No. 23-1065

In the Supreme Court of the United States

ROBERT A. EATON,

Petitioner,

v.

MONTANA SILVERSMITHS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 26, 2024
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QUESTIONS PRESENTED

1. In determining Whether the Ninth Circuit had power to Waive Eaton's Constitutional rights in their Memorandum regarding connection of personnel policy to the termination and Pv2, which were vague and unclear. "Waiving of rights" or "arguments abandoned" with "waiver" being "intentional relinquishment or abandonment of a known right" According to *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), which Eaton did not knowingly abandon any of his Rights. "[W]aiver of constitutional rights in any context must, at the very least be clear"; *Aetna Ins. Co. v. Kennedy*, 301 U.W. 389, 393 (1937) (stating courts should indulge in every reasonable presumption against waiver" in civil cases where fundamental rights were at issue). "Courts do not resume acquiescence in loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937). Could the 9th Circuit's waiving of rights and focus on PEv1, show a piecemealing of Eaton's case while not looking at the 'totality of the case', thus differing their opinion with 11th Circuit court that states a negative performance evaluation warrants the claimants case looked at as a whole.

2. Whether the Ninth Circuit violated the Due Process Clause of the Fourteenth Amendment by not answering all of Eaton's questions on appeal. Two of the questions being, 1) Would the lack of being heard via oral hearing disallow the ability to show existential and substantial evidence which could prove legitimate business reasons were illegitimate. Would the lower courts need to maintain allowance of following Montana Codes annotated with allowance of the hearing if they were using other MCA laws for reference in the case? 2) Would altering and withholding of evidence causing

manipulation of facts-taxes withheld, black hole for emails were not provided. 3) Could this cause the allowance of false pretext reasons for a Legitimate Business Reason could be detrimental to all 7 of Eaton's Counts, thus diminishing our rights as citizens through a manipulation of words within the documents presented by the lower Courts.

3. In determining whether Ninth Circuit should have evaluated "abuse of Discretion" *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003), the Recusal of Judge Watters per *F.J. Hanshaw Enters. v. Emerald River Dev. Inc.*, 244 F.3d 1128, 1145 (9th Cir. 2001), 28 U.S.C. § 455(a), which states: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned", and the Supreme Court delineated the standards where recusal and disqualification would be appropriate in *Liteky v. United States*, 510 U.S. 540 (1994). The 9th Circuit did not address this question directly. Is there pro se litigant bias when Justices make statements within an order (*e.g. Eaton v. Montana Silversmith* (2022) Doc. 132) which is incorrect and misrepresents the brief provided by the litigant (*Id.* Doc. 129).

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Robert A. Eaton

Respondent and Defendant-Appellee Below

- Montana Silversmiths

LIST OF PROCEEDINGS

U.S. Court Of Appeals for the Ninth Circuit
No. 22-35480
Robert Eaton v. Montana Silversmiths
Date of Final Judgment: October 31, 2023
Date of Rehearing Denial: January 4, 2024

U.S. District Court for the District of Montana Billings Division
No. CV-18-65-BLG-SPW
Eaton v. Montana Silversmiths
Date of Final Judgment: May 25, 2022

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert A. Eaton, pro se litigant respectfully petitions this Court for writ of certiorari to be issued to review the judgments below.

OPINIONS BELOW

The decision by 9th Circuit Court of Appeals in *Robert Eaton v. Montana Silversmiths*, is included in Appendix ("App") at 1a, is dated October 31st, 2023. The Memorandum Disposition (Mark J. Bennett, Jennifer Sung and Holly A. Thomas) which Affirmed in Part, Reversed in Part, and Remanded the decision of the District Court of Montana (App.15a); Specifically, with reference to: 1) affirming judgments; 2) Not answering some questions of law Eaton presented at Appellate level.

JURISDICTION

The 9th Circuit Court of Appeals issued a denial of rehearing en banc on January 4th, 2024. (App.92a). Mr. Eaton invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for writ of certiorari within ninety days, in order to preserve Eaton's rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IX

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. Thus, in simple terms, the rights of the citizens of the United States of America shall be protected whether these rights are listed or not. The rights which are not listed may provide an opportunity for interpretation.

U.S. Const. amend. X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition, this petition involves the following:

- Title VII of Civil Rights Act of 1964
- WDEA-Wrongful Discharge from Employment Act (WDEA) is an Act enacted by the State of Montana in 1987 which statutorily modifies employment at-will rule.
- ADAA, ADEA
- Family Medical Leave Act of 1993.

STATEMENT OF THE CASE

Eaton's whole case the totality of circumstances, comes to the Supreme Court of the United States of America as a multifaceted employment discrimination claim, six years into litigation. Eaton's original case, *Eaton v. Montana Silversmiths* (2022), included seven counts, Wrongful termination–WDEA, retaliation, ADEA, ADAA Discrimination, Hostile Work Environment, Defamation, and FMLA with breach of contract. Eaton, worked privately as a metalsmith 15+ years, with a Metalsmithing Degree from MSU-Bozeman. Montana Silversmiths hired Eaton as a designer/ engraver in the Apprentice Program in May, 2013 with VP of operations at the time, Kevin Johnson telling Eaton he would be trained on design, because of the ideas Eaton brought forth to the company during his interview. Kevin Johnson emailed Steve Anderson December 5, 2013, discussing getting Eaton a computer. (*Montana Silversmiths* (2022) Doc. 105-6 at 39) for design. Eaton's pay (higher than others, HR stating due to Eaton's previous training, at $23.11/hr.)/hours

were negotiated as part of the hiring process. According to Montana Silversmith's Job Description (*Id.* Doc. 105-7 at 56-57), Eaton's duties at MTS included engraving training on production products, hand engraving master dies, preparing/repairing nickel dies. Eaton's direct supervisor, Justin Deacon, confirmed in his deposition Eaton was capable of all duties requested of him (*Id.* (2022) Doc. 96-21 at 18-20). Additionally, in Eaton's 2014 performance review put in Eaton's permanent file, was written, "Robert is in our engraver apprentice program. Within the last 6 weeks he has started engraving buckles from start to finish with acceptable results. He also has become a proficient sawer." (*Id.* Doc. 105-6 at 37-38) In Eaton's 2015 Performance Review, comments included "Robert is a very hard worker . . . works all day every day".

