IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 22-0256

JAY SPILLERS,

Petitioner,

v.

MONTANA THIRD JUDICIAL DISTRICT COURT, ANACONDA-DEER LODGE COUNTY, THE HONORABLE RAY J. DAYTON, PRESIDING,

Respondent.

DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES' RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

Original Proceeding arising from *Spillers v. Montana Department of Public Health and Human Services*, Cause No. DV-17-74, Montana Third Judicial District, Anaconda-Deer Lodge County, Honorable Ray J. Dayton, Presiding

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STATEMENT OF FACTS

On August 11, 2017, Petitioner Jay Spillers filed his complaint in the action underlying his petition for writ of supervisory control, claiming violations of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), the Montana Human Rights Act (MHRA), and the Governmental Code of Fair Practices (GCFP). (Petitioner's Exhibit (Pet. Exh.) A.) On January 9, 2018, Respondent Montana Department of Public Health and Human Services (State or DPHHS) answered. (Pet. Exh. C.) The case passed through several attorneys for the State before the undersigned entered a notice of appearance on September 13, 2021. (State's Appendix (App'x) 1.)

Throughout the proceedings, Spillers repeatedly submitted jury instructions and exhibits addressing mitigation. For example, trial was initially set to begin on February 25, 2019. (Pet. Exh. D.) On February 4, 2019, Spillers filed his proposed jury instructions, which included an instruction stating: "The Plaintiff has a duty to minimize his damages." (State's App'x 2.)[1] Spillers also listed several mitigation exhibits in his exhibit list, including job applications and job search e-mails from after the State did not to hire him in April 2016. (Pet. Exh. F at 15–16.) For the most recent trial setting in January 2022, the first draft exhibit list Spillers sent to

[1] The original document is 22 pages. Only the relevant pages are included in the State's Appendix.

the State included these exhibits, additional job applications, and periodic and annual reviews from his vocational rehabilitation file. (State's App'x 3, Brown Declaration (Decl.), ¶¶ 14–15.) Spillers also included a mitigation instruction in his first draft jury instructions. *Id*. ¶ 16. The parties went back and forth on the proposed instructions and, on January 13, 2022, the day before pretrial documents were due, Spillers sent the State revisions that included a modified mitigation instruction. *Id*. ¶ 17.

Additionally, throughout discovery, mitigation was a central theme. For example, Spillers responded to the State's discovery request asking him to provide information regarding his damages claim by stating: "Despite his efforts, the Plaintiff was unable to find employment after the Defendant's discrimination until approximately July 23, 2017 . . . ." *Id*. ¶ 4. In the same set of requests, the State asked: "Have you subtracted interim earnings that you earned or could have earned with reasonable diligence from the amount of claimed damages? If so, describe how. If not, explain why." *Id*. ¶ 5. Spillers responded with no objection. The State also asked Spillers for information and documents regarding employment he sought or obtained after April 2016, including employment applications. *Id*. ¶¶ 6, 8, 10. Again, Spillers responded and never objected to these requests. *Id*.

After the close of discovery, the State moved to depose Spillers, arguing that new discovery responses raised "new issues on damages and possible mitigation."

(State's App'x 6 at 4.) While Spillers opposed the State's motion to depose him on the basis that discovery was closed, he never objected to the State's intent to depose him regarding mitigation. *See generally*, State's App'x 7. At his deposition on October 8, 2020, the State asked: "How would you say you've mitigated your damages since 2016?" (State's App'x 3, Brown Decl., ¶ 12.) Spillers responded without objecting. *Id*. At the same deposition, when asked about his damages, Spillers stated: "it was a calculation that my attorney had made over a certain number of years, and lost revenue. And he also added attorney [sic], mitigated damages, things like that." *Id*. ¶ 13.

Shortly before the first trial setting, Spillers sought supervisory control as to whether he was entitled to a jury trial on his federal discrimination claims. *Spillers v. Mont. Third Judicial Dist. Court*, 2020 MT 8, ¶ 1, 398 Mont. 323, 456 P.3d 560. This Court granted the petition and held that, while his state discrimination claims (MHRA and GCFP) could not be tried before a jury, *id*. ¶ 9, Spillers was entitled to a jury trial for his federal claims (ADA and Title VII), *id*. ¶ 19.

