## APPENDIX TABLE OF CONTENTS

### OPINIONS AND ORDERS

Memorandum Opinion, U.S. Court of Appeals for the Ninth Circuit (October 31, 2023) ..... 1a

Order Granting Motion for Summary Judgment, U.S. District Court for the District of Montana (May 25, 2022) ..... 15a

Order Denying Motion to Certify, U.S. District Court for the District of Montana (February 1, 2022) ..... 22a

Order Granting Motion to Leave to File, U.S. District Court for the District of Montana (February 1, 2022) ..... 25a

Order Clarifying Prior Order and Denying Motion for Reconsideration, U.S. District Court for the District of Montana (November 1, 2021) ..... 28a

Summary Judgment Order, U.S. District Court for the District of Montana (September 28, 2021) ..... 31a

Order Adopting Findings and Recommendations in Full and Granting Motion to Dismiss, U.S. District Court for the District of Montana (March 1, 2021) ..... 70a

Magistrate Judge's Findings and Recommendations, U.S. District Court for the District of Montana (August 3, 2020) ..... 77a

## APPENDIX TABLE OF CONTENTS (Cont.)

### REHEARING ORDER

Order, Denying Petition for Rehearing,
U.S. Court of Appeals for the Ninth Circuit
(January 4, 2024) ..... 92a

### OTHER DOCUMENTS

Plaintiff's Motion to Extend Motion to Compel
Deadline (December 3, 2020) ..... 94a

Plaintiff's Opposition to Defendant's
Motion to Strike (October 26, 2021) ..... 103a

Plaintiff's Response/Defense to Defendant's
Doc 124 Opposition to Interlocutory Appeal
(October 26, 2021) ..... 106a

**MEMORANDUM* OPINION,
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
(OCTOBER 31, 2023)**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT A. EATON,

*Plaintiff-Appellant,*

v.

MONTANA SILVERSMITHS,

*Defendant-Appellee.*

No. 22-35480

D.C. No. 1:18-cv-00065-SPW

Appeal from the United States District Court
for the District of Montana
Susan P. Watters, District Judge, Presiding

Submitted October 31, 2023**

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: BENNETT, SUNG, and H.A. THOMAS, Circuit Judges.

## MEMORANDUM

Plaintiff Robert A. Eaton sued his former employer Defendant Montana Silversmiths ("MTS") alleging seven causes of action: (1) retaliation; (2) wrongful termination; (3) disability discrimination; (4) age discrimination; (5) hostile work environment; (6) defamation; and (7) breach of contract.[1] Eaton appeals the district court's judgment in favor of MTS.[2] Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we AFFIRM in part, REVERSE in part, and REMAND.

1. The district court incorrectly dismissed Eaton's claim under the Family and Medical Leave Act ("FMLA"). We review de novo a district court's grant

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[1] Eaton does not make any arguments on appeal about his defamation claim. He also does not make any arguments on appeal about his breach of contract claim apart from the argument under the Family and Medical Leave Act, which we address *infra*.

[2] Eaton's Notice of Appeal states that he is appealing from the district court's order dismissing his breach of contract claim; order partially granting MTS's motion for summary judgment; order granting MTS's second motion for summary judgment; and judgment in favor of MTS. In an addendum to his Notice of Appeal, Eaton states that he is also appealing the district court's order denying his motion for clarification and/or reconsideration. In his appellate briefing, Eaton also raises arguments concerning the district court's decision to grant MTS leave to file a second motion for summary judgment. We construe pro se pleadings "liberally," *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016), and therefore address each of Eaton's arguments.

of a motion to dismiss under Rule 12(b)(6), taking all allegations of material fact as true and construing them in the light most favorable to the nonmoving party. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021).

The district court found that Eaton did not allege a claim under the FMLA or for a wrongful denial of his FMLA leave. The district court held that Eaton's FMLA allegation was not "separate and independent" from his claim alleging that his termination also constituted breach of contract with the "contract" being MTS's employee handbook. Therefore, according to the district court, Eaton's FMLA grievance, due to its connection with his breach of contract claim, was barred by a Montana statute that is the "exclusive remedy for wrongful discharge" in the state. *Ruzicka v. First Healthcare Corp.*, 45 F. Supp. 2d 809, 811 (D. Mont. 1997); *see also* Mont. Code Ann. § 39-2-902(3).

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 narrow view of FMLA rights. Under the FMLA, it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the Act. 29 U.S.C. § 2615(a)(1) (emphases added). "Interference" includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. § 825.220(b) (emphasis added). Eaton adequately alleged an interference with his FMLA leave. An HR staff member told Eaton that he did not qualify for FMLA leave because he was already on worker's compensation and that she would not provide him

with a "certification form to fill out, or request FMLA." Taken together, these actions could be viewed as "discouraging" Eaton from using his FMLA leave; he did not need to plead a denial of his FMLA leave.[3]

Thus, we reverse the dismissal of the FMLA claim.

2. We review the district court's grant of summary judgment de novo. *See Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021). We must determine whether, viewing the evidence in the light most favorable to the nonmoving party, "there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (citation omitted).

Montana's Wrongful Discharge from Employment Act ("WDEA") provides the exclusive remedy for an alleged wrongful discharge under Montana law.[4] Under the WDEA, 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

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[3] The same staff member stated in her deposition that a person is eligible to go on FMLA leave in conjunction with their worker's compensation leave. According to Eaton's pleadings, this is contrary to what she told him when he asked her for FMLA forms.

[4] Mont. Code Ann. § 39-2-902 (2020). Like the district court, we cite to the 2020 version of the WDEA, even though certain sections were amended in immaterial ways in 2021. *See* 2021 Mont. Laws 319.

> employer's probationary period of employment; or
>
> (c) the employer violated the express provisions of its own written personnel policy.

Mont. Code Ann. § 39-2-904(1). "'Good cause' means 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 reason." *Id.* § 39-2-903(5). "A legitimate business reason is one that is not false, whimsical, arbitrary, or capricious, and . . . must have some logical relationship to the needs of the business." *Putnam v. Cent. Mont. Med. Ctr.*, 460 P.3d 419, 423 (Mont. 2020) (internal quotation marks and citation omitted).

Eaton argues that the district court erred in finding that there was a legitimate business reason to lay him off.[5] MTS executed a three-phase reduction in force ("RIF") from 2016 to 2017, after it learned in 2016 that a major client was not renewing its contract with MTS—which would lead to a loss of substantial revenue for the company. MTS states that Eaton was laid off in the third phase of the RIF because Eaton lacked internal cross-training for different tasks and received the lowest total score on MTS's employee cross-training matrix.

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[5] Eaton abandoned his challenge to whether MTS complied with its personnel policy in connection with his termination. *See Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992) (deeming issues raised in a pro se litigant's brief but not supported by argument abandoned).

"To defeat a motion for summary judgment on the issue of good cause [in a WDEA case], the employee may either prove that the given reason for the discharge is not good cause in and of itself, or that the given reason is a pretext and not the honest reason for the discharge." *Becker v. Rosebud Operating Servs., Inc.*, 191 P.3d 435, 441 (Mont. 2008) (internal quotation marks and citation omitted). Eaton argues only that the district court did not look at his evidence in ruling on the summary judgment motions. But the district court fully considered the appropriate factual evidence in the record. Eaton only presented his own testimony and uncorroborated answers to interrogatories. Eaton's proffered evidence did not suffice to create a material issue of disputed fact.

Eaton could not "merely set forth conclusory statements," and instead needed to provide "material and substantial evidence" to support his claim that MTS's offered business reason was pretext. *Rolison v. Bozeman Deaconess Health Servs. Inc.*, 111 P.3d 202, 208 (Mont. 2005). Here, the district court found that Eaton "fail[ed] to proffer any evidence in support" of his contention that MTS's offered reason was pretextual or that his score on the matrix was inaccurate. We agree. Eaton's response to MTS's summary judgment motion did not create a disputed issue of fact concerning MTS's showing that its reason for terminating Eaton was "not false . . . [and had] some logical relationship to the needs of the business." *Putnam*, 460 P.3d at 423 (emphasis added) (citation omitted).

3. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, "prohibits an employer from discriminating against a qualified individual with a

disability because of the disability." *Nunes v. Wal-Mart Stares, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999) (internal quotation marks and citation omitted). The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual; . . . a record of such an impairment; . . . or being regarded as having such an impairment." 42 U.S.C. § 12102(1). The district court correctly found that Eaton had failed to establish such disability. The district court noted that Eaton suffered from carpal tunnel syndrome and underwent corrective surgery, but pointed out that Eaton had offered no evidence "illustrating that the impairment limited one or more major life activities or, in the alternative, that after surgery was performed he could be regarded as having such an impairment."

Eaton argues that the district court erred by not referring to the 2008 amendments to the ADA, but the district court correctly referred to all relevant provisions of the ADA. To dispute on appeal the finding that he is not disabled, Eaton points to medical records that were filed after the district court's grant of summary judgment with respect to his disability discrimination claim and thus were not before the district court at the time of that ruling.[6,7]

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[6] Eaton's disability discrimination claim also fails because Eaton has not shown a triable issue as to MTS's claimed legitimate business reason for terminating his employment. *See Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001) (explaining that, after an employer proffers a legitimate business reason for an employee's termination, the employee bears the burden of showing that the offered reason is pretextual).

4. Under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, it is unlawful to discharge any individual aged forty or older "because of [the] individual's age." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (quoting 29 U.S.C. § 623(a)(1)). ADEA claims (like ADA claims) employ a three-stage burden-shifting framework. First, the claimant must establish a prima facie case; then, the employer must articulate a legitimate, nondiscriminatory reason for the adverse employment action; and last, the employee must prove that the reason advanced by the employer is mere pretext for unlawful discrimination. *Id.*

Even if Eaton could establish a prima facie case of age discrimination,[8] his ADEA claim would fail because MTS has provided a legitimate business reason for terminating his employment—and Eaton has not pointed to specific evidence establishing that the reason was pretextual.

5. Eaton challenges the district court's summary judgment grant to MTS on Eaton's claim of retaliation

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[7] Eaton appeals the district court's grant of summary judgment to MTS on Eaton's hostile work environment claim, but bases his appeal only on his ADA argument. Thus, we also affirm the district court's summary judgment grant to MTS on the hostile work environment claim.

[8] The district court noted that Eaton could point to no evidence—apart from his own "Statement of Disputed Facts" and his own submission to the Montana Human Rights Bureau for an investigation—that his employer gave preferential treatment to younger employees. On appeal, Eaton does not point to any evidence that the district court failed to consider.

under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a).[9]

To survive a motion for summary judgment, a plaintiff first must establish a prima facie case of retaliation: "(1) that [he] was engaging in protected activity/opposition, (2) that [he] suffered an adverse employment decision, and (3) that there was a causal link between [his] activity and the employment decision." *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 755 (9th Cir. 1997). If a plaintiff does so, we then use the burden-shifting framework described above.

Eaton alleges that MTS retaliated against him by changing his work schedule for "bringing forth concerns in the company"; giving him an unjustified, poor performance evaluation in retaliation for raising concerns about sexual/racial harassment in the workplace; and laying him off for being on worker's compensation.

The district court originally held that Eaton had failed to make a prima facie case on his claim of being terminated for being on worker's compensation, because that was not a protected activity. The court also held that Eaton's schedule change was not an adverse employment action, because MTS put Eaton on the same schedule as all other employees and gave him additional time to adjust to the standardized schedule. Eaton does not challenge those holdings on appeal. We thus only address the performance evaluation retaliation claims.

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[9] The district court did not abuse its discretion in allowing MTS to file a second motion for summary judgment. *See Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010).

In Eaton's initial 2017 Annual Performance Evaluation ("PE v.1"), Eaton received the lowest possible marks in two categories, "Interaction with co-workers" and "Resolves conflicts in an appropriate manner." The "Comments" section stated: "At times [Eaton] creates unwelcoming environment in regard[] to Travis while at the same time interacting well with Rick and Brian" and "[s]idesteps proper reporting of concerns outside of management hierarchy." Eaton then met with Lance Neirby, the Vice-President of Operations at MTS, and Justin Deacon, Eaton's supervisor. In the meeting, Neirby changed Eaton's performance evaluation ("PE v.2"). Neirby kept Eaton's low scores the same. But Neirby changed the comment accompanying "Interaction with co-workers" to "Challenging relationship exists between employee and direct supervisor." Neirby stated that he changed the comment because Eaton screamed, yelled obscenities, and exhibited aggressive behavior toward Deacon, and Neirby wanted to calm Eaton down.

Eaton claims that the low marks in PE v.1 were retaliatory. Eaton presented admissible evidence that he had never received any notice of the supposed concerns in PE v.1 and that there were no documented concerns filed by other employees, and that he had received strong positive prior ratings regarding his ability to work with teammates.[10] Eaton also notes

[10] Eaton's 2014 and 2015 annual performance reviews both rated him "Good" on both "Interaction with co-workers" and "Resolves conflicts in an appropriate manner." Eaton's 2016 annual performance review rated him "Excellent" on "Interaction with co-workers" and "Good" on "Resolves conflicts in an appropriate manner." In addition, the 2016 reviewer included a comment that Eaton "is always in good spirit and is easy to get along with."

that the "sidestepping" comment directly contravenes MTS's 2015 Employee Handbook, which states that individuals who experience or witness harassment "must discuss their concerns with their immediate supervisor, Human Resources or any member of management." And Deacon testified that the negative comments regarding Eaton's relationship with Travis were inserted at the direction of Neirby, contrary to the wishes of Deacon as his reviewing supervisor. Deacon also testified that before the performance evaluation meeting that led to PE v.2, Deacon and Eaton got along "pretty good" and never "g[o]t into a fight about anything."

In its first order partially denying summary judgment, the district court found that Eaton "presented sufficient evidence to support a prima facie case of retaliation" and that MTS did not offer any legitimate, nondiscriminatory reason for PE v.1.

In its second summary judgment order, however, the district court did not discuss Eaton's claim that the PE v.1 negative evaluation was retaliatory. Instead, it focused entirely on whether MTS articulated a legitimate, nondiscriminatory reason for the change from PE v.1 to PE v.2, and whether the proffered legitimate reason was pretextual. Because we review summary judgment decisions de novo, we will analyze the PE v.1 claim based on the record before the district court.[11]

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[11] Eaton's briefs do not appear to argue that the change made in PE v.2 was retaliatory, and thus that claim is waived. But even were we to analyze that claim on the merits, we would agree with the district court that Eaton did not present any specific or substantial evidence regarding that claim.

Eaton established a prima facie case showing that PE v.1 was retaliatory. First, Eaton engaged in protected activity when he repeatedly reported alleged instances of sexual harassment and racial discrimination to the Human Resources Department and other members of management. Second, PE v.1, which gave Eaton the lowest possible marks for two categories, was final, shared with his supervisors, submitted to the Human Resources Department, and listed as one of the criteria to be considered in the RIF. Eaton thus suffered an adverse employment decision.[12] Third, there was evidence to suggest that a causal link existed between the protected activity and the adverse employment decision. Eaton filed a personal knowledge affidavit stating that he continued to observe instances of harassment, and that he repeatedly contacted other higher-ups in the company about it to no avail from 2015 through 2017. And Neirby's comment accompanying the low marks stating that Eaton "[s]idesteps proper reporting of concerns outside management hierarchy" could be read by a reasonable juror as referring to Eaton's repeated reporting of suspected sexual and racial harassment.

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[12] In its first summary judgment order, the district court discussed Supreme Court and Ninth Circuit precedent and held that "whether a negative evaluation constitutes an adverse employment action depends on the facts and circumstances of each case," which includes "whether the evaluation was . . . negative, how widely it was disseminated, if it was final, and whether it resulted in any adverse employment consequences." The district court found such an adverse employment action here. We agree. *See, e.g., Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) ("[U]ndeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under this section.").