Eaton underwent repetitive use of arms, hands and fingers. On November 24, 2015 (*Id.* Doc. 105-9 at 57-64), Colette Schlehuber, HR, on Eaton's behalf, opened a worker's compensation claim for Eaton's hand issues with date of injury as September 11, 2015. On December 13th, 2015, Dr. Bellville diagnosed Eaton, age 41, with "probable right carpal tunnel syndrome, left carpal tunnel syndrome, tenosynovitis of both hands, wrists, and possible right lateral epicondylitis" which was deemed to be directly related to his heavy physical demand at work. Dr. Bellville presented in his evaluation with written instructions to include, "carpal tunnel evaluation with need for evaluation of surgery with orthopedic surgeon" as well as "may continue to work, but with a variety of tasks rather than tasks with continuously holding material in his left hand, engraving those materials with a hand-held tool in his right hand. Whichever else could be available and not

involve such repetitive tasks as forceful gripping, grasping, pushing, and so forth . . . discussed with . . . employer"[1] This evaluation stated Eaton was NOT (MMI) "Maximum Medical Improvement"[2]. Eaton was never told by MTS, worker's compensation, or the evaluating physician that Eaton needed an altered working environment for his health. Eaton worked in a room with 3 other engravers and his direct supervisor. In June, 2015, Eaton still had not been trained on design. On June 16, 2015 Colette/HR sent an email to David Cruz and Justin outlining how Eaton had stopped by her office and how Eaton said he would love an opportunity to be trained in design. This email impressed Colette's positive view of Eaton's extensive talents, requesting Eaton be trained in design (*Montana Silversmiths* (2022) Doc. 105-7 at 4). David had responded to the email showing interest in doing this as well. On July 6th, 2015, the computer person for MTS, Pauletta Kluth, sent an email to HR, Matt Weinmann (VP of Operations) outlining her meeting with Eaton and the steps she was taking to get Eaton trained on the computer programs needed for design. (*Id.* Doc. 105-9 at 1).

There were several situations where Eaton had witnessed sexual/racial harassment by his direct

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[1] Eaton was unaware of these recommendations due to not being told. He only found out when requesting these through worker's compensation requests and receiving these records on January 4, 2018, after he was laid off. (*Id.* (2022) Doc. 105-9 at 65)

[2] Medical notes (Doc. 105-9 at 58-88; Doc 114-1 at 13, 14, 89 *Montana Silversmith* (2023)9th Cir. Exhibit 4-J). Medical Notes Showing Eaton had hand issues since 2015, with MD requested accommodations, back issues were documented as history of spinal fusion.

supervisor, Justin from 2013-2015. Eaton was under the obligation to comply with MTS handbook "Montana Silversmiths Handbook" (*Id.* Doc. 105-8 at 7-8) which outlines MTS Definitions of Harassment along with examples of sexual harassment to include:

> "Sexual jokes, innuendo; verbal abuse of a sexual nature, commentary about an individual's body, sexual prowess or sexual deficiencies; leering, whistling or touching; insulting or obscene comments . . . . otherwise adversely affects an individual's employment opportunities". The Handbook outlined the complaint process.[3] This stated Eaton could go to any member of management about his concerns. MTS handbook also states, "Any reported allegations of harassment, discrimination or retaliation will be investigated promptly." Eaton verbalized his concerns first in a meeting with HR. Eaton's concerns were memorialized in a memo written by HR, in a meeting with Eaton on July 29th, 2015 (*Id.* Doc. 105-7 at 56-57) which included the following documented statements:
>
> - (Justin). has said, "I can't train you, that will cut me and my family's throat, I'm making this a family business Travis (Justin's son) is the future and everyone here is behind Travis"

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[3] MTS handbook states "Individuals . . . . who believe they have witnessed such conduct must discuss their concerns with their immediate supervisor, Human resources or any member of management"

- Justin avoids him (Eaton), never addresses him or talks to him, talks to everyone else when he comes in the room.
- Robert (Eaton) has been promised to learn the computer by Kevin and Curt, never being given the opportunity.
- Robert has documented sexual harassment towards women employees, inappropriately touching . . .
- Justin threatened Robert, "if you push too hard, you'll get fired just like Kendall".
- Robert fears for his job because when Justin hears of his complaints he will be retaliated against.

Eaton was 'red flagged' on MTS Census of Active Employees, which was a piece of evidence produced by both Eaton and Defendants in *Eaton v. Montana Silversmiths* (2022) First Summary Judgment. (Doc. 105-13 at 23; Doc. 96-9 at 10 (Eaton's complaints dated in red). In this 5-page spreadsheet of all employees at MTS, Eaton is the ONLY employee who had expressed his overt concerns of sexual/racial discrimination. There was a column in this spreadsheet listing "Complaints of discrimination" with Eaton having complaints in July, 2015 and April, 2017. This shows potentiality of Eaton being targeted for his complaints.

After Eaton's initial complaint of witnessing sexual/racial harassment, his opportunities for advancement with regards to being trained in design were repudiated. Colette/HR, even to her own accord, did

not investigate Eaton's claims/concerns.[4] Eaton continued to observe sexual/racial harassment from 2015-2017, going to his supervisor's director, the CEO, David Cruz, VP Matt Weinman (before Lance), Lance Neirby (current VP of Operations) noted in Eaton's affidavit. In January, 2017, After Eaton discussed his ongoing concerns with sexual/racial discrimination with David, Product Manager, David had said he was going to tell Lance/VP. The next week, they told Eaton he had to change his schedule, which was negotiated for Eaton to pick up his children.

On April 4, 2017 Eaton met with Justin, his direct supervisor for his yearly performance evaluation (PEv.1), which was put in his permanent personnel file (App. 27a). Eaton was provided low marks on his performance evaluation[5], with his direct Supervisor,

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[4] (*Montana Silversmiths (2022)*; Doc. 105-7 at 38-39; MTS 49-50) On August 7, 2015 Colette has documentation about a meeting with Robert, stating they are investigating his claims. However, in Colette's deposition (Doc. 96-19 at 19:7) she reported not investigating, which goes against their personnel policy.

[5] According to *Montana Silversmiths (2022)*, Document 96-9 at 1, labeled "Montana Silversmith Cost Efficiencies and restructuring Plan 2016" #. Within this plan, subset 1(d) states "9/1/16 we put in a hiring freeze on the manufacturing side . . . made the decision not to rehire any exiting employees#; 1(e) of this list states, "October, 2016-New VP Operations was hired .. was tasked with manufacturing overview of operations, departments, staffing, job responsibilities, and performance evaluations to determine cost cutting initiatives." This plan stated 4(a-e), The following factors were utilized to determine which supervisor, which planner would be eliminated from staff: a. business needs, b. skill/knowledge for employees (cross trained process knowledge, etc./value to department success, c. performance evaluations, d. Disciplinary actions on file, e. Employment status-part time/temporary reduced first., f. Seniority. Eaton was unaware of this plan.

