IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0216

MATTHEW PEAVLER, Plaintiff/Appellant, v. ROCKY MOUNTAIN SUPPLY, INC. Defendant/Appellee.	**BRIEF OF APPELLANT**

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County, the Honorable Rienne H. McElyea, Presiding

Appearances:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

OTHER AUTHORITIES

I. STATEMENT OF ISSUES PRESENTED

1. Should the Court do away with the "gravamen" test, used by Montana district courts to distinguish between WDEA and discriminatory termination claims, because it leads to injustice?

2. Did the district court err when it dismissed Appellant's WDEA complaint, without prejudice, and without allowing for an opportunity to amend, thereby causing Appellant's claim to be time-barred by Montana Code Annotated § 39-2-911(1)(a)?

II. STATEMENT OF THE CASE

Matthew Peavler ("Appellant") and his wife both worked at Rocky Mountain Supply, Inc. ("RMS"). (D.C. Doc. 1, 2.) Matthew's wife was terminated from RMS during her maternity leave around August of 2020. (D.C. Doc. 1, 3.) In December of 2020, Matthew was told by RMS that he needed to provide a physical copy of his COVID mask exemption note for review by RMS. (D.C. Doc. 1, 3.) Matthew was told that he could not return to work at RMS until RMS's HR manager approved his return. (D.C. Doc. 1, 3.) Via his attorney, Matthew sent his mask exemption request to RMS. (D.C. Doc. 1, 3.) RMS received Matthew's mask exemption request yet did not review it. (D.C. Doc. 1, 3.) Matthew never

received approval to return to work from RMS's HR manager; instead, Matthew was told by his store manager that he could return to work if he wore a mask. (D.C. Doc. 1, 3.) With RMS having not reviewed his mask exemption, Matthew considered himself as constructively terminated and did not return. (D.C. Doc. 1, 3.)

Matthew brought both a Montana Human Rights Act ("MHRA") claim before the Montana Human Rights Bureau ("MHRB") *and* a Wrongful Discharge from Employment Act ("WDEA") claim before the district court. (D.C. Doc. 1, attached as App. A.) In response to Matthew's WDEA claim, RMS brought a 12(b)(6) motion to dismiss, stating that Matthew's claim was rooted in discrimination and therefore must be dismissed. (D.C. Doc. 2.) The district court subsequently dismissed Matthew's Complaint without prejudice. (D.C. Doc. 8, attached as Appendix C.) At this time, Matthew was not allowed to refile his complaint in district court since the WDEA's one-year statute of limitations had run. Matthew now appeals.

III. STATEMENT OF THE FACTS

Matthew Peavler and his wife, Jessica Peavler, both worked for RMS. (D.C. Doc. 1, 2.) RMS is headquartered in Belgrade, Montana and

has several store locations located throughout central and south-central Montana. (D.C. Doc. 1, 1.) Prior to her termination, Jessica worked as RMS's human resource administrator. (D.C. Doc. 1, 2.) Prior to his separation, Matthew worked part-time at RMS's Belgrade store as a store clerk. (D.C. Doc. 1, 2.) As a store clerk at RMS, Matthew worked at RMS's gun counter. (D.C. Doc. 1, 2.)

Jessica went on maternity leave with her second child on June 9, 2020. (D.C. Doc. 1, 2.) Prior to her maternity leave, Jessica trained Chara Allen to fulfill her job duties while Jessica was on maternity leave. Chara Allen is a Nevada-licensed attorney and was hired at RMS on a short-term contract. Matthew continued to work part-time at RMS while Jessica was on her maternity leave. (D.C. Doc. 1, 3.)

In July of 2020, while Jessica was still on her maternity leave, RMS called Matthew and Jessica and requested they come to RMS's Belgrade headquarters on a Saturday for an investigation. (D.C. Doc. 1, 2.) As requested, the Peavler's went to RMS's headquarters for investigative questioning, along with their newborn and toddler. (D.C. Doc. 1, 2.) The Peavler's were separated during questioning and were largely questioned about Matthew's gun purchases on his employee account. In addition to

the gun purchases, Jessica was briefly questioned about certain aspects of her HR role.