Because Eaton has established a prima facie case of retaliation, the burden shifts to MTS "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *Tex. Dep't of Cmty. Jiffs. v. Burdine*, 450 U.S. 248, 253 (1981) (citation omitted). MTS, in its Answering Brief, does not proffer any business justifications for issuing Eaton the lowest possible marks in two categories in PE v.1, focusing (as the district court did in its second order) only on the changes from PE v.1 to PE v.2. Even if we ignore MTS's briefing failure and look to MTS's evidence before the district court, we are still left with a triable issue of fact as to pretext.

In the district court, MTS stated, without providing a citation, that "[t]he uncontroverted testimony of both Deacon and Neirby demonstrate that Eaton had a couple of areas that required improvement, and that needed to be brought to his attention as an employee." MTS also pointed to Neirby's deposition testimony: "The reason those comments were added is because your inability to effectively communicate was leaving the team feeling as if they were walking on eggshells around you at all times because they didn't know how you would react, nor would you be cordial or not cordial. It was sometimes as if they didn't even exist, you would not acknowledge their existence."

Eaton has presented sufficient evidence that a reasonable juror could view MTS's proffered business justifications as pretextual. Eaton averred that he continued to report instances of sexual harassment and racial harassment throughout 2015 and 2017. Before PE v.1, Eaton had never received any notice of the supposed concerns. Indeed, he had received

strong positive prior ratings regarding his ability to work with teammates. The comment for allegedly sidestepping MTS's proper channels to report concerns contravenes MTS's 2015 Employee Manual. And Deacon, who testified that he and Eaton got along before PE v.2, stated that the negative comments in PE v.1 were inserted at the direction of Neirby. Viewing the evidence in the light most favorable to Eaton, there are genuine issues of material fact that should be left for a jury to decide.

Because Eaton has provided sufficient evidence of a triable issue of fact as to whether MTS's proffered business justifications for PE v.1 were pretextual, we reverse the district court's grant of summary judgment as to the retaliation claim with respect to PE v.1.[13]

For the foregoing reasons, we reverse the dismissal of Eaton's FMLA claim and the grant of summary judgment to MTS on Eaton's retaliation claim with respect to PE v.1. We affirm the grant of summary judgment to MTS on Eaton's claims under the WDEA, the ADA, and the ADEA.

AFFIRMED in part, REVERSED in part, and REMANDED.[14]

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[13] Eaton argues for the first time on appeal that the former counsel for MTS defamed him, and that the district court judge failed to recuse herself due to a "pro se litigant bias." These arguments were never presented to the district court, and we do not consider them for the first time on appeal. *See Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1043 n.4 (9th Cir. 2011).

[14] The parties shall bear their own costs on appeal.

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA (MAY 25, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendant.*

CV 18-65-BLG-SPW

Before: Susan P. WATTERS,
United States District Judge.

**ORDER**

Before the Court is Defendant Montana Silversmiths' Second Motion for Summary Judgement. (Doc. 137). Defendant moves for judgment in its favor on the sole surviving issue from the Court's order on the first summary judgment motion: whether Eaton was unlawfully retaliated against when his performance evaluation was changed after he made reports of possible sexual harassment in the workplace. (Doc. 138

at 2). The Court, in its prior order, determined that Eaton established a prima facie claim for retaliation under Title VII and that Montana Silversmiths did not, in its original briefing, make argument articulating a legitimate, non-discriminatory reason for the adverse employment action. Therefore, summary judgment was inappropriate. (Doc. 113 at 21). The Court, having extensively discussed the factual underpinnings of this action in previous orders, incorporates those factual findings here in lieu of another full factual recitation.

## I. Legal Standard

Summary judgment is appropriate where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable factfinder to return a verdict for the nonmoving party. *Id.* "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party fails to discharge this initial burden, summary judgment must be denied; the court need not consider the non-moving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party must "go beyond the pleadings and by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

Because the Court has ruled that there is a factual dispute as to whether Eaton engaged in protected activity and suffered an adverse employment action, *i.e.*, the negative April 2017 performance review, the burden shifts to Montana Silversmiths "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) (internal citation omitted); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir. 1983).

If Montana Silversmiths meets its burden, then Eaton has an opportunity to prove by a preponderance that the legitimate reason was not the true reason, but a pretext for discrimination. *Id.* at 256; *Crown Zellerbach*, 720 F.2d at 1012. Pretext can be shown by either direct or circumstantial evidence. "Only a small amount of direct evidence is necessary in order to create a genuine issue of material fact as to pretext." *Bergene v. Salt River Project Agr. Imp. & Power Dist.*, 272 F.3d 1136, 1142 (9th Cir. 2001). But "[c]ircumstantial evidence of pretext must be specific

and substantial in order to survive summary judgment." *Id.*

## II. Discussion

Montana Silversmiths argues that it possessed a legitimate, nondiscriminatory reason for Eaton's April 2017 negative performance review. (Doc. 138 at 13). In the initial 2017 Annual Performance Evaluation, Eaton received the lowest possible marks (4—Does Not Consistently Meet Expectations) in two categories: "Interaction with co-workers" and "Resolves conflicts in an appropriate manner." (Doc. 96-3 at 7). In the "Comments" section for the entries, the evaluation stated: "At times [Eaton] creates unwelcoming environment in regard to Travis while at the same time interacting well with Rick and Brian" and "Sidesteps proper reporting of concerns outside management hierarchy." (Doc. 96-3 at 7). The day he received his annual evaluation, Eaton met with Lance Neirby, the Vice President of Operations for Montana Silversmiths, and discussed Eaton's performance review and Eaton's continuing belief that sexual harassment was occurring in the workplace.

The next day, April 5, 2017, Eaton, Neirby, and Eaton's supervisor, Justin Deacon, met to discuss the performance evaluation. Neirby changed the comment under "Interaction with co-workers" to "Challenging relationship exists between employee and direct supervisor." (Doc. 96-3 at 9). Neirby stated that the wording was changed as a result of Eaton's behavior during the course of the second meeting, which apparently included screaming, yelling, obscenities, and aggressive behavior toward Deacon. Neirby also stated that he changed the comment to calm Eaton

down. (Doc. 96-20 at 44-46). The scores did not change. There is no evidence that the sexual harassment allegations were discussed specifically during the April 5 meeting.

Montana Silversmiths argues that Eaton's angry and aggressive behavior was the business reason behind changing the language in the performance review, both to better reflect the situation and as an attempt to defuse Eaton's anger. (Doc. 138 at 12). Montana Silversmiths notes that the scores were not changed and asserts that there was clearly an issue between Eaton and his supervisor that needed to be addressed to have a viable employee-employer relationship.

Eaton, in response, asserts that he was mocked and made to appear violent during the April 5 meeting. He claims that no conflict existed until after Neirby told Deacon about Eaton's allegations. However, there is no support for this contention other than Eaton's assertions; the deposition excerpts Eaton cites do not reflect the core of Eaton's assertions. (*See* Doc. 142 at 72-76).

Eaton also connects the performance evaluation to his eventual termination. (Doc. 143 at 28). He asserts that he was denied opportunities to advance his cross-training due to his downgraded performance evaluation. (Doc. 143 at 32). However, this assertion is not supported by the record and the citations to the disputed facts Eaton relies upon are incorrect. First, these are merely self-serving claims and esoteric details smuggled into an already confusing Statement of Disputed Facts. To combat the sworn deposition testimony of Neirby and Deacon, Eaton must cite to particular parts of materials in the record that would

demonstrate a genuine dispute as to the facts. Eaton merely asserts that these reasons are untrue or not the complete picture but does not support these arguments with discrete facts. Although Eaton is allowed leeway based on his *pro se* status, it is not the Court's role to fashion arguments for him. Second, and more importantly, it is Eaton's burden to show that there is a genuine issue of material fact regarding whether Montana Silversmiths given reason for changing his performance evaluation was pretextual. Eaton does not present any direct evidence on this issue. The change in language in the comments is minimal and the performance scores did not change. The total score was on par with previous evaluations. (*See* Doc. 96-3). Eaton's belief that the changes to the evaluation resulted from his continued reporting of perceived sexual harassment is an insufficient basis to rebut Montana Silversmiths' assertion that Eaton's interaction with his coworkers needed to be addressed. Certainly, an employee yelling profanities at his supervisor during a meeting reflects a "challenging relationship" between the two that could negatively impact the workplace.

Montana Silversmiths has demonstrated that, according to the undisputed material facts, it had a legitimate and non-discriminatory reason in altering Eaton's 2017 Performance Evaluation. Eaton fails to introduce evidence from which a reasonable person could conclude the contention that a legitimate business justification existed for the amendments is in doubt. *See Chauhan v. M Alfieri Co.*, 897 F.2d 123, 127 (3d Cir. 1990). He provides no direct evidence and the little circumstantial evidence supplied is both insufficiently supported and developed in the record and is

neither specific nor substantial enough to justify an inference in Eaton's favor. He has not shown that the reason provided is false or that retaliation was the real reason. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993).

## III. Conclusion

IT IS ORDERED that Montana Silversmiths' Second Motion for Summary Judgment (Doc. 137) is GRANTED. Because there are no remaining issues in controversy, judgment shall be entered in favor of Defendant. Any remaining motions and deadlines, such as the trial date, are VACATED.

DATED this 25th day of May, 2022.

/s/ Susan P. Watters
United States District Judge

**ORDER DENYING MOTION TO CERTIFY, U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA (FEBRUARY 1, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendant.*

CV 18-65-BLG-SPW

Before: Susan P. WATTERS,
United States District Judge.

Before the Court is Plaintiff's Motion to Certify an Interlocutory Appeal of this Court's order on Defendant's Motion for Summary Judgment. (Doc. 120). Defendant opposes the motion. (Doc. 124).

Parties typically can only appeal final orders that end litigation. *Couch v. Telescope Inc.*, 611 F.3d 629, 632 (9th Cir. 2010). However, a narrow exception is found in 28 U.S.C. § 1292(b), which provides:

When a district judge, in making in a civil

inapplicable statutes as well as makes new requests and claims, such as a complaint about not receiving a hearing on the summary judgment motion, that are far afield from the scope of motion. Accordingly, Plaintiff's motion (Doc. 120) is DENIED.

Dated this 1st day of February 2022.

/s/ Susan P. Watters
United States District Judge

**ORDER GRANTING MOTION TO LEAVE TO FILE, U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA (FEBRUARY 1, 2022)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendant.*

CV 18-65-BLG-SPW

Before: Susan P. WATTERS,
United States District Judge.

Defendant Montana Silversmiths requests leave to file a second motion for summary judgment, addressing the remaining surviving claim in Plaintiff's Fourth Amended Complaint. (Doc. 127). Plaintiff opposes the request. (Doc. 129). Federal Rule of Civil Procedure 56 does not preclude successive summary judgment motions. The Ninth Circuit held that "the denial of summary judgment does not preclude a contrary later grant of summary judgment." *Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010).

"Consequently, allowing a party to file a second motion for summary judgment is logical, and it fosters the 'just, speedy, and inexpensive' resolution of suits." *Id.* (citing Fed. R. Civ. P. 1).

Here, the Court finds that given the now-narrowed scope of the motion—in contrast to the unwieldy docket that existed when Defendant filed its initial summary judgment motion-a second motion for summary judgment may lead to resolution of the case. In the order denying summary judgment, the Court stated, "Montana Silversmiths did not present any argument on this claim in its motion for summary judgment . . . [t]herefore Montana Silversmiths motion for summary judgment as to this claim shall be denied." (Doc. 113 at 23-24). Accordingly, the Court has not ruled on the merits of this claim and whether it is appropriate for summary disposition. Full briefing will allow the Court to properly rule on the issue.

Plaintiff, in his response, references caselaw without attribution or citation, some apparently from New York Municipal Court and others with no references at all. This is directly in violation of District of Montana Local Civil Rule 1.5. Furthermore, the response contains several unhelpful parentheticals and is at least half devoted to attempting to have the Court reconsider previously dismissed claims. This is wholly inappropriate and a waste of the Court's time and resources. Briefing on a matter is meant to direct attention toward specific facts and legal argument and is expected to stay on the issue presented. See Local Civi l Rule 7.

Defendant's Motion for Leave is GRANTED.

Dated this 1st day of February 2022.

/s/ Susan P. Watters
United States District Judge

## ORDER CLARIFYING PRIOR ORDER AND DENYING MOTION FOR RECONSIDERATION, U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA (NOVEMBER 1, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendants.*

CV 18-65-BLG-SPW

Before: Susan P. WATTERS,
United States District Judge.

### ORDER CLARIFYING PRIOR ORDER AND DENYING MOTION FOR RECONSIDERATION

Before the Court are Plaintiff Eaton's self-styled "Objection to U.S. Magistrate Judge and Order" (Doc. 114) and Defendant Montana Silversmith's Motion to Strike and Request for Clarification (Doc. 115). Eaton objects to the Court's order on various motions, including partial summary judgment. Montana Silver-

smiths seeks to strike the objection as improper because the order was issued by a District Court Judge, rather than a U.S. Magistrate. The issue stems in part from a typographical error on the Court's behalf. The Court's prior Order (Doc. 113) is mistakenly captioned "U.S. Magistrate Judge and Order"; it should merely read "Order" and is hereby amended as such. The Court apologizes for any confusion or inconvenience due to this mistake. Correspondingly, Eaton's objection is improper and is not well-taken.

Eaton, in his reply requests that, in the alternative, his objection be considered a motion for reconsideration. (Doc. 117). Local Civil Rule 7.3(a) requires prior leave from the Court before filing a motion for reconsideration. Local Civil Rule 7.3(b) requires that such motions shall be limited to 2,275 words and must specify that there has either been a change in facts or applicable law presented to the Court in the original motion. Eaton has failed to demonstrate that either prong is met here. The Court also notes that the motion appears to violate Local Rule 7.3(c), which prohibits repetition of argument made on the underlying motion.

Adherence to this local rule will allow the Court, and the parties, to handle matters more expeditiously. Compliance with the local rule shall be required. A mere adverse outcome for one party is not sufficient to support reconsideration. Accordingly,

IT IS ORDERED that Eaton's Motion (Doc. 114) is DENIED insofar as it is an objection and is DENIED to the extent it is a Motion for Reconsideration. Montana Silversmith's Motion to Strike (Doc. 115) is GRANTED.

DATED this 1st day of November, 2021.

/s/ Susan P. Watters
United States District Judge

**SUMMARY JUDGMENT ORDER,
U.S. DISTRICT COURT
FOR THE DISTRICT OF MONTANA
(SEPTEMBER 28, 2021)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendant.*

CV 18-65-BLG-SPW-TJC

Before: Susan P. WATTERS,
United States District Judge.

**U.S. MAGISTRATE JUDGE AND ORDER**

Before the Court is Defendant Montana Silversmiths' Motion for Summary Judgment on Plaintiff Robert A. Eaton's remaining claims (Counts 1-6)[1] in the Fourth Amended Complaint. (Doc. 94.) Also pending is Eaton's "Motion to Extend Motion to Compel

[1] The Court previously dismissed Count 7. (*See* Docs. 54, 79, 110.)

Deadline," and Request for Hearing on Motions for Summary Judgment. (Docs. 97, 109.) The motions are fully briefed and ripe for review. Having considered the parties' submissions, the Court orders that Montana Silversmiths' motion (Doc. 94.) be GRANTED in part and DENIED in part. Eaton's motions for extension and for hearing will be DENIED.

## I. Background[2]

Eaton obtained a Bachelor of Fine Arts in metalsmithing from Montana State University in 2000. (Doc. 105 at ¶ 1.) Montana Silversmiths in Columbus, Montana, hired Eaton on May 13, 2013, into the apprentice program as a designer/engraver, when he was 39 years old. (Doc. 105 at ¶¶ 2-3.) Eaton worked for Montana Silversmiths in their engraving department until his termination on June 15, 2017. (Doc. 105 at ¶ 52.)

