

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 23-0012

ALMA EDWARDS

Plaintiff/Appellant,

vs.

TURLEY DENTAL CARE, P.C.,
Defendant/Appellee.

PLAINTIFF'S/APPELLANT'S BRIEF

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, District Court Cause No. DV 20-1292
Before the Honorable Jessica T. Fehr

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STATEMENT OF ISSUES

1. Did the District Court err as a matter of law when it dismissed the WDEA claim and held Turley had ‘good cause’ to terminate Alma Edwards? (District court’s 8/12/21 Order)
2. Did the District Court err by refusing to compel comparative evidence of disability and age discrimination, and other relevant evidence? (12/13/22 Order)
3. Did the District Court apply the incorrect legal standard, the wrong burden of proof, and decide multiple genuine issues of material fact as to age and disability discrimination in favor of the moving party? (12/13/22 Order)

STATEMENT OF THE CASE

This case is about an employer’s power to invade privacy rights and discriminate in the workplace. This Court should reverse the district court’s orders, which allow an employer to punish a worker for engaging in legal activities after work.

Appellant Alma Edwards (“Alma”) served her employer, Appellee Turley Dental Care, P.C. (“Turley”) as a devoted, loyal, hard-working and high-performing employee for 24 years, despite disabilities. *Complaint*. Alma has been diagnosed with Post-Traumatic Stress Disorder, anxiety, and back pain. *Id.* Two independent medical doctors prescribed medical marijuana for Alma to relieve her symptoms. *Id.* It is undisputed that Alma’s disabilities did not affect her ability to perform her job

duties. *Complaint*, ¶10; In fact, Turley testified it had no idea about Alma's medical marijuana usage until it received her positive drug test. *Answer*, ¶10-12.

After 24 years, Turley drastically and unfairly changed the terms of Alma's employment without any consideration. Turley created a mandatory drug testing policy that required every worker, regardless of job tasks, longevity or performance, to submit to random drug testing. *Complaint*, ¶14.

On or about October 8, 2019 Turley tested 62 year old Alma, who tested positive for marijuana, which she was legally prescribed and using *only* during evening after-work hours pursuant to her medical marijuana card. *Complaint*, ¶13. Alma was a highly supervised front desk worker with little to no authority or discretion. *Complaint*, ¶¶6-7; *Edwards Aff.* She answered the phone; greeted clients; gathered insurance information; scheduled clients; and collected payments, etc. *Id.* Her job did not include management, hazardous work, security, affecting public health, or fiduciary duties. *Id.*

Turley violated the Montana Drug Testing Act (the "Act") by requiring Alma to take a random drug test or else lose her job of 24 years. Turley then fired Alma. *See Complaint; Answer.* Turley claims it fired her for violation of its drug testing policy; Alma claims that proffered reason is a pretext for age/disability discrimination. *Id.* Alma applied for unemployment and won Turley's appeal of the decision. *Complaint*, ¶¶19-20. The Office of Administrative Hearings held:

- “Black’s Law Dictionary defines fiduciary as a person acting primarily for another person’s benefit. Examples of a fiduciary relationship include the relationship between an attorney and client, or the guardian of a minor.” *Complaint, Ex. A.*
- “**The claimant’s job** as a patient care coordinator/front office treatment coordinator **is not** a job that is **subject to Montana’s Drug and Alcohol laws**” and “**the claimant was not in a position that the employer could require her to be tested under Montana law.**” *Id.* (emphasis added).

Alma exhausted her administrative remedies before the Human Rights Bureau; obtained her right to sue letter; and filed suit in district court.¹ *Complaint*, ¶38.

Alma filed a motion for partial summary judgment that Turley Dental illegally drug tested Alma in violation of the Act. Alma argued she was not an “employee” subject to random drug testing and thus Turley did not have “good cause” for termination. Turley filed a cross-motion on that same issue. The district court granted Turley’s motion and denied Alma’s.

During litigation Turley withheld many documents (such as comparator evidence of discrimination and Alma’s own employee dental records evidencing her back disability). Alma filed a motion to compel, which the court denied.

¹ Alma sued Turley for 1.) Wrongful Discharge from Employment; 2.) violation of Mont. Code Ann. § 39-2-313 (Discrimination Prohibited for Use of Lawful Product During Non-Working Hours); 3.) violations of Montana Human Rights act (disability and age discrimination); and 4.) Invasion of Privacy.

While Alma's motion to compel was pending, Turley filed its third motion for summary judgment asking the court to dismiss Alma's discrimination claims. The district court applied the incorrect legal standards and refused to consider evidence Alma submitted in a light most favorable to her as non-moving party. On December 13, 2022 the district court granted Turley's motion and dismissed this case. On that same day, the district court also denied Alma's combined motion to compel discovery and award sanctions (attorneys fees and costs). Alma filed a timely appeal of the district court's final judgment.

STATEMENT OF (DISPUTED) FACTS²

1. Alma's clerical job did not involve management, hazardous work, security, public health or safety, or fiduciary duties. *Complaint*, ¶¶6-7; *Edwards Aff.* ¶¶3-5.

2. Alma Edwards suffered from disabilities, including chronic back pain, which Turley has disputed. *Complaint*, ¶8-12; *Affidavit of Sandra Rodoni*, attached as Ex. 2, ¶6 to *Alma's Brief in Opp. to Turley's 3rd SJ Motion*; see *Edwards' OrthoMontana Records* attached as Ex. 5 to *Alma's Brief in Opp. to SJ*; *Depo. of Dr. Hirt*, attached to *Alma's Brief in Opp.* as Ex. 6, pp. 105-106, 170-171 (and Ex. 13 to *Hirt Depo.*, also attached to *Alma's Brief in Opp.*).

² Please see Statement of Disputed Facts section of Alma's Response to Turley's Third Motion for Summary Judgment for more.

3. Contrary to their contradictory testimony, Turley and Dr. Hirt (50% owner of Turley) had knowledge of Alma Edwards' chronic back pain disability. *Id.* Dr. Hirt testified that he treated Alma Edwards as an employee dental patient. *See Hirt Depo*, pp. 105-107, 172, Ex. 6 to *Alma's Opp. Brief*.

Q: Because it seems to me that based on these notes someone at Turley Dental was aware that Alma was suffering from back pain, correct?

A: **It would appear that way that it's noted here.**

Q: And the problem from my perspective is we had the office manager, we have Rita Turley and Dr. Turley, Rachel Turley, and now you testify that you had no knowledge whatsoever of any back issues with Alma Edwards at any point. **But that's not true, is it? It's right in her record that she was having back issues.**

A: **Right.**

Dr. Hirt Depo, attached to *Alma's Opp. Brief* as Ex. 6, pp. 105:13-18; 170:22-25; 171:1-18 (emphasis added).

