

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 24-0455

IN THE MATTER OF UNFAIR LABOR PRACTICE COMPLAINT
2023DRS00256.

MITCHELL MCBROOM and BARBARA LEWIS-BACA,
PETITIONERS/APPELLANTS,

v.

MONTANA BOARD OF PERSONNEL APPEALS and MISSOULA URBAN
TRANSPORTATION DISTRICT, RESPONDENTS/APPELLEES.

On Appeal from the Fourth Judicial District Court, Missoula County
Hon. District Court Judge Jason Marks

BRIEF OF THE APPELLANT

Appearances

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Rules

Administrative Rule of Montana 24.26.120214

I. Issue Presented

1. Whether the Montana Board of Personnel Appeals (Board) erred when it declined to equitably toll the statute of limitations when the Appellants had relied upon their contract remedy prior to filing an unfair labor practice charge (ULP) before the Board and thereby missed the filing deadline.

II. Statement of the Case

2. Appellants were disciplined by their employer after they took concerted action simultaneously to improve the performance of their union representative and affect the terms and conditions of their employment. Appellants believed that the discipline interfered with their rights under the Public Employee Collective Bargaining statutes to act concertedly for mutual aid and protection.

3. Appellants sought redress through the contractual grievance procedure ending in binding arbitration contained in their collective bargaining agreement. The employer and union engaged in the grievance procedure and were prepared to engage in arbitration at which time they reached a settlement of the issue which reduced but did not eliminate the discipline of the Appellants. By the time the settlement was reached, the statute of limitations had run for filing a ULP before the Board.

4. Because the settlement did not eliminate the discipline that Appellants believed interfered with their rights to engage in concerted activities, they filed a

ULP before the Board. A Board agent investigated and denied the charge, for purposes of this appeal, based on the running of the limitation period.

5. Appellants requested review by the Board. The Board denied Appellants' request for tolling the statute of limitations and dismissed the charge¹. Appellants then sought district court review of the final agency decision. The district court upheld the Board's decision, from which Appellants now seek review by this Court.

III. Statement of Facts

6. Union members, including Appellants, engaged in concerted activities during the week of June 6, 2022. They simultaneously sought to improve the representation by their union representative by seeking signatures on a petition which was to be presented to union leadership and affect the terms and conditions of their employment by promoting a "no" vote on an upcoming memorandum of understanding. AR 310, 312-317.

7. The employer, Missoula Urban Transportation District (MUTD), investigated the employees' activities as a possible ULP, for encouraging members to vote "no" on the memorandum of understanding, and for a potential "sick out" work stoppage. AR 240-242.

¹ The Board considered the statute of limitations issue dispositive and declined to consider other issues in its review. AR 15, n.2.

8. MUTD has not disputed in the Record that Appellants were disciplined on June 29, 2022,² for their concerted activities. Prior to disciplining Appellants, MUTD investigated the employees' conduct as a ULP. AR 239-243, *Answer and Denial of Unfair Labor Practice*. MUTD interviewed over fifty employees during its investigation. AR 229-23.

9. Appellants timely filed a grievance according to Article 18 of the controlling collective bargaining agreement (CBA)(see AR 195-196) on June 30, 2022, and were represented by their union. AR 27-28

10. Appellants' union and MUTD processed Appellants' grievances through Step 3, the final step before binding arbitration. After the Step 3 meeting, MUTD offered to reduce but not eliminate Appellants' discipline. Appellants requested their union to pursue arbitration. Arbitration was scheduled but held in abeyance while the union pursued a ULP against MUTD on an evidentiary issue. See AR 244-245, 144-149.

11. On May 4, just prior to the evidentiary ULP hearing, the union accepted the original settlement offer from MUTD, and thereby abandoned arbitration. AR 244-245.

12. Appellants, who believed their concerted activities were protected by the Montana Public Employee Collective Bargaining statutes, did not accept the

² The 6-month statute of limitation to file a ULP began to run on this date and would end December 29, 2022.

settlement as sufficient and filed a ULP against MUTD with the Board. AR 321-331. Appellants simultaneously filed a duty of fair representation complaint against their union in district court. R, Doc. 12, *Order Denying Petition for Judicial Review of Final Agency Decision*, June 26, 2024, n. 2.

13. MUTD filed its Answer and Denial of Unfair Labor Practice on July 24, 2023. AR 239-243. In its answer, MUTD raised two affirmative defenses: 1) the complaint was not signed by the Teamsters Union, and 2) Res Judicata. AR 239-240.