In July 2015, Eaton met with Colette Schlehuber of Montana Silversmiths' Human Resources Department to discuss issues he perceived in the engraving department, including the use of racial slurs and the sexual harassment of a fellow female employee. (Docs. 41 at ¶ 6; 96-19 at 6-7: 19:17-21:14.) In keeping with Eaton's request to keep the complaint confidential, Schlehuber approached the female employee to ask if the work environment made her feel uncomfortable, but she admittedly did not conduct an "official" internal investigation. (Doc. 96-19 at 6-7:

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[2] The background facts set forth here are relevant to the Court's determination of the pending motion for summary judgment, are taken from the parties' submissions, and are undisputed unless otherwise indicated.

19:17-21:14.) The female employee told Schlehuber that she enjoyed being in the engraving department and nothing in the work environment made her uncomfortable. (*Id.*) The employee later confirmed in her deposition testimony that she was not uncomfortable with her work environment. (Doc. 96-24 at 4: 9: 12-15.) Other than Eaton's own reports of sexual harassment, no other similar reports were made to management. (Doc. 96-19 at 29: 112:18-113:3.) It appears that no further investigation or follow-up was conducted with respect to Eaton's 2015 report.

Eaton, like other Montana Silversmiths' employees, was subject to annual performance evaluations. Montana Silversmiths conducted Eaton's 2017 performance review on April 4, 2017. (Doc. 105 at ¶ 13; *see* Doc. 96-3 at 7-8.) Eaton's direct supervisor, Justin Deacon, noted two areas of deficient performance in which Eaton "Does Not Consistently Meet Expectations"—interaction with co-workers and resolves conflicts in an appropriate manner. (Docs. 96-3 at 7-8; 105-10 at 35.) As to the first area, Deacon commented: "[a]t times creates unwelcoming environment in regards to [Deacon's son] Travis while at the same time interacting well with Rick and Brian." (*Id.* at 7; 105-10 at 35.) In the second area, Deacon reported that Eaton "[s]idesteps proper reporting of concerns outside of management hierarchy." (*Id.*) Eaton was also found to significantly exceed expectations in the area of being a "[s]elf starter, shows resourcefulness," for which Deacon commented that he was a "very hard worker, always on task." (*Id.*) In sum, Eaton's total appraisal grade was 2.70, placing him between the ratings for "Exceeds Expectations" (2.0) and "Meets Expectations" (3 .0). (*Id.* at 8; 105-10 at 36.)

Eaton disputes that the negative ratings were warranted. He points out that Deacon did not want to include the comments relative to Travis. It was included at the insistence of Lance Neirby, Montana Silversmiths' Vice President of Operations. (*See* Doc. 105-4 at 43: 28:17-21; at 44: 29:7-17; at 53: 65:19-66:22.)

Additionally, 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 day on April 4 to discuss the evaluation and other issues in the workplace. (Docs. 41 at ¶ 8; 96-4 at 2; 105-10 at 39.) During the meeting, Eaton raised several issues, included nepotism, sexual harassment, and various observations of co-workers' personal and inter-personal behaviors and relationships. (Docs. 96-4 at 2-3; 105-10 at 39-40.)

The next day, April 5, Neirby, Deacon, and Eaton met to discuss the performance review and the issues Eaton raised the previous day. (Doc. 105 at ¶ 15.) Either before or during the meeting Neirby changed the language of the evaluation in the category of "[i]nteraction with co-workers" from focusing on "Travis" to state that a "[c]hallenging relationship exists between employee and direct supervisor." (Doc. 96-3 at 9.) Thus, the criticism shifted from a co-employ-

ee to Eaton's relationship with his supervisor, Justin Deacon. The rating for that category remained at the lowest possible rating. 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.)

By all accounts, the April 5 meeting was contentious. Neirby documented the meeting in an email to Schlehuber in human resources, in which he described Eaton as being "very agitated." (Docs. 96-4 at 2; 105-10 at 41-42.) Neirby explained that he tried to focus Eaton on better communication with Deacon but Eaton "was so stressed out and agitated." (*Id.; see* Doc. 96-5.)

Eaton, on the other hand, avers that he felt Neirby mocked him during the meeting and pushed him to defend himself for his complaints of nepotism and sexual harassment, asking: "what are [you] going to do then, what are you going to do then?" (Doc. 103-2 at ¶ 64.) Eaton attests that he responded, "You guys act like I am going to bring a bomb, that IS NOT what I'm saying, I am saying I am going to have to get a lawyer." (*Id.*) (emphasis in original).

At the conclusion of the meeting, Neirby and the management team decided to send Eaton "home for the remainder of the week with pay to allow for a cooling-off period." (Doc. 96-20 at 22: 84: 19-21.) Neirby then reported the incident to the Stillwater County, Montana Sheriff's Office at 11:24 a.m., the report of which states:

> Per 32-2 Lance notified of a problem that arised [sic] with an employee this morning and was sent home for the rest of the week.

> Does not fore see [sic] any further problems but wanted us to be aware of the employee and the situation[.]

(Docs. 105 at ¶ 24; 105-12 at 3.)

Eaton met with Schlehuber from human resources following the meeting. Eaton relayed that he felt as though he was being retaliated against for his complaints, and stated he was going to go home and call his lawyer and the EEOC. (Doc. 96-5.) Schlehuber 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." (Docs. 96-6; 105-7 at 5-8.) He hand-delivered the grievance on April 10, the day he returned to work after the "cooling off period." (Doc. 105 at ¶ 27.) The grievance detailed Eaton's view of the April 5th meeting, including the changes to his performance evaluation, nepotism and preferential treatment between Justin and Travis Deacon (among others), and his belief that the criticism for sidestepping proper reporting channels was contrary to the process laid out in the employee handbook. (Doc. 96-6 at 1-2.)

After Eaton submitted his grievance, Neirby sent an email to Schlehuber on April 13 "to further document points of concern during the discussion between Robert, [Deacon] and myself outlined in my Wednesday April 5th email." (Docs. 96-4 at 1; 105-10 at 41.) Neirby characterized Eaton as "extremely angry," "hyper focused, red faced and his body posture

was aggressive with clinched hands and was sitting forward in his chair in a dominating stance," and that he "yelled multiple times and told [Deacon] that he F----D him from the beginning and never helped him at all." (*Id.*) Neirby also recounted Eaton as saying, "'Everyone thinks I am going to go postal or bring in a bomb' followed by I have a lot of thinking to do and something like 'I won't bring in a bomb and I have talked to a lawyer.'" [*Sic*] (*Id.*) Neirby reported that he and Deacon were "shocked at the paranoid manner in which Robert was yelling and talking." (*Id.*) Among other things, Neirby expressed that his "concern now is how to evaluate Robert's comments about [going postal or bringing in a bomb]. . . . These comments are the reason I contacted the Undersheriff." (*Id.*)

The same day, April 13, Montana Silversmiths hired Associated Employers of Montana ("AEM") to investigate the allegations contained in Eaton's grievance letter. (Docs. 41 at ¶ 13; 105 at ¶ 28.) Montana Silversmiths state that neither its' nor AEM's investigation corroborated any of Eaton's complaints of sexual or racial harassment. (Doc. 96 at ¶¶ 11, 30.) Eaton disputes the integrity of both investigations.

Shortly after returning to work, Eaton took scheduled medical leave on April 14 for carpal tunnel release surgery. (Docs. 41 at ¶ 14; 105 at ¶ 42.) Schlehuber and Eaton subsequently exchanged communications regarding his return to work post-surgery.

On June 1, Schlehuber memorialized a phone call with Eaton, in which it was noted that Eaton's physician had updated his medical status, extending

his leave until June 12. (Doc. 105-12 at 8, 9.) Schlehuber advised Eaton that he would need a medical release form for his return. (*Id.*) Montana Silversmiths states that Eaton was never released by his treating physician to return to work so that it could discuss any necessary workplace accommodations with him. (Doc. 96 at ¶ 43.) Eaton attempts to dispute this statement, asserting that Schlehuber would not allow him back to work despite his physician's willingness to provide a release. (Doc. 105 at ¶ 43.)[3] Nevertheless, Eaton acknowledges that he never obtained a medical release from his medical providers, didn't know why he did not obtain a release, and never asked his provider for a release. (Docs. 96-18 at 16: 57:15-59:15; 105 at ¶ 47.) It also appears that Eaton did not provide Montana Silversmiths with any work restrictions or a request for accommodations.

On June 9, Montana Silversmiths issued a letter to Eaton regarding his return to work and AEM's report of his grievances. (Doc. 96 at ¶ 29.) The letter also addressed a change in Eaton's schedule. Apparently, Eaton had been given permission earlier in his tenure at Montana Silversmiths to work a modified work schedule. (Doc. 96-2.) But Neirby later instituted a policy that required everyone in the facility to work a uniform schedule within their

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[3] In support, Eaton cites to several exhibits on the record, none of which support his contention that Schlehuber would not allow him to work. (*See* Docs. 105-6 at 24, 50; 105-12 at 4, 8, 9, 10.) These documents undisputedly show Schlehuber reminding Eaton that he would need a doctor's release to return to work. Eaton's citation to PL TF-1613 in Doc. 105 at 60 is erroneous; no such document is indexed in Eaton's "Exhibit List" at Doc. 105-1.

department. (Doc. 96 at ¶ 29.) Eaton was reminded that upon his return from surgery, he would work a schedule aligned with others in his department. (*Id.*)

Prior to his return, however, Eaton's employment with Montana Silversmiths was terminated on June 15, 2017, as part of a restructuring and cost-savings plan implemented in 2016. (Doc. 105 at ¶¶ 50, 52.) Eaton's termination was part of the third phase of the reduction-in-force slated for June 2017. (*Id.* at ¶¶ 51-52.) Underpinning the restructuring and cost-savings plan was the anticipated loss of a sponsorship agreement with the American Quarter Horse Association ("AQHA"). (*Id.* at ¶ 59.) The AQHA contract was worth about $750,000 per year, comprising approximately half of the engraving department's workload. (*Id.* at ¶¶ 61, 63.) The phase three goal was a $250,000 reduction in force savings and ultimately resulted in $294,939.47 in savings. (Doc. 96-9 at 2, 4.)

Among the criteria for terminations in manufacturing were skills and cross training, performance evaluations, disciplinary actions, and value to future business. (Doc. 105 at ¶ 51.) Montana Silversmiths state that Eaton "comparatively lacked internal cross training for different tasks and positions . . . compared to other members of the Design/Engraving department," and that Eaton "only cross trained in the 'Design Fab' areas of 'Sawing' and 'Stone Setting,' as well as 'Custom Buckle Engraving'." (Doc. 96 at ¶ 53.) In support, Montana Silversmiths 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 Deacon, who acknowledged that 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.) Eaton further contends the matrix is not accurate, but he fails to cite to any evidence in the record to support the contention. (*See Id.* at ¶ 54.)

Eaton subsequently filed a complaint with the Montana Human Rights Bureau (MHRB) on July 12, alleging retaliation. (*Id.* at ¶ 67; *see* Doc. 96-12.) Eaton amended his complaint on November 12, adding claims of age and disability discrimination. (*Id.*; *see* Doc. 96-13.) MHRB issued its report on January 8, 2018, finding that "the allegations of Eaton's complaint are not supported by a preponderance of the evidence," "no reasonable cause to believe Silversmith discriminated against Eaton in the area of employment because of his age or disability," and no reasonable cause to believe Silversmith retaliated against Eaton in the area of employment because he engaged in protected activity. (*Id.* at ¶ 70; *see* Doc. 96-16.) On March 20, 2018, the U.S. Equal Employment Opportunity Commission adopted the Montana Human Rights Bureau's findings. (*Id.* at ¶ 71; *see* Doc. 96-17.)

Eaton then filed the instant suit on April 4, 2018. (Doc. 2.)

## II. Legal Standard

### A. Summary Judgment

Summary judgment is appropriate where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as

a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable factfinder to return a verdict for the nonmoving party. *Id.* "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party fails to discharge this initial burden, summary judgment must be denied; the court need not consider the non-moving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party must "go beyond the pleadings and by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The opposing party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere exis-

tence of a scintilla of evidence in support of the nonmoving party's position is not sufficient.") (citing *Anderson*, 477 U.S. at 252).

When making this determination, the Court must view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

## III. Discussion

In the operative Fourth Amended Complaint, Eaton alleges retaliation (Count 1), wrongful termination (Count 2), disability discrimination (Count 3), age discrimination (Count 4), hostile work environment (Count 5), and defamation of character (Count 6). (Doc. 48.) Montana Silversmiths moves for summary judgment on all counts. (Doc. 94.) The Court will address each in turn.

### A. Retaliation

In Count 1 of the Fourth Amended Complaint, Eaton brings a claim for retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). (Doc. 48 at 2-3.) Section 2000e-3(a) makes it unlawful to discriminate against any individual who has "opposed any practice made an unlawful employment practice by this subchapter" (opposition clause) or "made a charge . . . or participated . . . in an investigation, proceeding, or hearing under this subchapter" (participation clause). *Crawford v. Metro. Gov't of*

*Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 274 (2009). The section is also known as Title VII's "anti-retaliation" provision. *See, Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173-174 (2011); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994) ("Retaliation is a separate offense under Title VII.").

To survive a motion for summary judgment, a plaintiff must establish a prima facie case of retaliation. To do so, Eaton must demonstrate that: (1) he was engaging in protected activity, (2) he suffered an adverse employment decision, and (3) there was a causal link between his activity and the employment decision. *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754, 755 (9th Cir. 1997). In order to sustain this burden a plaintiff "need produce very little evidence." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008).

If Eaton successfully proves a prima facie case, the burden shifts to Montana Silversmiths "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) (internal citation omitted); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir. 1983). The employer's burden is not onerous. The employer "need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the [employer's] evidence raises a genuine issue of fact as to whether it discriminated against the [employee]." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, at 254-55 (1981).

If Montana Silversmiths meets its burden, then Eaton has an opportunity to prove by a preponderance

that the legitimate reason was not the true reason, but a pretext for discrimination. *Id.* at 256; *Crown Zellerbach*, 720 F .2d at 1012. Pretext can be shown by either direct or circumstantial evidence. "Only a small amount of direct evidence is necessary in order to create a genuine issue of material fact as to pretext." *Bergene v. Salt River Project Agr. Imp. & Power Dist.*, 272 F.3d 1136, 1142 (9th Cir. 2001). But "[c]ircumstantial evidence of pretext must be specific and substantial in order to survive summary judgment." *Id.*

In his complaint, Eaton alleges that Montana Silversmiths retaliated against him for "bringing forth concerns in the company," by changing his work schedule, providing low marks on his annual evaluation, and laying him off after being on worker's compensation. (Doc. 48 at 7.)

Montana Silversmiths argues (1) that Eaton cannot establish that he engaged in protected activity because he has no evidence to support his allegations of sexual and racial harassment, and independent investigations failed to corroborate any of his claims, (2) that filing a worker's compensation claim does not constitute a protected activity, and (3) it had a legitimate, nondiscriminatory reason for terminating Eaton. (Doc. 95 at 11-12.)

### 1. Protected Activity

First, with respect to Montana Silversmith's assertion that there is no evidence of sexual harassment or racial discrimination, Montana Silversmiths misconstrue the focus of the "protected activity" inquiry. This requirement does not tum on Eaton's ability to prove that sexual harassment or racial discrimina-

tion in fact occurred. Opposition to an unlawful employment practice—here, sexual harassment or use of racial slurs in the workplace—need only be based on a reasonable belief that the practice is unlawful. The plaintiff need not prove that the conduct he opposed was in fact unlawful under Title VII. *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994). Rather, "opposition clause protection will be accorded 'whenever the opposition is based on a 'reasonable belief that the employer has engaged in an unlawful employment practice." *Id.* (citing *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008,1012 (9th Cir. 1983). Even an erroneous belief that an employer engaged in an unlawful employment practice may be actionable under Title VII, if it is premised on a reasonable mistake made in good faith. *Id.; see also, Sias v. City Demonstration Agency*, 588 F.2d 692, 685 (9th Cir. 1978) ("When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts"). There is no evidence that Eaton did not have a reasonable belief that sexual harassment and racial discrimination had occurred.