4. Turley treated Alma worse than other non-disabled, younger people because of Alma Edwards' age and disabilities. Turley ultimately terminated Alma because of her age and disabilities. *See attachments to Alma's Opp. Brief: Aff. Rodoni*, Ex. 3, ¶¶ 4, 6, 7-20; *Aff. Schlichting*, Ex.1, ¶¶ 5-20; *see Alma Depo; Complaint*.

5. Contrary to Turley's contradictory testimony, Turley's Drug Testing Policy is not a 'zero tolerance' policy. *See Alma's Opp. Brief: Turley Depo.*, Ex. 4, pp. 227, 228, 231. (Q: So you had discretion in how to treat Alma, correct? A: Yes.)

6. Turley used its discretionary drug testing policy to discriminate against Alma and allow a non-disabled, significantly younger person to fail the drug test, retake it and be hired, despite the policy's statement that "a positive drug test will disqualify an applicant for employment." *Alma's Opp. Brief: Turley Depo.*, Ex. 4, pp. 66, 67, 227, 228, 231; *Aff. Schlichting*, Ex. 1, ¶¶ 4-20.

7. Turley (and the district court) questioned whether Alma Edwards was "otherwise qualified for continued employment," which is another genuine issue of material fact. *Alma Opp. Brief*: p. 17; *see Aff. Schlichting*, Ex. 1, ¶¶ 2, 3, 13.

8. Turley had a pattern and practice of treating older, disabled employees far worse than younger, healthy employees, including Alma Edwards. *Alma's Opp. Brief: Aff. Schlichting; Aff. Rodoni*, ¶¶ 1-20.

9. Turley Dental made comments like the following about older employees like Teresa Schlichting and Alma Edwards: "You are too old to wear your bangs in a clip"; "You are too old to wear sparkles on your shirt." *Alma's Opp. Brief: Schlichting Aff.*, Ex. 1, ¶¶ 1-20.

10. Turley Dental violated its own "Alcohol and Controlled Substance Policy" by serving and consuming alcohol during supervisor meetings. *Alma's Opp. Brief: Schlichting Aff.*, Ex. 1, ¶ 19. Non-disabled supervisors got away with violating the Policy; old, disabled Alma Edwards got fired. *Id.*

11. During depositions of Turley witnesses, Alma uncovered ongoing discovery abuse, including the fact that certain key Turley representatives were not asked to even search for responsive discovery documents until about a week before the deposition (and some not at all). *See id; see Alma's Brief in Support of Motion to Compel*, pp. 8-10.

12. During the depositions, Turley initially testified untruthfully about how it violated its own policy by hiring a young, non-disabled hygienist who failed Turley's drug test for recreational marijuana (illegal in Montana at the time); and yet, Turley fired 62-year-old disabled Alma Edwards almost immediately after it learned she failed the drug test for medical marijuana. *See id; see Alma's Brief in Support of Motion to Compel*, pp. 5-6.

13. On August 25, 2022, Dr. James Turley was asked the following under oath. His answers put his credibility at issue:

Q: Let me ask you this: If a hygienist failed a drug test for recreational marijuana, would you allow them to work for you?

A: No.

Q: You wouldn't?

A: No.

See Alma Brief in Support Motion to Compel, Dr. James Turley Depo, p. 54:18-23, attached as Exhibit D.

Dr. James Turley was also asked the following – and again answered untruthfully:

Q: So if you test positive, you're terminated. Are there any exceptions to that?

A: No.

Q: Is it also your understanding of the policy that if you test positive during on-boarding, you will not be hired?

A: That's correct.

Q: Are there any exceptions to that?

A: No.

Q: Has your office ever made any exceptions to that?

A: No.

Id. at 62:25;63:1-11, Ex. D.

14. The next day, Turley's Rule 30(b)(6) corporate representative Rita Turley also responded untruthfully:

Q: What about for new hires? If somebody is on-boarding and they test positive, is there also a zero-tolerance policy for new hires that test positive?

A: We do not hire them if they test positive.

Q: Has there ever been a time where a new hire has tested positive, failed a drug test, and were still hired despite a failed drug test?

A: No.

Q: Never?

A: Never.

Q: I'm going to remind you you're under oath.

A: I said never. Now –

Q: How about Ka--- La---?

A: I am unaware of that name.

Turley Rule 30(b)(6) Deposition by Rita Turley, p. 66:19-25; 67:1-7, attached as Exhibit E to Alma Brief in Support Motion to Compel.

15. Despite Turley's significant credibility issues, the district court ruled in its favor on every disputed factual issue. *See Order.*

STANDARDS OF REVIEW

Issue 1 (8/13/21 Summary Judgment Order): The Supreme Court reviews legal determinations made by the district court based on whether the court erred.

Langemo v. Montana Rail Link, Inc., 2001 MT 273, 307 Mont. 293, 298, 38 P.3d 782, 786. “We review questions of statutory interpretation as a question of law to determine whether the District Court's interpretation of the law is correct.” *Id.* at ¶ 18.

Issue 2 (12/13/22 Order denying Motion to Compel): “This Court follows ‘a strict policy that dilatory discovery actions shall not be dealt with leniently.’” *Id.* (internal citation omitted). The Rules of Civil Procedure are “premised upon a policy of liberal and broad discovery.” *Patterson v. State, Dep't of Just., Motor Vehicle Div.*, 2002 MT 97, ¶ 15, 309 Mont. 381, 387, 46 P.3d 642, 646. “Common sense and fundamental fairness suggest that no party should be forced to proceed under such a ‘cloud of uncertainty.’” *Id.* at ¶ 21. “When a party's failure to comply with discovery procedures effectively halts the discovery process, it results in impermissible prejudice to the opposing party.” *Id.* As this Court admonished:

This Court strictly adheres to the policy that dilatory discovery actions shall not be dealt with leniently. As we have said, the trial courts, and this Court on review, must remain intent upon punishing transgressors rather than patiently encouraging their cooperation. Accordingly, the imposition of sanctions for failure to comply with discovery procedures is regarded with favor. It is, after all, a maxim of our rules of discovery that the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires.

We have adopted this policy of intolerance regarding discovery abuse pursuant to our concern over crowded dockets and the need to maintain fair and efficient judicial administration of pending cases. As we have observed:

“Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism.”

Richardson v. State, 2006 MT 43, ¶¶ 55-58, 331 Mont. 231, 248, 130 P.3d 634, 647 (internal citation omitted).