Justin, stating in his deposition (App.11a), how Lance had made him put those marks low and made Deacon write two phrases in Eaton's evaluation, including, (1)"Sidesteps proper reporting of concerns outside management hierarchy" "In regards to resolves conflict in an appropriate manner'–instead of initiating conversation with Justin (Robert's direct manager) approaches David or Colette about his view/concerns with Justin's leadership style-creates feeling of animosity between Robert and Justin) (*Id. See* 105-10 at 38), (2) "At times creates unwelcoming environment in regards to Travis (Justin's son), while at the same time interacting well with Rick and Brian" (*Eaton v. Montana Silversmith* 2022 Doc. 105-10 at 37#3).

These comments/scores were in direct opposition to the comments/scores within Eaton's performance evaluation in 2016, which stated, "Always in good spirits and easy to get along with". In Eaton's performance evaluation on April 4th, 2017, Eaton was also found to significantly exceed expectations in the area of being a "[s]elf starter, shows resourcefulness,' for which, with Eaton's defense in his 2016 Performance Evaluation, Justin commented Eaton was a 'very hard worker, always on task." (*Id* at 8; 105-10 at 36). Eaton disputes the negative ratings were warranted. He points out Deacon did not want to include the comments relative to Travis. (App.11a) It was included at the insistence of Lance, MTS's Vice President of Operations-new hire who stated in his deposition he did NOT know Montana was not an 'at will' State (*See* Doc. 105-4 at 43; 28:17-21; at 44:29:7-17; at 53:65:19-66:22) (*Id. See* Doc. 96-21 at 65:19-66:22).

The criticism of Eaton "sidestepping" proper reporting channels appears to be contrary to Montana

Silversmiths' employee handbook. The 2015 Employee Handbook directs individuals with a complaint to 'discuss their concerns with their immediate supervisor, Human Resources or any member of management" (Doc. 105-8 at 8). The handbook also "has a policy that encourages any employee to speak to their supervisor, manager or human resource personnel at any time for any reason." (*Id.* at 21).

Eaton met with Neirby later in the evening on April 4th, 2017 to discuss Eaton's evaluation at which time Eaton's issues of sexual/racial harassment in the workplace were reiterated/ commemorated in an email Lance sent to Colette that evening where Eaton had said he talked to the EEOC and was going to get a lawyer because no one was listening. (*Id.* Docs. 41 at ¶ 8; 96-4 at 2; 105-10 at 39). (*See Montana Silversmiths* (2023) 9th Cir. Court of Appeals Exhibit 1-E, F).

The next morning, April 5, Neirby, Deacon, and Eaton met to discuss the performance review and the issues Eaton raised the previous day. (Doc. 105 at ¶ 15). During the meeting, after Neirby had Eaton bring up his concerns with sexual harassment and racial discrimination by Eaton to Justin, Neirby, in Peer Evaluation Volume 2 (PEv2) changed the language of the evaluation in the category of '[i]nteraction with coworkers" from focusing on 'Travis' to state 'A [ch]allenging relationship exists between employee and direct supervisor." (Doc. 96-3 at 9). Thus, the criticism shifted from co-employee to Eaton's relationship with his supervisor. The rating for that category remained at the lowest possible rating, which was commemorated in the April 5th email from Lance to Collette/HR. The revised performance evaluation also deleted a comment in the original evaluation, which

read "Robert will not acknowledge Travis's existence" (Doc. 96-3 at 8, 10). As well as deleting the comment "While getting along with Rick and Brian" (The other workers in the department).

Eaton went back to his desk, following the meeting. Lance stayed behind with Deacon in his office. Lance went to Eaton later and sent him home with pay. Eaton met with Colette/HR following the meeting. Eaton relayed to HR he felt as though he was being retaliated against for these complaints, and stated he was going to go home and call his lawyer and the EEOC. This was documented in a memo typed by Colette/HR on April 5, 2017 (*Id.* Doc. 96-5) Colette advised Eaton he was not being retaliated against, and instead fashioned his temporary dismissal as "a time for adjustment and time for him to think about how we all need to work together going forward." *Id.*

Eaton went home on April 5 as directed and composed a "grievance complaint." (*Id.* Docs. 96-6; 105-7 at 5-8) He hand-delivered the grievance on April 10, the day he returned to work after being sent home (*Id.* Doc. 105 at ¶ 27.)

The grievance detailed Eaton's view of the April 5th meeting, including the changes to his performance evaluation, being sent home, sexual/ racial harassment, nepotism, hostile work environment, retaliation and preferential treatment between Justin and Travis Deacon (initially a high schooler), and his belief the criticism for sidestepping proper reporting channels was contrary to the process laid out in the employee handbook (*Id.* Doc. 96-6 at 1-2) with regards to Eaton bringing forth his concerns of sexual and racial harassment.

Eight days later, after Eaton submitted his grievance, Neirby then sent an email to Colette/HR on April 13 "to further document points of concern during the discussion between Robert, [Deacon] and myself outlined in my Wednesday April 5th email."[6] (*Id.* Docs 96-4 at 1; 105-10 at 41.) Neirby added negative, demoralizing characterizations to the account of the April 5th meeting with Eaton. In Lance Neirby's April 13th email[7], noted 3 days after Eaton's grievance. The same day, MTS hired Associated Employers of Montana ("AEM") to investigate the allegations contained in Eaton's grievance letter. (*Id.* Docs. 41 at ¶ 13; 105 at ¶ 28).

After returning to work on April 10th, 2017, Eaton and Colette/HR had a meeting discussing benefits while on leave, however, Colette reported FMLA leave and work comp cannot run congruent, which is in direct contrast to what is stated in MTS personnel policy/handbook. Eaton took scheduled medical leave on April 14, 2017 for carpal tunnel release surgery for the related injury outlined earlier. (Docs. 41 at ¶ 14; 105 at ¶ 42) Colette/HR and Eaton Subsequently exchanged communications regarding his return-to-work post-surgery. These communications included Eaton requesting information for short term disability and FMLA leave requests, which Eaton was denied[8].

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[6] Probable in anticipation of litigation

[7] *Montana Silversmiths* (2022) (Docs 96-4 at 1; 105-10 at 41.)

[8] This is in direct contradictions to MTS Employee Handbook. *Montana Silversmiths (2022)* Doc. 105-8 at 29) under "Paid and Unpaid Leave", the personnel policy, states, ". . . , including workers' compensation leave (to the extent it qualifies), will be designated as FMLA leave and will run concurrently with FMLA."

On June 1, 2017 Colette/HR memorialized a phone call with Eaton, stating Eaton's physician updated his medical status, extending his leave until June 12. Eaton, again brought up short term disability and FMLA leave, which Colette denied. (*Id.* Doc. 105-12 at 8,9). Colette denied Eaton would receive any other benefits other than his Worker's Compensation Benefits, running "FMLA interference". State worker's compensation can't run concurrent with FMLA and HR never gave an eligibility notice.

