IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 23-0094

CINDY FUSON,

Plaintiff/Appellant,

v.

CHS INC., and DOES 1-5,

Defendant/Appellee.

Appeal from the Montana Ninth Judicial District Court, Toole County
Cause No. DV-18-044
The Honorable Robert Olson, Presiding

APPELLEE'S RESPONSE BRIEF

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I. STATEMENT OF THE ISSUES

CHS Inc. ("CHS") agrees with Fuson's Statement of Issues #1 and #2. As to Issue #3, the issue is:

Did the District Court correctly hold that Fuson's gender discrimination claim should be dismissed because (a) that portion of the gender discrimination claim that was pled before the Montana Human Rights Bureau ("MHRB") was barred by the statute of limitations and (b) the allegation that Fuson was terminated because of gender discrimination was never raised before the MHRB and cannot be raised for the first time in the District Court?

II. STATEMENT OF THE CASE

This case began as a Complaint before the MHRB. There, Fuson alleged she was discriminated against based on her gender and physical or mental disability. The MHRB found "no cause" to believe discrimination had occurred, dismissed the case, and issued what is commonly referred to as a "right to sue" letter.

Fuson sued CHS on September 28, 2018, making claims for (1) breach of the covenant of good faith and fair dealing (Count I), (2) wrongful discharge (Count II), and (3) illegal discrimination (Count III). Complaint, Dkt. 1. As to Count III, she alleged her employment was terminated because of her gender and disability. Id.

Following discovery, CHS filed a Motion for Summary Judgment. Dkt. 28. The Motion was fully briefed and argued, and on January 6, 2023, the Court granted CHS's Motion. Fuson App. 1. Fuson then filed a timely Notice of Appeal. Dkt. 55.

III. FACTS[1]

Fuson's Statement of the Facts is abbreviated, selective and in some cases incorrect. A complete statement of the facts is as follows.

A. The Events Which Led to Fuson's Termination.

Fuson worked as a driver/gauger. Fuson App. 3, 12:25 to 13:2; CHS App. 1. In this position she was required to have a commercial driver's license, and a Department of Transportation ("DOT") medical certification which had to be renewed every two years. Fuson App. 3, 14:4-20. This was both a CHS requirement (CHS App. 1, 2, 5) and a requirement of federal law. 49 C.F.R §391.41.

Fuson was injured on the job in August of 2016 and went on worker's compensation leave. Fuson App. 3, 19:11 to 20:11. She was either off work or doing light duty work until she had surgery in early November 2016. Fuson App.

[1] Where the documents referenced in this Facts Section are included in Fuson's Appendix, they will be referenced to as Fuson App. ___. CHS has submitted an Appendix containing additional documents, which are labelled "CHS App. ___", indicating the page in the Appendix where the specific document is located.

3, 20:12 to 21:6. The last day that Fuson actually worked at CHS was November 2, 2016. Fuson App. 3, 23:19 to 24:2.

Between November 24, 2016, and December 12, 2016, Fuson was hospitalized at Warm Springs State Hospital as a result of an involuntary court placement due to mental health issues. Fuson App. 3, 102:17-20; 11 p. 3. Fuson's worker's compensation physician released her to return to work at CHS from her August 2016 injury on December 14, 2016. Fuson App. 11, p. 3.

In mid-December 2016, Fuson asked CHS for a short-term disability leave of absence to deal with mental health issues. CHS granted that request, and between December 14, 2016, and June 15, 2017, Fuson was on a short-term disability leave. Fuson App. 3, 22:2-9.

On June 26, 2017, Fuson saw Physician Assistant, Christopher Rost at Marias Medical Center seeking the required DOT medical certification to be able to work as a driver. Fuson App. 3, 61:16 to 63:22; CHS App. 20. Rost declined to approve her medical certification, finding that "Examiner feels she is not suitable at this time to safely operate CMV [commercial motor vehicle]. Close psychiatric follow up is needed". CHS App. 20.

CHS uses Global Safety Network, an independent company, to review medical reports and determine whether drivers are medically qualified to drive a commercial motor vehicle. CHS App. 6. Global Safety Network reviewed the

medical form prepared by Rost and sent CHS a letter stating that Fuson was "**Not qualified due to mental health episodes without follow up. Taking phentermine.**" CHS App. 6, 9. (emphasis in original).

CHS also has long-term disability benefits available to qualifying employees through MetLife. CHS App. 6. CHS sent Fuson the forms to apply for long-term disability in April of 2017. Id.

On July 5, 2017, CHS Health and Welfare Benefits Specialist Jennifer Punzel sent Fuson a letter advising her that CHS had not received the forms required for her to apply for long-term disability. CHS App. 6, 10-11. It told her that she was being placed on "a temporary unpaid leave of absence which will end no later than July 17, 2017". (emphasis in original). CHS App. 10-11. The letter also advised her that:

> You are not medically qualified which is required prior to being considered for returning to work as a driver for CHS. This is not only a CHS requirement but the requirement of the federal government. Without the medical card you cannot return to work for CHS as a driver.