Upon conclusion of its investigation, RMS found no wrongdoing related to Matthew's purchase of guns; however, Jessica was terminated prior to the end of her maternity leave. (D.C. Doc. 1, 3.) Chara Allen—Jessica's temporary replacement who previously planned on obtaining her Montana law license—supplanted Jessica as RMS's new human resource administrator.

In response to her termination on maternity leave, Jessica filed a complaint with the Montana Human Rights Bureau. (D.C. Doc. 1, 3.) Jessica received a *cause finding* and the case settled in conciliation.

After Jessica was terminated, Matthew continued to work part-time at RMS. (D.C. Doc. 1, 3.) During this time, Matthew was dealing with persistent bronchitis after his bout with pneumonia shortly after his second child was born during the summer of 2020. Matthew vomited most days from coughing. Matthew's condition had a pervasive effect on his life: he struggled with shortness of breath, was unable to fulfill his household chores, was unable to play with his kids, and his sex life was

affected. Due to Matthew's condition, Matthew received a COVID mask exemption from the Bozeman Clinic. (D.C. Doc. 1, 3.)

In July of 2020, RMS instituted a mask requirement. Prior to submitting his mask exemption request, Matthew abided by RMS's mask requirement by wearing a bandana. Upon receiving his mask exemption request, Matthew's store manager allowed Matthew to work sans mask so long as Matthew kept his mask exemption note in the vehicle that Matthew drove to work. (D.C. Doc. 1, 3.)

Around December 9th of 2020, Matthew was told by his store manager that he must produce his mask exemption to RMS's HR department for review by Chara Allen; Matthew was reluctant to do so since he felt Ms. Allen undermined his wife, Jessica, while she was on her maternity leave. (D.C. Doc. 1, 3.) In response, Matthew hired the undersigned to resolve the situation. The undersigned, Attorney LeTang, contacted Ms. Allen via phone call. The undersigned then sent to RMS—to the attention of Ms. Allen—a copy of Matthew's mask exemption from Matthew's medical provider. For reasons that are in dispute, RMS refused to review Matthew's mask exemption and did not allow him to return to work sans mask. (D.C. Doc. 1, 3.) After RMS did not review his

mask exemption request, Matthew considered himself as constructively terminated. RMS confirmed such termination by removing Matthew from its work schedule. (D.C. Doc. 1, 3.)

In response to his separation, Matthew filed a complaint with the Montana Human Rights Bureau. Matthew received a *cause finding*, but the case did not settle in conciliation. Matthew's case proceeded to a hearing before the Office of Administrative Hearings. A three-day hearing was held on March 29-31, 2022. Proposed findings and full briefing were submitted by the parties and the matter awaits findings issued by the Hearing Officer.[1]

In addition to his discrimination claim, Matthew filed a WDEA claim in Gallatin County district court. (D.C. Doc. 1, attached as Appendix A.) In response to Matthew's WDEA claim, RMS filed a motion to dismiss pursuant to Rule 12(b)(6). (D.C. Doc. 2.) The district court granted RMS's motion without allowing for an opportunity to amend. (D.C. Doc. 8, attached as Appendix C.) At the time of the district court's

[1] It is likely that Appellant will receive a decision on his OAH case prior to a decision by the Court here. Appellant will certainly keep the Court apprised, via notices, of the ongoing proceeding before the Department of Labor. However, even if Appellant receives a finding of discrimination, such decision will not be conclusive until any appeal is time-barred or exhausted.

dismissal, Matthew was time-barred from refiling his WDEA complaint due to statute of limitations.

IV. STANDARD OF REVIEW

A district court's ruling on a motion to dismiss is reviewed *de novo*. *Puryer v. HSBC Bank USA, N.A.*, 2018 MT 124, ¶ 9, 391 Mont. 361, 419 P.3d 105. The Court reviews for correctness a district court's conclusion of law that a complaint fails to state a claim for which relief may be granted. *Plakorus v. Univ. of Mont.*, 2020 MT 312, ¶ 8, 402 Mont. 263, 477 P.3d 311. In evaluating a complaint, a district court "must take all well-pled factual assertions as true and view them in the light most favorable to the claimant, drawing all reasonable inferences in favor of the claim." *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692. When reviewing a district court's dismissal pursuant to Rule 12(b)(6), the Court applies the same standard. *See Scheafer v. Safeco Ins. Co.*, 2014 MT 73, ¶ 14, 374 Mont. 278, 320 P.3d 967.

