

APPLICATION FOR
DISTRICT COURT JUDGESHIP
First Judicial District

A. PERSONAL INFORMATION

1. Full Name: Donald Ford Jones
 - a. What name do you commonly go by? Don Jones
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: 316 Fuller Avenue, P.O. Box 1959, Helena, MT 59624
Phone: 406-443-3601
5. Length of residence in Montana: 17 years
6. List your place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
5/1/1998 - present	Helena	MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended, beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Renton H.S.	Renton, WA	1979	H.S. Diploma
Green River C. C.	Auburn, WA	1981	A.A.
Washington State University	Pullman, WA	1991	B.A. <i>Magna Cum Laude</i>
University of Oregon School of Law	Eugene, OR	1995	J.D.

8. List any scholarships, awards, honors and citations that you have received:

Washington State University

- Phi Beta Kappa

- Magna Cum Laude

Green River Community College

- Deans List (1980-1981)

Boeing Commercial Airplane Co.

- Employee of the Year, Auburn, WA (1986, 1988)

9. Were you a member of the Law Review? If so, please state the title and citation of any article that was published and the subject area of the article.

No.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
U.S. District Court for District of Montana	1999
Montana Supreme Court	1998
Ninth Circuit Court of Appeals	1996
U.S. District Court for District of Washington	1996
Washington Supreme Court	1995

11. Indicate your present employment (list professional partners or associates, if any).

Partner/Owner

Hohenlohe, Jones, PLLP

316 Fuller Avenue

P.O. Box 1959

Helena, MT 59624

My law partner is Philip Hohenlohe

12. State the name, dates and addresses of all law firms with which you have been associated in practice, all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Hohenlohe, Jones, PLLP Helena, MT	Partner	2007-present
Disability Rights Montana (F/K/A Montana Advocacy Program) Helena, MT	Staff Attorney	2002-2007
State of Montana Department of Administration Risk Management and Tort Defense Div. Helena, MT	Special Asst. Attorney General	2000-2002
Harrison, Loendorf, Poston & Duncan, P.C. Helena, MT	Associate	1998-2000
Leggett & Kram Tacoma, WA	Associate	1995-1998
Law Offices of Richard J. Milham Gig Harbor, WA	Intern	1992-1995
Boeing Airplane Company	Machinist	1979-1990

13. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

I have been employed continuously.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

- Employment Law (35%)
- Civil Rights/Discrimination (35%)
- Personal Injury (10%)
- Products Liability (5%)
- Construction Law (5%)
- Trust and Estates (5%)
- Family Law (3%)
- Criminal Law (2%)

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

I have enjoyed the opportunity to practice in a extensive range of the law over the course of my legal career. The breadth of my legal experience includes complex trial work against large multi-national

corporations to providing representation in simple traffic violation cases. I have worked in private and public practice. In my civil case work, I have represented both plaintiffs and defendants.

Starting in law school, I interned with a solo practitioner attorney, working exclusively on criminal law cases, specifically traffic violations and DUI. After law school, I was an associate attorney with a mid-sized law firm in Tacoma, WA. My first three years of practice was primarily in criminal law defense and family law. I was in court almost every week and had at least 15 cases that went to trial.

In 1998 I had the opportunity to move to Montana and practice law with the firm of Harrison, Loendorf, Poston and Duncan, PC. My practice included family law, criminal law, real estate, and general civil law cases. My first jury trial in Montana was a wrongful death case in front of Judge Honzel. I was counsel for the defendant and won a unanimous verdict. My next jury trial was in front of Judge Warner. I represented the plaintiff, a crop duster, and won a 11-1 verdict in a unfair trade practices case against Rhone-Poulenc, a multi-national chemical company. I also appeared before the Montana Supreme Court on behalf of the Montana Medical Association.

From 2000 to 2002, I worked for the State of Montana in the Risk Management and Tort Defense Division. My practice was the defense of tort cases against the state.