Issue 3 (Order granting Defendant Summary Judgment): “The test that we now establish for a plaintiff in a discrimination case to survive a motion for summary judgment comports with Rule 56, M.R.Civ.P., in that a plaintiff is required to raise an **inference of pretext**, as opposed to *proving* pretext.” *Heiat v. E. Montana Coll.*, 275 Mont. 322, 333, 912 P.2d 787, 793-4 (1996) (emphasis added). “This burden is more aligned with the general requirement of raising a genuine issue of material fact to survive the motion for summary judgment.” *Id.* “Our standard in reviewing a district court's grant of a motion for summary judgment is *de novo*.” *Id.* “That is, we review an order of summary judgment using the same criteria as the district court; we are guided by Rule 56, M.R.Civ.P.” *Id.* “Thus, we determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law.” *Id.* “Summary judgment is an **extreme remedy** and should **never be substituted for a trial** if a material fact controversy exists.” *Id.* (emphasis added).

“A party seeking summary judgment has the burden of establishing a **complete absence** of any genuine factual issues.” *Heiat v. E. Montana Coll.*, 275 Mont. 322, 329, 912 P.2d 787, 792 (emphasis added). “In light of the pleadings and the evidence before the district court, there must be **no** material issue of fact remaining which would entitle a non-moving party to recover.” *Id.* “Once the moving party has met its burden, the party opposing the summary judgment motion must present material and substantial evidence, rather than conclusory or speculative statements, to raise a genuine issue of material fact.” *Id.* “In addition, all reasonable inferences that might be drawn from the offered evidence should be drawn **in favor of the party who opposed summary judgment.**” *Id.* (emphasis added).

“On a motion for summary judgment in discrimination cases, the *McDonnell Douglas* order of proof and shifting of burdens at trial must be viewed in light of the traditional test for granting a motion for summary judgment.” *Id.* “That test is whether the moving party has demonstrated that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Id.* “As the Seventh Circuit stated, ‘[a]s a general rule, **questions of motive and intent are inappropriate for summary judgment.**’” *Id.* (emphasis added).

SUMMARY OF ARGUMENT

Issue 1. This Court should reverse the district court’s 8/12/21 order granting Turley summary judgment, because the district court violated the canons of statutory

construction (Mont. Code Ann. § 1-2-107 (Applicability of definitions)) and this Supreme Court's precedent³ to dismiss Alma's WDEA claim. To decide whether Alma was an "employee" subject to testing under the Drug Testing Act, the district court disregarded several sections of Montana's Code defining "fiduciary" and "affecting public health," and instead resorted to Merriam Webster's overly-broad, general *online* dictionary definitions. The court erred when it stated: "The Montana Supreme Court has never stated that courts should take a definition from one part of the Montana Code and apply it across the board to the entire Montana Code." *Order*, p. 7.

Contrary to the district court's Order, Mont. Code Ann. § 1-2-107 explicitly states the opposite: "Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears."

Contrary to the court's order, Alma was not a "fiduciary" or a worker whose tasks "affected public health" as a front desk receptionist at a private dental office. She was therefore not subject to random drug testing under the Act; Turley's proffered reason for termination was unlawful. The court should not have decided

³ *SJL of Montana Assocs. Ltd. P'ship v. City of Billings*, 263 Mont. 142, 147, 867 P.2d 1084, 1087 (1993) ("However, when a word is defined in the code, that definition is applicable to other parts of the code except where the contrary is plainly indicated.")

that Turley's proffered reason for Alma's termination constituted 'good cause' and thus should not have dismissed the WDEA claim.

Issue 2. The district court abused its discretion by refusing to compel the very evidence it stated Alma should have produced to defeat summary judgment on Alma's age and disability discrimination claims (Issue 3).

Issue 3. The district court applied the wrong legal standards to dismiss Alma's discrimination claims; improperly disregarded almost all of the admissible evidence Alma submitted; and decided multiple genuine issues of material fact in favor of Turley.

ARGUMENT

I. This Court should reverse the district court's summary judgment order because the court erred as a matter of law when it dismissed Alma's WDEA claim and held that Turley had 'good cause' to terminate Alma.

The district court should have granted Alma's motion and denied Turley's cross motion. Turley violated the Drug Testing Act by requiring Alma to take a random drug test or else lose her job of 24 years. The Court should reverse the district court's order and instead hold that Alma was not an "employee" subject to drug testing under the Act as that term is narrowly defined; and thus Turley violated the Act as a matter of law by requiring Alma to submit to the test. The test result was not 'good cause' for termination.

Turley's proffered⁴ reason for terminating Alma was her failed drug test for medical marijuana that she was legally using pursuant to her prescription from her doctors – never at work and only during non-work hours – to relieve the symptoms of her disabilities. *See Complaint; see Answer*. This Court should reverse the district court's order and hold that Turley's alleged reason for termination was not "good cause" and thus Turley also violated the WDEA. *See 8/12/21 Order*.

Turley was not allowed to drug test Alma because the Act provides a very narrow and strict definition of "employee" to limit who is – and more importantly who is *not* – eligible for drug testing in the workplace. *See Alma's Brief and Reply in Support of Summary Judgment; see also Alma's Response in Opposition to Turley's Cross Motion*. The very specific, limited definition of an "employee" who may be drug tested by an employer in Montana is as follows:

(4)(a) "Employee" means an individual engaged in the performance, supervision, or management of work in a:

(i) hazardous work environment;

(ii) security position; or

(iii) position:

(A) affecting public safety or public health;

(B) in which driving a motor vehicle is necessary for any part of the individual's work duties; or

(C) involving a fiduciary responsibility for an employer.

(b) The term does not include an independent contractor or an elected official who serves on the governing body of a local government.

⁴ The alleged failed drug test is the pretextual, false reason for termination; the real reason for termination was age and disability discrimination.

Mont. Code Ann. § 39-2-206(4).

The Court should reverse the district court's Order and protect Alma's right to privacy during non-work hours.⁵

A. Randomly drug testing low risk workers violates public policy and Montana's constitutional right to privacy.

There are serious public policy reasons to reverse the district court's order. Montana employers should not be armed with the power to randomly drug test low-risk, highly supervised employees without reasonable suspicion. Forcing an employee to provide her urine or blood to her employer to test for medical marijuana used during non-work hours invades the employee's fundamental right to privacy. This is especially true given that drug tests for marijuana are notoriously terrible at testing actual impairment at the time of testing. Instead, the test will likely uncover private information about legal medical marijuana usage during non-work hours, as in Alma's case. *See Alma's Summary Judgment Briefing*.