On June 9, MTS issued a letter to Eaton regarding his return to work and AEM's report of his grievances (Doc. 96 at ¶ 29). Colette/HR told Eaton he could not return to work because the AEM investigation and his return to work (from his occupational injury) run 'hand in hand". Colette said in her deposition she was in charge of maintaining contact with Work Comp for return to work and appeared to be keeping Eaton from returning to work. Colette was asking Worker's compensation for the medical status form, and said she would get this. Prior to his return to work, Eaton's employment with MTS was terminated on June 15, 2017. MTS contends Eaton's termination was part of the third phase of the reduction-in-force slated for June 2017. (*Id.* at ¶ 51-52). MTS argues that underpinning the restructuring and cost-savings plan was the anticipated loss of sponsorship agreement with the American Quarter Horse Association ("AQHA")[9] Eaton rejects this as an underpinning

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[9] AQHA emails-these emails are between employees at AQHA and Montana Silversmiths, discussing how AQHA representatives are planning a trip to Montana to meet with MTS and infer they want to make their partnership "stronger",–, these emails were dated June 13th, two days before Eaton was discharged, thus MTS

assumption, stating MTS was unaware of this as an issue until September, 2017 three months after his layoff. (*Id.*) Additionally, Eaton requested MTS taxes multiple times, stating this would show if there was financial justification for laying Eaton off, which MTS's attorneys refuse to provide Eaton and the lower courts will not enforce and denied Eaton's motion to compel this evidence (*Id.* Doc. 98; App.62a)

Among the criteria for termination in manufacturing were skills and cross-training, performance evaluations, disciplinary actions, and value for future business. (*Id.* at Doc. 105 at ¶ 51.) Montana Silversmiths state Eaton "comparatively lacked internal cross training for different tasks and positions . . . . compared to other members of the Design/Engraving department," and Eaton "only cross trained in the "Design Fab' areas of 'sawing'[10] and 'stone setting', as well as 'Custom Buckle Engraving'." (Doc. 96 at ¶ 53) In support, MTS proffers the cross-training matrix, which shows Eaton with the lowest score of the staff. (Doc. 96-9 at 13). Eaton disputes this assertion with the deposition of Justin, who acknowledged Eaton also "did some . . . stippling' and 'soldering' and Eaton also proffers his degree in metalsmithing to support his qualifications (Doc. 105 at ¶ 53; *See* Doc. 96-21 at 6: 19:15-18, 20:4-8). Additionally, in Eaton's 2014 Performance Evaluation, he was noted to be a proficient

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was not losing a contract. (*Montana Silversmiths* (2023) 9th Cir. Exhibit 4-I; *Montana Silversmiths* (2022) Doc. 105-3 at 31; Doc. 105-12 at 14-20; Doc. 105-7 at 14.

[10] MTS and counsel denied Eaton had this and 2 other proficiencies not marked on the matrix MTS stated they used for laying off until Eaton proved through documentations provided in discovery and depositions.

'sawer". Eaton further contends the matrix is not accurate.[11]

Eaton subsequently filed a complaint with the Montana Human rights Bureau (MHRB) on July 12, 2017 alleging retaliation. (*Id.* at ¶ 67; *see* Doc. 96-12) modeled after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), against Montana Silversmiths, Inc. (MTS). Eaton amended his complaint on November 12, 2017 adding claims of age and disability discrimination (*Id*; *see* Doc. 96-13). MHRB issued its report on January 8, 2018. On March 20, 2018, the EEOC adopted the MHRB findings. Eaton then filed the instant suit on April 4, 2018. Eaton contended in the lawsuit MTS retaliated against Eaton by lowering his performance evaluation marks on the April 4th, 2017 evaluation (which was used to lay off Eaton), and by sending him home after the April 5th,[12] 2017 meeting, Eaton claims MTS retaliated against him after he engaged in a protected activity. This included

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[11] Again, there were references to the documentation supporting Eaton's argument of invalid matrix, however, due to clerical error the judge could not see this. However, if the Judge was confused/not sure, the hearing Eaton requested could have easily cleared up any confusions, even though Objection Document 114 which was stricken, an interlocutory appeal or request for reconsideration, which were all denied.

[12] (*Id.* Doc. 105-10 at 39-40) direct evidence, referred to in Doc. 103,104,105-an email from Lance Neirby, VP, to HR, stating Eaton told Lance about sexual/racial harassment, Eaton was worried Justin was trying to make Eaton look Violent. In Doc. 105-10 at 42 Lance email on April 5th, he states Eaton leveled same complaints as night before (*i.e.* sexual/racial harassment), as Lance decided to change remarks about not getting along with Travis due to not speaking with Eaton first about this, but kept the numbers the same.

making complaints of sexual and racial harassment by his direct supervisor, through providing low marks and negative comments on his annual evaluation.

Eaton also claims MTS retaliated against him for filing a grievance regarding his harassment complaints by terminating his employment in June 2017 as part of a company-wide layoff while Eaton was on workers' compensation leave, with no allowance of FMLA, and using Eaton's performance evaluation for this justification. Eaton found out during the discovery process, obtaining the files from the MHRB, MTS's former lawyer, Jessica Fehr, former Moulton-Bellingham lawyer now Judge for 13th District Court in Yellowstone County (Billings, Montana), stated in her brief to MHRB, "MTS will willingly make the statements from the investigation available to the HRB, but on the condition, they are not revealed to Mr. Eaton or his counsel"[13] *Id.*, Doc. 105 attachment 14 at 74. This was referencing the AEM investigation whom MTS hired to investigate Eaton's claims, on April 14th, 2017 following Eaton's grievance on April 10, 2017. Eaton found later Justin Deacon (Eaton's supervisor) and David Cruz (Justin's Supervisor) stated in their AEM investigations they wanted Eaton gone (referenced in footnote 20).

In addition, Eaton defended two separate summary judgments put forth by the opposing counsel. Within these summary judgements were over 882 pages of

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[13] There is a link between the law firm representing the Respondents, Moulton and Bellingham (MB), who are linked to the 9th Circuit Court of Appeals via Chief Justice Sidney Thomas and now his predecessor, Johnston both having served on the 9th Circuit Court of Appeals.

admissible/factual evidence from within the AEM investigations, MHRB, Facebook account documentation (showing the company trying to hire during the supposed hiring freeze), medical records, documentation and memos put for by employees of MTS within the place of business, Depositions by Lance Neirby, Colette Schlehuber, Justin Deacon, Rick Waltner, Amy Braley, and Curt Robbins, (with Eaton's hand written notes corroborating all that was said) and Eaton's affidavit. However, due to Clerical errors with inputting Eaton's evidence, including and unscanned reference page in Eaton's first Summary Judgment Response (*Id.* Doc 105-1) to Eaton's attachments in his Second Summary Judgment Response (Doc. 142), where Eaton's labeled attachments were scanned into the main document-even though referenced, some items were not seen. Also, First Judgment was labeled, "Magistrate Judge and Order" (App.25a), which the court was allowed to fix. Eaton provided a descriptive response "Objections to Magistrate Judges Order" asking the court to have a chance to clear up some of Eaton's mistakes (Doc. 114, 114-1), which the opposing counsel was allowed to strike, without allowance for Eaton to clarify. Eaton had provided a timely request for hearing to clarify any confusion. Instead, the judge only allowed defendants second summary judgment[14] for 'judicial economy', and would not allow Eaton "request for reconsideration, request for interlocutory appeal, motion to compel taxes, request for hearing".