14. Appellants filed their Reply to MUTD's Answer and Denial of Unfair Labor Practice Charge on July 31, 2023. AR 218-228.

15. MUTD supplemented its Answer by letter to the Board agent on August 1, 2023, at which time it raised the affirmative statute of limitations defense. AR 173, [¶ 4].

16. Appellants replied to MUTD's letter on August 2, 2023. AR 170-171. In their reply letter, Appellants asserted reliance on the grievance procedure and the duty of fair representation claim against the union as reasons for tolling the limitation period.

17. The Board agent allowed MUTD's statute of limitations defense and issued its *Finding of No Probable Merit*. Appellants' charge was denied based on the

statute of limitations defense and the Board agent's determination that nothing prevented Appellants from filing a ULP within the limitation period. AR 160-167.

18. Appellants filed their Request for Review of Finding of No Probable Merit and Notice of Intent to Dismiss on September, 9, 2023, in which they argued they had met the criteria for the Board agent to equitably toll the statute of limitations. AR 44-57.

19. MUTD filed a response on October 24, 2023, AR 32-38, in which it argued that Appellants were not pursuing a legal remedy when they sought binding arbitration through the grievance procedure. AR 36, ¶ 19.

20. Appellants filed a reply on November 7, 2023, in which they argued the law and facts favored tolling the statute of limitations. AR 24-28. Appellants argued the reasonableness of their attempt to utilize the grievance procedure and arbitration. AR 24-25, ¶¶ 23-29. Appellants once again argued equitable tolling should apply to their claim. AR 25-26, 27-28.

21. The Board held hearing on November 16, 2023, and issued a final agency decision on December 1, 2023, which upheld the Board agent's denial to toll the statute of limitations based on the premise that nothing prevented Appellants from filing the ULP within the limitation period. AR 14-17.

22. Appellants filed a petition for judicial review of final agency decision on December 29, 2023. R., Doc. 1, *Petition for Judicial Review of Final Agency Decision*.

23. MUTD filed a response brief on April 3, 2024. R., Doc. 4, *Respondent Missoula Urban Transportation District's Response to Petition for Judicial Review of Agency Decision*. In addition to arguing Appellants could have filed a ULP parallel with the grievance process, MUTD raised, for the first time, an issue related to Article 6 (see AR 185) of the CBA as interpreted by *Winchester v. Mountain Line*, 1999 MT 134, 294 Mont. 517, 982 P.2d 1024. MUTD argued that Article 6 forecloses a ULP charge from the grievance procedure. R. Doc 4, 9-10.

24. The district court denied Appellants' Petition on June 26, 2024. R., Doc 12, *Order Denying Petition for Judicial Review of Final Agency Decision*. The court reasoned that because the Board rule contemplates filing a ULP while the grievance procedure plays out, the policy in *Small v. McRae*, 200 Mont. 497, 651 P.2d 982 (1982), was not reason to toll the limitation period in favor of Appellants. R., Doc. 12, 7-9. The court cited *Winchester* to support its finding that Appellants were likely required to "sidestep the provisions of the collective bargaining agreement." R., Doc 12, 11-12.

25. The court upheld the Board's decision to not apply equitable tolling by finding that:

Failure to achieve resolution on the merits of an action is not cause to apply equitable tolling. Moreover, the Court has determined that BOPA did not err in concluding that the Union was not solely responsible for filing Petitioners' ULP, and that Petitioners were likely required to bring their ULP individually and "sidestep" the CBA since the CBA barred alleged violations of state statutes from its grievance and arbitration procedures. Finally, Petitioners do not allege untimeliness due to service in the armed forces, which is the only exception to the statute of limitations contemplated under Montana law.

R., Doc 12, 14.