**2. Eaton's Termination**

Montana Silversmiths next argues that Eaton's worker's compensation claim cannot provide the basis for a retaliation claim. The Court agrees. Title VII protects an employee "because he has opposed any practice made an unlawful employment practice by this subchapter. . . . " The "filing of and collecting on a worker's compensation claim does not concern any employment practice that violates Title VII." *Harris*

*v. Treasure Canyon Calcium Co.*, 132 F.Supp.3d 1228, 1246 (D. Idaho 2015).

But even if Eaton could establish a prima facie retaliation claim relative to his termination, Montana Silvermiths has presented a legitimate, nondiscriminatory reason for his termination. Montana Silversmiths initiated a restructuring and cost-savings plan in 2016 in preparation for an anticipated loss of a $750,000 contract with AQHA, which substantially impacted the engraving department where Eaton worked. (Doc. 105 at ¶¶ 61, 63.) During the restructuring plan, Montana Silversmiths terminated Eaton's employment along with 29 other terminations, eliminated positions, and planned retirements as part of its overall reduction in force. (Doc. 96-9.) Eaton's score on the cross-training matrix was undisputedly the lowest in the company. (*Id.* at 13.) As the U.S. Supreme Court stated in *Burdine*, the employer's burden only requires an explanation of "what [they] have done" or the production of "evidence of legitimate nondiscriminatory reasons." *Burdine*, 450 U.S. at 256. The Court finds Montana Silversmiths has satisfied that burden.

Eaton subsequently fails to show by a preponderance of the evidence that the reduction in force is not the true reason for his termination. Eaton contends the matrix is not accurate but fails to proffer any evidence in support. Eaton offers Deacon's testimony to show he "did some . . . stippling" and "soldering," (stippling being one of the matrix categories) and also proffers his degree in metalsmithing to show his expertise. (Doc. 105 at ¶ 53; see Doc. 96-21 at 6: 19:15-18, 20:4-8.) But Eaton fails to show specific evidence of the nature and extent of his experience or

"cross-training" in these and other areas, or to equate his degree with quantifiable skills in the matrix's select categories, sufficient to raise a genuine issue of material fact as to the true reason for his termination.

Therefore, the Court finds Montana Silversmiths has presented a legitimate nondiscriminatory reason for Eaton's termination, and Eaton has failed to show it is not the true reason for his discharge.

Eaton's remaining retaliation claims are based on his negative performance review and a change of his "agreed upon" schedule. The Court finds that Eaton has presented a prima facie case of retaliation with respect to his performance review, but not his schedule change.

### 3. Performance Evaluation

First, Eaton engaged in protected activity when he reported alleged instances of sexual harassment and what he viewed as racial discrimination to the Montana Silversmiths' Human Resources Department in July 2015, and to the Vice President of Operations during his evaluation process in April 2017. *Crawford*, 555 U.S. at 276 ("When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity") (internal citations, quotations omitted); *Archuleta v. Corr. Corp. of Am.*, 829 F. App'x 242, 243 (9th Cir. 2020) ("Filing an internal complaint pursuant to an established reporting procedure, raising concerns in a discussion with a human-resources representative, or filing an EEOC complaint are all protected activities").

Also, during a meeting on April 4 between Eaton and Neirby, Eaton expressed that he contacted the "EEO," to which Neirby responded he had a right to obtain counsel. (Doc. 96-4 at 3-4.) He also advised Schlehuber that he intended to contact his lawyer and the EEOC during their meeting on April 5, 2017. (Doc. 96-5.) While the record does not necessarily support the existence of a separate U.S. Equal Employment Opportunity Commission filing at that time, "[t]he statutory protections against retaliation also extend to an applicant or an employee who informs his employer of his intention to participate in a statutory proceeding, even if he has not yet done so." *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 1007 (9th Cir. 2002), *on reh'g en banc*, 345 F.3d 742 (9th Cir. 2003).

Second, Eaton has established a prima facie case showing that he was subject to an adverse employment action with respect to his performance evaluation. The U.S. Supreme Court clarified the standard to be applied in determining whether an action can constitute an adverse employment action for purposes of retaliation under Title VII in *Burlington Northern Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The Court interpreted the antiretaliation provision more broadly than the "substantive provisions" of Title VII. Unlike the requirements for a substantive discrimination claim, retaliation claims are not limited to discriminatory actions that affect the terms and conditions of employment. *Id.* at 64. Rather, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge

of discrimination." *Id.* at 68 (internal quotations and citations omitted).

Courts in the Ninth Circuit have considered whether a negative performance evaluation can be considered an adverse employment action in several cases. Some cases have recognized that a negative evaluation may support a retaliation claim. *See e.g., Yartzoff v. Thomas*, 809 F.2d 1371, 1 376 (9th Cir. 1987) ("undeserved performance ratings, if proven, would constitute an 'adverse employment decision' cognizable under this section"); *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000) ("Among those employment decisions that can constitute an adverse employment action are . . . undeserved negative performance review"); *Lelaind v. City and Cty. Of San Francisco*, 576 F.Supp.2d 1079, 1098 (N.D. Cal. 2008) (whether performance evaluation was negative or positive was a disputed issue of material fact for the jury); *Rivera v. England*, 360 F.Supp.2d 1104, 1120 (D. Haw. 2005) (evaluation containing negative comments "beyond mediocre" constituted adverse employment decision).

Other decisions have found that performance evaluations were not adverse employment actions under the facts and circumstances presented. *See e.g., Kortan v. California Youth Authority*, 217 F.3d 1104, 1113 (9th Cir. 2000) (no adverse action where performance evaluation was not disseminated beyond a supervisor who corrected and raised low marks, was not sub-average or undeserved, and did not result in negative consequences); *Lyons v. England*, 301 F.3d 1092, 1118 (9th Cir. 2002) (performance rating of "fully successful" that did not result in adverse consequences was not an adverse employment action).

Therefore, whether a negative evaluation constitutes an adverse employment action depends on the facts and circumstances of each case; the relevant factors include whether the evaluation was, in fact, negative, how widely it was disseminated, if it was final, and whether it resulted in any adverse employment consequences.

Application of these factors here supports finding an adverse employment action. While Eaton generally scored between "Exceeds Expectations" and "Meets Expectations," he was given two unfavorable "Does Not Consistently Meet Expectation" ratings. It also appears the evaluation was final, was shared with, at least, his supervisors, and was submitted to Montana Silversmiths' Human Resources Department where it was presumably placed in Eaton's permanent personnel file. While it is not clear whether Eaton suffered adverse employment consequences directly from the evaluation, performance evaluations were listed as one of the criteria to be considered in the reduction-in-force layoffs. In viewing all inferences drawn from the facts in the light most favorable to Eaton, this showing is sufficient to establish that Eaton's 2017 performance evaluation was an adverse employment action for purposes of a prima facie retaliation claim.

There is also some evidence to support the final requirement, that there was a causal link between the protected activity and the employment action. There is no direct evidence, and scant circumstantial evidence, to connect Eaton's 2015 report of sexual harassment to human resources with his negative evaluation. Any inference that they are causally related is also not supported by the time interval

between the two events. Almost two years had passed since that report and his 2017 performance evaluation. To support an inference of causality, the temporal proximity between the two events must be "very close." *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). But the 2017 evaluation was conducted at the same time as Eaton's report of sexual harassment to Neirby on April 4, 2017. In fact, Neirby made changes to the evaluation after meeting with Eaton on April 4 to allege that Eaton had a "challenging relationship" with his direct supervisor. (Doc. 96-3 at 9.) Given the relatively light burden required to overcome Montana Silversmiths' motion for summary judgment, the evidence is sufficient to create an issue of fact for trial as to causation.

There is also evidence in the record to support Eaton's argument that the negative aspects of the review were unwarranted. As discussed above, the negative comments regarding Eaton's relationship with Travis were inserted in the review at the direction of Neirby, contrary to the wishes of Deacon as his reviewing supervisor. Also, Neirby's subsequent change to the evaluation to allege a problematic relationship between Eaton and Deacon is contradicted by Deacon's testimony that the two got along "pretty good" and never "got into a fight about anything" prior to April 5, 2017. (Doc. 105-4 at 44: 29: 18-30:2.) Moreover, as discussed above, the negative rating for allegedly circumventing the company's proper channels to report concerns, directly contravenes Montana Silversmiths' 2015 Employee Manual.

Accordingly, Eaton has presented sufficient evidence to support a prima facie case of retaliation based on an unwarranted negative performance eval-

uation. Montana Silversmiths did not present any argument on this claim in its motion for summary judgment, and thus did not present a legitimate, nondiscriminatory reason for the action. Therefore, Montana Silversmiths motion for summary judgment as to this claim shall be denied.

### 4. Schedule Change

The same is not true with respect to Eaton's retaliation claim based on a change in work schedule. While Eaton was given permission in September 2014 to work a modified schedule, it was made clear that the goal was to get Eaton on the same schedule with the others in the department. (Doc. 96-2.) When Neirby joined the company as Vice President of Operations, he aligned everyone in the various departments to the same schedule. (Doc. 96-20 at 6: 18:9-13.) It appears Eaton was given additional time, until April 30, 2017, to come into compliance with the requirement. (*Id.*, 19: 18-20:5.) Eaton stated that he intended to comply with the change (Doc. 105 at 19), and he expressed his appreciation to Neirby for being given an extension of time to do so. (*Id.*, 20:1-8.)

Requiring an employee to work the same schedule as all other employees while also providing ample time to adjust to a different schedule is not the type of employment action that would dissuade a reasonable worker from making or supporting a charge of discrimination. Accordingly, under the facts presented here, Eaton did not sustain an adverse employment action because of his schedule change sufficient to support a prima facie claim of retaliation.

Therefore, Montana Silversmiths' motion for summary judgment on Eaton's retaliation claims shall be denied as to Eaton's claim based on his 2017 performance evaluation and granted as to all remaining claims.

**B. Wrongful Termination**

In Count to 2 of the Fourth Amended Complaint, Eaton asserts a claim for wrongful termination. (Doc. 48 at 8.) Montana's Wrongful Discharge from Employment Act ("WDEA") provides the exclusive remedy for an alleged wrongful discharge under Montana law. Under the WDEA, a discharge is wrongful only if:

(1)

(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.

Mont. Code Ann. § 39-2-904 (2020). In his complaint, Eaton alleges he was terminated without good cause and the reasons given for his discharge were pretext. (Doc. 48 at 8.) ("There were pretextual measures taken that transpired into wrongful discharge. Wrongful termination was provided by pretextual measures.")

The WDEA defines "good cause" 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 reason." Mont. Code Ann. § 39-2-903(5). "A legitimate business reason is one that is not false, whimsical, arbitrary or capricious, and . . . must have some logical relationship to the needs of the business." *Putnam v. Cent. Montana Med. Ctr.*, 460 P.3d 419, 423 (Mont. 2020) (citing *Bird v. Cascade Cty.*, 386 P.3d 602, 605 (Mont. 2015) (internal citations omitted)).

An employer must set forth evidence demonstrating good cause for the discharge, whereupon the burden shifts to the employee. *Putnam*, 460 P.3d at 424. "To defeat a motion for summary judgment on the issue of good cause, the employee may either prove that the given reason for the discharge is not good cause in and of itself, or that the given reason is a pretext and not the honest reason for the discharge." *Becker v. Rosebud Operating Services, Inc.*, 191 P.3d 435, 441 (Mont. 2008) (quotations omitted).

Montana Silversmiths argues that it had a legitimate business reason for terminating Eaton with the 2016 restructuring and cost-savings plan. (Doc. 95 at 17.) Eaton argues Montana Silversmiths lacked good cause and had no legitimate business reason. (Doc. 103 at 27-30.)

As the Court previously found, Montana Silversmiths had a legitimate business reason to terminate Eaton under its restructuring and cost-savings plan in anticipation of losing $750,000-worth of business from AQHA. This included a reduction-in-force that impacted 29 other employees. For his part, Eaton undisputedly had the lowest score on the cross-training matrix.

Eaton has not produced facts showing that Montana Silversmiths based its decision to terminate his employment on anything other than the restructuring and cost-savings plan. As previously discussed in context of Eaton's Title VII retaliation claim, Montana Silversmiths considered multiple factors, including cross training, in their reduction-in-force decision-making. Eaton has not raised genuine issues of material fact as to the validity of the restructuring and cost-savings plan sufficient to show pretext.

Additionally, although not plainly alleged in his Fourth Amended Complaint, Eaton argues in his response brief that he was terminated for reporting a violation of public policy. (Doc. 103 at 28.) Eaton asserts that he was terminated for reporting sexual harassment and racial discrimination. Thus, he argues, his discharge was in violation of Mont. Code Ann. § 39-2-904(1).

To the extent this claim is properly raised by his pleadings, it is excluded from coverage under the WDEA by Mont. Code Ann. § 39-2-912(1). That section provides that the WDEA does not apply to a discharge "that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute . . . includ[ing] those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, . . . sex, age, disability, . . . and other similar grounds."

Here, Eaton's claim that he was terminated in retaliation for reporting sexual harassment and racial discrimination falls squarely within Title VII's antiretaliation provision. As discussed above, 42 U.S.C. § 2000e-3(a) makes it unlawful to discriminate against

an individual who has "opposed any practice made an unlawful employment practice by this subchapter. . . ." Section 2000e-2(a)(l) provides that it is an unlawful employment practice to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . [or] sex. . . ." Thus, Title VII of Civil Rights Act of 1964 provides "a procedure or remedy for contesting the dispute" raised by Eaton's WDEA claim for reporting a violation of public policy. Accordingly, the claim is barred from coverage under the WDEA.

Therefore, the Court will grant summary judgment as to Count 2' s wrongful discharge claim.

### C. Disability Discrimination

In Count 3, Eaton claims disability discrimination under the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (Doc. 48 at 10.) Section 12112(a) of the ADA prohibits discrimination against a qualified individual based on disability regarding advancement, discharge, or job training of employees, among other actions. *See E.E.O.C. v. BNSF Ry. Co.*, 902 F.3d 916, 922 (9th Cir. 2018), *as amended* (Sept. 12, 2018). To establish a prima facie case of disability discrimination, Eaton must show he (1) is disabled within the meaning of the ADA, (2) was qualified for the position, and (3) that Montana Silversmiths discriminated against him because of his disability. *Id.* If Eaton satisfies the elements for establishing a prima facie case of disability discrimination, the burden shifts to Montana Silversmiths to show a non-discriminatory reason for discharge similar to Title VII retaliation claims. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 23 7

F.3d 1080, 1093 (9th Cir. 2001). If satisfied, the burden again shifts back to Eaton to show the articulated reason is a pretext for disability discrimination. *Id.; Smith v. Barton*, 914 F.2d 1330, 1340 (9th Cir. 1990).

Montana Silversmiths argues that Eaton fails to demonstrate that he is disabled within the meaning of the ADA. (Doc. 95 at 20.) Eaton argues he had a back injury prior to his employment with Montana Silversmiths and then developed carpal tunnel while employed there. (Doc. 103 at 3 1-32.) Eaton also contends that Montana Silversmiths failed to engage in an interactive process to provide accommodations, such as a modified work schedule, and would not allow him to return to work after medical leave. (*Id.* at 34-35.)

The Court finds that Eaton has failed to establish he is disabled under the ADA, which defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment . . .

42 U.S.C. § 12102(1). For the purposes of (1)(A), above, major life activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). For the purposes of (1)(C),

above, an individual may be "regarded as having such an impairment" when the individual establishes "that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment." 42 U.S.C. § 12102(3)(A). However, subsection (1)(C) does not apply to transitory or minor impairments—those with an actual or expected duration of six months or less. 42 U.S.C. § 12102(3)(B).