Following that decision, the State filed a motion in limine to exclude Spillers' claims of lost wages and lost benefits from consideration by the jury. (State's App'x 8.) The State explained that Title VII and the ADA only allow a jury trial for compensatory and punitive damages, which do not include back or

front pay. *Id*. at 3–4 (citing *Spillers*, ¶ 16; 412 U.S.C. § 1981(a)(b)(2) and (3); *Lutz v. Glendale Union High Sch., Dist. No. 205*, 403 F.3d 1061, 1069 (9th Cir. 2005) ("[T]here is no right to have a jury determine the appropriate amount of back pay under Title VII, and thus the ADA, . . . instead, back pay remains an equitable remedy to be awarded by the district court in its discretion."); *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 866 (9th Cir. 2017)). The State argued that presenting evidence on front and back pay to the jury "would present the jury with irrelevant information regarding the issues it must decide" and prejudice the State. *Id*. at 6. Instead, the State requested that the jury decide the issue of liability and, if needed, front and back pay could be presented to the Court in a separate proceeding. *Id*. Spillers opposed this motion, conceding that these damages are equitable remedies and that he is not entitled to a jury trial on lost wages and fringe benefits, but arguing that bifurcation would be judicially inefficient. (State's App'x 9 at 2–4.) Ultimately, the district court decided to "allow evidence of all damages to be presented to the jury and a special verdict form will be used to limit the jury's determination of damages to those authorized by federal statute." (State's App'x 10 at 3.)

Despite years of responding to discovery requests without objection regarding his failure to mitigate, calculating mitigation into his alleged damages, adding mitigation exhibits to his list, proposing jury instructions on mitigation, and

fighting to get front- and back-pay damages in front of the jury, on the eve of the January 2022 pretrial conference, Spillers claimed for the first time that mitigation was irrelevant because the State had not raised it as an affirmative defense. Given this last-minute statement from Spillers' counsel that he would challenge evidence he had been aware of—and intending to use—for years, the State immediately filed a motion to amend its answer. (Pet. Ex. I.) In his response, Spillers claimed he was unduly prejudiced because he did not conduct discovery on mitigation. (State's App'x 4 at 2.) In reply, the State informed the court that it would not oppose a request to reopen discovery on the limited issue of Spillers' failure to mitigate and was willing to apply an expedited timeline to respond to any discovery requests. (State's App'x 5 at 3.)

On March 3, 2022, the district court granted the State's motion to amend. (Pet. Ex. H.) The court also granted leave for additional discovery on mitigation. *Id*. Despite this order, Spillers never sent discovery requests to the State, nor did he request to depose any of the State's witnesses, nor did he conduct any additional discovery.

ISSUES

I. Whether urgent factors exist in this case to permit exercising supervisory control.

II. Whether the district court is proceeding under a mistake of law causing a gross injustice.

ARGUMENT

"Supervisory control is an extraordinary remedy, reserved for extraordinary circumstances." *Stokes v. Mont. Thirteenth Jud. Dist. Ct.*, 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754; *see also* Mont. App. P. 14(3). It is only "*sometimes* justified when urgency or emergency factors exist making the normal appeal process inadequate, [and] when the case involves purely legal questions . . . ." Mont. App. P. 14(3) (emphasis added). Relevant here, the petitioner must also demonstrate that the district court "is proceeding under a mistake of law and is causing a gross injustice." *Id*.