CHS App. 10. She was further advised that it was "imperative that outstanding employment related items be resolved no later than July 17, 2017" and, if not, "we will re-evaluate your on-going status as an employee of CHS". Id.

In response to this letter, Fuson did not ask CHS for assistance (a reasonable accommodation) for any disability. Instead, she did two things. First, on July 17,

2017, Fuson submitted forms necessary to apply for long-term disability through CHS's provider, MetLife. CHS App. 7. Second, on July 18, 2017, Fuson sent her supervisor, Shelia Maloney, an email in which she stated, "got a DOT physical" and then she asked for the email or fax for the "MRO," which was Global Safety Network. Fuson App. 5. Maloney responded, "Forward it to me and I will get to the MRO". Id.

Fuson apparently got a second medical certification form on or around July 18, 2017, from a health care provider in Kalispell (hereafter, the "Kalispell Form"). Fuson App. 4. But Fuson did not provide any documentation regarding this second DOT physical before she was terminated. CHS App. 2, 7. Fuson admitted in her deposition that she "just held on to it." Fuson App. 3, 68:18-20. She remained on leave while MetLife considered her application for long-term disability. CHS App. 6-7.

CHS took no action with respect to Fuson's employment pending MetLife's determination whether Fuson was eligible for long-term disability benefits. CHS App. 9. On or about September 29, 2017, MetLife advised Fuson and CHS that it was not approving her for long-term disability. Fuson App. 3, 89:1-15; CHS App. 7, 21.

By September 29, 2017, CHS had no documentation from Fuson establishing that she was medically certified to drive a commercial motor vehicle.

CHS App. 7. It did get an email from Fuson's lawyer in which he stated Fuson had a "valid CDL", but it said nothing about a DOT medical certification. Fuson App, 8.

As a result, CHS had no medical documentation to alter the conclusion reached by Rost – that Fuson was not medically certified to drive. Because Fuson was determined to be medically unqualified to drive a commercial motor vehicle by both Rost and Global Safety Network, she was not qualified to work as a driver/gauger for CHS. Id. Indeed, it would have been illegal for CHS to have allowed her to do so. 49 CFR 391.41. Because Fuson was medically unqualified to drive a commercial motor vehicle, CHS terminated her employment. CHS App. 7.

B. The Factual Basis of Fuson's Claims before the MHRB and the District Court.

Fuson filed a Complaint before the MHRB on February 6, 2018, alleging disability and gender discrimination. As to the disability claim, she alleged, "CHS illegally terminated Fuson because it perceived Fuson as disabled and used a false reason to terminate her". Fuson App 11, p. 3.

Fuson did not allege that she was terminated due to gender discrimination. The sole allegations relating to gender discrimination were:

3. Fuson was the only female driver in the area.

4. Fuson was subject to a hostile work environment wherein a male

supervisor treated her disparately than other male drivers.

Fuson App 11, p. 3. Fuson admitted in her deposition that the gender discrimination alleged in her MHRB Complaint occurred prior to November 2, 2016, the last day she actually worked for CHS. Fuson App. 3, 23:21 to 24:2; 26:11-16. Thus, her MHRB Complaint was filed some 16 months after the last act of gender discrimination.

The allegations in Fuson's District Court Complaint contained little, if any, facts to differentiate it from the MHRB Complaint. In her deposition, CHS asked Fuson if the factual basis of the claims she made before the MHRB were the same as the factual basis of her District Court claims. She expressly admitted that they were the same.

> Q. Here's kind of what I want to know. It's your position in this litigation that CHS terminated you based upon its perception that you were disabled because of your medical condition and based upon discrimination based on your gender. Correct?
>
> A. Yes. Yes.
>
> Q. And that's the complaint that you made to the Montana Human Rights Bureau. Correct?
>
> A. Yes.
>
> Q. And the complaint that you have now made in district court is based on exactly the same facts, isn't it?
>
> A. Yes.

Fuson App. 3, 53:6-18. While Fuson claims she had a distinct factual predicate for her common law claims, she has never articulated one and produced no evidence to contradict the admission in her deposition.

IV. SUMMARY OF ARGUMENT

A DOT medical certification is required for a person to legally drive a commercial motor vehicle. 49 CFR §391.41. CHS terminated Fuson on September 29, 2017, because a health care provider refused to grant her a DOT medical certification, concluding that "she is not suitable at this time to safely operate CMV [commercial motor vehicle]" due to mental health issues. Because Fuson was not medically qualified to drive a commercial vehicle, she was not "qualified for continued employment" with CHS. As such, she could not prove the second element of a prima facie case of disability discrimination.

The crux of Fuson's argument is that summary judgment should not have been granted because she claims she held the necessary medical certification. This argument fails for two reasons. First, she did not give any DOT certification to CHS before it terminated her. CHS was not obligated to re-evaluate its termination decision based on information it received post-termination. *Jackson v. Costco Wholesale Corp*., 2018 MT 262, ¶24, 393 Mont. 191, 429 P. 3d 641. Second, even if Fuson had given CHS the conflicting medical certification, she was still unqualified to drive on September 29, 2017, because the existence of contradictory

certifications renders a driver medically unqualified to drive as a matter of law. 49 C.F.R. §391.47(f).

The District Court correctly dismissed the wrongful discharge and breach of implied covenant claims, because they are barred by the exclusivity provisions of the Montana Human Rights Act ("MHRA"). Mont. Code Ann. §49-2-101(1). Fuson admitted in her deposition that the factual basis of her common law claims was the same as her discrimination claims. She has never articulated a distinct factual basis for her common law claims. To the contrary, before the MHRB, in the District Court and even in her Brief on appeal, she has described the basis of the respective claims in virtually identical terms. The Court has repeatedly rejected efforts by plaintiffs to recharacterize a discrimination claim as some other claim in order to avoid the exclusive procedures set forth in the MHRA. *Lay v. State Dept. Of Military Affairs*, 2015 MT 158, ¶15, 379 Mont. 365, 351 P. 3d 672.

Finally, Fuson's gender discrimination claim was properly dismissed. The claim she actually filed before the MHRB – a hostile work environment claim - is barred by the statute of limitations. The claim she tried to assert for the first time in District Court – termination because of gender – is barred because it was never raised before the MHRB and could not be raised for the first time in the District Court. *Borges v. Missoula Cnty. Sheriff's Office*, 2018 MT 14, ¶¶ 19, 22-23, 390 Mont. 161, 415 P.3d 976.

The Court should affirm the District Court Order granting summary judgement.

V. STANDARD OF REVIEW

The Supreme Court reviews a District Court order granting summary judgment *de novo*. *Missoula Electric Cooperative v. Jon Cruson, Inc*., 2015 MT 267, ¶15, 385 Mont. 200, 383 P. 3d 210. CHS generally agrees with Fuson's summary of the applicable summary judgment standard.

VI. ARGUMENT

A. The District Court Correctly Held that Fuson's Disability Claim is Barred Because She Failed to Prove a Prima Facie Case.

The parties agree that to state a prima facie case of disability discrimination, Fuson must prove: (1) she belonged to a protected class; (2) **she was otherwise qualified for continued employment** and her employment did not subject her or others to physical harm; and (3) she was denied her continued employment because of her actual or perceived disability. *Reeves v. Dairy Queen,* 1998 MT 13, ¶21, 287 Mont. 196, 953 P.2d 703 (emphasis added).

It is likewise not disputed that to be "qualified for continued employment" Fuson was required to have a CDL and a proper DOT medical certification. Fuson agreed during her deposition that she needed both to work as a CHS driver/gauger. Fuson App, Ex. 3, p. 14:4-20. This was both a CHS requirement (CHS App. 1, 2, 5) and, more significantly, it is a requirement of federal law. 49 CFR § 391.41.

The District Court granted summary judgment because Fuson could not state a prima facie case; specifically, she failed to establish that she was "qualified for continued employment," because she did not have the required DOT medical certification. Fuson App. 1, p. 13. Federal Courts have addressed the issue whether a person can bring an ADA claim if they do have a DOT medical certification. The U.S. Supreme Court described the relationship between DOT standards and an ADA claim as follows:

> When Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law. The Senate Labor and Human Resources Committee Report on the ADA stated that 'a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards **in order to be considered a qualified individual with a disability' under [the ADA].**

Albertson's v. Kirkingburg, 527 U.S. 555, 573 (1999) (quoting S. Rep. No. 101–116, at 27–28 (1998) (emphasis added). Applying this logic, courts in other jurisdictions have specifically held that termination of a driver because he or she does not have a medical certification does not violate the ADA. "Thus, 'courts have consistently held that an employment action based upon an employee's or prospective employee's inability to satisfy DOT medical standards does not violate disability discrimination laws.'" *Williams v. J.B. Hunt Transp., Inc.*, 826 F.3d 806, 811 (5th Cir. 2016), *quoting Talbot v. Md. Transit Admin.*, 2012 WL 5839945, at *2 (D. Md. Nov. 15, 2012); "Thus, as a matter of law, if an essential function of a

position is the ability to operate a commercial vehicle, then being DOT-certified is an automatic, binding, and utterly unavoidable requirement". *Hawkins v. Schwan's Home Serv., Inc.*, 778 F.3d 877, 895-96 (10th Cir.), *cert. denied*, 577 U.S. 1049 (2015).