Here, Eaton claims his back injury and carpal tunnel are disabilities. (Doc. 48 at 10, 13.) But the record simply does not support such a finding. The record is bereft of any evidence of back issues beyond a single medical record from January 2019—approximately 18 months after his termination—denoting "low back and bilateral leg discomfort." (Doc. 105-9 at 64.) While it is undisputed that Eaton suffered from carpal tunnel syndrome and underwent corrective surgery, he does not extend any evidence illustrating that the impairment limited one or more major life activities or, in the alternative, that after surgery was performed he could be "regarded as having such an impairment."

Moreover, even if Eaton could establish a prima facie case of disability discrimination, Montana Silversmiths has shown that it had a nondiscriminatory reason for Eaton's layoff and termination, as discussed above.

Therefore, the Court finds there is no dispute as to any issue of material fact that Eaton lacks a disability under the ADA and grants summary judgment as to Count 3.

**D. Age Discrimination**

In Count 4, Eaton alleges age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (Doc. 48 at 13-16.) Under the ADEA, it is unlawful to discharge any individual because of the individual's age. 29 U.S.C. § 623(a)(1). Like the Title VII and ADA claims discussed above, ADEA claims employ the three-stage burden shifting framework, with the claimant first establishing a prima facie case, then the employer articulating a legitimate, nondiscriminatory reason for the adverse employment action, and last the employee proving that the reason advanced by the employer is mere pretext for unlawful discrimination. *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008).

Generally, to establish a prima facie case under the ADEA, a plaintiff must show he was (1) at least 40-years old, (2) performing his job satisfactorily, (3) discharged, and (4) either replaced by a substantially younger employee with equal or inferior qualification or discharged under circumstances otherwise giving rise to an inference of age discrimination. *Id.* (internal quotes, citation omitted).

Montana Silversmiths argue that, at a minimum, Eaton's claim is precluded by the fourth requirement: Eaton did not allege, nor can he prove, he was replaced by a younger employee. (Doc. 95 at 24.) In support, Montana Silversmiths asserts that it has not refilled Eaton's position since his termination in 2017. (Doc. 96 at ¶ 57.)

This argument misses the mark. Where, as here, the discharge resulted from a reduction in workforce,

a plaintiff "need not show that they were replaced; rather they need show 'through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination.'" *Coleman v. Quacker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000) (quoting *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990)). This can be shown where an employer had a continuing need for their services, or that others not in their protected class were treated more favorably. *Id.*

Consequently, the fact that Montana Silversmiths has not replaced Eaton's position since his termination is not dispositive of his claim. Nevertheless, it supports the conclusion that Montana Silversmiths did not have a continuing need for his services.

Eaton further argues, however, that younger employees were treated more favorably. He alleges that at least two of his supervisors, Lance Neirby and Curt Robbins, told him that Montana Silversmiths was looking for and needed new engravers. (Doc. 103 at 40.) He also argues that two younger employees, Travis Deacon and Andrew Wells, were treated more favorably and not terminated in the reduction-in-force. (*Id.* at 39-40). Finally, Eaton maintains that by his calculations the number of individuals 40 and over comprise 77.77 percent of layoffs. (*Id.* at 39.)

The Court finds that Eaton has failed to establish a prima facie case of age discrimination. Eaton offers no evidence in support of his contention that Justin Deacon or David Cruz preferred younger engravers, or that Travis Deacon or Andrew Wells were given preferential treatment and not terminated due to

their youth.[4] Eaton does not discuss where Travis Deacon was positioned in the layoff matrix. Eaton does contend that Andrew Wells "was written in the layoff matrix, but was not terminated, laid off, or retired." (Doc. 103 at 38.) But it also appears that Wells had only been provided a short apprenticeship in the engraving department before he was transferred to "buffing" in March 201 7, prior to the third phase of the reduction-in-force. (Doc. 103 at 38.) It is not clear how that affected the reduction-in-force criteria, and whether some departments were more directly impacted by the process. As noted above, the loss of the AQHA contract resulted in a 50% reduction in the engraving department's work.

Eaton's statistical calculations are likewise insufficient. "To establish a prima facie case based solely on statistics . . . the statistics 'must show a stark pattern of discrimination unexplainable on grounds other than age.'" *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir. 2000) (quoting *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1423 (9th Cir. 1990)). Assuming Eaton's "Z-score" analysis is accurate, a single calculation based on one factor is insufficient to establish a "stark pattern of discrimination" or show that the restructuring/cost-savings plan's reduction in force is unexplainable for any other reason. The analysis does not consider any variables other than age. As discussed in *Coleman*, statistics that fail to account for other obvious nondiscriminatory variables that may affect the analysis are of little

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[4] Eaton attempts to cite to his supplementary "Statement of Disputed Facts" (Doc. 104), which in tum cite to his own submission to the Montana Human Rights Bureau's investigation. (*See e.g.* Docs. 105-6 at 43-57, 59-74; 105-7 at 15-25.)

value and fail to raise a triable issue of fact of intent to discriminate. *Id.* at 1282-83.

Therefore, the Court finds Eaton has failed to establish a prima facie case of age discrimination under the ADEA. Moreover, even if Eaton could establish a prima facie case of discrimination, Montana Silversmiths has presented a legitimate, nondiscriminatory reasons for his termination.

Accordingly, the Court finds that summary judgment is appropriate as to Count 4.

**E. Hostile Work Environment**

In Count 5, Eaton claims he was subjected to a hostile work environment when Justin Deacon made sexually and racially harassing remarks in his presence at work. (Doc. 48 at 16-19.) Hostile work environment falls under the protections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). "A hostile work environment claim involves a workplace atmosphere so discriminatory and abusive that it unreasonably interferes with the job performance of those harassed." *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000). To prevail, Eaton must show his "workplace was permeated with discriminatory intimidation . . . that was sufficiently severe or pervasive to alter the condition of his employment and create an abusive working environment." *Id.* (citing *Harris*, 510 U.S. at 21). A totality of the circumstances test is used to determine whether an environment is hostile or abusive. *Harris*, 510 U.S. at 23.

Eaton cannot establish a hostile work environment claim. Eaton has not sufficiently shown his work environment to be so severe or pervasive that it altered the condition of his employment and created an abusive working environment. Eaton recounts sporadic incidents over several years in which Justin Deacon used sexual or racial-based epithets but offers no evidence or argument on how those events affected him or the workplace. The Court's focus is on the total effect of the circumstances on the work environment. In *Harris*, the U.S. Supreme Court suggested this may "include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Eaton does not describe the frequency, severity, or how it interfered with his work performance.

Therefore, the Court finds Eaton has failed to establish a prima facie case of hostile work environment under Title VII and that summary judgment is appropriate as to Count 5.

**F. Defamation**

In Count 6, Eaton alleges defamation arising from verbal statements made to the MHRB during its investigation regarding his comment about a bomb. He alleges this affects his ability to find work "in a small community with these rumors." (Doc. 48 at 19.)

In Montana, either libel or slander effect a claim for defamation. Mont. Code Ann. § 27-1-801. Libel is a "false and unprivileged publication by writing,

printing . . . or other fixed representation that exposes any person to hatred . . . or causes a person to be shunned . . . or that has a tendency to injure a person in the person's occupation." Mont. Code Ann. § 27-1-802. Slander is a "false and unprivileged publication other than libel that . . . tends directly to injure a person in respect to the person's office . . . or by natural consequence causes actual damage." Mont. Code Ann. § 27-1-803. Defamatory words "must be of such nature that the court can presume as a matter of law that they will tend to disgrace and degrade [the plaintiff] or cause him to be shunned and avoided. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks him, and subjects him to jests or banter, so as to affect his feelings." (Citations omitted) *Ray v. Connell*, 371 P.3d 391, 395 (Mont. 2016).

Montana Silversmiths argues that Eaton admits to making the statement about a bomb, and that relaying the statement to the Montana Human Rights Bureau is privileged under § 27-1-804. (Doc. 95 at 35-36.)

Eaton appears to argue that the statements were made with reckless disregard of whether they were false and were made both internally and externally. (Doc. 103 at 50.)

The Court finds that Eaton has failed to raise genuine issues of material fact to survive summary judgment on his claim for defamation. First, in his affidavit Eaton admits he said: "You guys act like I am going to bring a bomb, that IS NOT what I'm saying, I am saying I am going to have to get a lawyer." (Doc. 103-2 at ¶ 64.) (emphasis in original). Therefore, even if Eaton disputes precisely what was

said or its context, there is no dispute that Eaton made a statement that referenced bringing a bomb.

Second, it is undisputed that both Eaton and employees of Montana Silversmiths recounted their version of the statement, and their interpretation of the statement, to AEM investigators and MHRB investigators.[5] But even if somewhat inconsistent, those statements were privileged, and absent a showing of malice, cannot form the basis for a slander claim.

Only unprivileged publications are actionable under Montana law. *Skinner v. Pistoria*, 633 P.2d 672, 675 (1981). Under Mont. Code Ann. § 27-1-804, privileged communications include those made:

(1) in the proper discharge of an official duty;

(2) in any legislative or judicial proceeding or in any other official proceeding authorized by law;

(3) in a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information;

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[5] Neirby also notified the Stillwater Sheriff's Office regarding the incident where the statement was made, but the report did not include any statement regarding a bomb. It only recounted that there had been an incident with an employee who was sent home the remainder of the week, but Neirby advised he did not foresee any further problems.

(4) by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

The first and second communications listed above are absolute privileges. *Skinner*, 633 P.2d at 676. The third and fourth are qualified privileges, requiring the absence of malice. *Rasmussen v. Bennett*, 741 P.2d 755, 758 (1987); *Cox v. Lee Enterprises, Inc.*, 723 P.2d 238, 240 (1986).

The Court finds that any statements made to MHRB are subject to absolute privilege under § 27-1-804(2), because MHRB is authorized by law "to sit in independent judgment of complaints of alleged discrimination," under Mont. Code Ann. § 49-2-205. Eaton does not dispute that MHRB is a government entity authorized by law to adjudicate administrative claims of discrimination.

The statements made to AEM investigators are not raised in Eaton's Fourth Amended Complaint, which only alleges statements made to the Montana Human Rights Board. (*See* Doc. 48 at 19.) Nevertheless, to the extent any such statements have been fairly raised in this action, they are also privileged under § 27-1-803(3). Any statements made to AEM investigators were made "to a person interested therein [AEM investigators] by one who was also interested [Montana Silversmith employee witnesses] . . . or who is requested by the person interested to give the information." In accordance with the plain language of the statute, this privilege has been extended in similar situations involving internal organizational investigations. *See e.g., Berg v. TXJ Companies*, 2013 WL 3242472 *8-9 (D. Mont. June 24, 2013) (state-

ment made as part of internal investigation of misconduct by employee was privileged under § 27-1-802(3)); *Rasmussen v. Bennett*, 741 P.2d 755, 758 (Mont. 1987) (in the absence of malice, statements of church members made in the course of a disciplinary or expulsion proceeding are privileged under the section). Further, any internal communications between employees of Montana Silversmiths concerning the statement would also fall within the privilege. *Rapp v. Hampton Management LLC*, 2018 WL 3470236 *3 (D. Mont. 2018) ("privilege protects communications between an employer and its employees, so long as the communication is made without malice.")

There is also no evidence of malice regarding Eaton's statement concerning a bomb. "To prove malice, [Eaton] must show that defendants' statements were made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Rasmussen*, 741 P.2d at 758 (quoting *Williams v. Pasma*, 656 P.2d 212 (Mont. 1982); *New York Times v. Sullivan*, 376 U.S. 254 (1964)). Here, there is no evidence that any of the statements alleged were made with knowledge that they were false. In fact, all were the same, or substantially similar to, the statement Eaton acknowledges making. There are small discrepancies in the various statements to investigators as to exactly what was said, and there were also some statements made interpreting Eaton's statement, but none that can be characterized as false.

Thus, the statements allegedly made to investigators are privileged. Montana Silversmiths motion for summary judgment as to Count 6 shall be granted.

## IV. Eaton's Motions

Eaton has filed a "Motion to Extend Motion to Compel Deadline." (Doc. 97.) It appears Eaton requests that the deadline be moved to "90 days prior to court." (Doc. 98 at 2.) The Court interprets this request to be an extension of time to file motions to compel up to 90 days prior to trial. The motion is not timely, does not present good cause for extending discovery in this case, and will be denied.

The discovery deadline was extended in this case to September 30, 2020. (Doc. 76 at 2). Eaton's request to extend the time to file motions to compel discovery was filed over two months after the expiration of the time for discovery. Eaton has not shown good cause for filing his motion to extend a scheduling deadline well after it expired. Additionally, the Court's scheduling order required that "[a]ll discovery motions shall be filed within fourteen (14) days of the parties' meet and confer." (*Id.* at 7.) It appears that the discovery issue underlying Eaton's request for an extension involves discovery responses that were provided on May 1, 2020, six months prior to the requested extension.

Eaton has also not shown good cause to modify the Court's scheduling order. Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."). *See also*, Court's Scheduling Order (Doc. 43 at 2) ("Continuance of these deadlines will not be granted absent good cause.").

Eaton has also filed a request for hearing on Montana Silversmiths' motion for summary judgment. (Doc. 109.) The Court has thoroughly reviewed the parties' submission on the summary judgment motion

and has determined that it would not benefit from oral argument. The request for hearing will be denied.

## V. Conclusion

IT IS ORDERED that Montana Silversmiths' motion for summary judgment (Doc. 94) is DENIED with respect to Eaton's claim for retaliation based upon his 2017 performance evaluation and GRANTED as to all remaining claims.

IT IS FURTHER ORDERED that Eaton's Motion to Extend Motion to Compel Deadline (Doc. 97) and his Motion for Hearing on Motions for Summary Judgment (Doc. 109) are DENIED.

DATED this 28th of September, 2021.

/s/ Susan P. Watters
United States District Judge

**ORDER ADOPTING FINDINGS AND RECOMMENDATIONS IN FULL AND GRANTING MOTION TO DISMISS, U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA (MARCH 1, 2021)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendant.*

CV 18-65-BLG-SPW

Before: Susan P. WATTERS,
United States District Judge.

**ORDER ADOPTING FINDINGS AND RECOMMENDATIONS**

Before the Court are U.S. Magistrate Judge Cavan's Findings and Recommendations (Doc. 79) on Defendant Montana Silversmiths' Partial Motion to Dismiss (Doc. 54) on Count VII of Plaintiff Robert Eaton's Fourth Amended Complaint. (Doc. 48). Judge

Cavan recommended that Count VII be dismissed for failure to state a claim upon which relief may be granted. (Doc. 79 at 1). Eaton, representing himself *pro se*, timely filed an objection. (Doc. 80). Montana Silversmiths ("Silversmiths") responded to Eaton's objection. (Doc. 82). For the following reasons, the Court adopts the Findings and Recommendations in their entirety.

## I. Background

The instant motion arises from Eaton's Fourth Amended Complaint, in which he added an additional count (Count VII) alleging that Silversmiths "breached their own contract several times, leading to retaliation and wrongful termination." (Doc. 48 at 20). In support of this allegation, Eaton describes three sections of the employee handbook and instances where he believes the handbook's policies were not followed. (Doc. 48 at 21-22). Eaton, in his initial complaints, made wrongful discharge claims. (*See* Doc. 2, 5, 12, and 34). Silversmiths moved to dismiss Count VII under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. (Doc. 54). Silversmiths argued that the Montana Wrongful Discharge from Employment Act[1] ("WDEA") precludes common law breach of contract claims based on that same discharge, and additionally argues that even if not precluded, Eaton failed to allege the existence of an enforceable contract. (Doc. 54 at 9-16).