An order granting a motion to amend a pleading cannot be immediately appealed. Mont. R. Civ. P. 6(1). And this Court "will not allow supervisory control to substitute for ordinary appeal at the convenience of the parties—it is generally appropriate '[o]nly in the most extenuating circumstances.'" *T.M.B. v. Mont. First Judicial Dist. Court*, No. OP 22-0175, 2022 Mont. LEXIS 439, at *4 (May 10, 2022) (quoting *State ex rel. Ward v. Schmall*, 190 Mont. 1, 617 P.2d 140 (1980)). Supervisory control is not appropriate where the petitioner has an adequate remedy on appeal, *Yearous v. Mont. Fifth Jud. Dist. Ct.*, 489 P.3d 878, 2021 Mont. LEXIS 344, 404 Mont. 551 (Apr. 13, 2021), nor is it appropriate for the sole purpose of conserving resources, *Gideon Knox, LLC v. Mont. Seventh Jud. Dist. Ct., Richland Cnty.*, No. OP 22-0053, 2022 Mont. LEXIS 100 (Feb. 8, 2022).

In this case, Spillers has an adequate remedy on appeal, and there are no extenuating circumstances at play. Spillers has not met his burden to demonstrate that urgent or emergent factors exist or that the district court operated under a mistake of law when it granted the State's petition.

I. No urgent or emergent factors exist to permit exercising supervisory control.

Spillers has not established—or even alleged—that any urgent or emergent factors make the normal appeals process inadequate under Mont. R. App. P. 14(3). Notably, he does not address this requirement in his petition at al. *See generally*, Pet. Brief (Br.). For this reason alone, his petition should be denied. Moreover, although the district court issued its order granting the State's motion to amend on March 2, 2022 (Pet. Exh. H), Spillers waited for more than two months—until just over two weeks before trial—to file his petition. Thus, any urgency was caused by his own delay.

Additionally, for the reasons set forth in the following section, the district court did not abuse its discretion in granting the State's motion to amend. Spillers will not—contrary to his unsupported statements—be prejudiced by allowing mitigation evidence at trial. For one, the jury may never reach mitigation. Spillers must first succeed on his case in chief in order for damages to become an issue. And with respect to his claim that mitigation evidence will taint the jury against him (Pet. Br. at 15), in responding to the State's motion in limine, Spillers was the

one who argued for back pay damages to go before the jury, even when the jury cannot resolve this issue (State's App'x 9). Throughout the course of this case, Spillers has operated with the obvious intention of producing mitigation evidence to the jury. And when presented the opportunity to conduct discovery on mitigation, he decided not to.

Spillers has presented no compelling reason for why the normal appeals process is inadequate in this instance. He has not met his burden to demonstrate that urgent or emergent factors make the appeals process inadequate.

II. The district court is not proceeding under a mistake of law causing a gross injustice.

Importantly, a district court's decision to grant or deny a motion to amend is discretionary. *Ally Fin., Inc. v. Stevenson*, 2018 MT 278, ¶ 10, 393 Mont. 332, 430 P.3d 522. This alone is reason against granting supervisory control based on an alleged mistake of law. Moreover, Mont. Rule of Civil Procedure 15(a)(2) provides that courts should "freely give leave [to amend a pleading] when justice so requires." And this Court repeatedly has iterated that "Rule 15(a) 'favors allowing amendments.'" *Puryer v. Barstis (In re Estate of Kurth)*, 2016 MT 188, ¶ 23, 384 Mont. 261, 378 P.3d 1151; *Seamster v. Musselshell Cnty. Sheriff's Office*, 2014 MT 84, ¶ 14, 374 Mont. 358, 321 P.3d 829. The rule is "to be interpreted liberally so that allowance of amendments [is] the general rule and denial is the

exception." *Ally Fin.*, ¶ 13 (quoting *Haugen Tr. v. Warner*, 204 Mont. 508, 513, 665 P.2d 1132, 1135 (1983)).

Rule 15's purpose is "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." *Seamster*, ¶ 17 (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane*, Federal Practice and Procedure*, vol. 6A § 1471 (3d ed., West 2010)). As such, "[r]efusal to permit an amendment to a complaint which should be made in the furtherance of justice is an abuse of discretion." *Ally Fin.*, ¶ 13 (quoting *Haugen Tr.*, 204 Mont. at 513, 665 P.2d at 1135). Even at the outset of trial, courts should freely permit amendments to pleadings "when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." Mont. R. Civ. P. 15(b)(1); *Giles v. GE*, 245 F.3d 474, 491–92 (5th Cir. 2001) (allowing asserted defense to be raised in pretrial order); *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855–56 (5th Cir. 1983).