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[14] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) "If there are any genuine factual issues that properly can be resolved in favor of either party, then summary judgment may not be granted." MTS was allowed second summary judgment over a year after end of discovery.

Instead the lower court dismissed all counts, without viewing any of the factual evidence or having an evidentiary hearing.[15] In Document 129 of *Eaton v. Montana Silversmiths* (2022), Eaton contended MTS's counsel wanted another summary judgment over a year after discovery and the first summary judgment request on 12/8/20, without showing of excusable neglect under the Pioneer factors (*see Rosario-Diaz v. Gonzalez,* 140 F.3d at 313 1st Cir. 1998) and if allowed "should be reviewed for abuse of discretion" including danger of prejudice."

Eaton appealed all decisions, which the 9th Circuit Court of Appeals. As summarized in Law 360 Review (Patrick Hoff, 11/1/23), The Ninth Circuit Court of Appeals, in a unanimous panel decision, reversed Eaton's FMLA claim against MTS on October 31, 2023, stating, "But the district court failed to construe Eaton's pro se pleadings "liberally," *Draper v. Rosario,* 836 F.3d 1072, 1080 (9th Cir. 2016), and erred in its

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[15] The Due Process Clause of the Fourteenth Amendment guarantees every litigant the right "to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush co.*, (1982). "This right must include the right to present evidence necessary to establish a constitutional claim . . . .yet state rules of administrative procedure frequently trap litigants, denying this due process right by placing them in a Catch-22: Constitutional claims can only be raised in court if the administrative process has been exhausted, but suits appealed from an administrative process can only rely on the administrative record . . . urges the Court to end this trap and establish baseline standards for when a state must allow evidentiary supplementation of an administrative records. When citizen's rights are violated by the decisions of an agency, that person must have a genuine opportunity to present facts to a neutral decision-maker to show the agency acted unconstitutionally. Thomas A. Berry, Cato Institute, *The Right to Present Evidence Is Fundamental* (January 11, 2021).

narrow view of FMLA rights. In addition, the panel also reversed summary judgment on a small portion of Eaton's Title VII claim of retaliation with regards to Eaton's first performance evaluation (PE-V1), ruling jury is required secondary to Eaton having provided sufficient evidence of triable issue of fact as to whether MTS proffered business justification for PE V.1 were pretextual, considering Eaton's personal knowledge affidavit stating he had continued to observe instances of harassment, and he repeatedly contacted other 'higher ups' in the company about it to no avail form 2015 to 2017. The 9th Circuit Court of Appeals affirmed the granting of Summary Judgment to MTS on Eaton's claims under WDEA, the ADAA, and the ADEA. Thus, Eaton's counts at the 9th Circuit Court of Appeals were AFFIRMED in part, REVERSED in part, and REMANDED.

In detailed analysis, Eaton's rights were waived without knowledge in the footnotes of the case. (*Robert Eaton v. Montana Silversmiths* (2023) The 9th Circuit Court of appeals solicited two Waivers of Eaton's rights. This limits Eaton's ability to put forth the warranted evidence to the jury in order to be provided an impartial trial to prove his case. Additionally, the 9th Circuit erred in not addressing Eaton's question(s) regarding whether the District Court erred on not allowing Eaton an evidentiary Hearing to clear up confusions with respect to MTSs claim of legitimate business reasons (Doc. 125) and all counts as Eaton requested, nor did they answer Eaton's question regarding MTS not providing and lower courts not allowing motion to compel taxes. These answers would have changed the outcome of Eaton's case.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS HAVE ERRED IN THE OPINIONS BELOW WHICH ARE GRIEVOUS, CAN/DID CHANGE THE OUTCOME OF EATON'S CASE, AND SHOULD BE RECTIFIED.

Would allowing individual waiver of Constitutional rights harm the interest of individuals other than the litigant involved in the case at hand, harm the interests of the government in terms of its repudiation and credibility or potential for future effectiveness, and/or cause long term effects on the stability of our constitutional system?

According to *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1102 (9th Cir. 2005) (quoting *United States v. Hamilton*, 391 F.3d 1066, 1071 (9th Cir. 2004)). "Waiver is the intentional relinquishment or abandonment of a known right." With, specific to one's Constitutional Rights, "Constitutional rights may ordinarily be waived [only] if it can be established by clear and convincing evidence the waiver is voluntary, knowing, and intelligent." *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997) (alteration in original) (quoting *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991)). "Waivers of Constitutional rights not only MUST BE voluntary, but MUST BE knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences" *Brady v. United States*, 397 U.S. 742, 748 (1970) (citing *Brookhart v. Janis*, 384 U.S.1 (1966) *See also Scririo v. Landrigan*, 550 U.S. 465, 479 (2007); *Tacon v. Arizona*, 410 U.S. 351, 355 (1973); *Boykin v. Alabama*,

395 U.S. 238, 242 (1969). Above Cited in Simona Grossi, *The Waiver of Constitutional Rights*, 60 HOUS. L. REV. 1021 (2023). Eaton did not knowingly waive any of his rights.

The Appellate court stated Eaton "Appeared" to waive his right regarding Pv.2 being retaliatory (App11.a footnote). Eaton never 'knowingly' waived his right. Additionally, in App.5a footnote, the 9th circuit Court of appeals states "Eaton argues the district court erred in finding there was a legitimate business reason to lay him off-with footnote stating "Eaton abandoned his challenge to whether MTS complied with its personnel policy in connection with his termination (referencing *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992)."

Within Eaton's brief at the Appellate level, Eaton's main arguments and supplemental arguments continuously referred to MTS's Handbook *i.e.*, personnel policies. In fact, these policies are consistent even through his briefs at the lower courts level. Therefore, it does not stand to reason he knowingly waived any rights in this manner. Eaton links the personnel policies to the retaliation and lay off extensively. One excerpt state, "The handbook also 'has a policy encouraging any employee to speak to their supervisor, manager or human resource personnel at any time for any reason.' (*Id.* at 21)." Eaton describes how MTS disregards this and gives him a low score on his 2017 performance evaluation, saying he went to HR instead of Justin regarding his concerns for sexual/ racial harassment of Justin. This gave him a low score on his performance evaluation, which Lance VP was hired for, thus throwing him into the layoff. It is a totality of the case, sequential steps taken with disregard to

their policies allowing them to put Eaton into a lay off because of his age, sexual/racial harassment complaints about direct supervisor(s) who said after Eaton's grievance he wanted Eaton gone, a plan to hire another engraver, and Eaton's disabilities.