Fuson does not dispute that she must have a proper DOT medical certification to prove the second element of her prima facie case – that she is "qualified for continued employment". The sole issue on appeal as to her disability claim is whether she established that she was a qualified person before she was terminated on September 29, 2017. She failed to do so as a matter of fact and as a matter of law.

1. <u>Fuson Raised No Fact Disputes that Precluded Summary Judgment</u>.

Fuson raises three facts in support of her claim: (1) she got the Kalispell Form on or about July 17, 2017; (2) she told CHS she got a DOT physical in an email to her supervisor on July 18, 2017, and (3) her lawyer sent CHS an email on September 29, 2017, stating she had "a valid CDL". None of these demonstrate that she raised a genuine issue of material fact as to whether she had a proper DOT medical certification at the time CHS terminated her employment.

As to the first point, it is undisputed that Fuson did not provide the Kalispell Form to CHS before she was terminated. In fact, she admitted that she "just held on to it." Fuson App. 3, 68:18-20. A cynical observer might deduce that Fuson

held on to the Kalispell Form, because she was hoping to be approved for long-term disability. But, whatever her reasons, she did not give the Kalispell Form to CHS.

As to the second point, the "DOT physical" referenced in Fuson's July 18, 2017 email to her supervisor is apparently a reference to the Kalispell Form, which is dated the day prior. On page 8 of her Appeal Brief, Fuson states that she asked her supervisor for the contact information for Global Safety Network (CHS's independent review company) presumably to send it the Kalispell Form, but "her supervisor refused to give it to her." This is simply false. Fuson sent an email to her supervisor, Shelia Maloney, in which she stated "got a DOT physical" and asks for the email or fax for the "MRO" [Global Safety Network]. Fuson App., Ex. 5. Her supervisor responded, "Forward it to me and I will get to the MRO". Id. This was an offer of assistance, not a refusal to provide information. The only person who refused to provide information was Fuson.

Finally, Fuson notes that her lawyer sent CHS an email in which he said she had "a valid CDL". Fuson App. 8. There is no evidence in the record as to what Fuson did to get the State of Montana to issue her a CDL. More to the point, there is no evidence that Fuson's lawyer gave CHS any medical information to contradict Rost's refusal to grant Fuson a DOT medical certification, much less that he sent CHS the Kalispell Form on September 29, 2017.

An employer does not violate the Montana version of the ADA by making a proper employment decision, based upon the information it has at the time of the decision. The Court considered a similar issue in *Jackson v. Costco Wholesale Corp*., 2018 MT 262, 393 Mont. 191, 429 P. 3d 641. There, Costco terminated Jackson without any information that he claimed to have a disability. *Jackson*, ¶ 24. The Court held that Costco could not have terminated Jackson because of a disability, if it had no knowledge that he claimed to have a disability. *Id.*, ¶ 23. And the fact that Jackson came forth after the termination decision and claimed he had a disability did not alter the decision. *Id*., ¶24. The Court still rejected Jackson's claim, because Costco acted appropriately based on the information it had received.

The only documented information that CHS had on September 29, 2017, was that Physician's Assistant Rost had declined to grant Fuson the required DOT medical certification, finding that "Examiner feels she is not suitable at this time to safely operate CMV [commercial motor vehicle]. Close psychiatric follow up is needed". CHS App. 20. The reason this was the only information CHS had is neither Fuson nor her lawyer gave the Kalispell Form to CHS. Under *Jackson*, CHS cannot be liable for disability discrimination when the only information in its possession established that it would have been a violation of Federal law to allow Fuson to drive a commercial vehicle. This is particularly so where, as here, Fuson

sat on contrary information while awaiting the outcome of her long-term disability application.

Fuson argues that CHS violated the law because it was required to request additional information from Fuson as part of the ADA "interactive process". Appeal Brief, pp. 9-10. But CHS had no obligation to engage in the interactive process, because Fuson never made a request for an accommodation prior to her termination.

It is certainly true that *if* an employee requests an accommodation, both the employer and the employee must engage in the "interactive process". *Goos v. Shell Oil. Co.*, 451 Fed. Appx 700, 702 (9th Cir. 2011); *Alexander v. Mont. Dev. Ctr.*, 2018 MT 271, ¶ 12, 393 Mont. 272, 430 P. 3d 90. But it is the employee's notification to her employer that she has a disability and desires an accommodation that triggers the obligation to engage in that process. *Alexander*, ¶ 13. The only accommodation that Fuson ever sought was a short-term disability leave of absence for mental health issues, which she was granted from December 15, 2016 to June 15, 2017. CHS then gratuitously extended that leave so that she could file the paperwork to seek long-term disability.