"Leave of court to amend a [pleading] in order to correct a mistake should be freely given when the amendment will not mislead [the other party] to their prejudice." *See Ally Fin.*, ¶ 16 (quoting *Haugen Tr.*, 204 Mont. at 512, 665 P.2d at 1134). Relevant here, "[p]rolonged delay and the stage of proceeding alone do not warrant denial [of a motion to amend a pleading]. The key is whether the

party's efforts and expenses are wasted in allowing the new legal theory to proceed." *Id.* ¶ 15. Spillers cannot demonstrate undue prejudice, and the interests of justice require allowing the amendment.

A. Spillers cannot demonstrate that he is unduly prejudiced by the district court's order.

"A district court balances undue prejudice against the sufficiency of the amending party's rationale." *Id.* ¶ 16. Despite his unsupported claims to the contrary, the record demonstrates that Spillers is not prejudiced by the district court's order granting the State leave to amend its answer. While failing to plead mitigation as an affirmative defense appears to have been an oversight by previous counsel for the State, Spillers has always anticipated mitigation would be an issue for trial. While Spillers is correct that oversight is sometimes insufficient justification for a delay in amending a pleading, this is only true when there is a "*strong* finding of undue prejudice." *See id*. ¶ 16 (emphasis added). In this case, Spillers cannot demonstrate prejudice at all.

Throughout the proceedings, Spillers repeatedly acknowledged that mitigation is central to his damages claim. His arguments to the contrary are baseless and unsupported by the record. For example, as set forth in the Statement of Facts, above, Spillers responded to multiple discovery requests pertaining to mitigation without objection; testified at his deposition that his attorney considered

mitigation when determining his damages; included mitigation exhibits in his exhibit lists for trial; and proposed jury instructions on mitigation.

Moreover, the only prejudice Spillers claimed in response to the State's motion to amend was an alleged inability to conduct discovery on the State's failure-to-mitigate defense. (App'x 4 at 2.) This claim likewise is not supported by the record. Spillers issued just one set of discovery requests, on August 17, 2018, and did not depose a single witness. (Pet. Exh. J.) Presumably, Spillers did not conduct discovery on mitigation because he did not need to; all the actions—or inactions—were his. And Spillers has long had access to every document the State intends to use at trial, most if not all of which were obtained directly through him or through a release to his vocational rehabilitation counselor. (State's App'x 3, Brown Decl., ¶¶ 6, 8, 10.)

Nonetheless, the State informed the district court that it would not oppose a request from Spillers to reopen discovery on mitigation and was willing to apply an expedited timeline to respond to any discovery requests. (State's App'x 5 at 3.) And the court granted leave for additional discovery on the issue. Despite this, *Spillers never submitted any additional discovery requests to the State*, nor did he ask to depose any of its witnesses or conduct discovery in any other way. It defies credulity for Spillers to now claim that he was prejudiced by a shorter discovery period when he never took advantage of the opportunity in the first place.

This case is distinguished from *Bitterroot Int'l Sys. v. W. Star Trucks, Inc.*, 2007 MT 48, 336 Mont. 145, 153 P.3d 627, because that case was a direct appeal, not a petition for writ; the amendment in this case is limited to damages and does not affect substantive claims; this Court relied heavily on the district court's exercise of its discretion to deny amendment in *Bitterroot*; Spillers has not conducted extensive discovery or taken any depositions; Spillers himself made mitigation a central issue through responses to discovery, in his deposition, in jury instructions, and in his proposed exhibit lists; Spillers fought to get these damages before the jury even though the jury has no power to award them; and Spillers was provided an opportunity for additional discovery by the court but did not attempt to use it. The other appeals of a motion to amend Spillers cites likewise are not grants of a petition for writ and for similar reasons are distinguished from this case. *See e.g.*, *Rolan v. New W. Health Servs.*, 2017 MT 270, ¶ 22, 389 Mont. 228, 405 P.3d 65 (finding undue prejudice because amending to include ERISA claim would destroy class certification, requiring case to begin anew; no such issue is present here).