Additionally, allowing employers broad power to randomly test all employees gives employers a weapon to use testing results to discriminate on the basis of disability, as in Alma's case. *Id.* Employers like Turley can test for prescription drugs and then demand verification of the prescription (ostensibly to determine

⁵ It is undisputed that Alma did not use medical marijuana in the workplace – only at home in the evenings pursuant to her doctor's prescription. It is further undisputed that Alma was not tested pursuant to the "Reasonable Suspicion Testing" provision of Turley's Policy.

whether the employee is using legally) – and in doing so - can uncover medications for mental illness and other disabilities that employers should not be allowed to know. *Id.* Employers like Turley can then use that private information to get rid of disabled employees like Alma. *Id.* This is a drastic overreach and infringement on workers’ rights, as well as the Montana Constitution.

Article II, Section 10 of the Montana Constitution guarantees the Right of Privacy: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” Mindful of our broad state constitutional right to privacy, the legislature placed strict limits on who an employer can randomly drug test. The only workers who can be tested are individuals engaged in the performance, supervision, or management of work in a hazardous work environment, security position, or position affecting public safety or public health; driving a motor vehicle for work; or involving fiduciary responsibility for the employer. Mont. Code Ann. § 39-2-206(4)(a). Indeed, there is no ‘compelling state interest’ for the legislature to grant employers the power to randomly test every worker, regardless of risk.

Those specific, narrow categories have the following in common: They involve high risk duties. *Id.* And they assume significant control, authority, and discretion with limited supervision. *Id.* For example, a person “engaged in the performance, supervision or management” in a “hazardous work environment” such

as a mine operator or supervisor has significant risk of bodily and/or financial harm in a high-stakes environment. It makes sense to drug test. Likewise, a person in a security position typically exercises control, authority, discretion, and supervision over others – and often carries weapons. There may be a high risk of bodily injury or financial harm if that person does not properly secure the premises; it makes sense to drug test. Likewise, a person driving a motor vehicle exercises control, authority, is rarely constantly supervised, and risks killing a person if driving while intoxicated; it makes sense to drug test. Likewise, fiduciaries exercise autonomy, control, authority and discretion, with little to no supervision. Their responsibilities involve a high level of physical or financial harm and the risk of exploitation. Thus, it also makes sense to test fiduciaries.

B. Turley violated the Act by randomly drug testing Alma because she was not a “fiduciary”, but rather a clerical front desk worker who was under constant surveillance, who had no authority, control or discretion, and who had no written knowledge or notice of her alleged ‘fiduciary’ status.

A “fiduciary” is one who has a “special relationship” with his/her employer and (a) exercises control, authority, and discretion with little to no supervision; (b) whose responsibilities involve a significant risk of serious physical or financial harm or exploitation; and (c) who has knowledge and written notice that s/he is a “fiduciary”. This Court has held that “whether a fiduciary duty exists between two parties is a question of law, not fact, and it may be resolved on summary judgment when no genuine issues of material fact remain.” *Gliko v. Permann*, 2006 MT 30, ¶

24, 331 Mont. 112, 120, 130 P.3d 155, 161. “Likewise, whether a ‘special relationship’ exists between two parties such as would give rise to a fiduciary duty is a question of law, not fact, for the relationship and the duty are two sides of the same coin.” *Id.* “To determine the existence or absence of a special relationship in cases where it normally does not exist—such as between a bank and a customer—a court may be required to make a fact-intensive inquiry.” *Id.* “The circumstances of the particular relationship are factual, and disputes over material facts will preclude summary judgment.” *Id.* However, the *conclusion* drawn by a court from undisputed facts is one of law, not of fact.” *Id.*

Contrary to the district court’s order, the Supreme Court should not disregard existing, well-established Montana statutory and case law on fiduciaries and resort to Merriam-Webster’s overly broad, general online dictionary definition. *8/12/21 Order*, pp. 6-9; *Alma’s SJ Briefing*. The Montana Legislature has enacted the following definitions of “fiduciary,” which this Court should adopt and apply to the Drug Testing Act:

(2) “Fiduciary” means a personal representative or a trustee.

Mont. Code Ann. § 72-34-422 (Title 72. Estates, Trusts, and Fiduciary Relationships. Chapter 34. Principal and Income. Part 4. Montana Uniform Principal and Income Act.); *see also* Mont. Code Ann. § 72-16-601 (Title 72. Estates, Trusts and Fiduciary Relationships, Chapter 16. Estate and Generation-Skipping Taxes. Part 6. Apportionment of Taxes.)

(4) “Fiduciary” means a personal representative, trustee, agent acting under a power of attorney, or other person authorized to act as

a fiduciary with respect to the property of another person.

Mont. Code Ann. § 72-2-818 (Title 72. Estates, Trusts, and Fiduciary Relationships. Chapter 2. UPC-Intestacy, Wills, and Donative Transfers. Part 8. General Provisions Concerning Probate and Nonprobate Transfers.)

(14) “Fiduciary” means an original, additional, or successor personal representative, conservator, agent, or trustee.

Mont. Code Ann. § 72-31-402 (Title 72. Estates, Trusts and Fiduciary Relationships, Chapter 31. Miscellaneous Provisions Relating to Fiduciaries. Part 4. Revised Uniform Fiduciary Access to Digital Assets Act.)

(1) “Fiduciary” means a trustee under any trust, expressed, implied, resulting, or constructive; executor; administrator; guardian; committee; conservator; curator; tutor; custodian; nominee; receiver; trustee in bankruptcy; assignee for the benefit of creditors; partner; agent; officer of any corporation, public or private; public officer; or any other person acting in a fiduciary capacity for any person, trust, or estate.

Mont. Code Ann. § 32-1-425 (Title 32. Financial Institutions. Chapter 1. Banks and Trust Companies. Part 4. Operation and Regulation).

In the banking context, the Montana Supreme Court has held that the relationship between a bank and its customer does **not** give rise to fiduciary responsibilities in the absence of “special circumstances.” *See Richland Nat. Bank & Tr. v. Swenson*, 249 Mont. 410, 418, 816 P.2d 1045, 1050 (1991) (“It is well settled in Montana that “[t]he relationship between a bank and its customer is generally described as that of debtor and creditor ... and as such does not give rise to fiduciary responsibilities.”); *see also Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 35, 375 Mont. 38, 47, 324 P.3d 1167, 1177 (“A bank owes a fiduciary duty **only**

when it gives advice ‘other than that common in the usual arms-length debtor/creditor relationship.’”) (Emphasis added.)

In the context of the shareholders of a corporation, the Supreme Court has held that former shareholders did not owe a fiduciary duty in their capacity as shareholders. *See Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.*, 2016 MT 218, ¶ 56, 384 Mont. 464, 483, 380 P.3d 747, 761.

What all of those statutory definitions for “fiduciary” have in common is exercise of discretion, authority, control, limited supervision, written notice and knowledge of fiduciary status, and a real risk of significant physical or financial harm or exploitation. One is not like the other. Unlike those engaged in hazardous work, security, driving, and fiduciary duties, Alma’s clerical desk job does not fit into any of those categories of high-risk workers who can be tested. *Complaint; Edwards Aff.*

Furthermore, there was no ‘special relationship’ between Alma and Turley beyond the usual employer-employee relationship. Neither Turley nor the district court cited any binding legal authority for their conclusions. *See Order*, pp. 7-9; *Turley Resp. Brief*. Again, Alma was the receptionist at Turley, not a “fiduciary” or “trustee” as that term is specifically and narrowly defined by well-established Montana law. Unlike the other categories of workers who can be drug tested, Alma’s

position involved no control, authority, discretion, or any significant risk of exploitation or physical/financial harm. Furthermore, Turley conducted constant audio-visual surveillance of Alma at the front desk (and also of its own clients being treated without their written consent.). Alma was constantly supervised and had no custody, control or authority over any of Turley's bank accounts or other financial transactions. *Alma's Opp. to Turley's SJ dated 6/10/21*, pp. 6, 7, 9, 10. Her job was to answer the phone, schedule client visits, and accept payments. *Id.*

Furthermore, Alma could not have owed fiduciary duties to Turley because Turley never informed her she was a "fiduciary." *Alma's Opp. to Turley's SJ dated 6/10/21*, pp. 6, 7, 9, 10. Notice and knowledge are prerequisites to assuming the role of a fiduciary on behalf of another; a person cannot be a fiduciary without notice and acceptance of the duties. *Id.* This is why a Power of Attorney, Appointment of Personal Representative and Letters, etc. are required to be in writing. Assuming Turley believed Alma was its fiduciary, Turley's belief would be unreasonable because it never provided Alma with any notice of her fiduciary duties and Alma never accepted the obligations associated with serving as a fiduciary. *Id.* There was nothing in Alma's job description that said the word "fiduciary." *See id.* There is no evidence to the contrary. *See id.* Therefore, Alma was not an "employee" and Turley was not allowed to demand a random sample of her bodily fluid and test it for legally prescribed medical marijuana used only during non-work hours.

C. Turley violated Montana’s Drug Testing Act by randomly drug testing Alma because she was not “affecting public health” while working in a secretarial role at a private – not public – dental office.

Turley argues – and the district court incorrectly held - that because of its “business interests” as “a health care facility” Alma’s “position was one ‘affecting public health’ within the meaning of Montana drug and alcohol testing laws.” *Turley Brief*, p. 9; *Order*, pp 7-9. On the contrary, Turley Dental is not a “health care facility” as that term is specifically defined by the Legislature. *See* Mont. Code Ann. § 50-5-101.

Private dental practices are specifically excluded from the definition of “health care facility” under the explicit statutory definitions set forth in Title 50 (“Health and Safety”), which is the Title governing “public health and safety” in Montana. Mont. Code Ann. § 50-5-101 (Definitions) (emphasis added) states:

(26)(a) “Health care facility” or “facility” means all or a portion of an institution, building, or agency, private or public, excluding federal facilities, whether organized for profit or not, that is used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any individual. The term includes chemical dependency facilities, critical access hospitals, eating disorder centers, end-stage renal dialysis facilities, home health agencies, home infusion therapy agencies, hospices, hospitals, infirmaries, long-term care facilities, intermediate care facilities for the developmentally disabled, medical assistance facilities, mental health centers, outpatient centers for primary care, outpatient centers for surgical services, rehabilitation facilities, residential care facilities, and residential treatment facilities.

(b) The term does not include offices of private physicians, dentists, or other physical or mental health care workers regulated under Title 37, including licensed addiction counselors.

In other words, the Legislature intentionally excluded private dental businesses from the Public Health and Safety Code. Private dental practices are *private*, not *public*. See *Alma's SJ Reply Brief*.

Contrary to Turley's argument and the district court's order, this Court should not disregard the legislature's intent and adopt and apply Merriam-Webster's online dictionary definitions of the individual words "public" and "health" to this case. Mont. Code Ann. § 1-2-107 provides that the court must apply a definition from one part of the Code to the same word or phrase wherever else it occurs in the Code, "except where a contrary intention plainly appears." Here, no contrary intention for the definitions of "fiduciary" or "public health" appears in the Drug Testing Act. Thus, this Court should hold that the existing statutory definitions for "fiduciary" and "public health" apply. *SJL of Montana Assocs. Ltd. P'ship v. City of Billings*, 263 Mont. 142, 147, 867 P.2d 1084, 1087.

The legislature has already adopted a comprehensive statutory framework to regulate Public Health and Safety (Title 50), including specific Definitions, Policies, Purposes. *Alma's Reply in Support SJ*, pp. 2-7. The Legislature intentionally excluded private dental businesses like Turley Dental from that framework. *Id.* Turley Dental is not part of the "public health system" and is not specifically

regulated under Montana’s Public Health and Safety Laws. The Definitions set forth in Mont. Code Ann. § 50-1-101 demonstrate that Alma’s position as a front desk clerk at Turley Dental is not a “position affecting public health and public safety” under Montana’s Public Health and Safety laws.

Mont. Code Ann. § 50-1-105 (Policy—purpose) shows that the Legislature did not believe private dental offices “affect public health and safety.” That statute, coupled with the Definitions provision show Alma’s front desk responsibilities as Patient Care Coordinator did not “affect public health or safety” as the Legislature contemplated when it enacted Mont. Code Ann. § 50-1-105 (emphasis added):

(1) It is the policy of the state of Montana that the health of the public be protected and promoted to the extent practicable through the public health system **while respecting individual rights to dignity, privacy, and nondiscrimination.**

(2) The purpose of Montana's public health system is to provide leadership and to protect and promote the public's health by:

- (a) promoting conditions in which people can be healthy;
- (b) providing or promoting the provision of public health services and functions, including:
 - (i) *monitoring health status to identify and recommend solutions to community health problems;*
 - (ii) *investigating and diagnosing health problems and health hazards in the community;*
 - (iii) informing and educating individuals about health issues;
 - (iv) *coordinating public and private sector collaboration and action to identify and solve health problems;*
 - (v) *developing policies, plans, and programs that support individual and community health efforts;*
 - (vi) *implementing and enforcing laws and regulations that protect health and ensure safety;*
 - (vii) linking individuals to needed personal health services and assisting with needed health care when otherwise unavailable;
 - (viii) to the extent practicable, providing a competent public health workforce;

- (ix) *evaluating effectiveness, accessibility, and quality of personal and population-based health services; and*
- (x) *to the extent that resources are available, conducting research for new insights on and innovative solutions to health problems;*
- (c) encouraging collaboration among public and private sector partners in the public health system;
- (d) seeking adequate funding and other resources to provide public health services and functions or accomplish public health system goals through public or private sources;
- (e) striving to ensure that public health services and functions are provided and public health powers are used based upon the best available scientific evidence; and
- (f) implementing the role of public health services and functions, health promotion, and preventive health services within the state health care system...

It is undisputed that Alma's position at Turley did not require her to perform any of the above functions that would affect, change, or impact "public health and safety" in any significant or meaningful way. Alma's position did **not** involve **"providing or promoting the provision of public health services and functions"** by performing such enumerated functions as: "monitoring health status to identify and recommend solutions to community health problems"; "investigating and diagnosing health problems and health hazards in the community"; "coordinating public and private sector collaboration and action to identify and solve health problems"; "developing policies, plans and programs that support individual and community health efforts"; implementing and enforcing laws and regulations that protect health and ensure safety"; "evaluating effectiveness, accessibility, and quality of personal and population-based health services"; or "conducting research

for new insights on and innovative solutions to health problems.” *See* Mont. Code Ann. § 50-1-105(2)(b)(i)(ii)(iv)(v)(ix)&(x).

Alma was a greeter, not a treater. *Alma’s Reply in Support SJ*, pp. 2-7; *Complaint; Edwards Aff.* There is no ‘compelling state interest’ to allow an employer like Turley to invade her fundamental constitutional right to privacy by demanding a random drug test. It is undisputed that Alma’s position at Turley involved virtually no managerial or discretionary authority. *Id.* It is also undisputed that Alma’s position did not involve operating on or performing any dental procedures on patients. *Id.* She was not responsible for enacting policies for Turley, let alone the Public Health System. *Id.* Rather, Alma was a low-level ministerial administrative staff member who had no control over “public health or safety,” let alone qualifications or licenses to legally affect it. *Id.*

Holding otherwise would open floodgates for employers to invade the privacy of their workers. If Alma’s front desk job “affected public health,” then that would mean almost any worker could be drug tested, regardless of the significance of the effect on public health. For example, if the Court decides Alma’s “sanitation” duties “affect public health or public safety,” such a holding would unfairly and unnecessarily broaden the employer’s power to test every worker who has duties involving sanitation, including dishwashers. Surely there is no compelling state

interest in the legislature granting employers the power to drug test front desk workers and dishwashers in violation of their constitutional rights to privacy.

II. The Court should reverse the district court's order denying Alma's motion to compel because the court abused its discretion.

Turley Dental refused to provide complete and truthful responses to discovery requests and wrongfully withheld relevant, responsive documents throughout the underlying case. Nonetheless, Alma took the depositions of Rita Turley and Rachel Turley as Rule 30(b)(6) corporate representatives of Turley, Rachel Turley individually, Dr. James Turley and Dr. Christopher Hirt without complete production. During those depositions, Alma uncovered additional proof of ongoing discovery abuse, including the fact that certain key Turley representatives were not asked to even search for responsive discovery documents until about a week before the deposition (and some not at all). *See Alma's Brief & Reply in Support Motion to Compel and Exhibits attached thereto.*

During the depositions, Turley initially testified untruthfully about how it hired a significantly younger, non-disabled hygienist who failed Turley's drug test for *recreational* marijuana (illegal in Montana at the time); and yet, Turley fired 62-year-old disabled Alma Edwards almost immediately after it learned she failed the drug test for *medical* marijuana.

The district court abused its discretion when it denied Alma's motion to compel the Turley Dental to produce full and complete discovery responses, (and an

order issuing sanctions in the form of attorneys fees and costs), including the following categories of requests:

A. Contrary to the court's order, evidence of Alma Edwards' back and mental health disabilities in Turley's custody is directly relevant.

The court refused to compel Alma's own patient records from Turley, which show her health history and contain documentation about Turley prescribing Alma opioids for her chronic back pain, as well as documenting the history of chronic back pain. As Alma has argued (and the district court ignored), Turley's credibility as to whether it had knowledge of Alma's disabilities is at issue. Proof of Alma's back disability is directly relevant to disability discrimination and should have been compelled. *See Motion to Compel Order*, p. 4.

B. Evidence in Turley's possession, custody and control showing disparate treatment (how KL's failed drug test and other failed drug tests were treated in comparison to Alma) is discoverable, as *Billings Gazette* does not apply where the documents would be produced pursuant to the parties' Stipulation for Protection of Confidential Information.

Contrary to the district court's Order, the *Billings Gazette* case does not apply to this case. *Compel Order*, pp. 5-6. That involved the Billings Gazette's demand for *public* disclosure of a government employee's private employment information without a protective order – not *private* disclosure pursuant to a Stipulation for Protection of Confidential Information. *See Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 26. Here, there is no dispute that there will be no public disclosure of any third-party comparator employment records in this case, which is why undersigned

counsel refers to comparators such as KL by their initials – to protect their privacy from public disclosure. There is no privacy issue for KL here.

C. Turley’s wrongfully withheld correspondence with its drug testing contractor Chemnet and drug testing evidence of disparate treatment and disparate impact.

The court abused its discretion in refusing to hold Turley accountable for fully responding to discovery and producing all of the relevant, responsive documents.

D. Turley improperly withheld documents in its possession, custody and control showing age and disability discrimination.

The court abused its discretion by refusing to compel documentation to support the self-serving, unreliable information contained on the age chart Turley created for this case, despite Turley’s credibility issues in depositions. (And yet, the court ultimately based its summary judgment order on its interpretation of this self-serving, unverifiable table of ages. And then criticized Alma for not producing contradictory evidence to dispute Turley’s table.) *Compel Order*, p.7; 12/13/22 *Order*, pp. 6-9.

E. The court should have compelled Turley to produce email correspondence and execute meeting minutes regarding drug testing policies and evidencing discriminatory conduct with regard to Alma in comparison to younger, non-disabled employees/potential employees, especially given Turley’s untrustworthy deposition testimony on this (and many other critical issues).

III. The District Court erred as a matter of law when it granted Turley’s summary judgment motion, because the court applied the wrong rules and there are multiple genuine issues of material fact as to age and disability discrimination that must be decided by the jury. (12/13/22 Order)

A. The district court erred by applying the wrong discrimination summary judgment standard.

The district court incorrectly applied the heightened summary judgment standard from *Reeves v. Dairy Queen*⁶ to dismiss Alma's discrimination claims. *Order*, pp. 4-10; *Reeves v. Dairy Queen, Inc.*, 1998 MT 13, ¶ 16, 287 Mont. 196, 202, 953 P.2d 703, 706 ("Direct evidence cases are ones in which the parties do not dispute the reason for the employer's action, but only whether such action is illegal discrimination.") The *Reeves* test does not apply because unlike *Reeves*, this case involves circumstantial, not direct, evidence of discrimination. Here, unlike in *Reeves* the parties dispute the reason for discharge: Alma alleges Turley treated her worse than her younger, non-disabled peers and then ultimately fired because of her age and disabilities; Turley alleges it fired Alma because she failed the drug test.

Therefore, the court should have applied the *Heiat* standard on summary judgment, not the *Reeves* standard. *Reeves* itself says this: "...[T]he summary judgment burdens of proof discussed in *Heiat* apply in *all types of discrimination cases* regardless of whether the claims are based on federal or state law." *Reeves*, 1998 MT 13, ¶ 14 (emphasis added) ("...[W]e now confine the three-part summary

⁶ In *Reeves*, this Court reversed the district court's summary judgment in favor of defendant due to issues of fact that the plaintiff was entitled to have resolved at trial. Even if this case were a 'direct evidence' discrimination case and *Reeves* were to apply, the district court misapplied the holding and rationale in *Reeves* as well.

judgment test set forth in *Heiat* to those cases in which discriminatory intent can only be proven by circumstantial evidence (cases that require the *McDonnell Douglas* shifting burden analysis at trial). *Id.* at ¶ 15.

The court erred by ignoring and neglecting to apply *Heiat*'s rulings (bulleted and discussed below) to this circumstantial evidence case:

- “The test that we now establish for a plaintiff in a discrimination case to survive a motion for summary judgment comports with Rule 56, M.R.Civ.P., in that a plaintiff is required to raise an *inference* of pretext, as opposed to *proving* pretext. This burden is more aligned with the general requirement of raising a genuine issue of material fact to survive the motion for summary judgment.”

Heiat v. E. Montana Coll., 275 Mont. 322, 333, 912 P.2d 787, 791 (1996). (The district court here dismissed Alma's claims after incorrectly requiring Alma to prove pretext. *See, e.g., Order*, p. 9 (“Moreover, this distinction would be the only clear way of **proving** age or disability discrimination against Edwards.”) (Emphasis added.) Contrary to the court's holding, Alma was not required to “prove” discrimination to defeat summary judgment. Furthermore, the judge denied the motion to compel evidence that Alma needed to “prove” discrimination. On the one hand, the court criticized Alma for not submitting enough evidence to ‘prove’ discrimination; and yet refused to allow Alma to discover the very evidence the court required; and also refused to acknowledge any of the evidence Alma did submit in a light most favorable to Alma as the non-moving party.

- “Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists.” *Id.* at 327.
- “As the Seventh Circuit found in *Box*, this factual determination of motive or intent is precisely the reason that summary judgment is generally inappropriate in discrimination cases.”

Id. at 275 Mont. 329-30. Here, the district court improperly substituted its own judgment and credibility determinations on motive and intent for that of the jury. *Order*, pp. 6-10. The court construed evidence against Alma and in favor of Turley on such questions as whether Turley replaced Alma with someone younger. *Id.* Alma strongly disputes the veracity of Turley’s self-serving age chart, which the court copied and pasted into the order as an ultimate fact - without compelling the supporting documents needed to verify the veracity of Turley’s chart. *Id.* at 7. The court did so despite the fact that the credibility of Turley’s deposition testimony is strongly disputed. *Id.*

Additionally, the court overstepped its authority and invaded the province of the jury when it interpreted the disputed facts on the ultimate issue of motive and intent in favor of the moving party: “Furthermore, Edwards was not treated differently than younger and more able-bodied coworkers, specifically the young woman KL.” *Order*, pp. 9-10. To reach that conclusion, the court ignored the Affidavits of Sandra Rodoni, Teresa Schlichting, and all of the deposition testimony Alma cited. *See Alma’s Opp. to 3rd SJ Motion and attachments*. That ultimate issue of fact is up to the jury, not the judge on summary judgment.

- “We note that [plaintiff’s] burden to overcome a motion for summary judgment is different than her burden at trial. *Id.* at 330-31.
- “Where different ultimate inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment.” *Id.* at 330. “Thus, to survive a motion for summary judgment, a plaintiff must only produce evidence sufficient to support a reasonable inference of the existence of the fact at issue.”

Id. Again, the district court here erroneously applied the trial burden of proof to deny summary judgment; ignored and/or misconstrued almost all of the evidence Alma submitted; and construed all of Turley’s proffered “facts” in light most favorable to Turley. *See Order.*

B. The district court erred by misstating and misapplying the burden of proof in disparate treatment cases (A.R.M. 24.9.610).

The district court incorrectly applied the burden of proof in disparate treatment cases set forth in A.R.M. 24.9.610 and affirmed by this Court. It ignored almost all of that regulation and instead inserted the court’s own judgment in place of the jury’s to decide and dismiss certain elements of the claim based solely on ‘evidence’ Turley presented. It even required a “nexus” element as part of Alma’s prima facie case that simply does not exist. *Order*, p. 4; *c.f.* A.R.M. 24.9.610(2)(b)(v).

A.R.M. 24.9.610 states in pertinent part (emphasis added):

(1) To prove a claim of unlawful discrimination or illegal retaliation based on disparate treatment, a charging party must establish a prima facie case in support of the alleged violation of the act or code.

(2) A prima facie case of discrimination or retaliation based on disparate treatment means evidence from which the **trier of fact** can **infer** that adverse action against the charging party was **motivated by** respondent's consideration of charging party's **membership in a protected class**, protected activity, or association with or relation to a person who is a member of a protected class or who has engaged in protected activity.

(a) The elements of a prima facie case will vary according to the type of charge and the alleged violation, but generally consist of proof:

(i) That charging party is a member of a protected class or engaged in protected activity; (*Alma has proven this and this is undisputed.*)

(ii) That charging party sought and was qualified for an employment, housing, service, credit or other opportunity made available by the respondent; and (*Although the parties did not dispute Alma's satisfactory performance, the district court sua sponte concluded that there is no "circumstantial evidence that she performed her job satisfactorily." See Complaint, ¶¶5-11; Answer, ¶¶5-12; Order, p. 7.*)

(iii) That charging party was denied the opportunity, or otherwise subjected to adverse action by respondent in circumstances raising a **reasonable inference** that charging party was treated differently because of membership in a protected class or because of protected activity. (*The court ignored all of Alma's evidence and her Response Brief on this issue.*)

(b) **Examples** of evidence establishing a reasonable inference that charging party was treated differently because of membership in a protected class or because of protected activity include:

(i) proof that respondent continued to make the employment, housing, service, credit, or other opportunity available to persons who are not members of the same protected class as charging party; (*District court ignored Alma's evidence.*)

- (ii) proof that similarly situated persons outside the protected class were treated more favorably; (*District court ignored Alma's evidence.*)
- (iii) proof that there was a close proximity in time between protected activity of the charging party and adverse action by the respondent;
- (iv) proof that respondent intended to discriminate against persons of the protected class; or
- (v) other proof that there is a causal connection between adverse action by the respondent and the charging party's membership in a protected class or protected activity.

Although (v) is only one of the “examples” of how to establish a reasonable inference of disparate treatment, the district court incorrectly imposed this as a requirement for Alma to defeat summary judgment. See Order, pp. 4 (“To do so, the plaintiff must present evidence of a ‘causal connection...’”) That is simply wrong. There is no such requirement on summary judgment.

(3) Once a charging party establishes a prima facie case of unlawful discrimination or illegal retaliation based on *circumstantial evidence* of disparate treatment, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the challenged action. (*Alma did this.*)

(4) If a respondent produces evidence of a legitimate, nondiscriminatory reason for a challenged action in response to a prima facie case, the charging party must demonstrate that the reason offered by the respondent is a pretext for unlawful discrimination or illegal retaliation. The charging party can prove pretext with evidence that the respondent's acts were more likely based on an unlawful motive or indirectly with evidence that the explanation for the challenged action is not credible and is unworthy of belief. (*Again, Alma did this in her Response Brief; the court disregarded it.*)

C. The district court erred by deciding inherently factual questions of intent and motive on summary judgment.

This Court should reverse the district court's order because the court decided inherently factual issues of credibility, causation and intent regarding age and disability discrimination – all of which should have been decided by the factfinder (the jury) at trial. The real reason for Alma's termination is a genuine issue of material fact, which Alma is entitled to have resolved at trial by a jury of her peers. *See Alma's Opp. to 3rd SJ Motion*. The district court violated the summary judgment standards by viewing all facts (however inadmissible) in favor of the moving party, while blatantly ignoring almost all of the admissible evidence submitted by Alma – or viewing the evidence Alma submitted in Turley's favor. *Order*, pp. 4-10. That is reversible error.

Additionally, the court improperly exercised the role of the jury in deciding the factual issue of discrimination separate and apart from termination - whether Turley treated Alma Edwards worse than other younger, non-disabled people under Turley's control.

Finally, the court incorrectly distinguished and disregarded Alma's comparative evidence. The court substituted its own judgment for that of the jury by concluding: "Edwards was an employee in clear violation of the policy – KL was not an employee and had not yet signed the policy regarding marijuana use" and

concluding that “unlike KL” Alma was “subject to the drug testing policy...” *Order*, pp. 8-9. That is inaccurate for several reasons.

First, the court refused to compel evidence of how Turley treated KL versus Alma, so we do not actually know whether KL “signed the policy” regarding pre-employment testing form. *See Motion to Compel Briefing & Order*. (We also do not know for sure who else failed a drug test and was hired nonetheless and/or not terminated, because the court took Turley’s word for it, despite the credibility issues in Turley’s deposition testimony.) *Id.*

Second, and contrary to the court’s order, Turley’s drug testing policy explicitly applies to pre-employment applicants: “TYPES OF TESTING Pre-Employment Testing All applicants applying for a position shall undergo urine drug testing prior to employment...A positive drug test will **disqualify an applicant for employment.**” *See Turley’s Alcohol and Controlled Substance Policy*, attached as Exhibit A to *Aff. Rachel Turley*, Ex. 1 to *Turley’s BIS SJ*. (Bold emphasis added). Turley discriminated against Alma by exercising its admitted “discretion” in applying its drug testing Policy to terminate her. *Alma Brief in Opp. SJ*, p.2, *Turley Depo.*, Ex. 4, p.228. And Turley refused to apply its so-called “zero tolerance” policy to “disqualify” younger, non-disabled KL from employment. *Id.* Turley exercised its discretion to hire KL despite the same failed drug test Alma took. *Id.* Alma has

submitted proof Turley applied its policy in a discriminatory manner; Turley argues it did not. The answer is up to the jury, not the judge on summary judgment.

D. The district court erred by neglecting to consider critical issues raised by Alma in response to Turley's Motion.

First, additional documents Turley presented to the Court as summary judgment exhibits were untimely disclosed discovery surprises; and the affidavits Turley submitted in support of summary judgment contained inadmissible evidence. *Alma Brief in Opp. to SJ*, pp. 12-18.

Instead, the district court erred by accepting and weighing all of Turley's proffered facts as true – and even misstated certain “facts” as true. The Court granted summary judgment based on inadmissible evidence it viewed in Turley's favor. The court granted Turley's motion based at least in part on Turley's own inadmissible, self-serving hearsay statements. *Order*, pp.4-10.

Second, the court improperly disregarded the critical pending discovery issues and Alma's alternative argument set forth in response to summary judgment. *See Order*. Alma asked the court to stay ruling on the summary judgment motion and first grant Edwards' Motion to Compel the wrongfully withheld evidence in Alma Edwards' age and disability discrimination case because the evidence sought is directly relevant to Edwards' remaining claims for age and disability discrimination, and is necessary for Edwards to fully respond to this Motion. Instead, the court

criticized Alma for not presenting the very evidence the judge refused to compel.
Order, pp. 5-10.

CONCLUSION

The Court should reverse the District Court's Orders and remand this case for a trial by jury with instructions consistent arguments made in this appellant brief.

DATED this 7th day of MARCH, 2023.

VARELA LAW FIRM PLLC

By: /s/ Elizabeth M. Varela
Elizabeth M. Varela
Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; with left, right, and bottom margins at one inch; and the word count calculated by Microsoft Windows 10, is not more than 10,000 words, excluding certificate of service and certificate of compliance.

Dated this 7th day of MARCH, 2023

/s/ Elizabeth M. Varela
Elizabeth M. Varela
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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing on March 7, 2023 via electronic service.

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APPENDIX

1. District court Order Granting Defendant's Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Summary Judgment dated August 12, 2021.
2. District court Order Denying Plaintiff's Combined Motion to Compel Discovery and Award Sanctions (Attorney Fees and Costs) dated December 13, 2022.
3. District court Order Granting Defendant's Motion for Summary Judgment on Plaintiff's Remaining Count III of the Complaint and Demand for Jury Trial dated December 13, 2022.

CERTIFICATE OF SERVICE

I, Elizabeth Mary Varela, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-07-2023:

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