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V. SUMMARY OF ARGUMENT

The Court should do away with its gravamen test, applied by Montana district courts to determine whether a termination was discriminatory or not, since it leads to injustice.

If the Court does not agree with Appellant's gravamen test argument, the Court should determine that Appellant's Complaint did not allege discrimination.

Regardless of whether the gravamen test is applied and the district court was correct in its determination that Appellant's Complaint impermissibly pled a discrimination claim, Appellant should have been granted an opportunity to amend.

VI. ARGUMENT

A. Appellant may bring a WDEA claim alongside an ongoing discrimination claim.

The Montana Supreme Court has ruled that a plaintiff may bring a WDEA lawsuit in Montana district court—alongside an MHRA case—so long as: (1) the gravamen of the WDEA complaint is not premised upon discrimination; and (2) the plaintiff has not already received an

affirmative determination. *Vettel-Beck v. Deaconess Med. Ctr. of Billings, Inc.*, 2008 MT 51, 177 P.3d 1034.

> Discrimination can occur without a wrongful discharge and wrongful discharge can occur without a discriminatory act. Along these same lines, there can be facts supporting a claim for discrimination and other facts supporting a claim for wrongful discharge arising from the same case. Where the plaintiff charges discrimination but fails to demonstrate a prima facie case entitling him to recover, the dismissal of his discrimination claim does not preclude a wrongful discharge claim, as long as that claim is not premised upon underlying allegations of discrimination.

Id., at ¶ 40.

The reasoning behind the Court's case law allowing simultaneous claims is simple: a wrongful discharge "can be proven in several ways" and ". . . there can be facts supporting a claim for discrimination and other facts supporting a claim for wrongful discharge arising from the same case." *Id.*, at ¶ 38, 40. Further, for a litigant who has been wrongfully terminated, it may not be readily apparent—especially prior to discovery—whether their termination resulted from discrimination or some lesser mixed motive that may be suitable for a WDEA claim.

Montana law allows litigants to bring a simultaneous WDEA claim despite the language of § 39-2-912(1)(a), which states that the WDEA does not apply to a discharge that:

> . . . is *subject to* any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.

Mont. Code Ann. § 39-2-912(1)(a) (emphasis added).

Section § 39-2-912(1)(a)'s operative phrase "subject to" is not described and raises certain questions. For instance, does "subject to" mean a dispute that *could be* filed before and administrative body? Or does "subject to" mean a dispute that *has already been* filed before an administrative body? Despite the confusion inherent in § 39-2-912(1)(a), the Court has recognized that although claims may center on allegations of the same conduct, separate and distinct claims may exist that do not fall within the MHRA's exclusivity provision and the WDEA's exemption provision. *See Spillers v. Mont. Third Judicial Dist. Court*, 2020 MT 8, 456 P.3d 560.

B. The Court should do away with the "gravamen test."

Grafting the "gravamen test" onto the WDEA results in injustice. First, the gravamen test is not defined. What is "gravamen"? The Oxford Languages definition of *gravamen* is "the essence or most serious part of a complaint or accusation"; the Merriam-Webster definition of *gravamen* is "the material or significant part of a grievance or complaint"; Ballentine's Law Dictionary definition of *gravamen* is "gist; essence; substance; sting." Even if a district court applied the standard uniformly, how does a district court determine which legal theory of liability (i.e., discrimination or wrongful discharge)—both supported by the same conduct in the complaint—"stings" more?

Second, the gravamen test usurps the role of the factfinder. No one can see discriminatory intent; discrimination is a mental intent. No one can see discriminatory intent any more than one can see a criminal mental intent. Instead, intent must be inferred via words and conduct. Deciphering discriminatory intent requires a fact and circumstance-intensive inquiry—one that is best suited for a factfinder. When a district court looks for the line between a discriminatory termination or a plain vanilla wrongful termination, it is engaging in weighing discriminatory

and non-discriminatory conduct. And in the case where the same factual conduct supports both discrimination and non-discrimination, the district court must impute its own conclusion on motivation to defendant's conduct.