Fuson never sought another accommodation. Further, her position was and is that she did not need any accommodation because she was fully medically qualified to do her job. *See* Fuson Brief, p. 12 ("Fuson held the necessary DOT

medical certification required for her position as driver/gauger"). And to the extent the existence of the Kalispell Form might have started a conversation as to her medical qualification, she prevented that discussion by withholding the Kalispell Form. Under the facts of this case, Fuson never triggered the interactive process, and CHS did not violate the law because it did not engage in the interactive process.

2. Fuson was Not Qualified for Continued Employment as a Matter of Law.

Even if CHS had known that Fuson had two conflicting medical evaluations (Rost's and the Kalispell Form), she was still not medically qualified to operate a commercial motor vehicle on September 29, 2017, as a matter of federal law.

The Department of Transportation issues regulations which govern commercial driver medical examinations.[2] No person can operate a commercial motor vehicle unless he or she is medically qualified. 49 C.F.R § 391.41(a)(1)(i). A person who has a mental disease or psychiatric disorder likely to interfere with his or her ability to drive is not qualified. 49 C.F.R § 391.41(b)(9). That is what Rost and Global Safety Network said. CHS App. 9, 20.

Where there is a dispute between the medical provider for the employer and a medical provider of the employee, there is a process that must be followed to determine if the employee is medically qualified. 49 C.F.R § 391.47. The party

[2] The relevant regulations are provided as CHS App. 12-19 for ease of reference.

seeking review of the dispute must prepare and submit to DOT an application for "determination of a driver's medical qualifications". 49 C.F.R § 391.47(a). It must include, among other things, (1) the names of the driver, the employer and the medical providers; (2) proof that there is a disagreement as to medical status; and (3) copies of all relevant medical records and statements. 49 C.F.R § 391.47(b).

Then, there is a process by which the application is reviewed. 49 C.F.R § 391.47(c)-(e). And of critical importance to the issue before this Court, the regulation provides:

> (f) Status of driver. Once an application is submitted to FMCSA [Federal Motor Carrier Safety Administration] (MC-PS), **the driver shall be deemed disqualified until such time as FMCSA (MC-PS) makes a determination**, or until FMCSA(MC-PS) orders otherwise.

49 C.F.R § 391.47(f) (emphasis added).

Even if Fuson had given CHS the Kalispell Form, the existence of this opinion did not render Fuson medically qualified to drive. Just the opposite is true. She was "deemed disqualified" as a matter of law until the disputed medical certifications were reviewed by the Federal Motor Carrier Safety Administration, and it determined whether she was medically qualified. 49 C.F.R § 391.47(f). There is no evidence in the record that Fuson ever initiated this process, even now some five years later. As a result, as of September 29, 2017, Fuson could not establish the second element of her prima facie case – that she was otherwise

qualified for continued employment – because she was deemed disqualified as a matter of law.

During oral argument, the District Court inquired whether CHS had an obligation to initiate the DOT appeal process described in 49 C.F.R § 391.47(c)-(e). Transcript, p. 24:17 to 26:14. In response, counsel for CHS told the Court that CHS was unaware of any cases that say that. In fact, courts have considered whether it is the obligation of the employer or the employee to invoke the dispute resolution process contained in 49 C.F.R § 391.47. They have determined that, in the context of an ADA case, the party who has the burden to prove that the employee is a qualified for continued employment is the party with the obligation to seek a resolution of the dispute under 49 C.F.R § 391.47.

In *Williams v. J.B. Hunt Transp., Inc.*, 826 F.3d 806 (5th Cir. 2016), the Court addressed whether an employer violates the ADA by refusing to allow an employee to drive a commercial motor vehicle when the employer has two contradictory medical opinions as to the employee's medical qualifications. The employer, J.B. Hunt, moved for summary judgment on the grounds that Williams could not establish a prima facie case of disability discrimination, because he was not qualified for the job. *Williams*, 826 F. 3d at 810-11. The Court held:

> Thus, "courts have consistently held that an employment action based upon an employee's or prospective employee's inability to satisfy DOT medical standards does not violate disability discrimination laws." *Talbot v. Md. Transit Admin.*, No. WMN–12–1507, 2012 WL

> 5839945, at *2 (D. Md. Nov. 15, 2012). Otherwise, motor-carrier employers would face the dilemma of risking ADA liability or violating the DOT's command that "a motor carrier shall not ... permit a person to drive a commercial motor vehicle unless that person is qualified" under the agency's safety regulations. *See* 49 C.F.R. § 391.11. Applying this logic and recognizing the DOT's greater expertise in applying its medical-certification regulations, three sister circuits have rejected commercial drivers' ADA claims when, as here, a doctor found the plaintiff medically unqualified and the plaintiff did not obtain a contrary opinion through the DOT's administrative process.

Id. at 811.