From 2002 to 2007, with Disability Rights Montana (DRM), my work was exclusive to the protection and promotion of the rights of people with disabilities, primarily in the areas of employment and access. I had several bench trials in District Court, several Human Rights Hearings before administrative judges, and had two appearances in front of the Montana Supreme Court. I also represented clients of Montana Vocational Rehabilitation and was a governor-appointed member of the Vocational Rehabilitation Council. I made several presentations on various aspects of the ADA and Vocational Rehabilitation to a wide variety of audiences. I frequently lobbied and testified at legislative hearings on behalf of people with disabilities.

I started my own firm with Phil Hohenlohe (Hohenlohe, Jones, PLLP) on October 1, 2007. We primarily represent plaintiffs and employees in discrimination and employment law cases. Our practice also includes personal injury and occasional general practice in the areas of construction law, family law, adoptions, trusts and estates, and criminal law.

16. If you specialize in any field of law, what is your specialty?

Employment and Discrimination.

17. Do you regularly appear in court? Yes, but the frequency varies considerably.

What percentage of your appearance in the last five years was in:

Federal court	20%
State or local courts of record	30%
Administrative bodies	50%
Other	0%

18. During the last five years, what percentage of your practice has been trial practice? 90%

19. How frequently have you appeared in court? 1-2 times per month on average.

20. How frequently have you appeared at administrative hearings?
1-2 times per month on average.

21. What percentage of your practice involving litigation has been:

Civil	90%
Criminal	10%
Other	0%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

No recent appearances before the Montana Supreme Court.

23. State the number of jury trials that you have tried to conclusion in the last ten years. 1

24. State the number of non-jury trials that you have tried in the last ten years. 17

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

CAPTION/CASE NO.	TRIAL DATE	OPPOSSING COUNSEL	PRESIDING JUDGE
Nedved v. Paveco Case No. 15-2016	Dec. 6, 2015	Sarah Simpkins Johnson, Berg & Saxby, PLLP 221 First Avenue East P.O. Box 3038 Kalispell, Montana 59903-3038 406-755-5535	Caroline A. Holien 406-444-4662
Patrick v Walmart HRB No. 0151017359	Ongoing	Malie Gilmore Littler Mendelsen, PC 222 E 2nd Ave. Ste. 2700 Miami, FL 33131 415-276-2530	Human Rights Bureau
Wipf v. Wipf No. BDR 2015-517	2015	Joint representation	Hon. Jeffery Sherlock 406-447-8205
Streib v. City of Boulder HRB No. 0151017521	Ongoing	Amy Christensen Christensen & Prezeau, PLLP 314 N Last Chance Gulch, Ste 300 Helena, MT 59601 406-442-7140	Human Rights Bureau

Fenner v. Cascade County Case No. 781-2014	May, 2014	Dee Ann Cooney Cooney Law Firm PO Box 7775 Helena, MT 59604 406-443-7298 Maureen Lennon MACO 2717 Skyway Dr., Ste. F Helena, MT 59602 406-441-5471	Terry Spear 406-444-4662
Lewis v. Central Montana Community Health Center No. DV 2014-20	2014	Kris Birdwell 505 W. Main Street, Suite 313 Lewistown, MT 59457 406-538-2624 Mark Higgins PO Box 1746 Great Falls, MT 59403-1746 406-771-0007	Hon. John Oldenburg 406-535-8028 and Human Rights Bureau
Goulah v. Providence HRB No. 0141017109	2014	Dennis Westlind Providence Health & Services 4400 N.E. Halsey Building 2, Suite 292 Portland, OR 97213 504-893-6090	Human Rights Bureau
Hecker v. Providence HRB No. 015017173	2014	Dennis Westlind Providence Health & Services 4400 N.E. Halsey Building 2, Suite 292 Portland, OR 97213 504-893-6090	Human Rights Bureau
Galvin v. Supervalu, Inc No. DCV 2012-664	2013	James A. Donahue Davis, Hatley, Haffeman & Tighe, P.C. 101 River Drive North P.O. Box 2103 Great Falls, Montana 59403 406-761-5243	Hon. James P. Reynolds 406-447-8209
Duncan v Montana Dept. of Corrections BOPA No. 1-2011 (2255-2011)	2013	Marjorie L. Thomas Michael P. Manion Department of Administration P.O. Box 200127 125 N. Roberts Helena, MT 59620-0127	Terry Spear 444-4662

Billeter v. USDA MSPB No. DE 0752-13- 0153-I-1	2013	Gary M. Gilbert Gary M. Gilbert & Associates, P.C. 1100 Wayne Avenue, Suite 900 Silver Spring, MD 20910 (301) 608-0880	Hon. Glen D. Williams 303-969-5101
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26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

Four appearances before the Human Rights Commission (two as appellant and two as appellee of Hearings Officer decisions in employment discrimination cases). Also, I also appeared before the Montana Board of Personal Appeals in a disputed pay band case.

27. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, please state the date, topic and group to which you spoke.

TOPIC	DATES	GROUP
Americans with Disabilities Act and public transportation	2005, 2006	Montana Transportation Partnership
Title I ADA and reasonable accommodations	2003, 2004, 2005	Montana State Rehabilitation Council
Disabilities Rights - How to request reasonable accommodations	2003-2007	Several Job fairs across the State including Great Falls, Miles City, Kalispell, Butte, Billings and Helena

While working for Disability Rights Montana (2002 to 2007), I wrote several articles for our monthly newsletter on a range of topics important to people with disabilities. I also wrote a monthly column with updates on our activities and information about our advocacy work. I also drafted, modified and edited several informational sheet and pamphlets on a variety of disability related topics including: Titles I, II and III of the American With Disabilities Act, SSDI, Vocational Rehabilitation, and the Client Assistance Program.

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member and give the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

State Bar of Montana	(1998-Present)
Montana Trial Lawyers Association	(2002-Present)
State Bar of Washington	(1995-2012)
Lewis and Clark Bar Association	(1998-present)

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. Please state the title and date of any office that you have held in each organization. If you held any offices, please describe briefly your activities in the organization.

Helena School Board, Trustee 2000-2012, vice-chair 2001-2006, chair 2006-2007
Montana School Boards Association, Board of Directors 2005-2012, vice chair 2006-2007
Helena Wrestling Club, Treasurer 2014-2015
Helena Education Foundation 2006-2013
Montana Conservation Voters 2012-2015
Ducks Unlimited 2015

30. Have you ever run for or held public office? If so, please give the details.

-Helena School Board Trustee 2000-2012 (4 terms)
-Unsuccessful bid for Montana House District 82 in 2012

31. Please explain your philosophy of public involvement and practice of giving your time to community service.

Community service is a vital component of a healthy and high-functioning society. I think it is the life-blood of many communities in Montana, including my own. One of the things I admire about my community is the high value and esteem placed on community service. Most people I know find a way to participate and give something back to our community. From serving in public office to giving your time to a charity, a church or club. Maybe it's as simple as giving a helping hand to a neighbor or co-worker in need. It is essentially a culturally-engrained attitude in Montana.

As attorneys, I think the vast majority of us place an even higher value on public service. I am certain this higher value is shared by all my fellow applicants. Serving our community is simply what most of us live for - it is in our DNA.

Some of the ways I have voluntarily enjoyed serving my community include:

- serving on the Helena School Board and the Montana School Board Association Board of Directors,
- coaching wrestling, football, baseball, t-ball, soccer, skiing and mountain biking,
- serving on the boards and/or assisting with the organization and operations of a variety of sports clubs,
- remedial reading volunteer in several Helena area elementary schools,
- speech and debate judging,
- membership and participation in several educational, religious, and community committees and organizations.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

No

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, please explain.