Third, the gravamen test leads to inconsistent results. Consider the following hypothetical:

> Litigant Jane Doe is terminated by her employer. Jane brings a discrimination claim before the MHRB and a WDEA case in district court because: (1) she is unsure of the intensity of discrimination at play, and (2) she does not yet have the benefit of discovery. Jane unwittingly alleges certain facts in her WDEA complaint that may sound in discrimination. Upon applying the gravamen test, the district court dismisses her complaint pursuant to a 12(b)(6) motion. Later, either the MHRB or Office of Administrative Hearings does not find for discrimination. At this time, Jane cannot refile her WDEA claim because the WDEA's one-year statute of limitations has run.

This hypothetical raises this point: the gravamen test is no guarantee of a finding for discrimination before the MHRB/OAH. And by the time a final agency determination is made, or at the time of the district court's dismissal of the WDEA claim, the WDEA's one-year statute of limitations has run. Mont. Code Ann. § 39-2-911(1).

Fourth, the gravamen test does not mesh with Montana's liberal pleading standard. Montana is a liberal pleading state. Montana follows liberal pleading rules to "allow for compliance with the spirit and intent of the law, rather than a rigid adherence to formula or specific words." *Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 391 Mont. 156, 415 P.3d 486. No magic or formulaic words are necessary to open the doors to Montana courts; likewise, no haphazard or unwitting utterance of no-no words should close the doors to Montana courts. The liberal notice pleading standard should not place Montana district courts in the position of reading the tea leaves of a complaint and weighing whether the alleged facts in a complaint gives rise to an unmeasurable and unknowable quantum of discrimination.

Rather than keep the gravamen test, the Court should determine, as it has before, that separate and distinct claims may flow from the same conduct and allow such simultaneous claims to exist until a determination or judgment is first entered in either forum. This way, district courts would not improperly weigh facts and impute motivation to alleged conduct that might simultaneously support both a discrimination claim and a WDEA claim.

Courts need not prejudge the merits of gray-area discrimination/wrongful termination matters that allege conduct supportive of two distinct legal theories. District courts would still be free to dismiss a state law cause of action for discrimination brought before it, while letting the WDEA claim proceed to a jury. And, like the law stands now, a district court or the HRB/OAH may prevent any double-recovery by dismissing a claim in one forum when a determination or judgment is entered and any subsequent appeal is exhausted or time-barred:

> Whether a discharge will ultimately be "subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute" is not immediately known when a claim is filed. This must be determined before it is known whether the Wrongful Discharge Act may be applied. It is established only when a finder of fact has made that determination or when judgment on the claim has otherwise been entered. Therefore, we conclude that claims may be filed concurrently under the Wrongful Discharge Act and other state or federal statutes described in § 39-2-912, MCA, but if an affirmative determination of the claim is obtained under such other statutes, the Wrongful Discharge Act may no longer be applied.

Tonack v. Montana Bank, 258 Mont. 247, 255, 854 P.2d 326 (Mt. S. Ct. 1993).

C. If the Court does not agree with Appellant's gravamen test argument, the Court should determine that Appellant's Complaint did not allege discrimination.

In an inarticulate attempt to invoke punitive damages, Appellant's Complaint alleged that RMS's decision to terminate Appellant was a "direct result" of Jessica Peavler's attempt to enforce public policy; however, "direct result" does not mean "sole result" and categorically does not preclude other non-discriminatory factors were at play in Appellant's termination.

Appellant's Complaint does not utter the words "discrimination" or any other like word. Likewise, the Complaint did not assert a cause of action for discrimination. Instead, Appellant's Complaint alleged two causes of action: (1) a WDEA claim, wherein Appellant alleges he was terminated for "pretextual reasons" and "without cause"; and (2) a WDEA punitive damages claim premised upon allegations that Appellant's termination was a "direct result" of his wife's refusal to violate public policy. (D.C. Doc. 1, 3.)

Allegations of pretextual termination without cause is the essence of a WDEA claim. Here, Appellant did not allege that the only reason he

was terminated was solely because of his marital status; instead, Appellant's Complaint is rooted in his allegation that Defendant did not have *good cause* to terminate under Montana's WDEA statute. Appellant did not allege that he was terminated *solely because* of his wife's decision to enforce public policy. (D.C. Doc. 1, 3.) Appellant's allegations do not preclude alternative explanations to why Appellant was terminated—only that his termination was "without cause" and could be a "direct result" of Mrs. Peavler's decision to uphold public policy.

In its decision, the district court stated that Appellant's Complaint "is premised entirely on underlying allegations of marital discrimination . . . ." (D.C. Doc. 8, 5.) Appellant respectfully disagrees. The following factual allegations were made:

> 18. When Plaintiff produced a doctor's note in a mailed envelope, RMS refused to open it.
>
> 19. After refusing to acknowledge Plaintiff's doctor's note, Defendant terminated Plaintiff without cause for "job abandonment."
>
> 20. Though there were other RMS employees that produced doctor's notes exempting them from wearing a mask, Plaintiff's doctor's note was the only one that RMS ignored.

(D.C. Doc. 1, 3). Such allegations do not state that RMS's behavior was based in discrimination; instead, the district court inferred it. Such

conduct alleged in Paragraphs 18-20 could be the result of decision making that was either *false, whimsical, arbitrary, or capricious* and void of discriminatory intent. The district court could just have easily inferred non-discriminatory motivation to these allegations; instead, the district court chose to infer discriminatory intent and dismissed Appellant's Complaint—which is the essence of Appellant's concern about the gravamen test discussed above.

D. Regardless of whether the gravamen test should be applied and the district court was correct in its determination that Appellant's Complaint impermissibly pled a discrimination claim, Appellant should have been granted an opportunity to amend under the circumstances.

The issue with the district court's dismissal without prejudice results from the WDEA's one-year statute of limitations. Montana's WDEA bars an employee from asserting a WDEA claim after one year from the date of discharge:

> 39-2-911. Limitation of actions. (1) An action under this part must be filed within 1 year after the date of discharge.

Mont. Code Ann. § 39-2-911(1).

Here, though there is a dispute about whether Appellant was terminated from or abandoned his job, Matthew's date of separation unequivocally occurred in December of 2020. Therefore, the statute of limitations, found in § 39-2-911(1) causes Appellant's claim to be time-barred in December of 2021. The district court's dismissal here in April of 2022 occurred after the statute of limitations deadline of December 2021. Therefore, any attempt to refile Appellant's case would be time-barred by MCA § 39-2-911(1).

Here, perhaps Appellant's Complaint could be read as tickling the dragon's tail of a discrimination claim; however, such tickling (if the subjective interpretation of a reader might infer) should not doom the Complaint to the dustbins of a 12(b)(6)—especially when a dismissal will result in a plaintiff's inability to bring a subsequent complaint due to statute of limitations.

Montana law favors a resolution on the merits and an opportunity to amend a complaint prior to dismissal. *Donaldson v. State*, 2012 MT 288, ¶ 12, 292 P.3d 264. In its response to RMS's 12(b)(6) motion, Appellant indeed requested an opportunity to amend if the district court determined that the MHRA's exclusivity provision or the WDEA's

exemption applied. Appellant requested such opportunity in his response brief:

> **C. Opportunity to amend, if necessary.**
>
> Should the Court determine any causes of actions to be improperly pled, the Court should also grant Plaintiff an opportunity to amend his Complaint unless the Court determines that such amendment would be futile or legally insufficient. *Donaldson v. State*, 2012 MT 288, ¶12, 292 P.3d 264.

(D.C. Doc. 5, 5.)

The district court's decision did not state why it was dismissing Appellant's Complaint without granting an opportunity to amend. The district court's decision does not state that there were no set of facts in the Complaint that, if taken as true, could entitled Appellant to relief. The district court's decision does not state whether it considered a statute of limitations issue prior to rendering its decision.

VII. CONCLUSION

The Court should do away with the gravamen test since it leads to injustice and puts Montana district courts in the position of weighing facts. Appellant's Complaint did not allege discrimination; instead, the district court inferred that all allegations contained in the Complaint were born from discriminatory intent. Regardless of whether Appellant's

Complaint impermissibly contained allegations of discrimination, Appellant should have been afforded the opportunity to amend his complaint prior to dismissal.

Respectfully submitted this 11th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellant Procedure, I certify that this primary brief is printed with proportionately spaced Century Schoolbook 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 3,615, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Nicholas LeTang
NICHOLAS LETANG

CERTIFICATE OF SERVICE

I, Nicholas LeTang, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-22-2022:

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