The Court also considered who was required to initiate the DOT's administrative appeals process. It stated:

> Williams also contends that "[e]ven if 49 C.F.R. § 391.47 were applicable ... it was [J.B. Hunt] who should have filed an appeal with the DOT." But he cites no authority supporting this argument, which conflicts with the three circuit cases cited above. And another court has sensibly reasoned that "the party that bears the burden of proof on the issue of whether the driver is qualified is the party that carries the burden of seeking a determination from the DOT regarding medical qualification." *Estate of Szleszinski v. Labor & Indus. Review Comm'n*, 304 Wis. 2d 258, 736 N.W. 2d 111, 123 (2007)(citing Bay, 212 F. 2d at 973-74). Here, that party is Williams.

Williams, at 813, FN 7.

In *Estate of Szleszinski*, 304 Wis. 2d 258, 282, 736 N.W. 2d 111, 123 (2007), the court held that the employer was required to initiate the DOT appeals process because under Wisconsin law the employer has the burden to prove the employee was not qualified. In Montana, the burden of proof is the opposite of that in Wisconsin and it is the same as the ADA burden of proof applied in *Williams*. In

Montana the employee has the duty to prove that "she was otherwise qualified for continued employment" as part of her prima facie case. *Reeves*, ¶21. Thus, under *Williams* and the cases cited therein, Fuson had the obligation to initiate the DOT appeals process if she wished to challenge whether she was medically qualified to drive for CHS. Because she did not, as a matter of law, Fuson was and still is medically unqualified for a driver position at CHS.

Finally, Fuson argues that the Court should not consider her failure to use the DOT appeal process, because CHS did not raise this failure as an affirmative defense. Fuson Appeal Brief, p. 12. Fuson, not CHS, had the burden to prove that she was otherwise qualified for continued employment as part of her prima facie case. *Reeves*, *Id*. As noted above, the existence of contradictory medical opinions renders Fuson disqualified as a matter of Federal law. 49 C.F.R § 391.47(f). CHS is not relying on Fuson's failure to engage in the appeals process as an affirmative defense. It is simply evidence that Fuson took no steps to alter the fact that she cannot prove a prima facie case because she is disqualified as a matter of law. [3]

The Court should affirm the District Court Order granting summary judgment on the disability discrimination claim.

[3] Fuson cited to *Marshall v. Gordon Trucking, Inc*., 215 F. Supp. 3d 1036 (D. Ore. 2016). There, the Court followed recent Ninth Circuit law and held that, where a defendant pleads the defense of failure to exhaust administrative remedies as an affirmative defense, it "should normally be raised through a summary judgment motion . . .". *Marshall*, 215 F. Supp. 3d at 1038. While CHS did not plead this as an affirmative defense, the result is the same. The application of the law to the undisputed facts requires dismissal of Fuson's discrimination claim.

B. The District Court Correctly Dismissed the Common Law Claims Because They are Based on the Same Facts as the Disability Discrimination Claim.

Fuson filed claims for wrongful discharge and breach of the implied covenant of good faith and fair dealing. The MHRA is the "exclusive remedy" for addressing unlawful discriminatory conduct under that Act. Mont. Code Ann. § 49-2-512(1). In fact, for over 40 years, it has been the law in Montana that, where the gravamen of the claim is discrimination, a plaintiff cannot assert alternative theories of relief, in addition to those that are available under the MHRA. *Harrison v. Chance*, 244 Mont. 215, 222-23, 797 P. 2d 200, 205 (1990).

The Court has repeatedly reaffirmed this core holding in *Harrison v. Chance*. In *Lay v. State Dept. Of Military Affairs*, 2015 MT 158, ¶15, 379 Mont. 365, 351 P. 3d 672, the Court noted that it "is no stranger to attempt to characterize a claim in such a way as to avoid the exclusive procedures set forth in the MHRA", and cited numerous cases in which it has declined to allow such re-characterization. [4]

[4] *Edwards v. Cascade Cnty. Sheriff's Dep't*, 2009 MT 451, 354 Mont. 307, 223 P.3d 893; *Vettel–Becker v. Deaconess Med. Ctr. of Billings, Inc*., 2008 MT 51, 341 Mont. 435, 177 P.3d 1034; *Saucier v. McDonald's Rests. of Mont., Inc*., 2008 MT 63, 342 Mont. 29, 179 P.3d 481; *Arthur v. Pierre Ltd*., 2004 MT 303, 323 Mont. 453, 100 P.3d 987; *Shields v. Helena Sch. Dist. No. 1*, 284 Mont. 138, 943 P.2d 999 (1997); *Bruner v. Yellowstone Cnty*., 272 Mont. 261, 900 P.2d 901 (1995); *Fandrich v. Capital Ford Lincoln Mercury*, 272 Mont. 425, 901 P.2d 112 (1995); *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200 (1990).

It is possible for a plaintiff to bring a discrimination claim and a wrongful discharge claim in the same case if there are separate factual predicates for each. *Vettel-Becker v. Deaconess Medical Center of Billings, Inc.*, 2008 MT 51, ¶ 37, 341 Mont. 435, 177 P. 3d 1034. Fuson argues she has a distinct factual predicate for her common law claims, but utterly fails to articulate one.

On page 14 of her Appeal Brief, she describes the factual basis of her common law claims as follows:

> CHS's proffered reason for terminating her employment is that she did not possess the certifications required for her position as a driver/gauger for CHS. However, the evidence disproves those reasons, as Fuson held both a valid CDL and medical card . . .

This is precisely the same factual basis relied upon by Fuson in support of her disability discrimination claim both before the MHRB:

> 14. Fuson notified the company that she was able to return to work, had a valid CDL and was cleared by a DOT-approved physical
>
> * * *
>
> 18. Despite this, CHS erroneously determined that Fuson did not have a valid CDL and made this the basis for determination.
>
> 19. CHS illegally terminated Fuson because it perceived Fuson as disabled and used a false reason to terminate her.

Fuson App. 11, p. 4.

Likewise, in her District Court Brief opposing summary judgment, Fuson described the factual basis for her common law claims and for her disability

discrimination claim in essentially identical terms. As to her common law claims, she stated:

> The Defendant's (sic) proffered reason for terminating her employment is that she did not possess the certifications required for her position as a driver/gauger for CHS. However, the evidence disproves those reasons, as Fuson held both a valid CDL and a medical certification/medical card . . .

Fuson Summary Judgment Brief at 5 (Dkt. 39). As to her disability discrimination claims, she stated "the grounds relied upon by the employer for termination are not disputed," and then articulated those grounds as follows:

> CHS's brief on this matter demonstrates that its reason for terminating Fuson's employment was her perceived disability, as it states, 'Because Fuson had been determined to be medically unqualified to drive a commercial vehicle. . . , she was not qualified to work as a driver/gauger for CHS'.

Fuson District Court Brief at 7-8. (Dkt. 39).

Before the MHRB, in the District Court, and now before the Supreme Court, Fuson has described the factual basis of her common law claims and her disability discrimination claim in essentially identical terms. As such, she cannot rely upon *Vettel-Becker* to survive summary judgment as to her common law claims.

Finally, Fuson's Brief simply ignores the fact that she admitted in her deposition that the facts relied upon to support her common law claims are the same as the facts relied upon to support her discrimination claim. Fuson App. 3, 53:6-18. Fuson cannot admit the basis of the claims are the same, repeatedly

describe the basis of the respective claims in identical terms, and then just say that there is a distinct factual predicate for the common law claims. At every turn, Fuson has made it abundantly clear that the factual basis – the gravamen – of her common law claims are predicated on the exact same allegations as her disability discrimination claim. Under *Harrison v. Chance*, 244 Mont. at 222-23, 797 P. 2d at 205, and numerous cases decided since, she cannot bring her common law claims. The Court should affirm the District Court Order dismissing the claims for wrongful discharge and breach of the implied covenant of good faith and faith dealing.

C. The District Court Correctly Dismissed the Gender Discrimination Claims Because the Claim Fuson Made Before the MHRB is Barred by the Statute of Limitations and She Cannot Bring a New Claim for Termination Based on Gender for the First Time in District Court.

Fuson argues the Court erred by dismissing her gender discrimination claim because it was barred by the statute of limitations. Her argument is confusing at best, ignores the substance of her actual allegations before the MHRB, and disregards this Court's holding in *Borges v. Missoula Cnty. Sheriff's Office*, 2018 MT 14, ¶ 19, 390 Mont. 161, 415 P.3d 976.

In her MHRB Complaint, the sole allegations relating to gender discrimination were:

3. Fuson was the only female driver in the area.

4. Fuson was subject to a hostile work environment wherein a male

supervisor treated her disparately than other male drivers.

Fuson App. 11, p. 3.

In her deposition, Fuson was asked when the hostile work environment discrimination occurred:

Q. Okay. Now, did this discrimination occur while you were driving truck for CHS?

A. Yes.

Q. **So it would have been sometime prior to November 2nd of 2016. Correct?**

A. Yes.

Fuson App. 25:19 to 26:16 (emphasis added).

A complaint of discrimination is barred unless it is filed within 180 days of the unlawful discriminatory practice. Mont. Code Ann, §49-2-501(4)(a); *Skites v. Blue Cross Blue Shield of Montana*, 1999 MT 301, ¶18, 297 Mont. 156, 991 P. 2d 301 (summary judgment properly granted where discrimination claim filed 225 days after last discriminatory act). Fuson's Human Right Bureau Complaint was filed on February 6, 2018, more than a year after her last day of work (November 2, 2016), which was also the last possible day that any hostile work environment gender discrimination could possibly have occurred. As such, the gender discrimination claim is time-barred and must be dismissed.

Fuson tries to avoid the statute of limitations by focusing on the date she was terminated (September 29, 2017), rather than the last possible date that any hostile work environment discrimination occurred (November 2, 2016). Fuson Brief, p. 16. But this does not work, because there is **no** allegation in her MHRB claim that she was terminated because of her gender. Fuson concedes her claim was "inartfully pled," but suggests this is excused because Montana is a "notice pleading" state. This argument fails for two reasons.

First, Fuson's MHRB complaint did not give CHS any notice that she was claiming she had been terminated because of gender discrimination. She did not come close to giving the required "notice". As the Court said in *Anderson v. ReconTrust Co., N.A,* 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692:

> The liberal notice pleading requirements of M. R. Civ. P. 8(a) and 12(b)(6) do "not go so far to excuse omission of that which is material and necessary in order to entitle relief," and the "complaint must state something more than facts which, at most, would breed only a suspicion" that the claimant may be entitled to relief. *(citations omitted).*

Moreover, notice pleading only works, because there is an opportunity for robust discovery after a claim is filed. *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957), abrogated on other grounds by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)("Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more

narrowly the disputed facts and issues".) Here, Fuson's claim was dismissed at the conclusion of the MHRB Investigation. CHS has no opportunity to do any discovery to learn the basis of Fuson's "inartfully pled" claim.

Second, Montana law is clear that claims must be clearly asserted and adjudicated before the MHRB or they cannot be brought in District Court. The MHRA is the "exclusive remedy" for addressing unlawful discriminatory conduct under that Act. Mont. Code Ann. § 49-2-512. An alleged violation of the MHRA "may not be entertained by a district court other than by the procedures specified" in the MHRA. Mont. Code Ann. § 49-2-512(1). This statutory procedure requires a claimant to first file a complaint with the MHRB, *and* obtain an adjudication, before they are permitted to file a claim in district court. *Borges v. Missoula Cnty. Sheriff's Office*, 2018 MT 14, ¶ 19, 390 Mont. 161, 415 P.3d 976 (citing *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 35, 358 Mont. 193, 244 P.3d 321) ("A party claiming discrimination may not file a claim in district court without first obtaining an adjudication of that claim by the HRB"). The failure to exhaust the administrative remedies set forth under the Act conclusively bars a claimant from bringing a claim in court. *Jones v. Montana Univ. Sys.*, 2007 MT 82, ¶ 39, 337 Mont. 1, 155 P.3d 1247.

A plaintiff cannot raise a new factual claim in District Court which was not raised before the MHRB. The complaint must "state 'the particulars of the alleged

discriminatory practice'" to be valid. *Borges*, ¶ 19, quoting Mont. Code Ann. § 49-2-501. The only factual claims that a district court may consider are those factual claims made before the MHRB *and* adjudicated as part of its investigation. *Borges*, ¶ 23. Fuson's belated effort to argue she was terminated due to her gender is barred by the holding in *Borges*.

Finally, on pages 18 and 19 of her Brief, Fuson argues her gender discrimination claim is saved by the continuing violation doctrine. It is true that a court may consider events of discrimination which occurred more than 180 days prior to the last discriminatory act if those earlier acts are part of a continuing course of the same discriminatory conduct. *See, e.g. Benjamin v. Anderson*, 327 Mont. 173, 181-85, 112 P. 3d 1039, 1045-48 (2005). But this doctrine has no application to the facts in this case. Fuson admitted in her deposition that the last act of alleged gender discrimination occurred no later than November 2, 2016. She concedes in her Appeal Brief that there was no continuing conduct thereafter, because Fuson was on a leave and "CHS had no opportunity in the intervening eleven months to engage is discriminatory conduct towards Fuson". Fuson Appeal Brief, p. 19. While the implication of her argument seems to be that CHS would have discriminated against her had she been at work, she admits nothing happened because she was not at work. This precludes the application of the continuing violation doctrine.

The Court should affirm the District Court Order granting summary judgment on the gender discrimination claim.

VII. CONCLUSION

Fuson simply has no viable claims. She has no common law claims, because the factual basis for those claims is the same as her discrimination claims. She has no gender discrimination claims, because the statute of limitations bars the claims she made before the MHRB, and she cannot raise a new, gender discrimination claim based on her gender for the first time in District Court. Finally, she has no disability discrimination claim, because as a matter of fact and law, she cannot prove an element of her prima facie case--that she is "qualified for continued employment". The Court should affirm the District Court Order granting summary judgment.

DATED this 28th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure I certify that Appellee's Response Brief on Appeal is proportionately spaced with Times Roman Text with a typeface of 14 points, doubles-spaced and contains 7,061 words, excluding the cover page, table of contents, table of authorities and certificate of compliance.

DATED this 28th day of June, 2023.

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CERTIFICATE OF SERVICE

I, John Gregory Crist, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-28-2023:

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