No

34. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations unless they also included a jail sentence.

No

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

No

36. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.

No

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

No

38. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

NA

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, please identify the source and the approximate percentage of your total income it constituted over the last five years.

NA

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or which in any manner or for any reason might embarrass you? If so, please explain.

No

41. Have you filed appropriate tax returns as required by federal, state, local and other government authorities?

Yes

If not, please explain.

NA

42. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No

If yes, please explain.

NA

43. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, please give details.

No

G. WRITING SKILLS

44. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

I research, draft, edit and finalize all my own briefs and legal writings. My staff and partner will generally proof-read and suggest edits for most of my work. I estimate 50% of my office time is researching and preparing a variety of legal pleadings, briefs, mediation brochures, settlement agreements, letters, and memoranda.

45. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., please explain the type and extent of writing that you have done.

Please see my answer to No. 44 above.

46. Please attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

Please see the attached portion of a brief I filed in the U.S. District Court of Montana, Helena Division, Case No. CV 11-21-H-DMW.

47. What percentage of your practice for the last five years has involved research and legal writing?

50 %

48. Are you competent in the use of Westlaw and/or Lexis?

Yes

H. MISCELLANEOUS

49. Briefly describe your hobbies and other interests and activities.

I am a passionate mountain biker and thoroughly appreciate riding on the quality trails surrounding our community. I also practice yoga. In the wintertime it's skiing and snowboarding with my family and friends. I follow (and often coach) all of the sports and activities my children participate in. I also enjoy hunting, fishing, hiking, camping, and simply spending quality time in the great outdoors with my family and friends. I like working on a variety of home improvements, both on my home and for friends when they need assistance. I also enjoy attending fundraising dinners and events for a variety of community and national organizations. Traveling, reading, movies, dining, and date nights with my amazing wife are always a blast.

50. Describe the jobs that you have held during your lifetime.

My first job after high school was with the Boeing Airplane Company. I worked for Boeing for eleven years. I started out in the machine shop as a sheet metal scraper, where I used a simple hand-held scraper to remove the sharp edges off the freshly cut sheet metal parts. I worked my way up in the machine shop and was a machinist two years later. In my sixth year at Boeing I moved into quality control. Two years later I was programming the machines I had previously operated. By the time I left Boeing was a NC robotics programmer and worked in machine operations systems development

My second career was in the law, as detailed in my answers to Questions No. 12 and 15.

51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.

My partner and I regularly provide some form of free assistance and advice to almost everyone who contacts us for employment and discrimination matters. Unfortunately, employment law in Montana rarely favors, nor well-serves, the needs of the most vulnerable employees in Montana – people working in low paying jobs. The damages in most employment cases are limited to lost wages (four years maximum) minus mitigation (what that person earns or should be able to earn in another job during that same four year period). With attorney fees available only in limited circumstances, if the person isn't in a high paying job the damages simply do not pencil out to offer contingency fee representation, even when the facts and liability are clear.

People in minimum-wage paying jobs cannot afford paying for hourly fee representation. Therefore, we give a significant amount of our time helping people in preparing and, sometimes, filing pro bono claims. We also provide free advice and assistance for many people with discrimination cases under investigation by the Human Rights Bureau. We also help many people with disabilities make and negotiate reasonable accommodation requests with their employers at no charge. We regularly provide information and referrals to the entities and services available to low-income earners to help in their employment challenges.

On an infrequent basis, I also provide legal assistance to the various sports and charitable organizations I have been involved with. I assist with preparing the necessary non-profit business formation filings, as well as providing free advice on a variety of general legal issues.

52. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

I have had excellent mentors and access to good attorneys to learn from over my career. However, the person I think influenced me most was Peter Kram, the first attorney to take me under his wing. Peter is a trial attorney in Tacoma, Washington. I worked with him my first three years after law school. Correspondingly, the early events that influenced the way I view our justice system are linked to Peter Kram - my first jury trials.

