DA 22-0424

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 24

SHAWN FOWLER,

Plaintiff and Appellee,

v.

DEPARTMENT OF JUSTICE,
MONTANA HIGHWAY PATROL,

Defendant and Appellant.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DV-2019-40
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Michael Kauffman, Patricia Hope Klanke, Drake Law Firm, P.C., Helena, Montana

For Appellee:

Karl Knuchel, Webster Crist, Karl Knuchel, P.C., Livingston, Montana

Submitted on Briefs: October 4, 2023

Decided: February 13, 2024

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 The Montana Highway Patrol ("MHP" or "State") appeals the judgment of the Sixth Judicial District Court, Park County. We reverse.

¶2 We restate the issue on appeal as follows:

> *Were Fowler's WDEA claims barred because he was covered by a collective bargaining agreement (CBA), and he failed to exhaust the grievance procedures of the CBA?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Shawn Fowler (Fowler) was employed as a Montana state trooper from 2001 until he retired on March 30, 2018. Prior to retiring he worked as a K-9 handler. In January of 2018, Fowler was investigated for allegedly mishandling two suspected DUI traffic stops in 2017. The first incident occurred on November 29, 2017, and involved a single vehicle crash. Fowler responded and observed the driver was having difficulty speaking, speaking slowly, and was confused about what day and time it was. Fowler had the driver get into his patrol vehicle and told him "[y]ou reek of alcohol." The driver admitted to drinking and told Fowler he needed to report to WATCh[1] in the morning. He asked Fowler to give him a break and drive him home. Fowler conducted an abbreviated DUI investigation, requiring the driver to complete only two Standard Field Sobriety Tests (SFSTs). Fowler administered the tests improperly as he had the driver remain seated in his patrol car where there was insufficient room for movement. Fowler did not request blood or alcohol testing. He issued the driver a citation for driving with a suspended license and told the driver not

[1]WATCh is a substance abuse treatment program. The acronym stands for Warm Springs Addiction, Treatment, and Change.

to "be a pain in my ass and plead not guilty to driving suspended" because he was "giving [him] some pretty big breaks here."

¶4 When the video and audio recording from the patrol car was reviewed by a supervising officer, the supervisor concluded that it was highly inappropriate to disregard these indicators of impairment, conduct only two SFSTs, and then to do them improperly. Additionally, the supervisor noted Fowler's statement about pleading guilty was highly unprofessional because it amounted to pressuring someone to plead guilty. Finally, the supervisor explained there were several errors in the crash report Fowler submitted and that the report should have been submitted earlier.

¶5 The second incident occurred on December 4, 2017. Fowler responded to a report that two occupants in a vehicle located in a parking lot were extremely intoxicated. Fowler observed the driver was staggering and smelled of marijuana. A bag of marijuana was found during a search of the driver. Fowler learned the driver had an outstanding $50,000 arrest warrant. He did not administer any SFSTs or request a breath or blood test, despite witness statements that the driver appeared to be under the influence of alcohol or drugs and his own statement that the driver "appeared intoxicated." Fowler arrested the driver for the outstanding warrant and issued the driver citations for driving with a suspended license and possession of marijuana. However, he failed to investigate further whether he had been driving under the influence of alcohol or drugs. Additionally, during transport, he did not secure the driver with a seatbelt and drove at speeds up to 91 miles per hour in a 70 mile per hour zone while portions of the road were snow packed. Fowler's supervisor

found his failure to investigate the DUI troubling and concluded that Fowler's failure to properly investigate the incident was inappropriate and in violation of MHP policy and procedures.

¶6 On March 1, 2018, Fowler's supervisor sent a due process letter to Fowler at his home informing him that he faced potential disciplinary action for these two incidents. Fowler was placed on administrative leave pending the results of the disciplinary action and his patrol car, badge, weapons, ID card, and computer were confiscated. The letter informed Fowler that he could submit a written or oral response during a due process meeting on March 6, 2018. Additionally, he was informed of his right to have union representation during the meeting. Fowler appeared at the meeting with Darcy Dahle (Dahle), his union representative. On March 13, 2018, Fowler was notified that he would receive a two-day suspension without pay and was being relieved of his K-9 duties. Fowler was told, however, that he could reapply to be a K-9 handler once his performance had improved.

¶7 Six days later and prior to exhausting the CBA's grievance procedures, Fowler emailed his supervisors on March 19, 2018, informing them he planned to retire "due to the extreme level of stress that has been imparted upon my family and I from the hostile and caustic work environment created by some of my supervisors, and from the general stresses of the job." Fowler claimed that his wife was also suffering from anxiety because of the "disciplinary action taken against me and the excessive punishment and

inconsiderate treatment meted out to me and my family as a result." Fowler submitted a formal notice of resignation on March 20, 2018, with an effective date of March 30, 2018.

¶8 Prior to resigning, Fowler was a member of the Montana Public Employees Association (MPEA) and his employment was covered by a CBA between the MHP Troopers Unit of the MPEA and the State. The agreement recognized the MPEA "as the exclusive collective bargaining representative" concerning "rates of pay, hours of employment and other conditions of employment." The CBA states that its purpose is, among other things:

> to provide an orderly and peaceful means of resolving grievances, to prevent interruption of work and interference with the efficient operation of the Highway Patrol Division, and to set forth herein a basic and complete agreement between the parties concerning terms and conditions of employment which are not otherwise mandated by statute.