Judge Cavan found that the handbook Eaton alleged formed the basis of Count VII did not create a contract and, even if it did, the WDEA precludes

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[1] Mont. Code Ann. Sec. 39-2-901, et seq.

such a claim. (Doc. 79). Judge Cavan explained that under Montana law, handbooks distributed after hiring are generally not considered a contract because they are usually unilateral and their terms are not bargained for. (Doc. 79 at 9). Even absent that general rule, the Silversmiths handbook expressly disclaims the intent to form a contract; the handbook stated that it did not guarantee a fixed term of employment and stated it could be changed unilaterally, further demonstrating a lack of intent to bind Silversmiths. (Doc. 79 at 11). Therefore, Judge Cavan found there cannot be relief for breach of contract when no contract exists.

Next Judge Cavan concluded that the exclusive remedy portion of the WDEA precludes Eaton from asserting common law contract claims stemming from his discharge. (Doc. 79 at 14-15). The WDEA "provides the exclusive remedy for wrongful discharge from employment." Mont. Code Ann. § 39-2-902. Except as provided in the WDEA, "no claim for discharge may arise from tort or express or implied contract." Mont. Code Ann. § 39-2-913. Judge Cavan found that "none of Eaton's alleged contract claims constitute separate and independent claims which could have been asserted in the absence of his discharge." (Doc. 79 at 13). In the contract claims Eaton describes in Count VII, he does not claim damages arising from the breach beyond his termination. Judge Cavan concluded that Count VII failed to state a claim upon which relief could be granted and recommended dismissal with prejudice. (Doc. 79 at 15).

## II. Standard of Review

The parties are entitled to *de novo* review of those findings or recommendations to which they object. 28 U.S.C. § 636(b)(1). When neither party objects, this Court reviews the Magistrate's Findings and Recommendation for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). A party makes a proper objection "by identifying the parts of the magistrate's disposition that the party finds objectionable and presenting legal argument and supporting authority such that the district court is able to identify the issues and the reasons supporting a contrary result. *Lance v. Salmonson*, 2018 WL 4335526 at *1 (D. Mont. Sept. 11, 2018).

Dismissal under Rule 12(b)(6) is proper when the complaint either "(1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court's review of a 12(b)(6) motion is limited to the pleadings and, in limited circumstances, to documents attached to the pleadings or incorporated by reference. *U.S. v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003).

## III. Discussion

Eaton, in his objection, requests "reconsideration" of his breach of contract claim for several reasons. (Doc. 80 at 2). First, Eaton alleges that there are at

least five contracts besides the handbook between he and Silversmiths that apparently form the basis for his claims in Count VII. (Doc. 80 at 3). This seems to be an attempt to circumvent Judge Cavan's finding that the handbook could not constitute a contract. The Court will not consider objections other than those relating to Count VII—that is, those based off the handbook—because the language in the pleading explicitly states that the claim is based off violations of the handbook's policies. To do otherwise would be to stray beyond the scope of the Findings and Recommendations and beyond the pleading standards set by *Iqbal* and *Twombly*. The separate breach of contract theories Eaton alleges for the first time in his objections were not presented in any of his complaints and so the Court will not consider them at this stage.

Eaton next objects that Judge Cavan incorrectly found that the handbook did not form a contract. (Doc. 80 at 6-7). Eaton argues that a valid contract, with offer, acceptance, consideration, and legal object, was formed when he signed and followed the handbook. Eaton does not cite to, and the Court cannot find, any authority or legal argument contrary to Judge Cavan's finding that handbooks that specifically disclaim contractual obligations without bargained for terms, and without separate consideration other than that of the employment relationship, do not create contractual obligations. The existence of an employment relationship between Eaton and Silversmiths does not also require that every document signed creates a separate contract, as Eaton suggests. Judge Cavan correctly found that the handbook at issue did not form a contract.

Eaton also objects to Judge Cavan's finding that even if a contract existed, it is precluded by the exclusivity portion of the WDEA. (Doc. 80 at 6). The WDEA "provides the exclusive remedy for wrongful discharge from employment." Mont. Code Ann. § 39-2-902. Except as provided in the WDEA, "no claim for discharge may arise from tort or express or implied contract." Mont. Code Ann. § 39-2-913. Claims which are unrelated to an alleged wrongful discharge are not pre-empted, while claims which are inextricably intertwined with a discharge are barred under the statute. *Beasley v. Semitool, Inc.*, 853 P.2d 84, 86-87 (Mont. 1993).

Eaton once again supplies no legal authority to support his position that his claims should be viewed as separate from the wrongful discharge action aside from an uncited quotation for which the Court cannot find the source. Eaton's statement in his Fourth Amended Complaint that Silversmiths breached the handbook "several times, leading to retaliation and wrongful termination of Mr. Eaton" is fatal to his subsequent argument in his objection that the claim is independent. Judge Cavan correctly determined that, were the handbook a contract, Eaton's claims as pled relating to violations of the handbook are precluded by the WDEA under its exclusivity provision.

## IV. Conclusion

For these reasons, the Court ADOPTS in full Judge Cavan's Findings and Recommendations. Accordingly, Montana Silversmith's Motion to Dismiss (Doc. 54) is GRANTED and Count VII of Eaton's Fourth Amended Complaint is DISMISSED WITH PREJUDICE.

DATED this 1st day of March 2021.

/s/ Susan P. Watters
United States District Judge

**MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS, U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA (AUGUST 3, 2020)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendant.*

CV 18-65-BLG-SPW-TJC

Before: Timothy J. CAVAN,
United States Magistrate Judge.

**FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE**

Plaintiff Robert A. Eaton ("Eaton") brought this action against Defendant Montana Silversmiths ("Silversmiths") alleging various causes of action related to his termination of employment. (Doc. 48.) Before the Court is Silversmiths' Motion to Dismiss Count VII of Eaton's Fourth Amended Complaint,

which alleges breach of contract, under Fed. R. Civ. P. 12(b)(6). (Doc. 54.) Eaton filed a response brief in opposition (Doc. 61) and Silversmiths has replied (Doc. 63). This matter is fully briefed and ripe for review.

For the following reasons, the Court recommends Silversmiths' motion be GRANTED as to Count VII of the Fourth Amended Complaint.

## I. Factual Background

When considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true all factual allegations set out in the complaint, draw inferences in the light most favorable to the plaintiff, and construe the complaint liberally. *Barker v. Riverside Cty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009).

Silversmiths employed Eaton as a metalsmith beginning in March 2013. (Doc. 48 at 1-2.) Between his on-boarding and termination, Eaton worked in "3-4 departments" and exceled at his work, even winning an internal design contest. (*Id.* at 4, 6-7.) Eaton also trained "a young male in his early 20s . . . to do the work he did," starting in August 2016 through February 2017. (*Id.* at 4.)

On January 24, 2017, Eaton approached David Cruz, a company director, with issues and concerns regarding Eaton's immediate supervisor, Justin Deacon. (*Id.* at 4.) Eaton had observed Deacon's alleged "sexual and racial harassment with women and Latinos in the company." (*Id.*) Cruz said he would discuss

Eaton's concerns with Lance Nearby,[1] vice president of the company. (*Id.* at 2, 4.) The next day, January 25, Nearby approached Eaton to insist he change his work hours, which disrupted the work schedule Eaton arranged when he took the job and frustrated his regularly scheduled time he picked his children up from school. (*Id.* at 5, 9, 14.) Eaton was given an ultimatum to change hours or quit his employment. (*Id.* at 9.) Eaton ultimately complied with the change of work hours. (*Id.* at 5, 9.)

On April 4, 2017, Eaton received "subpar ratings" in his annual evaluation from Deacon, in which it was commented that Eaton did not get along with his supervisor's son, Travis Deacon. (*Id.* at 5, 14.) The next day, Eaton was called into a meeting with Deacon and Nearby. (*Id.* at 5.) Eaton noted that the comment in his evaluation that he did not get along with the supervisor's son, had been changed to "not getting along with his supervisor." (*Id.*) Eaton also raised his concerns about Deacon's sexual harassment at the meeting. (*Id.*) Eaton was told to go home. (*Id.*) The same day, Eaton penned a grievance letter for sending him home without good reason. (*Id.*) Eaton returned to work on April 10, 2017, still uncertain why he was told to go home on April 4. (*Id.*) Four days later, Eaton took medical leave to undergo surgery for a work-related injury. (*Id.* at 6.)

Silversmiths' human resources department responded to Eaton's grievance letter on May 15, 2017, stating a third-party investigation would be undertaken. (*Id.*) On June 9, Eaton received another response

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[1] The Court notes the spelling of "Nearby" also appears as "Neirby" in the Complaint. (*Cf.* Doc. 1 at 2 and at 5, ¶ 7, *e.g.*)

—presumably the findings of the investigation—and Eaton returned a letter of appeal to Silversmiths within a few days. (*Id.*) On June 14, 2017, Human resources informed Eaton there was no mechanism to appeal a grievance. (Id.) Eaton was then laid off on June 15, 2017. (*Id.*)

On July 7, 2017, Eaton filed a Notice of Retaliation with the Montana Human Rights Bureau ("MHRB"), alleging sex and age discrimination, as well as retaliation for reporting harassment in the workplace. (*Id.* at 3.) MHRB issued a Notice of Dismissal, Notice of Final Agency Decision, and Notice of Right to Sue on January 23, 2018. (*Id.*) Eaton then filed the instant action on May 23, 2018, alleging retaliation (Count I); wrongful discharge (Count II); disability discrimination (Count III); age discrimination (Count IV); hostile work environment (Count V); and defamation of character (Count VI). (Doc. 5.)

Silversmiths filed a motion to dismiss Eaton's Second Amended Complaint on November 9, 2018. (Docs. 12, 16). The Court granted the motion as to Counts III-VI without prejudice, and granted Eaton leave to amend his complaint. (Doc. 33 at 3-4.). Eaton then filed a third and fourth amended complaint, each of which re-alleged Counts III-VI. (Docs. 34, 48.) The Fourth Amended Complaint also added a breach of contract claim in Count VII. (Doc. 48.) Silversmiths answered the Third Amended Complaint (Doc. 35), and in response to the Fourth Amended Complaint, filed the instant motion to dismiss Count VII. (Doc. 54.)

## II. Legal Standard

A Rule 12(b)(6) motion to dismiss tests the sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *see also Chavez v. Bank of America, N.A.*, 2010 WL 1854087 at *4 (E.D. Cal. 2010) (summarizing the legal standard to be applied to Rule 12(b)(6) motions to dismiss). "Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008)).

The Court evaluates Rule 12(b)(6) motions to dismiss in light of Rule 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). While "detailed factual allegations" are not required, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678 (quotations and citations omitted). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotations and citations omitted). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Twombly*, 550 U.S. at 570). A claim

is plausible on its face when the facts pled "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The claim need not be probable, but there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Facts that are "merely consistent with" a defendant's liability fall short of this standard. *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (first alteration added).

The Court's review of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is generally confined to the pleadings. *U.S. v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003); *U.S. v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011). However, the Court also may consider documents attached to the pleadings or incorporated into the pleadings by reference. *Ritchie*, 342 F.3d at 908. Documents may be incorporated by reference into the pleadings where "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Corinthian Colleges*, 655 F.3d at 999.

## III. Discussion

Silversmiths advances two grounds for dismissal under Rule 12(b)(6). First, Silversmith argues that Eaton's breach of contract claim is statutorily precluded by Montana's Wrongful Discharge from Employment Act ("WDEA"). (Doc. 55 at 5, 13.) Second, Silversmith asserts that Eaton's Fourth Amended Complaint

fails to plead any facts or allegations that establish the existence of an enforceable contract between Silversmiths and Eaton. (*Id.* at 6, 18.)

**A. Existence of a Contract**

Eaton's breach of contract claim is based upon Silversmith's "Employee Handbook" ("Handbook").[2] Eaton alleges that the Handbook constitutes a contract, and that Silversmith breached three specific sections of the Handbook: (1) Communications; (2) Use of Paid and Unpaid Leave; and (3) Nepotism, Employment of Relatives, and Personal Relations. (Doc. 48 at 20-23).

With respect to the communications section, the complaint alleges that the Handbook encourages employees to speak to their supervisors or managers at any time for any reason. (*Id.* at 21.) Eaton alleges that Silversmiths breached this provision because he received negative marks on his performance evaluation after he expressed his concerns regarding sexual and racial harassment to a director of the company. (*Id.*)

With respect to the leave section of the Handbook, Eaton alleges Silversmiths breached the provision of the Handbook which provides for FMLA leave for its employees. (*Id.*) He alleges that he was told he would not qualify for FMLA leave while on worker's compensation and was not provided a form to request

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[2] Silversmiths submitted the Handbook with its motion to dismiss. (Doc. 55-1.) Although the Handbook is not attached to fourth amended complaint, it is referenced extensively in the pleading; it is central to Eaton's claim for breach of contract; and neither party questions the authenticity of the document. It may therefore be considered in connection with Silvermiths' motion to dismiss. *Corinthian Colleges*, 655 F.3d at 999.

FMLA. (*Id.*) Thus, he contends he was not allowed to find out whether he qualified for FMLA leave. (*Id.*)

As to the nepotism section, Eaton alleges that Silversmiths breached the company's nepotism provisions in the Handbook, resulting in more favorable treatment to employees being supervised by family members. (*Id.* at 22-23.) Eaton alleges this allowed employees in higher positions to work together to discharge Eaton. (*Id.* at 23.)

To establish the existence of a contract, Eaton must establish "(1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration." Mont. Code Ann. § 28-2-102. "Mutual consent consists of an offer and an acceptance of that offer." *Chipman v. Northwest Healthcare Corp., Applied Health Services Inc.*, 317 P.3d 182, 185 (Mont. 2014). The consent of the parties must be "mutual; and communicated by each to the other." Mont. Code Ann. § 28-2-301.

Under Montana law, employee handbooks distributed to employees after hiring are generally not considered a contract. *Kittleson v. Archie Cochrane Motors, Inc.*, 813 P.2d 424, 427 (Mont. 1991). "[T]he handbook constitutes a unilateral statement of company policies and procedures, because its terms are not bargained for, and because no meeting of the minds occurred." *Id.* (citing *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1066 (Mont. 1982) (employee handbook contained a unilateral statement of company policies and procedures and was not a contract)). Eaton does not allege in his complaint that the policies and procedures in the Handbook were any way bargained for by the parties.

Eaton argues, however, that he "was offered a job with Silversmiths and had to sign the employee handbook in order to accept all policies and procedures to work there." (Doc. 61 at 4.) Thus, Eaton maintains, there was an offer by Silversmiths and his acceptance of the offer, creating a binding contract. (*Id.*) But "[t]o be considered an offer, the offeror must manifest a willingness to enter into a bargain." *Chipman*, 317 P.3d at 185. Here, Silversmiths expressly stated its intention not to be contractually bound by the Handbook. The Handbook states:

> Neither this handbook nor any other company document confers any contractual right; either express or implied, to remain in the company's employ. Nor does it guarantee any fixed terms and conditions of your employment. No supervisor or other representative of the company (except the president) has the authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to the above. (Doc. 55-1 at 2.)

The Handbook further provides:

> There are several things to keep in mind about this handbook. First, it contains only general information and guidelines. It is not intended to be comprehensive or to address all possible applications of, or exceptions to, the general policies and procedures described. (*Id.*)
>
> . . . .

> The procedures, practices, policies and benefits described here may be modified or discontinued from time to time. (*Id.*)

In 2013, Eaton also signed an acknowledgement that he received the Handbook, which states:

> I understand this Handbook reflects only a non-exclusive summary of some current policies and benefits. It does not create a contract of employment. Montana Silversmiths Inc. retains the right to change these policies and benefits, at its discretion and without notice. Other policies, procedures, and plans may also exist and may be equally applicable in a given situation. (Doc. 55-2.)

> Eaton's 2015 acknowledgment similarly provided:

> I understand that any and all policies and practices may be changed at any time by Montana Silversmiths Inc. and the company reserves the right to change my hours, wages and working conditions at any time. (Doc. 55-3.)