Before law school, one of my views of the justice system was that it took incredible talent and certain power and skills, perhaps innate, to be a successful attorney. When I first met Peter Kram, he did not leave the impression he was a great trial attorney. Outside of the courtroom he doesn't dress like an attorney, he doesn't talk like an attorney, and he doesn't act like I thought a good attorney should. Peter looks and behaves like a regular, blue-collar-type, nice and friendly guy. But it is a whole other story when he is in a court room.

That was probably the first of many lessons from Peter. It's not your appearance, how you dress, talk or act that dictates your success as an attorney. It's really a matter of preparation, research, hard work, belief in you client and dedication to your client's case that counts. He told me not to worry about opposing attorneys who use threats, intimidation, or treat you like you're wet-behind-the-ears. I really needed to be more concerned with the attorneys who treated me with respect.

Another thing Peter said was a jury with all the facts will make the right decision. Doing a great job in presenting your facts and argument is very important, but winning is rarely about who the better attorney was. It gives me confidence knowing a jury with all the facts will usually reach the right decision no matter how amazing of an attorney, or not, you are.

53. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

A good judge needs to be a respectful, confident, and a fair-minded leader with excellent listening skills. A good judge is a good communicator, is open-minded, a life-long learner, well-organized and must know how to perform high quality research. A good judge should also be a people person who is empathetic and compassionate. Additionally, I believe a good judge needs to have a reputation of being fair, thorough, thoughtful, and temperate. A good judge always carefully listens to, and is respectful of, everyone who enters the courtroom. In a nutshell, be like Judge Sherlock.

54. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

A court must observe, understand, respect and bind itself to the decisions delivered by the Supreme Courts of the United States and Montana. Supreme Court decisions are one of the primary sources of law. Likewise, courts are generally bound by and apply the laws established by the legislature. Another key role of a court is to defend and uphold both the Constitution of the United States and the State of Montana, which may, at times, be at odds with the established law. A court has the power to interpret and determine the meaning, the scope, and the constitutionality of the laws passed by the legislature.

All Montanans have the right to seek the protection of the judiciary when their rights are violated. It is the responsibility of the judiciary to protect the rights of the people. Our Montana Constitution, in part, states, "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." In order to reach a reasonable balance between established precedent and flexibility in the law, a court must always respect and be bound by established precedent and law, but it must also uphold the Constitution.

Indeed, a court must apply restraint. However, there will be occasions when an exception to restraint may need to apply. In those rare circumstances, such as when the prevailing attitudes or the meanings of the law have been clearly altered by the passage of time, and in cases where the established law interferes or fails to protect the constitutional rights of all citizens, a court should, with impartiality, be equally capable to call upon its own sense of justice, fairness, and wisdom.

55. In the space provided, state the reasons why you are seeking office as a district court judge.

Because I am ready and able. Because I believe district court judge is one of the highest callings for an attorney in Montana and I am willing to answer the call.

My initial consideration for seeking this office was due to the suggestion of another attorney whom I, and many other attorneys, have great respect for. Upon further reflection and discussions with my family and colleagues, I am quite certain I would enjoy, and very much desire, serving in this office. It's a good fit for me. It's also a good fit for the community. I have the necessary experience and skills in the law and, likewise, I have significant life experience outside of the practice of law. I am well-qualified and well-prepared for the challenges, obligations, and work of a district court judge.

56. What items or events in your career have distinguished you or of which you are most proud?

Over the past seven years, my partner and I have done a good job distinguishing ourselves as go-to guys for employees who have lost their job due to any form of discrimination. This certainly makes me proud.

More specifically, the events I am most proud are the successes I have earned for my clients with mental health disabilities. As a lawyer, some of my most satisfying moments are when I am successful in removing the barriers that interfere with their employment opportunities. Particularly the barriers that are based upon the stigma, the unfounded fears, the ignorance, and the prejudices too many of us hold against people with mental health challenges.