IV. Standard of Review

26. Final agency decisions are reviewed under the Montana Administrative Procedure Act, Montana Code Annotated, Title 2, chapter 4, section 7. A district court's review of an agency's findings is limited to a review of the record. Mont. Code Ann. § 2-4-704(1). A district court may not substitute its judgment for that of the agency for determining weight of the evidence for questions of fact, but it may reverse or modify the agency decision if substantial rights have been prejudiced. Mont. Code Ann. § 2-4-704(2). The same standard of review applies to subsequent review of the district court's decision on appeal. *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 16, 387 Mont. 202, 394 P.3d 159 (citing *In re Transfer of Ownership & Location of Mont. All-Alcoholic Bevs. License No. 02-401-1287-001*, 2007 MT 192, ¶ 6, 338 Mont. 363, 168 P.3d 68). "We review an order from a district court acting in an appellate capacity to determine whether the district court reached the correct conclusions under the appropriate standards of review." *Mashek*

v. DPHHS, 2016 MT 86, ¶ 8, 383 Mont. 168, 369 P.3d 348 (citation omitted). The district court's legal conclusions are questions of law subject to de novo review. *Dick Irvin Inc. v. State*, 2013 MT 272, ¶ 18, 372 Mont. 58, 310 P.3d 524 (citing *In re J.D.N.*, 2008 MT 420, ¶ 8, 347 Mont. 368, 199 P.3d 189).

V. Summary of Argument

27. Appellants timely chose one of two options to pursue their claim regarding unlawful discipline for engaging in concerted activities. As collectively bargained employees, they naturally turned to the grievance procedure ending in binding arbitration in their CBA.

28. Appellants avoided forfeiting their claim through timely action of filing a grievance through their union representative and thereby provided notice and avoided subsequent surprise to MUTD regarding Appellants' claim against it.

29. An apparent option or requirement to individually pursue a parallel ULP claim before the Board was not clear to Appellants. Only when the grievance procedure failed to reach the merits of their claim did Appellants feel free to file a claim before the Board.

30. The Board's denial of Appellants' request for equitable tolling of the limitation period does not serve to promote justice and denies Appellants the opportunity of pursuing their rights.

VI. Argument

31. Equitable tolling of the statute of limitations is appropriate under the facts because Appellants did not neglect their claim. They pursued a reasonable course of action to resolve discipline they received for concerted activity which provided timely notice to MUTD. MUTD was not prejudiced in gathering evidence to defend against a ULP in front of the Board because MUTD had asserted from the outset that Appellants' activities were possibly a ULP, and MUTD had conducted a thorough investigation. Where the grievance procedure failed to reach the merits of Appellants' claim, Appellants acted in good faith to pursue their claim before the Board.

32. An apparent ability for the Plaintiffs to pursue a parallel claim by filing a ULP while the grievance process was pursued, as the Board and district court held, does not necessarily foreclose the Board or court from tolling the limitation period. In hindsight, it may be clear to the Board and district court that a parallel claim could possibly be filed, but Appellants made reasonable, good faith decisions under the circumstances to protect their rights.³

³ Of note, in § 301 "hybrid" actions against the employer for breach of contract and the union for breach of duty of fair representation, the 8th Circuit Court of Appeals found that the statute of limitations is tolled (does not accrue) for the action against the employer until the employee has exhausted the grievance process and the grievance has been rejected due to unfair representation. *Butler v. Int'l Brotherhood of Teamsters*, 514 F. 2d 442, 449-450, 1975 U.S. App. LEXIS 15595, 15. Appellants in this case are also pursuing a breach of duty of fair representation claim, which may weigh towards equitable principles being applied to their ULP.

A. Equitable Tolling

33. The Board denied equitable tolling of the statute of limitations because it determined that the employees could have timely filed a ULP charge in parallel with the grievance procedure. Importantly, the Board did not deny equitable tolling because the employees did not pursue one of several legal remedies in good faith; or because the employees did not provide timely notice to the employer by filing the first claim within the statute of limitations; or because the employer was prejudiced in gathering evidence to defend against the ULP charge; or because the employees did not pursue the ULP charge in good faith and with reasonable conduct.

34. The Board did not apply the correct rule, namely whether the plaintiff reasonably and in good faith pursued one of several courses of action to preserve their legal rights. The Board instead relied on whether Appellants could pursue a parallel course of action.

35. “The policy behind the doctrine of equitable tolling is ... to avoid forfeitures and allow good faith litigants their day in court.” *Schoof v. Nesbit*, 2014 MT 6, ¶ 34, 373 Mont. 226, 316 P.3d 831 (quoting *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 16, 366 Mont. 78, 285 P.3d 494 (citing *Addison v. State*, 21 Cal. 3d 313, 146 Cal. Rptr. 224, 578 P.2d 941, 945 (Cal. 1978))). “Limitation periods are designed to ensure justice by preventing surprise, but no surprise exists when defendants are

already on notice of the substantive claims being brought against them.” *Weidow v. Uninsured Emp’rs’ Fund*, 2010 MT 292, ¶ 28, 359 Mont. 77, 246 P.3d 704, (citing *Stevens v. Novartis Pharms. Corp.*, 2010 MT 282, ¶ 34, 358 Mont. 474, 247 P.3d 244.

