claim. He asks this Court to remand his § 1983 claim to District Court where he may try his claim on the merits before a jury. With the Final Agency Decision being affirmed on judicial review and unchallenged on appeal, however, Clark is precluded from pursuing his § 1983 claim. *Parini*, 284 Mont. at 23, 944 P.2d at 204. Whether he had the right to a jury trial on his § 1983 claim does not affect a claim or issue preclusion analysis.³

CONCLUSION

¶34 Although the District Court incorrectly held that Clark had to pursue his § 1983 claim under the exclusive remedy of the MHRA, we conclude that claim preclusion now bars Clark from relitigating that claim. The judgment of the District Court is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE

³ The Commission argues that Clark should not have been permitted to combine his Amended Complaint with his Petition for Judicial Review in District Court. Considering the foregoing discussion, we find it unnecessary to address the Commission's argument.