The Montana Supreme Court considered an employee handbook which contained similar language in *Chipman*. In that case, employees signed a receipt for each edition of the company handbook, which stated that the employee understood that nothing in the handbook could be "construed as creating a promise of future benefits or a binding contract with [the employer]." *Chipman*, 638 P.2d at 184. It further provided that the handbook stated the policies and practices in effect at that time, but they "are continually

evaluated and may be amended and modified or terminated at any time." *Id.*

The Montana Supreme Court found the policies lacked the required contractual element of mutual consent. *Id.* at 186. The court said "[g]iven these express disclaimers, the Employers' objective manifestations leave no doubt that they did not intend the statement of benefits to bind their future obligations, and employees could not reasonably rely on the benefits described in the handbook as existing indefinitely." *Id.*

Just as in *Chipman*, Silversmiths expressly disclaim that the Handbook was not intended to confer any contractual right; stated that the Handbook does not guarantee fixed terms of employment; and made clear the policies and practices outlined may be changed at any time. The language makes clear that there was no mutual consent indicating the parties intended to be bound to the Handbook as a contract.

**B. WDEA Exclusivity**

Silversmiths further argue that Eaton cannot maintain a common law breach of contract claim based on the same underlying discharge from employment, because the WDEA provides the exclusive remedy for wrongful discharge and preempts common law remedies. (Doc. 55 at 13.)

The WDEA "sets forth certain rights and remedies with respect to wrongful discharge . . . [and] provides the exclusive remedy for wrongful discharge from employment." Mont. Code Ann. § 39-2-902. It further provides that "[t]here is no right under any legal theory to damages from wrongful discharge under

this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages except as provided in [the Act]." Mont. Code Ann. § 39-2-905(3). It also makes clear that, except as provided in the WDEA, "no claim for discharge may arise from tort or express or implied contract." Mont. Code Ann. § 39-2-913.

Accordingly, the Montana Supreme Court has consistently recognized that it is "beyond dispute that the Wrongful Discharge From Employment Act . . . is the exclusive remedy for wrongful discharge in Montana." *Ruzicka v. First Healthcare Corp.*, 45 F.Supp.2d 809, 811 (Mont. 1997). Nevertheless, the Montana Court has also recognized that claims that are unrelated to an alleged wrongful discharge are not preempted. *Beasley v. Semitool, Inc.*, 853 P.2d 84, 86-87 (Mont. 1993) (the WDEA "bars claims for discharge arising from tort or implied or express contract, but does not bar all tort or contract claims merely because they arise in the employment context.") Therefore, claims which are separate and independent, and which aver damages separately from the damages claimed for wrongful discharge, are not barred. *Id.* at 86. But claims which are "inextricably intertwined with the discharge and whose claims for damages are caused by an asserted wrongful discharge" are barred. *Daniels v. YRC., Inc.*, 2013 WL 449300, *1 (D. Mont. Feb. 5, 2013); *Beasley*, 853 P.2d at 87.

None of Eaton's alleged contract claims constitute separate and independent claims which could have been asserted in the absence of his discharge. His claim based on the communication section of the Handbook, for example, alleges that the marks on his performance evaluation were downgraded when

he "overstepped the hierarchy when verbalizing his concerns in the company . . . " (Doc. 48 at 21.) But he does not allege that he was damaged in any way separately from the damages he claims for his discharge. *See e.g.*, *Mysse v. Martens*, 926 P.2d 765, 774 (Mont. 1996) ("because [plaintiff) did not allege any damages arising from this breach separate from the damages arising out of her discharge, the complaint is insufficient to indicate a separate claim.").

The same is true with respect to Eaton's contract claim based on the leave section of the Handbook. Eaton does not allege a claim under the FMLA, or that he was wrongfully denied FMLA leave. He alleges that he was denied the opportunity to "at least submit an FMLA leave form request to assess whether he could obtain this in conjunction with worker's compensation." (Doc. 48 at 21.) Eaton explains that had he been placed on FMLA leave, he would have been exempt from Silvermiths' layoff, and apparently not terminated. (Doc. 61 at 6.) Thus, Eaton's contract claim based on Silvermiths' leave policy is grounded on his termination, and again does not allege that he incurred damages separately from his discharge.

Finally, his contract claim based on the nepotism provisions of the Handbook is clearly not a separate and independent action. Eaton alleges that the "conflicts of interest" created by nepotism within the company "lead the employees that were in higher positions (supervisor, HR) to work together to wrongfully discharge Eaton." (Doc. 48 at 23.) Again, the claim is based on his wrongful discharge, and does not allege that he was separately damaged by nepotism within the company.

Eaton summarizes the basis for his breach of contract claim by stating: "Thus, [Silvermiths] breached their own contract several times, leading to retaliation and wrongful termination of Mr. Eaton." (*Id.*) These allegations make clear that Eaton's contract claims are inextricably intertwined with his wrongful discharge claim, and do not constitute separate and independent claims which could have been asserted in the absence of his discharge. The claims are barred by the WDEA's exclusivity provisions.

## IV. Conclusion

The Court finds that Eaton's claim for breach of contract based on Silversmiths' Employee Handbook fails to state a plausible claim and is further barred by the WDEA's exclusivity provision. The Court further finds that any amendment of Eaton's breach of contract claim based on the Handbook would be futile, and therefore recommends that the claim be dismissed with prejudice.

Therefore, the Court RECOMMENDS Defendant Montana Silversmiths' Motion to Dismiss (Doc. 54) be GRANTED, and that Count VII of Eaton's Fourth Amended Complaint be DISMISSED WITH PREJUDICE.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

IT IS ORDERED.

DATED this 3rd day of August, 2020.

/s/ Timothy J. Cavan
United States Magistrate Judge

**ORDER, DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (JANUARY 4, 2024)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT A. EATON,

*Plaintiff-Appellant,*

v.

MONTANA SILVERSMITHS,

*Defendant-Appellee.*

No. 22-35480

D.C. No. 1:18-cv-00065-SPW
District of Montana, Billings

Before: BENNETT, SUNG, and H.A. THOMAS, Circuit Judges.

**ORDER**

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

The Clerk of the Court is directed to serve Petitioner with a print copy of the docket sheet in 22-35480 along with this order.

**PLAINTIFF'S MOTION TO EXTEND MOTION TO COMPEL DEADLINE (DECEMBER 3, 2020)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

Case No. CV 18-65-BLG-SPW-TJC

**PLAINTIFF'S MOTION TO EXTEND MOTION TO COMPEL DEADLINE**

Plaintiff, Robert Eaton moves the Court for an Order extending the deadline for Motion to Compel evidence. Pursuant L. R. 7.1, Plaintiff has contacted Defendant's regarding his position on this Motion. Defendant has indicated they oppose this Motion.

Plaintiff, Robert Eaton, respectfully requests permission from the Court to extend the Motion to Compel Deadline to 90 days prior to court for the following reasons:

1. Eaton originally requested defendant's taxes in a combined discovery request at request

#49 on March 2nd, 2020, stating, "Please provide a copy of Defendant's state and federal income tax returns and financial statements for each year beginning with 2013 to present".

2. Defendant's original response, dated May 1st, 2020 stated, "Montana Silversmiths objects to this request on the basis it is overly broad, unduly burdensome, and not reasonably tailored to lead to the discovery of admissible evidence as it seeks confidential information that is irrelevant to this litigation".

3. Eaton followed up with this request with an email/ letter dated May 9th, 2020 stating the following:

REQUEST FOR PRODUCTION NO. 49: Please produce a copy of Defendant's state and federal income tax returns and financial statements for each year beginning with 2013 through present. Your response, which failed to include such documents and objected to the request as overly broad, unduly burdensome, and not reasonably tailored to lead to the discovery of admissible evidence as it seeks confidential information that is irrelevant to this litigation. As explained below, your objections fail to justify withholding the production, and you must provide the responsive documents in accordance with the Federal Rules of Civil Procedure.

- "The burden lies on the objecting party to show that a discovery request is improper." *Ivins v. Corr. Corp. of Am*, 291 F.R.D. 517, 519 (D.Mont. 2013). Overall, you fail to pro-

vide any specific explanation how gathering and producing MTSS tax records "2013 to present" constitutes an improper discovery request, meaning your objections cannot justify withholding the requested documents. *See id.* At 519-20 (citing *McLeos, Alexander, Pwel & Apf el, P.C. v Quarles*, 894 F. 2d 1482, 1485 (5th Cir. 1990).

- More importantly, your inaccurate, illogical objection that the Request "is not reasonably tailored to lead to the discovery of admissible evidence, as you stated, carries not merit whatsoever. The information contained in MTSS tax records is not only directly relevant to this case, it is absolutely necessary and needed. Federal R. Evid. 401 establishes the following:
- Evidence is relevant if:
  - It has a tendency to make a fact more or less probable than it would be without evidence; and
  - The fact is a consequence in determining the action.
- Pursuant to Fed. R. Cov. P 34 (a), a party may request the production of any designated documents within the expansive scope of Rule 26 (b)(1). With that,"Proper discovery request relating to the amount of damages recoverable is certainly relevant and therefore permissible under Rule 26 so long as none of the material

> sought to be discovered is privileged". *United States v. Miracle Recreation Equip. Co.* 118 F. R. D. 100, 104 (S.D, Iowa 1987) The law is well established that income tax returns are not privileged from discovery and production under Rule 34, especially where plaintiff has a claim of punitive damages or where punitive damages are expected, *Guardado*, 163, *Jabro*, 95 Cal. App. 4th at 758.

As such, Plaintiff requests that MTSS supplement their response to Request No. 49 on or Before May 23, 2020 by providing the requested documents. Thank you for your attention to this matter. (DIRECT QUOTES)

4. Montana Silversmiths Counsel responded with the following on May 21, 2020:

Finally, Plaintiff's request for financial data spanning five years is overbroad. "Only current financial documents are relevant to a claim for punitive damages." *Lane v. Capital Acquisitions*, 242 F.R.D. 667, 669 (S.D.Fla.2005) (holding that some of Plaintiff's discovery requests were overbroad on their face because they sought financial records for a five-year period). The Court finds that a shorter span of financial records is appropriate. At the hearing, Defense counsel advised the Court that she was not aware of the specific accounting practices of her client. Counsel for both parties are directed to confer regarding that information. By the deadline for production (30 days prior to

> trial, currently set for September 2013), Defendant must produce the most relevant documents, which will be either for year-end 2012 or different time periods in 2013, dependent upon Defendant's specific accounting practices and the date of trial. If audited statements are available, these must be produced rather than un-audited statements. Production of the financial data described in this order will be subject to a protective order that the parties shall agree to prior to production.

*Williams v. S. Lubes, Inc.*, No. 1:12-CV-180-SPM-GRJ, 2012 WL 6135170, at *1-2 (N.D. Fla. Dec. 3, 2012). Here, Montana Silversmiths is confident that it will prevail on pretrial dispositive motions regarding your punitive damages claims. If that is not the case, then Montana Silversmiths will be willing to discuss this request at a later date. Until then, however, Montana Silversmiths must stand by its objections to this request. (DIRECT QUOTES)

5. Plaintiff followed up with a meet and confer request on 5/26/20, which included the request for taxes. The email request resulted in no immediate responses.

6. Plaintiff, Robert Eaton, wrote another letter September 20, 2020 requesting taxes again, as follows:

Dear Moultan Bellingham:

This letter is in response to my request for Montana Silversmiths taxes, which have yet to be produced. I affirm that I am seeking punitive damages for a few of my counts, which indicate a need for

Montana Silversmiths taxes. Legal theories are indicated below:

In the case of *Orlando Montes V. Pinnacle Propane, LLC* the plaintiff stated the following in his request for Defendant's taxes:

> "[I]f a plaintiff has alleged sufficient facts to claim punitive damages against a defendant, information of the defendant's net worth or financial condition is relevant because it can be considered in determining punitive damages." Roberts v. Shawnee Mission Ford, Inc., No. 01- Case 2:16-cv-00126-JCH-SMV Document 143 Filed 09/20/16 Page 3 of 9 4 2113-CM, 2002 U.S. Dist. LEXIS 9525, at *10 (D. Kan. Feb. 7, 2002) (internal quotation marks omitted). The party requesting the discovery generally does not need to "establish a prima facie case on the issue of punitive damages before it can obtain pretrial discovery of the other party's financial statements and tax returns." *Id.* at *10–11 (internal brackets omitted). "To discover a party's financial condition in light of a claim for punitive damages, requesting parties generally must show the claim for punitive damages is not spurious." *Id.* (citation omitted). A claim is not spurious if "sufficient facts have been alleged to make a claim for punitive damages." *Krenning v. Hunter Health Clinic, Inc.*, 166 F.R.D. 33, 34 (D. Kan. 1996) (emphasis added).

In this case, the plaintiff was allotted a statement of net worth. I am seeking punitive damages in a few of my counts and have sufficient facts to make a claim

for punitive damages, therefore, it is necessary for me to receive a networth and/or taxes provided by Montana Silversmiths in this case. (DIRECT QUOTES)

7. Montana Silversmiths counsel responded as follows:

Dear Robert:

This letter is in response to your September 21, 2020, letter regarding Request for Production No. 49, which seeks Montana Silversmiths' tax returns for numerous years. Your letter contains simply a blanket statement that you are seeking punitive damages, and that you have alleged sufficient facts to make such a claim. We would respectfully disagree. You fail to cite which specific claims and conduct you allege give rise to a punitive damages claim. As you know, the bar for recovering punitive damages is significantly higher than that of general damages, and without specific citations from you, we are unable to agree you have met the burden of showing a prima facie case of entitlement to punitive damages. We would ask you supplement your letter outlining these details, so we may evaluate your arguments more completely. Interestingly, the case you cite in support of your arguments, *Montes v. Pinnacle Propane, L.L.C.*, 2016 WL 10179315, *4-5 (D.N.M. Sept. 20, 2016), actually did not require the production of tax returns, and the court specifically ordered the defendant was not required to produce those. Rather, the court had the defendant produce only a statement of net worth, verified by a CPA, at a later date.

Substantively, other courts have adopted a similar approach, essentially requiring disclosure of net worth at a later date assuming a plaintiff's claims survive

summary judgment. *See Pasternak v. Dow Kim*, 275 F.R.D. 461 (S.D.N.Y. 2011). As I am sure you could anticipate, we will be filing a dispositive motion on your claims, and we believe the prudent course would be to address supplementation of this request and this issue following a ruling by the Court on our motion. That being said, we are certainly open to the idea of further discussions as outlined above, provided you can provide us such information. (DIRECT QUOTE)

8. Plaintiff, Robert Eaton, requested another meet and confer on the request for taxes completed on November 19th, 2020.

Plaintiff, Robert Eaton, not only has punitive damages in this lawsuit, but depositions from Justin Deacon, Plaintiff's direct supervisor in his previous job at Montana Silversmiths, as well as documentation from Collette Schlehuber, Human Resources, and deposition from Lance Neirby (VIce PResident of Montana Silversmiths) that state Eaton's position was extracted secondary to a loss of a contract by the company Eaton worked for. Even if the defendant's position isn't complete financial loss, there is definite inference of financial loss or hardship, at least in part, which led to Eaton's dismissal. Secondary to information in the case inferring at least in part that Eaton's job was eliminated secondary to financial losses by the company. Eaton's claim certainly promotes concern by Eaton as to whether the company actually had a financial loss or not prior to his elimination. Therefore, his request for taxes is two-fold. One, for identification of punitive damages in several of his counts against Montana Silversmiths and two, for

identification of financial loss several of key litigants are stating as the reason for Eaton's layoff.

Secondary to Montana Silversmiths lead counsel stating that they are going to request attorney fees if Eaton continues with a formal Motion to Compel, Eaton is respectfully requesting in the least for the Motion to compel deadline to extend to up until 90 days prior to court. Also, if it so pleases the court, Eaton would like support in requesting Defendants in the least produce a financial statement by CPA for years 2013 to present.

