DA 21-0061

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 6N

DANIEL P. McCAUL,

Plaintiff and Appellant,

v.

SOUTHWEST MONTANA COMMUNITY FEDERAL CREDIT UNION,

Defendant and Appellee.

APPEAL FROM: District Court of the Third Judicial District,
In and For the County of Anaconda-Deer Lodge,
Cause No. XBDV-2018-29
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Daniel P. McCaul, Self-Represented, Bozeman, Montana

For Appellee:

Scott D. Hagel, Crowley Fleck PLLP, Kalispell, Montana

Submitted on Briefs: August 4, 2021

Decided: January 11, 2022

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Daniel McCaul appeals from the January 8, 2021 Order of the Third Judicial District Court, Deer Lodge County, granting summary judgment in favor of Defendant, Southwest Montana Community Federal Credit Union (Southwest). We affirm.

¶3 McCaul was employed by Southwest as a special asset manager beginning August 2016. On November 30, 2017, McCaul met with his supervisor, Tom Dedman, President and CEO of Southwest. During the meeting, McCaul and Dedman discussed that Southwest was reviewing McCaul's position, requiring Dedman to "justify [his] position with a cost-benefit analysis," and that there were employees at Southwest "who did not want [him] working there." The parties dispute whether Dedman told McCaul that "he no longer had a job" at Southwest or whether his involvement in a lawsuit against another credit union negatively impacted his job at Southwest.

¶4 In response to the meeting, McCaul emailed a 20-page letter to Dedman on December 3, 2017, asserting he had been wrongfully discharged during the November 30 meeting. On December 4, 2017, Dedman emailed a confirmation of receipt to McCaul, stating he needed to review the letter's contents with Southwest's Board of Directors. After meeting with the Board, Dedman emailed McCaul and offered a leave of absence. Dedman asserted Southwest had not terminated McCaul and requested that "[i]n any event, we need

you to return to work as soon as possible." McCaul responded by email, declining the offer to return to work and reasserting that he had been wrongfully discharged.

¶5 On December 14, 2017, Southwest's attorney advised McCaul he had not been fired and instructed him to return to work no later than December 21, 2017, after which his absence would be treated as abandoning his position at Southwest. McCaul's attorney responded on December 21, 2017, reiterating that McCaul had been wrongfully terminated and questioned Southwest's motive for the offer of reinstatement. McCaul did not return to work at Southwest. Southwest paid McCaul his full salary and accrued benefits through December 14, 2017.

¶6 In February 2018, McCaul filed suit for wrongful discharge. Southwest moved for summary judgment. The District Court granted the motion, finding that regardless of whether McCaul was wrongfully discharged, his refusal to return to work cut off his accrual of damages. The District Court stated:

> The undisputed facts show that [Southwest] made an immediate and unequivocal reinstatement offer to McCaul to the exact same position. [Southwest] has presented material facts which show a prompt and unconditional curative reinstatement offer, which this Court tentatively accepts as unreasonable to refuse. While not conclusive, this shifts the evidentiary burden back to McCaul to show that his refusal was reasonable.

The District Court further found that McCaul's response to Southwest's motion failed to meet the nonmoving party's burden of proof that his refusal to accept the job was reasonable. The District Court stated McCaul did nothing more than "talismanicly recite[] that reasonable rejection is a special circumstance and must be determined by a trier of fact." The District Court held that because McCaul had been fully paid his salary and

accrued benefits through December 14, 2017, he had no actual damages. The District Court dismissed McCaul's suit with prejudice.

¶7 We review a district court's grant of summary judgment de novo. *Cole v. Valley Ice Garden, LLC*, 2005 MT 115, ¶ 4, 327 Mont. 99, 113 P.3d 275. Summary judgment is an extreme remedy and should "never be substituted for a trial" if a material issue of disputed fact exists. *Bellanger v. Am. Music Co.*, 2004 MT 392, ¶ 9, 325 Mont. 221, 104 P.3d 1075. Summary judgment is appropriate when the "pleadings, the discovery and disclosure materials on file, and any affidavits" establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3). The party moving for summary judgment has the initial burden of proving there are no genuine issues of material fact that would permit a nonmoving party to succeed on the merits of the case. *Bellanger*, ¶ 9. "[U]nless that initial burden is met by the moving party, the nonmoving party may rest on its pleading." *Brinkman & Lenon, Architects & Eng'rs v. P & D Land Enters.*, 263 Mont. 238, 242, 867 P.2d 1112, 1115 (1994). "A de novo review affords no deference to the district court's decision, and we independently review the record, using the same criteria used by the district court to determine whether summary judgment is appropriate." *Siebken v. Voderberg*, 2012 MT 291, ¶ 20, 367 Mont. 344, 291 P.3d 572.