The 9th Circuit found the lower courts in this case didn't discuss PEv1 as being retaliatory, but instead focused on the nondiscriminatory reason for the change from PEv1 to PEv2[16] and whether this was pretextual, with a footnote stating "Eaton's briefs do not appear to argue the change made in PE v. 2 was retaliatory, and thus claim is waived. . . ." (App.11a).

First, the lower courts did not overtly separate the Performance evaluations (App.25-86a). Eaton maintained throughout the case systematic retaliation. The whole case is built on the retaliation claims beginning with PEv1 and maintained through PEv2. Thus, Eaton, in fact, has described throughout several of his briefs how the case as a whole shows to be retaliatory. Eaton discussed this in detail in his briefs (*See Montana Silversmith* (2023) DkEntry 2 & 13) and further describes this in his petition for rehearing (*Id.*, DkEntry 19). A great many courts have affirmed that where performance improvement plans and negative performance reviews precede an eventual termination, they may constitute adverse actions. *Winston v. Verizon Servs. Corp.*, 633 F.Supp.2d 42, 51 (S.D.N.Y. 2009); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377 (4th Cir. 2004).[17] Although

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[16] Changes made from PeV1 to PeV2 were completed within hours of each other (App. 25a).

[17] Note in Eaton's count for retaliation, his performance evaluation was in the criteria of selection for employees to be laid off.

the 9th Circuit and the lower courts agreed Eaton established a prima facie case showing retaliation (App.12a), including engaging in a protected activity, low marks on the performance evaluation, and a causal link, with the performance evaluation being in the criteria of selection for layoff. However, the 9th circuit and the lower courts disagree on the point of retaliatory behavior with PEv1 and/or PEv2. However, the 9th Circuit and the lower Courts are not looking at a pattern. When a pattern of discriminatory conduct is alleged, specific individual acts should be viewed as a whole, rather than as isolated incidents. *Ross v. Douglas Canty.*, 234 F.3d 391, 397 (8th Cir. 2000). Discriminatory actions should not be viewed individually, with each act itself required to constitute an "adverse employment action," but rather the court should determine whether the actions, viewed as a whole, were discriminatory and connected to one another. *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1998). State and federal courts recognize "adverse employment actions" include actions short of those causing economic disadvantage. The United States Supreme Court has recognized "adverse actions" are not limited to those actions which are economic or tangible. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998)." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Circuit 1992) (citations omitted).

The Eleventh Circuit Court confers an undeserved negative job evaluation or written reprimand may be actionable in a retaliation claim when it is viewed with other actions under a "totality of the circumstances"[18] approach. Generally, a "poor performance

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[18] In Lance's April 5th email, he specifically noted he changed the comments because of not speaking to Eaton but kept the numbers the

evaluation is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the term or conditions of the recipient's employment," Which was exactly what Lance did, in intervening with Eaton's performance evaluation, lowering his marks, when Eaton confronted him about this, He made Eaton confront his Direct supervisor about his concerns with sexual/racial harassment in an effort to make Eaton look violent, maintaining a reduction in force, then ultimately laying Eaton off within a supposed companywide layoff. Lance's plan is supported in Lance's Performance evaluation of Justin in April, 2017, where he wrote, "Create a selection process for the next engraving candidate and implement by July"[19], implemented two weeks after laying

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same, showing in PeV2 there was retaliation and it was going to be used to detrimentally alter the terms and conditions of Eaton's employment.

19 (Lance Dep 55:1-7; Curt Robbins Dep 47:11-23) *"Create selection process for next engraving candidate, implement new trainee program by July. (Dated 4/3/17)–same time as Eaton's performance evaluation. (Justin's performance evaluation by Lance)*

> Lance Deposition 56:4-7
>
> *(Q: Eaton in reference to Exhibit 17) Could you tell me what that means?*
>
> *(A) It means . . . we were going to create a selection process for the next engraving candidate and implement that program by July.*
>
> Curt Robbins Dep (47:11-23)-used to be a manager at MTS
>
> *(A: Curt Robbins) Creates a selection process for the next engraving candidate. Implement a new training program by July . . . . engraving is a vital part of Montana Silversmiths business . . . to sustain that level of quality . . . they-are continually looking for candidates*

Eaton off. This evidence was never looked at.[20]

The Appeals Court stating Eaton waived any rights, disallow Eaton to produce the totality of circumstances at trial. This also shows the lower courts, the 9th Circuit Appeals and the 11th Circuit Court of Appeals are not in agreement how to treat a case like Eaton's, needing the Supreme Court to analyze this in detail. The rights which are not listed may provide an opportunity for interpretation (9th Amend.)

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and having a process available to get the proper candidates. . . . to solidify the long-term business. Also,–Curt Robbins Dep (47:11-23)-MTS is always looking for engravers (*Montana Silversmiths* (2023) referenced Doc. 105-4 AT 22; Exhibit 4-K; MTS 002287-002292). Colette/HR's, deposition stated they are always looking to hire new engravers These statements were shown and never addressed by any Court.

*2017 Performance Evaluation for Justin, *Montana Silversmith* Doc. 105-13 at 31 #56 in "areas to focus on" states, "*Create selection process for next engraving candidate, implement new trainee program by July.*

* Colette Deposition, (*Id.*, EXHIBIT 3-C) Stating several times, they are continually looking for and would onboard a designer/ engraver.

[20] Support that there was no reduction in workload, defended by Eaton's assessment of overtime following his layoff, is Justin's Spring 2019 performance evaluation in reference to 2018, a few months after Eaton was laid off, stating "I would like to see an increase in training, or adding quality employees, so we are evenly staffed so overtime is not necessary". Within this evaluation, MTS shows a plan to hire a new designer/ engraver (*Montana Silversmiths* (2023) 9th Cir. Court of Appeals Exhibit 4-A). Additionally, two other designer/engraver employees stated a younger engraver was hired briefly after Eaton was laid off, but didn't make the cut (*Id.* Exhibits 4-M and Exhibit 4-L)

II. EATON'S 14TH AMENDMENT RIGHTS REGARDING DUE PROCESS, FOR HIS QUESTIONS PROVIDED TO THE 9TH CIRCUIT COURT OF APPEALS NOT BEING ANSWERED. THIS INCLUDES: REQUEST FOR HEARING, ALLOWING REQUEST FOR RECONSIDERATION AFTER STRIKING DOCUMENT 114, DUE TO THE COURTS CLERICAL ERROR REGARDING THE TITLE OF DOCUMENT 113 ORDER "MAGISTRATE JUDGE AND ORDER", AND MOTION TO COMPEL TAXES.