Respectfully Submitted,

/s/ Robert Eaton
Pro Per

Dated December 3, 2020

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE (OCTOBER 26, 2021)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendant.*

Case No. CV 18-65-BLG-SPW-TJC

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE**

Plaintiff opposes Defendant's motion to strike for the following reasons:

1. Defendant has failed to comply with L.R. 7.1(c)(1) regarding contacting opposing counsel on whether the undersigned counsel opposed his Motion to Strike Doc 114 & Document 114-1 and Clarification from the Court (Doc 115). L.R. 7.1 applies to all motions subject to a few exceptions not relevant here. Failure to comply with L.r. 7.1 (c)(1) may result

in summary denial of the motions without prejudice with leave to refile L. R. 7.1 (c)(4). Plaintiff would request the Motion be denied. However, if the court does not do so, please provide the Plaintiff with a determined allowable time to respond to Defendant's Motion to Strike.

2. Plaintiff, in extensive research on U.S. Magistrate Judges responses regarding Summary judgment/dispositive motions in addition with plaintiff contacting the Clerk of Court within 1 week of obtaining Document 113 (U.S. Magistrate Judge and Order) at which time the plaintiff was informed that the said document was NOT a final order. Plaintiff, Robert Eaton concluded that Document 113 was in essence a Magistrate Judges Findings and Recommendations and thus allowable for an objection. However, in the event that the Court does find this to be an order, please allow Eaton's Document 114 and 114-1 to be considered a Request for Reconsideration.

3. If the court so decides to uphold the strike, the plaintiff respectfully requests a clarification on timelines and what the court deems allowable time to complete request for reconsideration with new evidence and law (e.g., Law for ADAAA) outlined in Document 114 and/or timeline for request for interlocutory appeal pursuant 28 USC 1292.

4. Additionally, embedded in Document 113 was not just Recommendations for Dispositive

motion, but also Eaton's "Request for Hearing" (MCA 56 2(A)) and "Motion to extend motion to compel Deadline". Thus, each of the pending motions should be addressed individually, and were all addressed in Document 114 and 114-1, thus these documents should be allowed in order to address all motions considered.

Dated this 26th Day of October, 2021

By: /s/ Robert Eaton
Pro Se

**PLAINTIFF'S RESPONSE/DEFENSE TO DEFENDANT'S DOC 124 OPPOSITION TO INTERLOCUTORY APPEAL (OCTOBER 26, 2021)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT A. EATON,

*Plaintiff,*

v.

MONTANA SILVERSMITHS,

*Defendant.*

Case No. CV 18-65-BLG-SPW-TJC

**PLAINTIFF'S RESPONSE/DEFENSE | TO DEFENDANT'S DOC 124 OPPOSITION TO INTERLOCUTORY APPEAL**

Plaintiff, Robert Eaton, Pro Se, hereby provides his response/defense to Defendant, Montana Silversmiths opposition to Plaintiff, Robert Eaton's request to Certify Interlocutory Appeal (Doc 124). Defendant opposes Eaton's request for Interlocutory appeal pursuant 28 U.S.C. § 1292 (b) of the Court's Order dated September 28, 2021. Defendant's, Montana Silversmiths, allege that Eaton's attempt to immediately

appeal the summary judgement ruling on Counts 2 through 6 is improper and thus should be denied. Eaton's defense/response to Defendant's allegations are as follows and confirm that Eaton's interlocutory appeal with stay of court should be upheld. Additionally, Eaton would like to bring forth at the time, that he was not allowed a hearing, with a timely request for a hearing regarding his defense to summary judgement, which would have easily clarified many questions of fact brought up in Document 113. 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." Eaton had requested a hearing for his defense regarding Montana Silversmiths' Motion for Summary Judgement within 14 day after the time for filing a brief had expired, therefore he retained his right to a hearing.

## LEGAL STANDARD

Although, in general, courts of appeals may review only final judgements of a district court of appeal. *Cunningham v. Gates* 229 F.3d 1271, 1283 (9th Cir. 2000). However, Eaton has a right to immediate appeal of certain issues that are considered "collateral" to the main dispute. Additionally, while the final judgement rule might be efficient in most cases, applying it in Eaton's specific case may mean that the parties-and the trial court- could spend time and resources on a trial (e.g., FMLA) that an appellate court could later conclude should have included several other counts and would then need to be litigated further to include all counts. Through 28 U.S.C. § 1292, Eaton establishes that a district court may certify an interlocutory appeal, noted in the 9th Circuit Court

of Appeals. Within this standard, a district judge may certify an interlocutory order for immediate appeal when the judge is "of the opinion that such order [(1)] involves a controlling question of law [(2)] as to which there is substantial ground for difference of opinion, and that [(3)] an immediate appeal from the order may materially advance the case. In Eaton's interlocutory appeal, he is able to complete all standards for justification of such an appeal.

## ADDITIONAL INFORMATION

Being a Pro Se litigant, I have to research all information regarding each and every legal term, cases, case laws, etcetera to as great of extent as possible in order to comprehend the legal system and each step to take. Therefore, when obtaining Document 113, which was labeled "US Magistrate Judge and ORDER", I was confused, therefore researched all cases that I could find online which Judge Watters resided, mostly of which were also cases Judge Cavaan was involved. Within these cases, including *Kathrens v. Zinke,Siers v. Casey's Convenience Store #10 et. al* (July 12, 2018), *Batey v. Rosebud County (MT)* (August 28, 2018), *Baker v. Jones* (August 28, 2018), *Brodock v Nevro Corp, Safeco Insurance Company of America v. Grieshop, LaTray v. Montana, Colvin v. Bank, Wilhite v. United States, United States v. Toole, Smith v. Charter Communications Inc* (Jan 20201), *Tillett v. Bureau of Land Management, Warren v. Ficek* (July, 2015), *McLain v. McLain, Maulolo v. Billings Clinic* (June 13, 2019), four of these cases went into summary judgement and all four of the ones that I found that went into summary judgement (*Smith v. Charter Communications Inc* (Jan 20201),

*Tillett v. Bureau of Land Management, Warren v. Ficek* (July, 2015), *McLain v. McLain, Maulolo v. Billings Clinic* (June 13, 2019)); The Summary Judgement and response were provided Findings and Recommendations by the Magistrate judge and allowed an objection for Judge Watters to review before she put in her decision. Therefore, I put in an objection (Document 114;114-1), which was stricken. The controlling question of law may be whether Document 113 should have been a Findings and Recommendations, or whether Eaton should have been allowed either a hearing, an objection, a more appropriation Request for Reconsideration, in lieu of an interlocutory appeal. All of the above may be reconsidered at any time by the district judge.

**ARGUMENT**

Eaton request does involve more than one controlling question of law:

There are two of Eaton's counts that have specific questions of law: 1) Disability Discrimination; and 2) Wrongful termination with specific regards to legitimate business reason. These two issues, once shown that there is a controlling question of law lend to the supplemental jurisdiction claims. A controlling question of law is one in which either 1; if decided erroneously, would lead to reversal on appeal, or 2) is 'serious to the conduct of the litigation either practically or legally. (*Katz*, 496 F.2D at 755 (citations omitted). Saving the district court's time and the litigants expenses is a 'highly relevant factor'.

**1. Disability Discrimination–Controlling Question of Law.**

It should be noted that a controlling question of law may be characterized on an appeal as a mixed question of Law and Fact. There is a likelihood of confusion under the Lanham Act "A question of fact, a question of law or both?" (Kentucky Law Journal, 73). As Eaton had previously argued in his interlocutory appeal request for certification in *Nunes v. Holdings, Inc.*, (2018), the appellate court held

> "The plaintiff was not required to present evidence that the employer believed that plaintiff was substantially limited in a major life activity. Instead, the plaintiff could simply show that the employer terminated plaintiff "because of" his knowledge of the shoulder pain, regardless of whether the employer actually perceived the shoulder pain as a disability, and The Ninth Circuit's expansion of the scope of the "regarded-as" disability definition follows decisions in the First, Fifth, Sixth and Tenth Circuits which similarly defined the definition under the ADAAA. Additionally, although the employer had argued that the ADAAA "regarded-as" disabled definition does not apply to "transitory and minor impairments," the appellate court noted that this exception is an affirmative defense with the burden of proof on the defendant, and not the plaintiff. The court held that the employer had not set forth evidence to establish plaintiff's shoulder pain was transitory and minor. Therefore, the appellate court held that

> Plaintiff had established a genuine issue of material fact as to whether the employer regarded him as having a disability. The Ninth Circuit further reversed the circuit court's holding that the plaintiff could not establish his shoulder pain was an actual disability. Specifically, the appellate court found that because plaintiff could neither work nor lift more than 25 pounds nor lift his arm above chest height without pain, he had identified two major life activities affected by his impairment. The court noted an impairment "need not prevent, or significantly or severely restrict the activity" in order to substantially affect a major life activity. Therefore, the court found an issue of fact as to whether the plaintiff had an actual disability."

Additionally, in *Ortega v. South Colorado Clinic, P.C.* (Dist of Col. Jan 20. 2015), The United States District Court for the District of Colorado narrowly interpreted the definition of 'disability' and excluded the condition that arguably satisfied the ADA's broad standards. The plaintiff was terminated from her position as a medical coder following her diagnosis of fibromyalgia and interstitial cystitis. She claimed that her illness and consequential symptoms such as blurred vision, chronic pain, and dizziness interfered with her ability to read, work, and sleep. The court's insistence on a detailed pleading from the plaintiff regarding the description of her limitations and a comparison to the general public conflicted with the ADAAA's purpose of alleviating the plaintiff's burden under the ADA. Flaws in the court's analysis included,

under the ADAAA and subsequent regulations, an impairment can be substantially limiting if it is episodic, in remission, or temporary 42 U.S.C. § 12102 (4)(D) "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active"

In *Toyota Motor Manufacturing, Kentucky, Inc v. Williams* 534 U.S. 184 (2002). Congress explicitly repudiated the Supreme Court's analysis in *Toyota.* Specifically, Congress found that the Supreme Court in Toyota "created an inappropriately high level of limitation necessary to obtain coverage under the ADA (Section 2(b)(5) of the amendment act). The plaintiff was required to perform tasks that exacerbated her carpal tunnel syndrome.

The above cases show that there is a definite controlling question of law regarding the interpretation of the ADAAA as well as several courts who have erred in this instance. Eaton had a history of a back injury, which Collette, HR, was aware of. Additionally, he had undergone one of two carpal tunnel surgeries, both of which were work related from working at Montana Silversmiths, and both of which Colette was aware of and was actively speaking to Robert Eaton's Workman's Compensation adjuster regularly. The court has access to all the records in Eaton's interlocutory appeal request as well as summary judgment papers that substantiate this. Additionally, Eaton had completed one carpal tunnel surgery that was very evident to be taking longer than expected, showing he was in a disabled category with this and his back. Additionally, it was noted in Collette's letter to Eaton that he was expected back to work at full time and she would not engage in the interactive

process to initiate any sort of accommodations. In *Hostettler v. College of Wooster*, (2018), the judge ruled that working full time cannot be considered an essential job function, cautioning the consequences of allowing that requirement on all disabled employees. Thus, the controlling questions of law are evident in the newly adjusted ADAAA section of the ADA, showing that Eaton should not have the burden of proving he is disabled, especially because the defendants have already acknowledged his disabilities. But, the courts should be looking at the employer being at fault for not actively engaging in verbal interactions for accommodations, including FMLA, adjusted work hours, which were possibilities per Eaton's need for accommodations. Additionally, according to four other federal circuits, the Second Circuit recognized that the ADA could address hostile work environment claims. A judgment against Costco wholesale essentially 'eliminated any uncertainty' of hostile work environment claims under the ADA (O'Connell, 2019) (NWADA, 2019). The court concluded that a hostile work environment exists in an environment that is 'subjectively and objectivity' abusive.

**2. WDEA Legitimate Business Reason-Controlling Question of Law:**

In *Buck v. Billings Montana Chevrolet, Inc* (1991), 248 kMont. 276, 281-82, 811 P2d. 537, 540, "legitimate business reason" is defined as a "reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business". This last section is where Defendant, Montana Silversmiths falls short, showing a controlling question of law and fact, intermingled. This is shown by All individuals in administration

stating that they are continually looking for engravers, in addition to Eaton's supervisor, in his deposition, stating that Eaton was a very good engraver, as well as Eaton's performance evaluations prior to April, 2017 which showed he was good at his job. In addition, Justin Deacon's (Eaton's supervisor) performance evaluation stated in his April 2017 to hire a new engraver by July, 2017 (two weeks after Eaton was laid off) (Doc. 105 Exhibit 51-MTS 2288 in supervisor comments). The controlling question of law is obvious in the appellate Court stating that there must be some logical relationship to the needs of the business. Getting rid of an engraver does not show a logical relationship to the needs of the business. This, in the *Buck* case, when applied to the definition of wrongful discharge action brought summary judgement for the defendants in *Buck* were upheld because the plaintiff could not demonstrate the new employer did not have a legitimate business reason. What came out of this case is that the business reason MUST HAVE SOME LOGICAL RELATIONSHIP TO THE NEEDS OF THE BUSINESS. This applies very easily to Eaton's case in that, because of consistent documentation of Administration, employees in the engraving department stating in their depositions that a younger engraver was brought in before Eaton's lay off and after his lay off (they did not make the cut), as well as the engraving supervisor performance evaluations stating the they plan on trying to find, hire, and train an engraver as well as HR and former engraving supervisor stating that the hand engravers are the backbone of the company and hard to find, make it obvious that there is absolutely no logical relationship for firing Eaton when they needed him (and he was, according the Justin Deacon,

the next in line for master engraver) in relationship to the needs of the company (Doc 120 pgs 10-11). Additionally, in *Buck v. Billings Montana Chevrolet, Inc* (1991), the appellate court found that an employer's legitimate right to exercise discretion over whom it will employ must be balanced, however, against the employees equally legitimate right to secure employment (Buck 811 P2d at 540). The balance should favor an employee who presents evidence (which Eaton did), and not mere speculation, or denial, upon which a jury could determine that the reasons given for his termination were false, arbitrary, or capricious, and unrelated to the needs of the business (*Cecil* 797 P2d at 235).

In *John Kestell v. Heritage Healthcare Corporation* 858 P.2d3(1993) the Appellate court upheld *Kestell's* appeal secondary to Heritage healthcare having no legitimate business reason. Thus, even without the updated WDEA section stating "employer's reasonable business judgment" other cases within the state of Montana have found that there is a controlling question of law as to what an employer can state as a legitimate business reason, showing that they must have logical relationships to the business provide exemplary questions of law in Eaton's specific case. The cases provided in conjunction with the laws known and provided have shown that there historically has been and shown substantial grounds for difference of opinion stemming from the individuality that each individual case provides and Eaton's case, specifically shows a distinct identification of noticeable difference in opinion that prey to views of jurors and or other judges may seek insight consistent with Eaton's. Overall, allowing the certification of the interlocutory

appeal would, in turn, allow for a more speedy process in this case in that it would allow for a more comprehensive trial and minimize the probability of a more lengthy appeal following final judgement. The vital evidence is not being examined and no defense is being given regarding the timelines of the AQHA contracts in the emails A (Doc 105 pg. 43-44) and overtime (Doc 105 pg 83). No reasonable juror would look at Justin's performance evaluations and say Montana Silversmiths had a legitimate business reason to lay off an engraver when they were planning on hiring and training an engraver, implementing this in July, 2 weeks after me, and engraver, was laid off. Or, if they would look at the increase in overtime in the engraving department after my lay off. I also believe a reasonable juror would say I was wrongfully terminated when Justin Deacon, the one I made assertions about, stated in the grievance investigation, that he would leave his career over this. (Doc. 105 pg. 41) Thank you for this consideration.

/s/ Robert Eaton
Pro Se

December 7, 2021

SUPREME COURT
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