¶8 In a Wrongful Discharge from Employment Act (WDEA) case, an employee is entitled only to "lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge . . . ." Section 39-2-905(1), MCA. An employee who has been terminated has a duty to mitigate his damages. *Martinell v. Mont. Power Co.*, 268 Mont. 292, 321,

886 P.2d 421, 439 (1994). If an employee is offered an unconditional job offer, then "absent special circumstances," rejecting the offer "can be taken as establishing" that the ongoing injury from which he suffered has been "ended by the availability of better opportunities elsewhere." *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 238-39, 102 S. Ct. 3057, 3069 (1982).[1] In *Martinell*, this Court noted the policy behind the *Ford* rule, which encourages "defendants to make curative, unconditional offers of employment, thereby voluntarily complying with applicable law in order to end discrimination and more quickly close litigation." *Martinell*, 268 Mont. at 323, 886 P.2d at 440.

¶9 Southwest moved for summary judgment on the issue of McCaul's mitigation of damages, contending that regardless of the disputed factual issue of whether McCaul was actually terminated, it is undisputed that he was unconditionally directed to return to work. Southwest argued that his refusal to return was purely motivated by an intent to preserve his wrongful discharge claim. McCaul responded that although he was given an offer of reinstatement, there were special circumstances that made his refusal reasonable, and therefore his damages did not cease to accrue.

[1] What constitutes "special circumstances" has not been analyzed by this Court. Southwest cites two cases decided by the United States District Court for the District of Montana. *See Cooper v. Ferguson Enters.,* 2010 U.S. Dist. LEXIS 158207, at *22 (D. Mont. Jan. 14, 2010) (resolved without substantive analysis of this issue). In *Kibbee v. ACP Sales West, LLC*, the inquiry was whether there was anything "in the record that would allow a reasonable trier of fact to conclude that Kibbee's rejection of the reinstatement offer was objectively reasonable." 2008 U.S. Dist. LEXIS 47191, at *2-3 (D. Mont. June 17, 2008). *See also Smith v. World Ins. Co.*, 38 F.3d 1456, 1464 (8th Cir. 1994) (explaining "if a plaintiff reasonably rejects an offer of reinstatement, then the offer does not terminate the accrual of backpay damages"); *Ortiz v. Bank of Am. Nat'l Tr. & Sav. Assoc.*, 852 F.2d 383, 386-87 (9th Cir. 1987).

¶10 The reason for the District Court "tentatively accepting" as unreasonable McCaul's refusal of Southwest's unconditional reinstatement offer is unclear. The very basis of Southwest's summary judgment motion was that McCaul unreasonably rejected its unconditional reinstatement offer, which cut off his accrual of damages. Establishing that McCaul's refusal to accept the reinstatement offer was unreasonable was Southwest's burden as the moving party. Any reasonable inferences to be drawn from the evidence were to be drawn in favor of McCaul. In this case, though, the summary judgment record contains no evidence *at all* regarding the reasonableness of McCaul's refusal of reinstatement; therefore, there are no inferences to be drawn one way or the other regarding McCaul's refusal. The only evidence in the summary judgment record is the Dedman affidavit which documents the unconditional offer of reinstatement and McCaul's refusal of the offer. McCaul's allegations that certain Board members did not want McCaul to be employed at the credit union, and that the Board had been planning on terminating his employment are not part of the record for our consideration. "Conclusory statements, speculative assertions, and mere denials are insufficient to defeat a motion for summary judgment." *Davis v. State*, 2015 MT 264, ¶ 7, 381 Mont. 59, 357 P.3d 320. Whether or not these allegations, if properly submitted, might constitute special circumstances justifying McCaul's refusal of reinstatement is likewise not before us for our consideration. The only undisputed facts in the record are that McCaul rejected an unconditional offer of reinstatement. Since there is no properly submitted evidence in the record to support McCaul's assertion that there were special circumstances justifying his rejection, the District Court properly granted Southwest's motion for summary judgment.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court did not err by granting Southwest's motion for summary judgment. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

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