The allowance of an evidentiary Hearing, especially when the Justice stated portions of Eaton's brief appeared "confusing" (*Id. (2022)* Doc. 157). If one of Eaton's claims included WDEA, which is in respect to the Montana Code Annotated law, in conjunction with Eaton's 10th Amendment Rights, which state, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people", indicate if Eaton is arguing a claim using the state "Montana Code Annotated", (WDEA regarding wrongful termination only a law in the state of Montana) MCA § 39-2-901 through 39-2-915), then the use of MCA 56 2(A): Per MCA 56 2(A) The right to a hearing is waived unless a party requests a hearing within 14 days after the time for filing a reply brief has expired right to a hearing would serve to be constitutional rightful for the litigant to be preferred within this legal standard and environment. Especially when the lower Courts would reference MCA in their evaluations and orders (App.77a), then they should uphold Eaton's allowance of a hearing.

The allowance of Request for Reconsideration or not striking Document 114, if the Court made mistakes

regarding putting in Eaton's Documents for both Summary Judgments and mistyping the first Summary Judgments "Magistrate and Order". (*Id.* (2022) Doc. 113). Denying Eaton attempts to be heard, and allowing MTS two summary judgments, the second over 1 year after the end of discovery allowed for piecemealing Eaton's case from the overall totality of circumstance.

App.13a states, "Eaton has presented sufficient evidence a reasonable juror could view MTS's proffered business justifications as pretextual." If the 9th Circuit court states Eaton proved how the evidence showed pretext, and Eaton was indeed laid off due to this performance evaluation, should this not show wrongful termination? Especially with the smoking gun evidence of Eaton's direct supervisor and David Cruz (Justin's supervisor) stating in the AEM investigation they wanted Eaton gone[21] with Eaton being laid off three days after MTS received results of the internal investigation reviewing Eaton's grievance/claims of MTS not following their own personnel policy?[22] And why

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[21] In Justin's AEM investigation dated April 25th, 2017 Justin stated "*I'll leave my career over this-I can't work with him.* (MTS 292)." (*Montana Silversmiths* (2023) 9th Cir. Court of Appeals Exhibit 4-G). In David's AEM investigation-April 25th, 2017, David stated, "*Honestly, I would rather he (Eaton) didn't work here anymore*" (*Id.* Exhibit4-H)-This" smoking gun" evidence they wanted Eaton gone. was never addressed by any court, but put in Eaton's briefs with the evidence.

[22] Eaton continuously refers to MTS's personnel policy/ handbook violations throughout, which were even regarded in the AEM investigation (*Id.* (2022) Doc. 105-7 at 27-27), stating, "In light of Montana Silversmiths' Nepotism policy, Justin and Travis Deacon's reporting relationship does appear to be in violation. Montana Silversmiths must realize this violation of their own policy puts not only the enforcement/accountability for the Nepotism policy in jeopardy, but would likely jeopardize ALL

would the Appeals court, in their Order, state Eaton has "abandoned his challenge to whether MTS complied with its personnel policy in connection with his termination" when this is what Eaton spoke about this in all of his briefs, but this statement may very well severely compromise Eaton's ability to tie MTS personnel policy to his termination, and tie Eaton's hands when going to trial at the lower court level.

Eaton's description of 'systematic retaliation' leading to retaliatory discharge is in fact detailed in his response to the Second Summary judgment (*Eaton v. Montana Silversmiths* Doc. 145 at 18-20) *See Reeves v. Sanderson Plumbing* (2000) 530 U.S. 133, 147, 120 S.Ct. 2097 where "Proving the employer's reason false becomes part of the greater enterprise of proving the real reason was intentional discrimination". *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 [32 Cal.Rptr.3d 436] "liberalized the test for determining what level of adverse action was sufficient to support a retaliation claim. In the process, it also stressed real-world considerations were controlling. In particular, *Yanowitz* held courts "need not . . . decide whether each alleged retaliatory act constitutes an adverse employment action in and of itself," but instead must evaluate whether this involves "totality of the circumstances" or "pattern of systematic retaliation" (*Id.* at 1055-1056.)". In looking at the totality of the case, it shows continual retaliation of Eaton for reporting violations in public policy with ongoing degradations, ending in downgrade performance evaluations. *Kirkland v. Cablevision Systems,* 760 F.3d 223 (2d Cir. 2014) illustrates some courts are unwilling to

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policies". Thus, showing possible violation of accountability/enforcement of ALL policies.

clothe negative performance reviews with presumption of legitimacy and recognize negative performance reviews are often the manufactured product of an employer's retaliatory animus. This shows material point of fact or law was overlooked in the decision. The Federal District Court of Montana and the Ninth Circuit Court of Appeals fragmented Eaton's case into pieces/parts further waiving Eaton's Rights at the appeals level as to tie Eaton's hands when going to trial instead of allowing the case to be looked at/ assessed as a whole with all the evidence provided.

Federal District Court of Montana did not develop standard for burden of proof with Regards to any of Eaton's claims, in App.25a, App.15a, when granting Defendants summary judgments for all Eaton's counts. Instead, the court described Eaton's briefs as "voluminous and confusing"[23], yet did not allow an evidentiary hearing to show there was no legitimate reason to lay Eaton off, specifically, all of Eaton's evidence shows there were pretextual reasons for Eaton's lay off, which was retaliation for bringing forth concerns of sexual/racial harassment of his direct supervisor, with additional contributing factors for laying Eaton off, including his age (age discrimination), his disability (ADA[24]), which is shown through

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[23] The Court stated "confusing" following the brief presented by the opposing counsel stating Eaton's brief was "confusing" (*Id.* Doc. 128 at 6).

[24] Eaton engaged in the interactive process-having conversations with HR June 9th, 2017 noted memo, regarding Eaton having difficulties with healing, and Eaton was not allowed short term disability, altered work hours, or FMLA.(Doc. 125-further describes Eaton's contentions and the differing appeals and supreme courts opinions and ADA vs ADAA issue.)

'totality of circumstances', showing tangible adverse actions by the performance evaluation being put in Eaton's personnel file, and being used as one of the defining factors for laying Eaton off. All information is provided in detail in *Eaton v. Montana Silversmiths* (2022) Docs. 105, 104, and in *Montana Silversmiths* (2023) DktEntry 2, 13 with Attachments 1-5. It should be noted in Justin's deposition, alone (*Id.* (2023) 9th Cir. Exhibit 4-C), relays Eaton was well cross-trained, Deacon was the only one who knew about cross training[25] and Deacon didn't update the cross-training matrix, which was used as a factor in the layoff. Also, MTS was trying to bring Justin's brother to inhouse engraving after Eaton was laid off (*Id.* Doc. 105-4 at 44 (Dep. page 31), Justin knew nothing about Eaton being fired and stated he never saw Steve Muellner/CEO memo (*Id.* (2022) Doc. 105-13 at 20; *See Montana Silversmiths* (2023) Exhibit 4-D) says MTS would tell the Supervisors who in their department they were going to fire.), Overtime (Doc. 105-4 at pg. 45) was excessive after Eaton's termination, showing a continued need for Eaton. All this evidence was put into the lower/Appeals Courts.