¶9 The procedure for filing a grievance progresses, if unresolved, as follows: (Step 1) the individual submits a grievance to his or her immediate supervisor; (Step 2) the grievance is submitted to the District Commander; (Step 3) the grievance is submitted to the Lieutenant Colonel; (Step 4) the grievance is submitted to the Division Administrator, and; (Step 5) binding arbitration may be requested.

¶10 On March 28, 2018, Dahle submitted a grievance to Colonel Tom Butler (Butler) on behalf of Fowler. In the grievance, Dahle requested reimbursement for the two-day suspension, reinstatement as a K-9 handler, and removal of the disciplinary action from Fowler's record. Butler denied the grievance on April 25, 2018, noting both that Fowler had retired on March 30, 2018, and that "Fowler's actions in the two identified instances

clearly constituted unsatisfactory performance and that sentiment was shared by all of Fowler's supervisors who reviewed his actions." On April 27, 2018, Dahle submitted a request to MPEA Director Quint Nyman (Nyman) for arbitration. Nyman denied the request and when Dahle appealed the denial, Nyman wrote to the MPEA board of directors explaining his reasoning for the denial: Fowler's actions during the two stops were enough to justify termination but instead he was only given a two-day suspension; Fowler had already retired and was no longer an employee; and it was unreasonable to spend over $5,000 to arbitrate a two-day suspension when the member was no longer employed.

¶11 On March 28, 2019, Fowler filed a complaint alleging he was constructively discharged by MHP, in violation of the WDEA. He also alleged breach of contract by the MPEA because it declined Fowler's request to arbitrate. In his complaint, Fowler alleged numerous instances of mistreatment and harassment by MHP dating back to 2016, which were in addition to his two-day suspension. None of the instances, other than the two-day suspension, were grieved by Fowler pursuant to the CBA. Nor did Fowler file a grievance pursuant to the CBA for his claim of constructive discharge.

¶12 The State filed a motion for summary judgment arguing that the WDEA does not apply to an employee covered by a CBA. With its motion, the State filed a copy of the CBA and documentation that Fowler was covered by the CBA during his dates of employment. Fowler responded that the issue was whether the State and the MPEA collaborated to deny Fowler his right to a safe and non-hostile work environment. The District Court denied the State's motion on February 4, 2020, reasoning that there were

genuine factual disputes regarding the manner Fowler left his employment and the action or non-action of MPEA. Following discovery, the State filed a renewed motion for summary judgment on July 7, 2021. It argued that Fowler's constructive discharge was governed by the CBA and, therefore, fell within an exception to the WDEA. The State also argued that Fowler had failed to exhaust the grievance procedure under the CBA for his alleged constructive discharge because he had only grieved his two-day suspension. The District Court, under the same rationale it previously articulated in its February 4, 2020, order, denied the State's motion on September 29, 2021. Following a jury trial, Fowler was awarded $114,888.

¶13 The State appeals.

STANDARD OF REVIEW

¶14 "We review district court summary judgment rulings de novo for conformance to the applicable standards specified in M. R. Civ. P. 56." *Lawrence v. Pasha*, 2023 MT 150, ¶ 8, 413 Mont. 149, 533 P.3d 1029. "Summary judgment is proper only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Pasha*, ¶ 8. "A genuine issue of material fact is a fact materially inconsistent with proof of an essential element of a claim or defense at issue." *Pasha*, ¶ 8. The moving party "has the initial burden of showing a complete absence of any genuine issue of material fact on the Rule 56 record and that the movant is accordingly entitled to judgment as a matter of law." *Pasha*, ¶ 8. However, "the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue [of fact] does exist."

Osterman v. Sears, 2003 MT 327, ¶ 17, 318 Mont. 342, 80 P.3d 435. When determining whether there exists a genuine issue of material fact, "all facts considered material in light of the substantive principles that entitle the moving party to judgment as a matter of law and all reasonable inferences are to be drawn in favor of the party opposing summary judgment." *Weber v. Interbel Tel. Coop., Inc.*, 2003 MT 320, ¶ 5, 318 Mont. 295, 80 P.3d 88. However, "[t]he party opposing the motion for summary judgment cannot rely on mere allegations in the pleadings, but must present evidence raising genuine issues of material fact in the form of affidavits or other sworn testimony." *Putnam v. Cent. Mont. Med. Ctr.*, 2020 MT 65, ¶ 12, 399 Mont. 241, 460 P.3d 419.