36. The doctrine of equitable tolling may be applied to statutes of limitations. *Weidow*, ¶ 25 (citing *Harrison v. Chance*, 224 Mont. 215, 228, 797 P.2d 200, 208 (1990)). Moreover, equitable tolling principles may be applied to procedural filing deadlines during the administrative processing of claims. *Weidow*, ¶ 24 (citing *BNSF Ry. Co. v. Cringle*, 2010 MT 290, ¶ 18, 359 Mont. 20, 247 P.3d 706).

37. This Court has cautioned that equitable tolling should be applied sparingly and warned against the doctrine being applied to garden variety claims of excusable neglect, and that procedural time bars should be applied regularly and consistently. *Weidow*, ¶ 28. However, this Court has consistently rejected a one-size-fits-all approach that serves only to undermine the purpose of the equitable tolling doctrine which could deprive a plaintiff of his or her rights when such an approach serves no policy purpose. *Id.* Equity allows courts to evaluate the circumstances and reasons for why a party failed to comply with a limitations period and ensures just results in exceptional circumstances. *BNSF Ry. Co. v. Cringle (Cringle II)*, 2012 MT 143, ¶ 25, 365 Mont. 304, 281 P.3d 203, Morris J.,

specially concurring (internal citations omitted). A party must, at a minimum, make reasonable efforts to pursue his or her legal rights. *Cringle II*, ¶ 21.

38. A statute of limitations may be tolled when a party reasonably and in good faith pursues one of several possible legal remedies and the claimant meets three criteria: (1) timely notice to the defendant within the applicable statute of limitations; (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim. *Erickson v. Croft*, 233 Mont. 146, 760 P.2d 706 (1988). In other words, the plaintiff's reasonable and good faith pursuit of one of several possible remedies must provide timely notice to the defendant by filing the first claim within the limitation period, the defendant's ability to gather evidence for defense of the second claim was not prejudiced by the late-filed second claim, and the plaintiff reasonably and in good faith filed the second claim. *Lozeau v. GEICO Indem. Co.*, 2009 MT 136, ¶ 14, 350 Mont. 320, 207 P.3d 316.

1. Good faith reliance on the contract grievance procedure ending in binding arbitration.

39. The Board denied applying equitable tolling to Appellants' claim because, "Petitioners cite to no authority supporting the argument they could not initiate a ULP charge while simultaneously pursuing their grievance under the CBA." AR 15. The district court clarified in its ruling that the Board could have more

accurately stated that, “Petitioners cite to no persuasive authority supporting the[ir] argument.” R., Doc. 12, 12.

40. Appellants, however, had argued the public policy established by *Small v. McRae*, 200 Mont. 497, 651 P.2d 982 (1982), was reason for them to pursue the grievance procedure ending in binding arbitration. AR 52-54. “But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the “common law” of the plant.” *Small*, at 503, 651 P.2d at 986. (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-653, 85 S.Ct 614, 616-17 (1965)). “...[I]t cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee **until the employee has attempted to implement the procedures and found them so.**” *Id.*, 651 P.2d at 986 (emphasis added).

41. The Appellants pursued the grievance procedure, declined a settlement offer that they found unacceptable, and requested arbitration so the legitimacy of their discipline could be decided on the merits. The employer and union settled and cancelled arbitration after the statute of limitations had run, and thus the merits of the issue were not reached.

42. Based on public policy considerations set forth in *Small*, it is reasonable that Appellants would pursue and rely on the contract grievance procedure ending in arbitration to address their discipline from MUTD. Appellants pursued the contract grievance procedure in good faith to resolve the discipline until the union and MUTD settled the grievance without addressing the merits of the unfair labor practice allegedly committed by MUTD.

43. Appellants made a good faith effort to resolve their issues by pursuing their legal rights through the contract grievance procedure ending in final arbitration.

2. Timely filing of grievances provided timely notice to defendant within the six-month limitation period.

44. MUTD perceived Appellants' concerted activities as a ULP and investigated as such. AR 239-243, *Answer and Denial of Unfair Labor Practice*. MUTD was aware that Appellants were seeking to improve the quality of representation by their union agent and affect the outcome of a vote on an MOU. AR 310, 312-313. Such concerted activities are protected under established labor law. AR 45, ¶ 2; AR 48, ¶¶ 15, 17.

45. Appellants filed a grievance the day after they were disciplined which provided MUTD with timely notice of the claim within the limitation period to file ULP. AR 29-30

3. Defendant was not prejudiced in gathering evidence to defend against the ULP charge before the Board of Personnel Appeals.

46. MUTD thoroughly investigated the employees' conduct as a ULP before disciplining them. AR 239-243, *Answer and Denial of Unfair Labor Practice*. During its investigation, MUTD interviewed over fifty employees. AR 229-23. In addition, MUTD engaged in the grievance procedure and likely retained and developed evidence related to Appellants' conduct.

4. Plaintiffs exercised reasonable conduct and good faith when they filed the ULP charge before the Board of Personnel Appeals.

47. From its investigation and participation in the grievance process, MUTD was on notice of the substantive claims brought in the ULP charge. Appellants had reasonably relied on the grievance process ending in binding arbitration to reach the merits of their issue. When binding arbitration was denied them by the settlement between MUTD and the union, they reasonably turned to the ULP process before the Board.

B. Reliance on *Winchester v. Mountain Line* by Respondent and the district court.

48. The district court improperly relied on *Winchester v. Mountain Line*, 1999 MT 134, 294 Mont. 517, 982 P.2d 1024, in its order.

49. The Board was not presented with any argument regarding *Winchester* and Article 6 of the CBA and the district court improperly considered MUTD's

argument when it determined the equitable tolling should not apply in Appellants' case and upheld the final Board decision.

If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

Mont. Code Ann. § 2-4-703 (emphasis added).

50. The district court stated that *Winchester*, along with Article 6 of the CBA, is determinative that the arbitration clause in the CBA is not susceptible to an interpretation that covers Appellants' ULP. R., Doc. 12, 11-12. However, MUTD did not rely on *Winchester* in its arguments before the agency, and only raised *Winchester* for the first time in its response to the petition for judicial review of agency decision. R., Doc. 4, *Respondent Missoula Urban Transportation District's Response to Petition for Judicial Review of Agency Decision*, April 3, 2024, 9-10.

51. The agency record shows that MUTD was content to rely on the grievance procedure and benefit from its result and continued to do so throughout the agency process. Only when the matter came before the district court did MUTD become concerned with *Winchester's* interpretation of Article 6 of the CBA.

52. Under MUTD's own argument, it breached the CBA when it engaged in the grievance process, perpetuated its breach until the statute of limitations had passed for the Appellants to file a ULP, then benefited from having followed the grievance process to the detriment of Appellants. MUTD acted in bad faith and came before the court with unclean hands.

53. MUTD does not have good reason why it did not make its claim regarding *Winchester* before the agency and should not now be allowed to benefit from its untimely argument. The district court should have, if MUTD could have demonstrated good cause for not including *Winchester* and Article 6 in its arguments before the agency, remanded the new evidence to the Board.

VII. Conclusion

54. Equity allows courts to evaluate the circumstances and reasons for why a party failed to comply with a limitation period and ensures just results in exceptional circumstances. *Cringle II*, ¶ 25. Appellants missed the limitation period to file a ULP because they pursued their contract grievance procedure ending in binding arbitration, until the procedure was terminated without reaching the merits of their claim after the limitation period had lapsed. They did not perceive that there would be a requirement to individually file a ULP during the grievance process, or else they would have.

55. Appellants meet the requirements for a court to apply equitable tolling. They timely pursued an apparently legitimate course of action by filing a grievance concerning the discipline. MUTD was on notice of the claim and understood it to be a ULP. MUTD was not prejudiced in gathering evidence to defend against a ULP. Appellants timely filed a ULP in good faith.

56. Wherefore, Appellants request the court reverse the Board of Personnel Appeals decision denying equitable tolling for the reasons stated herein.

Dated this 7th day of October, 2024.

HRAFN LAW P.C.
Attorney for Appellants

/s/ David W. Diacon

Certificate of Compliance

Pursuant to Montana Rule of Appellate Procedure 11(4), I certify that this brief is printed with a proportionally spaced Times New Roman font of 14 points, is double spaced, and the word count as calculated by MS Word is 3986.

Dated this 7th day of October, 2024.

HRAFN LAW P.C.
Attorney for Appellants

/s/ David W. Diacon

CERTIFICATE OF SERVICE

I, David Wayne Diacon, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-07-2024:

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