In *Weil v. Citizens Telecom Services. Co.* (9th Cir. Court of Appeals, April 29, 2019). The panel held, under Federal Rule of Evidence 801(d)(2)(D), hearsay[26] does not include statement offered against

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25 *Id.* Dep. 105-4 at pg. 41-42); 2) (Doc. 105 4 at 42-Deposition page 23)

26 *Id.* Doc. 104/105 Eaton provides extensive evidence with excerpts from depositions and emails made in the place of business at MTS by HR,VP as attachments to prove the excerpts were true, however, the lower courts took defendants word for it without evidence. For example, HR stated they had no evidence

a party, made by the party's employee on a matter within the scope of employee's employment, if the statement was made while the employee was still employed by that employer. The panel held, properly considering the statement as admissible evidence of pretext, the plaintiff met his burden on summary judgment. Eaton has proven he was in a protected class, he performed satisfactorily, showing his documentation during business hours were corroborated by other employees within MTS (*See Montana Silversmiths* (2022) Docs. 103, 104, 105, 142, 143-App.38a-39a)

Within *Weil*, the 9th Circuit court of appeals stated "Because we may only consider admissible evidence when reviewing a motion for summary judgment *Orr v. Bank of Am. NT&SA*, 285 F.3d 764, 773-75 (9th Cir., 2002), . . . within the Federal Rules of Evidence, neither MTS nor Judge Watters from the lower court, specified why they were not looking at the evidence provided by Eaton, only it was inadmissible or 'self-serving' (Eaton's Certified affidavit noted as 'self-serving', not acknowledged as evidence until the Appellate level). The word 'confusing' was used several times and the 9th Circuit said Watters was reviewing all evidence of record. It should be noted, in *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249 (1986)" At the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial". This is what Eaton reports Judge Watters did (App.25-63a) and when dismissing Eaton's claims, Watters was weighing

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to proffer they were losing the AQHA contract, money loss, and no evidence Eaton had any disciplinary actions even after the April 5th meeting, but the Courts took these statements as fact.

the evidence herself. Also reviewed in *Weil v. Citizens*, the court noted "in reviewing motions for summary judgment in employment discrimination contact a court must 'zealously guard an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses." *McGinest v. GTE Serv. Corp,* 360 F.3d at 1112 (2004). "Very little . . . evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive. . . . May suffice to raise a question that can only be resolved by a factfinder" *Schnidrig v. Columbia Mach, Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996).

III. THESE TRANSITIONS INTO ANOTHER QUESTION, NOT NOTABLY ANSWERED BY THE COURT OF APPEALS "ABUSE OF DISCRETION.[27]

Montana Silversmiths #3 page 28 DktEntry 2: The Court presented "Abuse of Discretion" Where they would not allow Eaton to clarify information within the First Summary Judgment, which was unclear to the court due to clerical error, by not scanning in one of Eaton's pages provided as Exhibit list. Eaton was unaware of this error until the Second Summary Judgment. Regardless, The Court would not allow Eaton to object to the Findings, clarify information

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[27] (App.19a) Watters stated "No evidence that the sexual harassment allegations were discussed . . . during the April 5th meeting", however, there is evidence in Lance's emails he said they were discussed, thus Watters in making judgments about evidence, or not looking at it, either being an abuse of discretion. *See Rabkin*, 350 F.3d 967, 977 (9th Cir. 2003) Eaton put in request for Recusal of Watters, Reply Brief on 2/14/24, now awaiting response.

(Doc. 114), but instead struck this document. They would not allow Eaton a hearing to clarify information provided, Request for Reconsideration, or Interlocutory Appeal. The court did not look at the evidence Eaton provided in his defense to not allow defendant's second summary judgment, nor Eaton's defense to the summary judgment.

Motion to Compel Taxes was not considered by the lower courts, with a request (*Id.* Doc 98). Eaton provided a detailed request, showing the history of his requests for MTS taxes during discovery, which the defendants had stated they would provide, but did not, refusing to provide after the end of discovery. Eaton referred to FRCP34(a), Rule 26(b)1, *United States v. Miracle Recreation Equip., Co.,* 118 F.R.D. 100, 104 (S.D, Iowa, 1987) where the law is well established income tax returns are not privileged from discovery, especially where plaintiff has a claim of punitive damage, or where punitive damage are expected, *Guardado,* 163, *Jabro*, 95 CA. App.4th at 758. However, in addition, with Eaton's case, these taxes are needed to prove whether or not MTS really needed to lay Eaton off, or if their finances were another illegitimate reason to lay off Eaton.

Here, the contentious lower court proceedings, followed by the 9th Circuit Court of appeals decision in Eaton's lower court cases rely upon a very important factor of great legal, national significance, "Systems checks and balances" created to prevent any branch of the Federal Government from becoming too powerful *Marbury v. Madison* 6 U.S. 137, 163-164 (1803). According to Chief Justice Marshall, every right has a remedy or it is no right at all. If all is reviewed by the upper courts is the Orders/Memorandums in the

lower courts, not the arguments by the litigants, then this gives freedom of the Judges to deliberately word their decisions as to make light their own views, even if these views pose prejudicial undertones, allow for suppression of evidence, and exclusion of Due Process Rights. Thus, if the Supreme Court were to assess this case with close scrutiny, they may find the lower Courts and 9th Circuit Court of appeals decisions directly conflict with the Supreme Court's decision in *Kramer v. Union Free Sch. Dist.* No. 15, 395 U.S. 621 (1969), the decision of other courts of appeal, *Brady v. Maryland*, 373 U.S. 83 (1963) regarding illegal suppression/ alteration of evidence and due process rights.

In *Kramer*, The Court found, "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams,* 193 U.S. 621, 193 U.S. 633 (1904); *Mason v. Missouri*, 179 U.S. 328, 179 U.S. 335 (1900), absent, of course, the discrimination which the Constitution condemns". However, with pro se litigants, who are becoming more prevalent in our system today, such as Eaton, an overwhelming amount of discrimination is being noted in the underpinning of the Court's decisions.

CONCLUSION

For the foregoing reasons, Mr. Eaton respectfully requests this Court issue writ of certiorari to review the judgment of the 9th Circuit Court of Appeals.

Respectfully submitted,

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