Spillers cannot demonstrate that he is prejudiced by the district court's order allowing the State to amend its answer to include mitigation, particularly given that he has long operated under the assumption that mitigation will be an issue for trial

and did not even attempt to conduct discovery on mitigation when explicitly permitted to do so by the court.

B. The interests of justice favor permitting the amendment.

In granting the motion to amend, the district court acted in the furtherance of justice. *See Haugen Tr.*, 204 Mont. at 512–13, 665 P.2d at 1135. As demonstrated above, the parties have been operating throughout this case on the assumption that mitigation is an issue for trial. And this understanding is supported by the law: Title VII requires that "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against *shall operate to reduce the back pay* otherwise allowable." 42 U.S.C. § 2000e-5(g)(1) (emphasis added). The U.S. Supreme Court has made clear that "[t]his duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) ("An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g)."); *see also Pittington v. Great Smoky Mt. Lumberjack Feud, LLC*, 880 F.3d 791, 799–800 (6th Cir. 2018) ("Title VII requires plaintiffs to mitigate damages. This rule is designed to prevent claimants from recovering for damages which they could have avoided through reasonable diligence.") (citations and internal quotation marks omitted). Other courts have applied the same logic to ADA claims. *See Gunter v.*

Bemis Co., 906 F.3d 484, 490 (6th Cir. 2018) (holding the ADA "*requires* an employee to use reasonable diligence to mitigate damages. To that end, it limits back-pay and front-pay awards by the 'amounts earnable with reasonable diligence by the person . . . discriminated against.'") (emphasis added) (citations omitted).

Allowing the State to amend its answer to reflect these statutory requirements and comport with the parties' long-standing understanding of this case furthers the interests of justice. This is particularly true given that the evidence overwhelmingly demonstrates that Spillers did not reasonably attempt to obtain alternative employment following the State's decision not to hire him. For example, the State posted the same job opening—an administrative assistant position with DPHHS at its Anaconda Child and Family Services office—three times after April 2016. (State's App'x 3, Brown Decl., ¶ 18.) Spillers never applied to any of those openings. *Id.* Spillers also at one point obtained employment, which he then left due to personal reasons, and was thereafter placed on a do-not-rehire list. *Id.* ¶ 19. He repeatedly failed to keep in contact with his vocational rehabilitation counselor who was assisting him in his job search, despite being given many resources. *Id.* ¶ 20. And he continually changed his mind about what type of jobs he was interested in, including at several points only searching for positions he could perform from home. *Id*. ¶ 21. It would be an injustice to prohibit the State from presenting this evidence, particularly given that any damages are

statutorily required to be evaluated in light of it and—as demonstrated above—the parties have been contemplating its use throughout this case. *See Ally Fin.*, ¶ 13 ("Refusal to permit an amendment to a complaint which should be made in the furtherance of justice is an abuse of discretion.") (quoting *Haugen Tr.*, 204 Mont. at 513, 665 P.2d at 1135).

The district court did not proceed under a mistake of law. Allowing the State to amend its answer promoted the interests of justice without prejudicing Spillers. (Pet. Exh. H.) This is particularly true given that Spillers fought to get back pay in front of the jury, even while conceding it was an issue for the judge to decide. Spillers has known and expected throughout the course of this litigation that mitigation would be an issue for trial, and he has had an opportunity to conduct discovery on the issue, though he chose not to take advantage of it.

CONCLUSION

Supervisory control is not necessary or appropriate here because Spillers has demonstrated neither that the district court is proceeding under a manifest mistake of law, nor that ordinary appeal would be inadequate to remedy such error if it existed. His petition should be denied.

Respectfully submitted this 18th day of May, 2022.

AGENCY LEGAL SERVICES BUREAU

/s/ Aislinn W. Brown
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing response is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,653 words, excluding certificate of service and certificate of compliance.

/s/ Aislinn W. Brown
AISLINN W. BROWN

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Respondent.

APPENDIX

CERTIFICATE OF SERVICE

I, Aislinn W. Brown, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 05-18-2022:

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