DISCUSSION

¶15 The WDEA "provides the exclusive remedy for a wrongful discharge from employment." Section 39-2-902, MCA. Discharge includes a constructive discharge, which means the "voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative." Section 39-2-903(1), MCA. Section 39-2-912, MCA, provides exceptions to the exclusivity of the WDEA remedy. In relevant part, § 39-2-912, MCA, provides:

> (1) This part does not apply to a discharge:
>
> . . .
>
> (b) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

¶16 The WDEA became effective on July 1, 1987. Shortly thereafter, this Court had the occasion to address the relationship between a CBA and the WDEA in *Allmaras v.*

Yellowstone Basin Properties., 248 Mont. 477, 481, 812 P.2d 770, 772 (1991). We explained:

> The Wrongful Discharge Act does not change the common law in recognizing that a general statutory remedy for wrongful discharge should not apply to those classes of cases in which the employees enjoy other specific contractual or statutory remedies. Under common law, tort claims for wrongful discharge and breach of the implied covenant of good faith and fair dealing were available only to at-will employees. These tort remedies were developed specifically to provide redress for employees who had no legal protection against wrongful discharge. Persons employed under term contracts or collective bargaining agreements were not allowed to sue in tort, but rather were required to seek remedies under their contracts or collective bargaining agreements. Likewise, claims arising under discrimination statutes such as the Human Rights Act and the Governmental Code of Fair Practices may not form the basis of a tort claim. (Citations omitted).

In Montana, public employees have the right to organize and join a labor organization, and to bargain collectively through representatives of their own choosing on matters relating to wages and other conditions of employment. Section 39-31-201, MCA; *LaFournaise v. Mont. Dev. Ctr.*, 2003 MT 240, ¶ 17, 317 Mont. 283, 77 P.3d 202. These CBAs arise only after the public employer and the exclusive representative of the union have met their legal duties to bargain collectively and in good faith. Section 39-31-305, MCA; *LaFournaise*, ¶ 17.

¶17 Because labor unions are the exclusive bargaining agents of their membership, they have a common law duty to fairly represent all their members in the enforcement of grievance rights provided by CBAs. *Folsom v. Mont. Pub. Emps. Ass'n*, 2017 MT 204, ¶ 23, 388 Mont. 307, 400 P.3d 706. "[D]ue to the broad discretion that unions must have to balance the often competing interests of individual members and the union as a whole,

mere negligence is insufficient alone to constitute a breach of the duty of fair representation." *Folsom*, ¶ 23. "A breach of the duty of fair representation thus requires proof of fraud, bad faith, gross negligence, or other arbitrary or unlawful disregard or discrimination in the enforcement of grievance rights." *Folsom*, ¶ 23.

¶18 Importantly, a union, as the exclusive bargaining agent for its members, is not required to exhaust all possible grievance procedures and remedies in every case and has broad discretion not to pursue a remedy which it finds frivolous. *Folsom*, ¶ 23. A union's discretion is an important aspect of the bargaining process.

> If the individual employee could compel arbitration of [their] grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

Vaca v. Sipes, 386 U.S. 171, 191-92, 87 S. Ct. 903, 917-18 (1967). A union may thus, in its discretion, refuse to pursue an employee's grievance, in which case the employee's grievance process ends.

¶19 An employee is, nonetheless, entitled to pursue a claim outside the WDEA if he or she can show that the union breached its duty of fair representation. This would include a claim for breach of contract against the employer for breach of the CBA. As we explained in *Folsom*, the breach of the duty requires more than proof of negligence; it requires an arbitrary disregard or discrimination in the enforcement of grievance rights, fraud, bad

faith, or gross negligence. *Folsom*, ¶ 23. This allows an employee access to remedies that would exist had there not been a CBA. Because the employee has a remedy in contract, the statutory remedy of the WDEA is not available. Section 39-2-912(1)(b), MCA.

¶20 Where there is no "collusion with the employer, unions are generally not liable for an employee's lost wages because lost wages are the direct and natural consequence of the employer's independent breach of the collective bargaining agreement." *Folsom*, ¶ 33. Accordingly, the damages in this case were assessed against the State and the State is the only appellant. Fowler's only claim against the State was for constructive discharge, which was covered by the CBA and which Fowler failed to exhaust. Fowler's claim for breach of contract was against MPEA because MPEA failed to pursue arbitration under the CBA. However, a union has broad discretion in deciding whether to pursue arbitration. MPEA Director Nyman denied Fowler's arbitration request because it would require spending over $5,000 in arbitration costs to arbitrate a two-day suspension for an employe that had already resigned.

¶21 Here, Fowler failed to utilize the provisions of the CBA to grieve a constructive discharge; he only grieved his two-day suspension and, even then, resigned prior to completion of the grievance process. His alleged constructive discharge was covered by the CBA and he was thus required to exhaust the grievance procedures for a constructive discharge through the CBA. Fowler did not grieve any of the events preceding his suspension to which he averred in his Complaint. Accordingly, the District Court erred as a matter of law in denying the State's motions for summary judgment because an employee

covered by a CBA cannot bring a claim under the WDEA and Fowler's claims did not fall outside the CBA. Section 39-2-912(1)(b), MCA. While Fowler's two-day suspension was one of the circumstances he alleged contributed to his constructive discharge, Fowler resigned from employment prior to exhausting the grievance procedure of the CBA and never grieved a constructive discharge or the other allegations contained in his Complaint.

CONCLUSION

¶22 The District Court erred in denying the State's two motions for summary judgment. The judgment is reversed.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON