IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 23-0012

ALMA EDWARDS,

Plaintiff/Appellant,

-vs-

TURLEY DENTAL CARE, P.C.,

Defendant/Appellee.

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County
Hon. Jessica T. Fehr Presiding

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF THE ISSUES

I. Whether the District Court correctly denied Appellant's motion for summary judgment and granted summary judgment in Turley's favor on Appellant's wrongful discharge claim, and in so doing, held that Turley had "good cause" to terminate Appellant for a failed drug test given Appellant's status as an "employee" under the Montana Workforce Drug and Alcohol Testing Act.

II. Whether the District Court abused its discretion by denying Appellant's Combined Motion to Compel Discovery and Award Sanctions and her demands for various categories of information that largely did not exist, or was otherwise private, confidential, and irrelevant to Appellant's discrimination claims.

III. Whether the District Court correctly granted Turley summary judgment on Appellant's age and disability discrimination claims when: 1) relevant statutory authority and case law barred those claims, 2) Appellant was unable to demonstrate *prima facie* cases of age and disability discrimination, and 3) no genuine issues of material fact prevented summary judgment.

STATEMENT OF THE CASE

This case stems from Appellant Alma Edwards' knowing violation of Turley's no-tolerance Drug and Alcohol Testing Policy ("the Policy") and resulting termination after a failed drug test administered pursuant to the Policy.

Following her termination, Appellant filed a Complaint with the Montana Human Rights Bureau ("HRB"), alleging she was terminated based on age, disability, and a lawful medical marijuana prescription. The HRB concluded there was no reasonable cause to believe discrimination occurred and issued a Notice of Dismissal and Notice of Right to Sue in District Court.

Appellant then proceeded to District Court alleging four counts: 1) wrongful discharge under Mont. Code Ann. § 39-2-904; 2) discrimination for use of a lawful product during nonworking hours in violation of Mont. Code Ann. § 39-2-313; 3) age and disability discrimination; and 4) invasion of privacy. (Cmpl., Doc. 1).

In setting forth the alleged bases for her wrongful discharge claim, Appellant contended she was "not subject" to Montana's drug testing laws, and Turley therefore had no right to test her in the first place" and ultimately, it had no right to fire her for a failed test. (Doc. No. 1, ¶ 21).

As to the alleged factual bases for her discrimination claims, Appellant did not really describe them. She did note that she was 61 years old at the time of testing, that certain Turley employees had made fun of her for her "outdated attire," and that she allegedly suffered from anxiety, PTSD, and back pain for which she was afforded a medical marijuana prescription. (*Id.*, ¶ 8, 22-26).

Prior to conducting any discovery, Appellant moved for partial summary judgment asking the Court to hold as a matter of law that she was not an "employee" under the Montana Workforce Drug and Alcohol Testing Act. (*See* Doc. 12-13.)

Turley filed a Combined Response to Appellant's Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment on Appellant's Wrongful Discharge claim, asserting that Appellant was an "employee" under the Drug Testing Act, and Turley therefore had "good cause" to terminate Appellant, as she was terminated for a failed drug test administered in accordance with Montana law, a violation of Turley policy. (*See* Doc. 14-15)

The district court agreed with Turley, granting it partial summary judgment on Appellant's wrongful discharge claim and denying Appellant's Motion for Partial Summary Judgment by way of the same order. (Doc. 21, Appellant's App. 1)

The parties engaged in written discovery and Turley moved for summary judgment on Appellant's remaining claims in December 2021. (Doc. 24-25)

Appellant's Response largely argued Turley had withheld responsive documents that she needed to respond to the Motion, specifically in relation to her discrimination claims. (Doc. 27) Appellant asserted for the first time, "there [was] a genuine issue of material fact as to whether the drug test at issue was truly 'random' or whether [she] was unlawfully targeted and selected due to her disability and age." (*Id*., p. 4)

The Court issued an order granting Turley's Motion on Appellant's claims for discrimination for use of a lawful product under Mont. Code Ann. § 39-2-313 and invasion of privacy, but denied summary judgment as to Appellant's claims for age and disability discrimination. (*See* Doc. 35)

In doing so, the court noted that the parties were then involved in a "discovery dispute on the disclosure of records responsive" to the issue of whether the "testing utilized by Defendant, through a third-party contractor, was in fact random." (*Id*., p. 4) According to the court, "[t]he records as to how the employees of [Turley] were selected for testing [would] resolve the question [of whether Turley's drug-testing of Edwards] was a pretext for age and disability discrimination[,]" and denial of Turley's motion was therefore appropriate "*at the time."* (*Id.*)

After alleging at a Status Hearing on March 9, 2022 that a Motion to Compel was forthcoming, it was not until several months later Appellant sought court intervention to address alleged "discovery abuses" committed by Turley. On October 17, 2022, Appellant filed a Combined Motion to Compel Discovery and Award Sanctions, asking the court to compel production of various documents, including: 1) several broad categories of documents that would allegedly provide evidence of age or disability discrimination, disparate treatment, or disparate impact and 2) evidence regarding Turley's treatment of a woman known as KL who was not subject to Turley's drug testing Policy for employees, but who had failed a pre-

employment drug screening after Appellant's termination and even after Appellant had filed her Complaint in District Court. (*See* Doc. 38)

While Appellant's Motion to Compel was pending, Turley filed a renewed Motion for Partial Summary Judgment as to Appellant's age and disability discrimination claims. (Doc. 39-40) Turley renewed its Motion because the parties had taken several depositions, Turley had produced nearly 3,000 pages of additional pages of documents since the court's denial of its initial summary judgment motion, and as Appellant continued to change her theory of discrimination to one not actually pled in her Complaint.

By way of a pair of orders dated December 13, 2022, the district court denied Appellant's Motion to Compel (*See* Doc. 56 (Appellant's App. 2)) and granted Turley's Motion for Partial Summary Judgment (*See* Doc. 57 (Appellant's App. 3)). Appellant subsequently appealed to this Court. (*See* Doc. 62)

STATEMENT OF FACTS

This case concerns Turley's termination of Appellant Alma Edwards pursuant to its no-tolerance Drug and Alcohol Testing Policy following her positive test for marijuana use.

Appellant was a Patient Care Coordinator for Turley. This position required Appellant to greet patients and manage Turley's front desk. (Doc. 16, Turley Aff., ¶¶ 5-6) However, the position also required her to perform tasks requiring far more

trust, responsibility, and attention to detail. For example, Appellant's job responsibilities included treatment planning, the collection of personally identifiable patient information in a manner consistent with HIPAA guidelines, entering and verifying patient medical information, handling medical and insurance records and information (including correspondence with insurance providers confirming benefits and treatments), collecting payment on Turley's behalf, helping patients apply for credit according to Turley dental care policies and standards, and helping to establish and enforce sanitation measures and procedures. (*Id.*, ¶ 6).

In 2018, Rachel Turley, then a supervisor for Turley, attended a seminar presented by Chemnet, a third-party drug testing administrator, regarding services the company provided. (Doc. 40, Br. in Supp of Def.'s Mot for SJ on Pl.'s Remaining Ct. III, Ex. 1, Turley Aff., ¶ 4) After attending a presentation made by Samantha Morris of Chemnet, Rachel became interested in the drug and alcohol testing and background checks Chemnet offered to employers and felt it was something that could benefit Turley given its multiple locations and the fact that it employed 70+ individuals. (*Id.*)

In the Fall of 2018, Rachel reached out to Ms. Morris to inquire more into the drug and alcohol testing and background checks services provided by Chemnet. (*Id.*, ¶ 6; Doc. 40, Ex. 2, Morris Aff., ¶ 3.) After a few meetings and conversations with Chemnet, Turley was able to establish its own drug and alcohol testing policy and

procedures for its current employees and prospective applicants. (Doc. 40, Ex. 1, ¶ 7).

After Turley enlisted Chemnet, Chemnet provided Turley with a Statement of Randomness which described the random selection process that would be utilized to provide the random, quarterly selection for Turley's drug testing policy. (Doc. 40, Ex. 2, ¶ 5; *see also*, Ex. B to Ex. 2.)

As noted therein, Chemnet uses DrugPak Web to perform computer-generated random selections upon a pool of participants for its employer clients participating in random selection drug testing. (*See id.*, Ex. B to Ex. 2.) Notably, "[a]n individual participant's selection and testing history have no effect upon his/her likelihood of selection." (*Id.*) Thus, all participants "have the same probability of being selected" and "[t]hese selections cannot be influenced by the user in any way other than by controlling pool membership and selection rate." (*Id.*)

In order to implement Turley's drug testing program, at the beginning of each quarter, Chemnet, utilizing DrugPak Web, runs a random selection on the pool of Turley employees. (Doc. 40, Ex. 1, ¶ 12; Ex. 2, ¶ 8). At that time, a list of twelve employees is generated for testing that quarter with alternate selections in the event that an original selection employee is unable to test. (*Id*.) Turley then works to schedule a date with Chemnet for testing the randomly selected employees during the three-month period of that quarter. (Doc. 40, Ex. 1, ¶ 13; Ex. 2, ¶ 9.).

After Turley's Drug and Alcohol Testing Policy was created, Turley coordinated with Chemnet to come to Turley's office on March 2, 2019, to meet with all of its employees and discuss the new Policy. (Doc. 40, Ex. 1, ¶ 8; *see also*, Doc. 40, Ex. 2, ¶ 6.) Significantly, the Policy specifically identified that Turley would not accommodate for medical marijuana. (Doc. 40, Ex. 1, ¶ 8; Ex. A to Ex. 1, p. 3.) Indeed, Page 5 of the Policy clearly stated: "A POSITIVE DRUG AND/OR ALCOHOL TEST WILL RESULT IN TERMINATION OF EMPLOYMENT WITH TURLEY DENTAL." (Doc. 40, Ex. A to Ex. 1, p. 5).

All employees in attendance were required to sign an acknowledgment at the conclusion of the session, acknowledging receipt of Turley Dental's Alcohol and Controlled Substance Policy. (Doc. 40, Ex. 1, ¶ 9.) Alma Edwards attended this meeting and signed an Awareness and Acknowledgement Form. (*Id.*; *see also*, Doc. 40, Ex. B to Ex. 1.)

Indeed, Appellant testified during her deposition that she attended this meeting in March of 2019. (Doc. 40, Ex. 3, Dep. Trans. Of Alma Edwards, 65:5-71:9.) Specifically, Appellant acknowledged that she attended the March 2019 meeting, was told during the meeting that Turley's policy would test for marijuana (medical or otherwise), and understood that a positive drug test for marijuana could result in discipline, her discipline, up to and including termination. (*See id.*, 67:4-68:9.)

Turley's first random testing occurred on June 25, 2019. (Doc. 40, Ex. 1, ¶ 20.) The second random testing occurred on October 8, 2019. (*Id.*; *see also*, Doc. 40, Ex. I to Ex. 1.) Appellant was included in the random draw for the second testing, and after willingly participating and taking a drug test on October 8, 2019, without any objections, her test returned positive for marijuana. (*Id.*)

Following Turley's receipt of the positive test result, Appellant met with Chief Operations Manager, Rita Turley, on October 15, 2019. (Doc. 16, Turley Aff., ¶ 11.) During this meeting, Rita asked if Appellant understood she violated Turley's drug policy. (*Id.*, ¶¶ 11-12.) Appellant confirmed that she did and indicated she had a medical marijuana card for depression. (*Id.*, ¶¶ 12-13). Rita explained her positive test was still a violation of Turley's policy and she would have to be terminated. (*Id.*) Appellant was then terminated.

A week after her termination, Appellant filed for unemployment. Notably, in her Claimant Separation Statement, Appellant specifically acknowledged she was terminated for failing Turley's drug testing policy, responding to Unemployment's inquiries as follows:

…

What reason was given for letting you go?

Failing a UR
Was this reason true? Yes
Please explain:

> I have a Medical Marijuana card from a Physician. I use it to sleep & to relax in the evening. Never @ work.
> …

(Doc. 40, Ex. 4, Claimant Separation Statement, p. 1-2) (emphasis added).

Even when initiating this lawsuit, Appellant did not deny that her termination was prompted by a clear and knowing violation of Turley Policy. Instead, Appellant simply suggested that Turley had no right to test her in the first place, claiming her position was not subject to drug testing laws.

In an affidavit attached to her Motion for Partial Summary Judgment, Appellant stated: "On October 13, 2019, Turley *fired me based on the result of* the illegally administered drug test." (Doc. 13, Ex. A, Edwards Aff.) (emphasis added).

Likewise, in responding to written discovery requests, Appellant maintained that her termination was triggered by a failed drug test, again stating that "Turley violated Montana law and its own policy by illegally drug testing [her] and firing [her] *for the result of the illegal test*." (Doc. 25, Def.'s Br. in Supp. of Mot. for SJ on Remaining Cts. II-IV, Ex. C, Pl's Resp. to Turley's First Set of Written Disc. Req., Answer to Interrogatory No. 17, pgs. 6-7) (emphasis added). Thus, when Appellant initiated this lawsuit, it was undisputed that her failed drug test prompted her termination, not her age or any alleged disability.

STANDARDS OF REVIEW

Appellant appeals from two separate district court summary judgment orders, the first pertained to her wrongful discharge claim, and the second pertained to her discrimination claims and consequently related to her Motion to Compel.

The District Court's rulings on summary judgment are properly reviewed *de novo*, and the same standard under M. R. Civ. P. 56 is applied. *See Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 8, 364 Mont. 455, 276 P.3d 922 (internal citations omitted). Indeed, the District Court's decision pertaining to summary judgment is a conclusion of law which this Court reviews for correctness. *Id.*

However, a district court's decision is also *presumed to be correct.* *See Hawkins v. Harney*, 2003 MT 58, ¶ 35, 314 Mont. 384, 66 P.3d 305 (citations omitted). The appellant bears the burden of establishing error below and supporting his or her arguments with citations to relevant authorities. *See Rolison v. Bozeman Deaconess Health System, Inc.*, 2005 MT 95, ¶ 20, 326 Mont. 491, 111 P.3d 202 (internal citations omitted). Additionally, as this Court has noted, cases that hinge purely on questions of law are often suited for summary disposition. *Matter of Estate of Griffin*, 248 Mont. 472, 476, 812 P.2d 1256, 1259 (1991). Questions of statutory interpretation are questions of law. *State v. Denham*, 2005 MT 26, ¶ 5, 326 Mont. 24, 107 P.3d 1263.

By contrast, this Court reviews a district court's denial of a motion to compel for an abuse of discretion, and it will not overturn a decision on this variety of motion absent such an abuse. *Associated Management Services, Inc. v. Ruff*, 2018 MT 182, ¶¶ 70-78, 392 Mont. 139, 424 P.3d 571.

SUMMARY OF ARGUMENT

The District Court correctly interpreted and applied Montana law in concluding Appellant was an employee subject to Turley's drug testing policy, and Turley had "good cause" to terminate Appellant due to her violation of the Policy.

The District Court did not abuse its discretion in denying Appellant's Motion to Compel. And the District Court correctly dismissed Appellant's claims for discrimination based on the overwhelming evidence, including Appellant's own statements, concluding Appellant failed to meet her burden in opposing summary judgment.

Appellant's own policy preferences regarding employer-mandated drug testing cannot justify reversing the District Court's dismissal of Appellant's wrongful discharge claim, and this Court should so hold. Appellant amounted to an "employee" within the context of the Montana Workforce Drug and Alcohol Testing Act, as her position was one "involving a fiduciary responsibility" for her employer and "affecting public safety or public health." As such, she was properly subject to drug testing under statute, and Turley acted with "good cause" when it terminated

her for violating an employment policy based on a drug test expressly authorized by Montana law. The district court correctly dismissed Appellant's wrongful discharge claim.

Likewise, the district court appropriately used its discretion to deny Appellant's Motion to Compel dated September 30, 2022. Appellant's Motion relied on overbroad requests to seek various categories of information that largely did not exist, and in at least one instance, a category of information that was confidential, not subject to disclosure, and otherwise irrelevant to Appellant's discrimination claims.

Finally, the District Court correctly granted summary judgment to Turley on Appellant's age and disability discrimination claims as: 1) Appellant's claims were effectively barred by Montana statute and this Court's case law, 2) Appellant was without evidence to demonstrate *prima facie* cases of age and disability discrimination, and 3) because no genuine issues of material fact prevented summary judgment. This Court should affirm accordingly.

ARGUMENT

I. The District Court Properly Granted Summary Judgment on Appellant's Wrongful Discharge Claim.

Looking first to her request to reverse the District Court's dismissal of her wrongful discharge claim, Appellant presents two arguments to "support" that request.

First, she asks this Court to reverse the District Court because, in her eyes, "[r]andom drug testing low risk workers violates public policy and Montana's constitutional right to privacy[,]" and there are accordingly "serious public policy reasons to reverse the district court's order." (Opening Br. at 15).

Second, she asks the Court to hold that the lower court erred as a matter of law when it concluded she was properly subject to random drug testing conducted under the Drug Testing Act. Unfortunately for Appellant, both arguments fall flat, and this Court should accordingly affirm the District Court's dismissal of her wrongful discharge claim. (Opening Br. at 17-26).

A. Appellant's Public Policy Preferences Do Not Justify Reversing the District Court, Nor do Misguided References to Alleged "Constitutional" Violations.

At the outset, it is telling that Appellant begins her appeal with roughly three pages of discussion regarding alleged policy concerns. As the Court will note, this section is *devoid of legal citation,* including any citation to the Montana Wrongful Discharge from Employment Act or the Montana Workforce Drug and Alcohol Testing Act.

In beginning her brief with a "Hail Mary" appeal to alleged public policy concerns, Appellant seemingly acknowledges that the law applicable to this case is not on her side, and therefore asks the Court to overlook the law in a manner that — in her view — is more consistent with good public policy.

Appellant's own policy preferences are unpersuasive. The Court should disregard this portion of Appellant's briefing and not be persuaded to reverse the District Court's interpretation of law based on Appellant's unsupported policy arguments.

Furthermore, while Appellant, citing Article II, Section 10 of the Montana Constitution, also seemingly suggests there are constitutional concerns with allowing Turley to conduct drug testing on employees like her, these arguments also fail.

First, Mont. R. Civ. P. 56(a) provides parties the ability to move for "summary judgment on all or part of [a] *claim*." (emphasis added). In this case, Appellant did not plead any constitutional claim with the District Court, did not make any legal argument based on a constitutional right to privacy before the District Court in support of her wrongful discharge claim, and the District Court did not consider any such claim through summary judgment briefing or otherwise. Appellant cannot now ask this Court to reverse the District Court's holding on her wrongful discharge claim based on alleged constitutional claims that she did not present to the lower court. "This Court does not consider arguments raised for the first time on appeal." *Mountain W. Bank, N.A. v. Glacier Kitchens, Inc.*, 2012 MT 132, ¶ 13, 365 Mont. 276, 281 P.3d 600.

Moreover, even if Appellant had pled some sort of constitutional claim against Turley, it would have appropriately failed as a matter of law. As this Court has consistently recognized, "the privacy section of the Montana Constitution contemplates privacy invasion by *state action only*." *State v. Long*, 216 Mont. 65, 71, 700 P.2d 153, 157 (1985) (emphasis added). While Appellant may personally feel that her termination was unfortunate, it would not have triggered any sort of constitutional claim for her, even if she had pled one. The Court should appropriately disregard her arguments on this point.

B. Appellant Was Subject to Drug Testing Conducted Under the Montana Workforce Drug and Alcohol Testing Act, and Turley Had "Good Cause" to Terminate Her.

Further, even considering Appellant's arguments regarding whether she was properly subject to drug testing conducted under the Drug Testing Act, these arguments also do not justify reversing the District Court's dismissal of her wrongful discharge claim.

As the Court knows well, Mont. Code Ann. § 39-2-904 (2019) provides a remedy to employees who suffer a "wrongful discharge." Under that section,

> (1) A discharge is wrongful *only* if:
> (a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
> (b) the discharge was *not for good cause* and the employee had completed the employer's probationary period of employment; or
> (c) the employer violated the express provisions of its own written personnel policy.

Id. (emphasis added).

Per WDEA statutory definitions, "good cause" is defined as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reasons." Mont. Code Ann. § 39-2-903(5). Importantly, case law defines "a legitimate business reason" as any reason that is not "false, whimsical, arbitrary, or capricious, and one that must have some logical relationship to the needs of the business." *Putnam v. Cent. Montana Med. Ctr.*, 2020 MT 65, ¶ 15, 399 Mont. 241, 460 P.3d 419.

The essence of Appellant's wrongful discharge claim is a bit unusual as it essentially turns on a separate question of statutory interpretation. Appellant argues Turley should not have fired her for failing a drug test, as Appellant did not amount to an "employee" under the Drug Testing Act, and Turley therefore had no right to test her in the first place.

Thus, Appellant's claim centers on the narrow issue of whether Turley could lawfully subject her to drug testing. If Turley did not have the legal authority to subject her to drug testing, she argues it had no legitimate business reason to fire her. However, if Turley could subject her to testing, she effectively concedes that Turley

had a legitimate business reason for her termination, as she has offered no other argument to suggest her discharge was wrongful.[1]

Unfortunately for Appellant, her arguments on statutory interpretation fall short. When applying canons of construction to interpret Mont. Code Ann. § 39-2-206, the District Court correctly determined that Appellant was an "employee" properly subject to testing, and none of the arguments offered by Appellant regarding entirely unrelated statutes and inapplicable case law should convince this Court otherwise.

1. The District Court Correctly Concluded Appellant's Position Was One Involving a "Fiduciary Responsibility" and Affecting "Public Safety or Public Health."

As noted by Appellant, the Drug Testing Act explicitly defines "employee," thereby identifying the classes of individuals who would be subject to drug testing conducted under that statute.

> (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.

[1] All of which disregards that Plaintiff knowingly violated an employment policy which both she and Turley believed at the time applied to her. A violation of policy in almost any other discharge context equating to "good cause."

Mont. Code Ann. § 39-2-206 (emphasis added).

In this case, Appellant's case hinged on whether her position was one "involving a fiduciary responsibility" for Turley and/or one "affecting public safety or public health." Appellant asks the Supreme Court to hold that the District Court, applying ordinary canons of construction to interpret § 39-2-206, erred in holding that her position fell into both categories. The Court should not do so.

As noted in Turley's briefing to the lower court, in considering Appellant's status as an "employee" under § 39-2-206, courts must remain mindful of fundamental canons of construction governing statutory interpretation.

For example, this Court has consistently stated that it will defer to statutory definitions where the Legislature provided them. *City of Great Falls v. Montana Dept. of Public Service Regulation*, 2011 MT 144, ¶ 18, 361 Mont. 69, 254 P.3d 595. However, where the Legislature did not provide statutory definitions and courts need to interpret a particular piece of statutory language, they must ascertain the plain meaning of that language. *Id.* Courts do so by interpreting a term in accordance with its *dictionary definition*. *Montana Dept. of Revenue v. Priceline.com, Inc.*, 2015 MT 241, ¶ 10, 380 Mont. 352, 354 P.3d 631. Additionally, when interpreting undefined terms, courts may consider "the larger statutory scheme in which the term appears." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666.

In this case, because the Drug Testing Act did not specifically spell out what it means to hold a "fiduciary relationship" to one's employer or what it means for a position to "affect public safety or public health," the District Court resorted to dictionary definitions, and appropriately so. In contrast to Appellant's insinuations the court's resort to dictionary definitions somehow justifies reversal, such an approach is endorsed by well settled canons of construction.

When applying said definitions to ascertain the meaning of terms such as "involving," "fiduciary," and "relationship," as well as "affecting," "public," and "health" it is clear that Appellant's job as a patient care coordinator rendered her an "employee" under the Drug Testing Act.

Turley presented undisputed evidence to suggest that Appellant's position required her to conduct tasks such as collecting personally identifiable patient information, processing payment on Turley's behalf, and helping patients apply for credit according to Turley dental care policies and standards. Detail-oriented functions of this nature handling private and confidential information of patients demonstrates that Appellant's position was one relating to Turley's "confidence" or "trust," the terms the District Court obtained through its review of dictionary definitions for "fiduciary." As such, Appellant's position was one involving fiduciary duties for Turley, and Turley could lawfully subject her to drug testing.

Just as Appellant's position required her to work with Turley providers in creating dental treatment plans, collect sensitive patient information, handle medical records and insurance information, and establish and enforce sanitation measures and procedures. Tasks of this nature rendered her position one that "produced an effect" upon the business interests of Turley, a healthcare provider. As such, her position was also clearly one affecting "public safety or health," confirming again that Appellant was an "employee" under the Drug Testing Act who was properly subject to drug testing.

This interpretation makes sense in light of the larger statutory scheme of the Drug Testing Act, with Section 208 of that statute, which discusses requirements for "qualified testing programs," providing in part:

> **Qualified testing program -- allowable types -- procedures.** Each of the following activities is permissible in the implementation of a qualified testing program:
> (1) An ***employer may test any prospective employee as a condition of hire***.
> (2) ***An employer may use random testing*** if the employer's controlled substance and alcohol policy includes one or both of the following procedures:
> (a) An employer or an employer's representative may establish a date ***when all salaried and wage-earning employees will be required to undergo controlled substance or alcohol tests, or both***.
> (b) An employer may manage or contract with a third party to establish and administer a random testing process that must include:
> (i) an established calendar period for testing;
> (ii) an established testing rate within the calendar period;
> (iii) a random selection process that will determine who will be tested on any given date during the calendar period for testing;

> (iv) ***all supervisory and managerial employees in the random selection and testing process***; and
> (v) a procedure that requires the employer to obtain a signed statement from each employee that confirms that the employee has received a written description of the random selection process and that requires the employer to maintain the statement in the employee's personnel file. The selection of employees in a random testing procedure must be made by a scientifically valid method, such as a random number table or a computer-based random number generator table.

Mont. Code. Ann. § 39-2-208(1)-(2) (emphasis added).

Simply put, it is difficult to imagine why one section of the Drug Testing would contemplate "random testing" on "all" salaried, wage-earning, supervisory, and managerial employees if the Legislature had intended to exclude employees like Appellant from testing together. The district court correctly recognized as such, and this Court should affirm its conclusion that Appellant was an "employee" subject to drug testing.

2. None of the Arguments Offered by Appellant Should Persuade this Court of an Alternative Conclusion.

And while Appellant offers various arguments in "support" of her assertion that the District Court erred in interpreting Mont Code Ann. § 39-2-206, none of them should persuade the Court of such a conclusion. Indeed, while she devotes approximately seven pages of briefing to arguments that the District Court erred in determining her position was one "involving a fiduciary responsibility" and one affecting "public safety or public health," her position largely amounts to a request

for this Court to apply statutory terminology from *wholly unrelated statutes*. In arguing against her status as a fiduciary, Appellant also applies case law from wholly unrelated contexts to baselessly conclude that an employer must inform its employee of the employee's status as a fiduciary before the employee could become a fiduciary. The Court should decline her invitation on all points.

Looking first to her argument that her position did not involve "fiduciary responsibilities" owed to her employer, Appellant directs the Court's attention to various definitions of "fiduciary" in Chapters 72 and 32 of the Montana Code, all of which precede statutory sections governing trusts, estates, and financial institutions. (Opening Br. at 18-19). Because the cited definitions of "fiduciary" focus on individuals standing in the position of a personal representative, trustee, or other similarly situated, Appellant argues she did not have a fiduciary relationship with Turley under Mont. Code Ann. § 39-2-206. (*Id.*).

Appellant's argument is meritless. As Turley discussed in its briefing before the lower court, the definitions cited by Appellant do not precede the Drug Testing Act and should not govern this Court's interpretation thereof. Because these definitions largely limit "fiduciary" to include individuals acting as "trustees" or "personal representatives," applying them to the Drug Testing Act would carry drastic consequences.

Appellant seemingly asks this Court to conclude that an individual's job will not carry fiduciary responsibilities unless that individual serves as a personal representative or trustee to his or her employer. It's a stretch for any employee to meet such a definition, which underscores why it would make no sense to take definitions preceding statutes governing estates, trusts, and financial institutions, and apply them to a statute governing the employment relationship.

Just as Appellant argues that Mont. Code Ann. § 1-2-107 mandates that this Court apply such definitions here, this argument misses the mark. Indeed, Appellant ignores critical, qualifying language in that statute:

> 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*.

Mont. Code Ann. § 1-2-107 (2021) (emphasis added).

With regard to the definitions cited by Appellant, the Legislature evidenced a clear intent that those definitions would only apply to the sections that they precede. It is worth noting that while the various definitions cited by Appellant share some characteristics, they themselves offer slightly varied definitions. For example, Mont. Code Ann. § 32-1-425, a statutory section governing "financial institutions," defines "fiduciary" to include individuals such as "receiver[s]," "trustee[s] in bankruptcy", and "public officer[s]." Such classes of individuals are notably absent from all the other statutory definitions of "fiduciary" cited by Appellant.

Thus, Appellant's own citations prove that "fiduciary" does not carry the exact same meaning across all sections of Montana's Code. While it might make sense to define "fiduciary" to include "bankruptcy trustees" in a statute governing financial institutions, it does not make sense to include this person in the definition of "trustee" governing the Probate Code.

Further, Mont. Code Ann. § 32-1-425 states that its definitions apply "[f]or the purposes of § 32-1-426 and § 32-1-427," clearly evidencing the Legislature's intent that the definitions contained therein not extend across all sections of the Code. It does not make sense for the Court to apply a limited definition of this nature to a statute governing the employment relationship, and the Court should not do so.

While Appellant cites a handful of cases discussing fiduciary relationships in the banking and corporate contexts, these arguments also fail. Turley acknowledges that a Montana Supreme Court decision interpreting the meaning of "fiduciary relationship" as that phrase is used in the Drug Testing Act would obviously decide the present dispute, there is no canon of construction requiring courts to look at precedent interpreting the meaning of that phrase in wholly unrelated contexts, and, again, the Court should not do so.

To the extent the Court found it appropriate to look to the decisions cited by Appellant, Turley would note none of these decisions apply to a fiduciary relationship of an employee. The case from the corporate context considered the

standard of care a director owes a corporation, a breach of which being a breach of the shareholder's/director's fiduciary duties. *See Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.*, 2016 MT 218, ¶¶ 51-61, 384 Mont. 464, 380 P.3d 747. Whereas the cases from the banking context consider whether a banker owes his customer fiduciary responsibilities where the banker has not actually advised that customer on issues outside the ordinary, arms-length, debtor/creditor relationship. *Morrow v. Bank of America, N.A.*, 2014 MT 117, ¶ 35-36, 375 Mont. 383, 24 P.3d 1167; *Richland Nat. Bank & Trust v. Swenson*, 249 Mont. 410, 418, 816 P.2d 1045, 1050 (1991).

Per the dictionary definitions for "fiduciary" and "relationship" relied on by the District Court, these conclusions make sense. If a shareholder is no longer a director or enjoys an ownership interest in a corporation, he would no longer stand in a position of "trust" or "confidence" to the corporation. Likewise, where a customer has not actually solicited advice from a banker, the customer would not be putting the banker in a position of "trust" or "confidence," as the customer would not have entrusted the banker with any specific duties. By contrast, when Turley hired Appellant to work in a position requiring her to collect payment on Turley's behalf, handle personally identifiable information of its patients in a manner consistent with HIPAA guidelines, consult with and submit invoices to patients' insurance, and conduct other similarly important tasks, Turley put Appellant in a

position of trust or confidence, thereby rendering her a fiduciary. Appellant's Montana Supreme Court citations are distinguishable.

Finally, to the extent Appellant claims she did not amount to a fiduciary because Turley never "informed her" as such, Turley would simply note that the only "citation" provided by Appellant on this point is her own brief before the District Court. Thus, Appellant has offered no legal basis for this Court to conclude that one's status as a fiduciary is dependent on an employer informing them of that status, and this Court should hold as such.

Likewise, when turning to Appellant's arguments advanced t to suggest her position was not one affecting "public safety or health," these arguments also fail. In asking the Court to conclude her position did not fall within this description, Appellant once again brings the Court's attention to sections of Montana Code bearing *no relevance to employment or employer-mandated drug testing*.

As she did at the district court level, Appellant directs the Court's attention to a definition of "healthcare facility" in Mont. Code Ann § 50-5-101, a section preceding statutory sections governing "hospitals and related facilities" and discussing hospital licensure and similar requirements.

Further, Appellant adds a new citation not presented to the lower court, § 50-1-105, a section outlining the "purpose" of Montana's public health system. Notably, this section falls within a range of sections governing the activities of the Montana

Department of Public Health and Human Services. And while it does not provide definitions, Appellant seemingly argues that it supports a conclusion that her position did not affect public health, as her position did not require her to carry out any of the statutorily established purposes and functions of the Montana Department of Public Health.

Appellant's citations on this point are misguided for multiple reasons. First, even if this Court accepted Appellant's argument to apply one statutory definition to a wholly unrelated section of Montana Code, the sections she cites do not define "public safety" or "public health," the terms at issue in the Act. Appellant instead relies on a definition of "healthcare facility" in a wholly unrelated statute to argue that her position did not affect the health and safety of Turley's patients, all of whom are obviously members of the public seeking dental care for their health. The Court should not adopt Appellant's unusual invitation on this issue.

Even if the Court essentially concluded that her provided definition of "healthcare facility" is somehow "close enough" to the terms at issue in this case, in this instance, there is obvious legislative intent to limit applications of the statutory language in Title 50 cited by Appellant.

The Legislature likely did not envision that statutory sections riddled with references to the Montana Department of Public Health, the functions of that department, and the like, would one day be used to argue against employer-mandated

drug testing. The Court should not use said definitions to limit application of the Drug Testing Act in the manner advocated by Appellant.[2]

For all the reasons discussed herein, this Court should affirm the District Court's dismissal of Appellant's wrongful discharge claim. Based on ordinary canons of construction, the District Court correctly interpreted Montana law, concluding that Appellant's position was one involving a "fiduciary responsibility" for her employer and one affecting "public safety and public health," and Appellant has offered no compelling justification to hold otherwise.

Appellant was an "employee" under the Drug Testing Act who was rightfully subject to drug testing, and Turley acted with "reasonable job-related grounds" in dismissing her for a failed drug test administered in accordance with the Act, particularly when Appellant knew of Turley's Policy and was on notice violation of the Policy would result in termination.

II. The District Court Appropriately Used Its Discretion to Deny Appellant's Motion to Compel.

This Court has consistently recognized "district courts may well need to prohibit discovery requests which are too broad, given the particular claims and

[2] Appellant, again, appears to assert constitutional violations including her assertion that "no compelling state interest" exists to justify drug testing a menial employee like herself. Turley incorporates its earlier arguments concerning Appellant's new constitutional claims.

defenses of each case." *Peterson v. Doctors' Co.*, 2007 MT 264, ¶ 44, 339 Mont. 354, 368.

Mont. R. Civ. P. 26(b)(1) only permits discovery on "non-privileged" items "reasonably calculated to lead to the discovery of admissible evidence." Appellant continues to ignore her own burden to show the information sought "is reasonably calculated to lead to the discovery of admissible evidence" as required by Rule 26. Appellant's continued arguments that discovery is "liberal/broad" is insufficient.

This Court has plainly stated that discovery requests must be "narrowly tailored to lead to discoverable information" and "fishing expeditions" are prohibited. *Peterson v. Doctors' Co.,* 2007 MT 264, ¶ 44, 339 Mont. 354, 367, 170 P.3d 459, 467; *Davidson v. Barstad*, 2019 MT 48, 395 Mont. 1, 435 P.3d 640; *see also, Rauthe v. Metropolitan Life Ins. Co.*, 2010 WL 3522487, *2 (D. Mont. 2010) (citation omitted) (any discovery that is propounded "must be narrowly tailored to reveal the nature and extent of the conflict, and must not be a fishing expedition."); and *Harris v. St. Vincent Healthcare*, 2012 WL 12269086, *1 (Mont. Dist. Ct. 2012) ("requests need to be tailored to lead to the discovery of admissible evidence. Simply put, relevance is a valid objection and discovery requests that amount to nothing more than fishing expeditions or that have no hope of leading to admissible discovery are not permitted.").

When this litigation began, Appellant consistently asserted that her termination was due to her positive drug test. However, when Turley relied on this position in Summary Judgment on her discrimination claims, Appellant came up with a new theory of discrimination not pled before the HRB or the District Court. Namely, she argued that the Policy was a pretext for discrimination, and suggested she was entitled to additional documentation confirming whether testing conducted under the Policy was truly random.

On February 21, 2022, the District Court entered an order denying Turley's Motion for Partial Summary Judgment as to Appellant's discrimination claims, but noting that "records as to how the employees of [Turley] were selected for testing [would] resolve the question [of whether Turley's drug-testing of Edwards] was a pretext for age and disability discrimination." (Order Gr. Def. Second Mot. for Part. SJ in Part, Doc. 35 at 4)

Despite this limiting language, in the months preceding her filing of the Motion to Compel discussed herein, Appellant sought information bearing no relevance to the application of the Policy, any discrimination claim she actually pled, and in many instances, information that simply did not exist. Eventually, she sought court assistance in producing such information, but because the District Court appropriately denied her requests, she now asks this Court to hold that it abused its discretion in doing so. The Court should decline her request.

A. Alleged Evidence of Appellant's Back and Mental Health Disabilities.

The first category of documents discussed by Appellant is alleged evidence of "back and mental health disabilities." (Opening Br. at 28). More specifically, Appellant seeks production of "her health history" and any documents suggesting that Turley prescribed Appellant "opioids for her chronic back pain." (*Id.*).

Turley voluntarily produced Alma's entire personnel file and all of her treatment records in Turley's possession, *even though Appellant's treatment records were never requested in discovery nor were they ever sought in Appellant's Meet and Confer letter*.(*See* Doc. 42 at 15-16; Doc. 42, Exs. C, F, and J at p. 7) Any evidence concerning Alma's alleged disabilities and in Turley's possession, custody and control would be included in the information already produced. This Court should affirm the District Court's decision on this request.

B. Confidential Information Contained within the Personnel File of another employee Turley Employee who Initially Failed a Pre-Employment Drug Screening after Appellant's Termination.

Appellant sought confidential information contained within the personnel file of a woman identified herein as KL, an individual who failed a pre-employment drug screening administered for Turley, was later hired by Turley after passing a drug test, with all these events occurring after Appellant filed her District Court Complaint and nearly two years after Appellant's termination. (*See* Doc. 42)

Personnel records are generally regarded as confidential, as "such records include subjective opinions of the employee's performance that will vary with the person evaluating the employee, public disclosure could impede candid communication between employer and employee, and a supervisor could use the public nature of evaluations or ratings as a vindictive mechanism against employees she disliked." *Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 26, 372 Mont. 409, 416–17, 313 P.3d 129, 135.

Given the confidential nature of KL's personnel records, the District Court appropriately used its discretion to deny their production in this case, and Appellant's arguments regarding a protective order signed by the District Court do not change this conclusion.

The Parties executed a protective order in this case to address issues associated with production of Appellant's own medical records. In contrast to Appellant, KL is not a party to this case, and she has not expressly authorized the disclosure of her private information to anyone, including Appellant, her counsel, or the Court. Indeed, KL only became a person of interest in this litigation after Appellant raised allegations about KL during a discovery deposition. (*See* Doc. 42 at 13-14, citing Ex. K, Turley 30(b)(6) Dep). Turley did not voluntarily disclose any information about KL, and in the absence of such authorization from her to do so, it would be entirely inappropriate for Turley to do so here.

Even if the Court agreed with Appellant that production of KL's records does not raise privacy concerns, such information is entirely irrelevant to Appellant's claims. Again, it is undisputed that KL failed a pre-employment drug screening and that this screening occurred after Appellant's termination. As correctly recognized by the District Court "KL was not an employee, and thereby, not subject to the Alcohol and Drug policy when she tested positive." (Doc. 56/Appendix 2 at 6)

Appellant cannot cobble together an employment discrimination claim based on Turley's treatment of a non-employee based on events that occurred after Appellant filed this litigation, and this Court should affirm the District Court accordingly.

C. Alleged Correspondence Between Turley and Chemnet Evidencing "Disparate Treatment and Disparate Impact."

Next, Appellant asks for alleged correspondence between Chemnet and Turley evidencing "disparate treatment and disparate impact." (Opening Br. at 29).

As acknowledged by the District Court, this request is overbroad, and quite frankly, is akin to Appellant asking Turley to "hand over" any and all documents that would provide her any evidence of employment discrimination. To Turley's knowledge, no such documents, even if relevant, exist.

Further, as acknowledged by the lower court, at the time of Appellant's Motion, Turley had already produced hundreds of pages of correspondence with

Chemnet. (Doc. 56 at 7). Turley did not withhold certain responsive documents and no evidence exists suggesting otherwise.

D. Other Documents Turley Allegedly withheld Showing Age and Disability Discrimination.

Appellant now seeks other evidence allegedly in Turley's possession that would support her age and disability discrimination claim, including information that would allow her to refute an "age chart" documenting the ages of Turley's employees and evidencing a general practice on Turley's part of retaining older employees. (Opening Br. at 29). This argument is different from the argument presented in Appellant's Motion to Compel, in which she failed to recognize she already possessed a list of the ages of front desk employees at the time of Appellant's termination, as well as testimony from Turley that none of the individuals had known disabilities. Now on appeal, Appellant asserts she is entitled to names of the individuals. (Doc. 38 at 14)

In sum, Appellant alleges that Turley's chart cannot be trusted in light of unidentified "credibility issues," and she was therefore entitled to evidence to refute said chart. (Opening Bf. At 29) Appellant's arguments, though constantly changing, remain meritless. This request was overbroad, and Appellant presented no compelling justification as to how additional identifying information about Turley's dozens of employees would save her discrimination claims. The lower court appropriately denied Appellant's request for production of this information.

E. Email Correspondence and Executive Meeting Minutes Allegedly Evidencing Discriminatory Conduct with Regard to Appellant.

And finally, without offering any briefing or argument in support thereof, Appellant argues the District Court abused its discretion in denying her request for "email correspondence and executive meetings" allegedly evidencing discriminatory conduct. (*Id.*).

On this point, Turley would reiterate that it searched for emails and executive meeting minutes regarding Appellant. (Doc. 42 at 18, citing Ex. J, Fourth Supp. Resp. to Pl.'s First Disc Req) Indeed, Turley produced nearly 2000 pages of emails mentioning Appellant's name from 2018 through 2019, only withholding correspondence between Appellant and dentists concerning a patient's care. No documents exist related to what Appellant demanded in its Motion to Compel.

The District Court did not abuse its discretion in its Order on Appellant's Motion to Compel.

III. The District Court Appropriately Granted Summary Judgment to Turley on Appellant's Age and Disability Discrimination Claims.

Appellant asks this Court to reverse the District Court's dismissal of her age and disability discrimination claims. (Opening Br. at 29-38). While she devotes several pages of briefing and several different subsections to this argument, it seems she ultimately believes reversal is appropriate for two reasons.

First, Appellant asserts that the District Court applied the wrong law to her claims, arguing it incorrectly applied a burden of proof applicable only to cases involving "direct evidence" of discrimination, instead of the burden set forth in this Court's 1996 decision of *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1996). (*Id.* at 30).

Second, Appellant asserts there were several genuine issues of material fact that should have prevented summary judgment on her discrimination claims. (*Id.* at 36).

A. Montana Law Mandated Summary Judgment in this Case.

The viability of Appellant's discrimination claims faced two significant obstacles under Montana law, neither of which she can overcome through the misguided argumentation offered in her opening brief.

First, given Appellant's initial acknowledgment that her termination was *prompted by failed drug test administered pursuant to Turley's Drug and Alcohol Testing Policy*, her discrimination claims were barred under Montana statute and recent case law from this Court.

Indeed, what was previously § 50-46-320(4)(b) and 5(b), MCA and has since been changed to § 16-12-108(4)(b), (c), and (e), prevents actions against employers "for disciplining an employee for violation of a workplace drug policy…;" against "an employer from declining to hire, discharging, disciplining, or otherwise taking

an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy…;" and does not "permit a cause of action against an employer for wrongful discharge pursuant to § 39-2-904 or discrimination pursuant to § 49-1-102.

Furthermore, as affirmed by this Court in *Barthel v. Barretts Minerals Inc.*, an admitted violation of company drug-testing policy constitutes good cause for termination, and accordingly fails to support a claim for employment discrimination. *See Barthel v. Barretts Minerals Inc.*, 2021 MT 232, ¶ 7 n.2, ¶ 21, 405 Mont. 345.

Here, Appellant consistently represented to Unemployment, the HRB, and the District Court, by way of an affidavit executed in April 2021 and through written discovery responses, that her termination was prompted by her failed drug test administered under Turley's Policy. (Doc. 40 at 7-10)

While not expressly discussed by the District Court in granting summary judgment, Appellant's acknowledgment on this point rendered summary judgment in Turley's favor appropriate. Regardless of whether Appellant attempts to transform her discrimination claims into something about pretextual application, disparate impact, disparate treatment, or the like, her claims were clearly barred under Mont. Code Ann. § 16-12-108 and this Court's holding in *Barthel*.

Appellant has waffled on whether her termination was the adverse employment action she relies on in support of her discrimination claims. However, in her opening brief, she once again asserts she "was ultimately fired because of her age and disabilities." (Opening Bf. at 30) Given Appellant's acknowledgment in her Brief, § 50-46-320(4)(b) and 5(b), MCA and *Barthel* clearly demonstrate the District Court's dismissal of Appellant's discrimination claims was appropriate.

Moreover, even if this Court looked past this statutory bar, Appellant was still without evidence —circumstantial or direct — to support a *prima facie* case of age or disability discrimination.

A specific analytic framework, known as the "McDonnell Douglas" test, governs summary judgment motions in discrimination cases" of this type. *Jackson v. Costco Wholesale Corp.*, 2018 MT 262, ¶ 16, 393 Mont. 191, 197, 429 P.3d 641, 645, citations omitted. "First, the employee must allege a *prima facie* case of discrimination in the complaint." *Id.* "Second, the employer seeking summary judgment must come forward with a legitimate, nondiscriminatory reason for its action." *Id.* "If the employer sets forth a legitimate, nondiscriminatory reason for its action, the employee must produce evidence that <u>*establishes a prima facie*</u> case and evidence that raises an inference the proffered reason is pretextual." *Id.* (emphasis added).

Here, Appellant argues she lost on summary judgment because the court allegedly applied a burden of proof applicable only to "direct evidence" evidence cases, while it should have applied the standard set forth in this Court's 1996 decision in *Heiat*. Relatedly, in a different section of her argument, Appellant argues the District Court misapplied the burden of proof applicable to "disparate treatment cases" set forth in ARM 24.9.610. (Opening Br. at 33).

Frankly, Appellant's arguments on this point are perplexing. Both *Heiat* and ARM 24.9.610 simply set forth the oft-cited *McDonnnell Douglas* framework quoted by Turley above, quoted by Turley in its briefing to the District Court, and applied by the District Court in granting summary judgment in Turley's favor.

The Court did not apply the "direct evidence" standard set forth in *Reeves v. Dairy Queen*, 1998 MT 13, 287 Mont. 196, 953 P.2d 703, and if it had, such application likely would have been helpful to Appellant. In direct evidence cases where both parties agree on the employer's "articulated reason for firing the plaintiff[,]" this Court would not require plaintiffs to prove that the articulated reason for firing was pretextual, thus lessening the burden for these discrimination plaintiffs. *Reeves*, ¶ 18.

Instead, what Appellant continues to miss is that the *McDonnell Douglas* burden shifting framework applicable to her case still requires her to prove a *prima facie* case of age and disability to fend off summary judgment.

Thus, in the context of disability discrimination claims, the Court has indicated that plaintiffs must prove: 1) membership in a protected class, 2) that they were "otherwise qualified for continued employment and [their] employment did not subject [them] or others to physical harm," and 3) the employer denied them continued employment *because of the disability*. *Reeves*, ¶ 22 (emphasis added).

Similarly, successful age discrimination plaintiffs must provide either: 1) "direct evidence" demonstrating that one's status in a protected age group prompted their termination, or 2) circumstantial evidence evidencing that the employee was performing their job satisfactorily, but the employer replaced them with a "substantially younger person" anyway. *Mysse v. Martens*, 279 Mont. 253, 264, 926 P.2d 765, 772 (1996).

In light of these requirements, the lower court correctly granted Turley summary judgment on Appellant's discrimination claims. As to disability discrimination, Appellant offered the Court no evidence apart from her own allegations that would prove membership in a protected class, nothing to suggest she was otherwise qualified for continued employment, particularly when she violated Turley's drug testing policy, and most definitely nothing to *prove or suggest her disability prompted her termination*, particularly when she admitted that the her termination was prompted by a failed drug test, and because her allegations about

the random nature of Turley's testing found no support in the communications between Turley and Chemnet.

Likewise, as to her age discrimination claim, Plaintiff was unable to provide the Court with any: 1) direct evidence that her status in a protected age group prompted her termination or 2) circumstantial evidence that she was performing her job satisfactorily but was replaced with a substantially younger person.

Indeed, all Appellant offered the District Court on the latter point was unsubstantiated assertions questioning Turley's representations regarding the ages of its various employees. Such assertions cannot be used to defeat summary judgment or absolve Appellant of her obligation in proving a *prima facie* case. Because Appellant did not do so, this Court should affirm the lower court's grant of summary judgment.

B. No Genuine Issues of Material Fact Prevented Summary Judgment in this Case.

Furthermore, while Appellant has raised various alleged "issues of fact" in her opening brief, none of them should alter the analysis set forth above. Appellant goes on for several pages about the "evidence" allegedly ignored by the District Court in deciding her discrimination claim, Turley will focus on the high points, discussing: 1) the alleged issue of fact concerning "the real reason" for her termination and 2) Appellant's alleged "comparative evidence" of discrimination.

In her opening brief Appellant asserts the "real reason for [her] termination [was] a genuine issue of material fact." (Opening Br. at 36). As the Court knows well, such "unsupported conclusory or speculative statements do not raise a genuine issue of material fact. *Abraham v. Nelson*, 2002 MT 94, ¶ 22, 309 Mont. 366, 46 P.3d 628.

In this case, Appellant was simply without evidence to support any theory of age and disability discrimination. And she asserted several different theories throughout the case. From the beginning, Appellant admitted that she was fired for a failed drug test, and though she tried to locate evidence of pretextual application of the testing randomness, such evidence did not exist. Simply put, there was nothing to suggest that Turley's application of the Policy was anything but random or that Turley somehow targeted Appellant in applying the Policy. Appellant therefore could not prevent summary judgment in Turley's favor by alleging an issue of fact where she was without evidence to support it, and this Court should affirm the District Court's dismissal of her claims as such.

Further, while Appellant makes much to do of alleged "comparative evidence" of discrimination (Opening Br. at 36), namely including any information pertaining to KL and her failed drug test, for the reasons outlined in addressing Appellants' Motion to Compel, such information is of no relevance here. To summarize, KL: 1) was not a Turley employee when she failed a pre-employment

drug screening, and 2) was not subject to the Policy. Further, KL did not undergo a day-long training on Turley's Policy and acknowledge receipt of a copy of said Policy, did not knowingly violate the Policy, and her failed pre-employment drug test occurred after Appellant filed her District Court Complaint and more than a year after Appellant's termination.

Accordingly, Appellant cannot cite information pertaining to KL to support a discrimination claim that she filed in 2019. The District Court appropriately concluded that such alleged "comparative evidence" could not prevent summary judgment in this matter, and this Court should affirm the District Court's conclusion on this point.

CONCLUSION

Ultimately, for all the reasons outlined herein, this Court should affirm the district court on all three issues outlined in this appeal. The District Court's orders granting Turley summary judgment on Appellant's wrongful discharge and age and disability discrimination claims were correct as a matter of law, while the district court appropriately used its discretion to deny Appellant's Motion to Compel. This Court should hold accordingly.

//

RESPECTFULLY SUBMITTED this 9th day of May, 2023.

MOULTON BELLINGHAM PC

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 9,813 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ Afton E. Ball
Afton E. Ball or Bobbi K. Owen

CERTIFICATE OF SERVICE

I, Afton Eva Ball, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-09-2023:

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