In the five years I worked for Disability Rights Montana (2002-2007), I had the pleasure and opportunity to meet and work with many people with disabilities across our state. Since its inception in 1990, the ADA has made good progress (though there is much more work to be done) in improving and changing the attitudes, beliefs, and prejudices towards people with obvious physical disabilities. But for people with less obvious disabilities, particularly when it's their mental health, the progress is just not there yet.

I learned fairly quickly the vast majority of people with mental health challenges are capable as anyone else in performing their work and can keep their jobs just as long no one found out about their mental health diagnosis. For many, that is their greatest fear. Unfortunately, too often their fear is all too real and justified.

I have also learned the reasonable workplace accommodations needed by people with mental health disabilities are often the simplest, the cheapest, and easiest accommodations to provide in the workplace. But in order to get the needed accommodations means revealing the fact of their type of disability - herein lies the dilemma.

This dilemma both challenges and intrigues me. I want to take every opportunity I can to help resolve this problem, this shortcoming of the ADA. I want to eliminate the stigma, the fears, and the prejudices people have towards people with mental health disabilities.

I've had some success with this for my clients in private employment, as well as in state employment, and even with our own bar association. The simple fact is when people are willing to talk about their mental health needs with their employers without any fear or possibility of retribution, that is what works the best for everyone involved. When I can make that happen I am very proud.

57. State any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

I believe the pertinent information is already set forth in my other responses.

58. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge candidate?

As I mentioned in prior answers, I was a blue-collar worker for the first eleven years of my adult life. The nature and length of this real world experience outside of the practice of law has naturally made me very capable of relating to and understanding the challenges, the attitudes, the beliefs, and the different ways people perceive the world around them who are not part of our judicial system. It's not that life-long attorneys can't relate to the working person, its just that I can truly and naturally identify with the lives of the people who are not accustomed to the legal world we operate in because that was me for a very long time. Though I have been an attorney for 20 years, my empathy and identity is more aligned with the non-attorney people our judicial system serves. These are the people a district court judge serves.

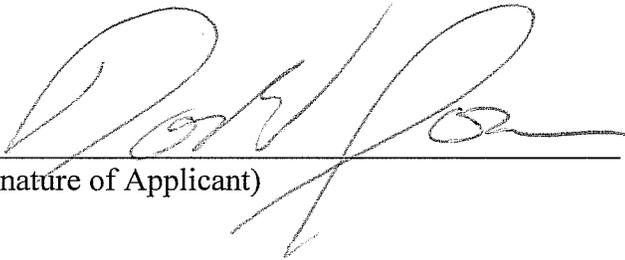
CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 1st Judicial District, if tendered by the Governor, and further, my willingness to abide by

the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

9-4-15

(Date)



(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Sunday, September 13, 2015.

Mail the signed original to:

**Lois Menzies
Office of Court Administrator
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

Application form approved 7/10/93
Revised 9/15/2009

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 HOHENLOHE, JONES, PLLP
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Attorney for Plaintiff

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

DOUGLAS WEBER, Plaintiff, vs. DELTA DENTAL INSURANCE COMPANY, Defendant.	Cause No. CV 11-21-H-DMW PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
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I. SUMMARY OF ARGUMENT

Delta Dental Insurance Company (“Delta Dental”) wrongfully terminated Doug Weber’s employment. The termination was without good cause because Delta Dental failed to follow the provisions of their own Performance Management Plan. The Performance Management Plan required meetings in 30 day intervals to assess Doug Weber’s progress under plan. These meetings never occurred. Thus, Doug Weber was never informed of any problems after the issuance of the plan, nor was he provided any opportunity to correct problems after the issuance of the plan. Without these meetings, it was impossible for Doug to determine whether or not he was performing to Delta Dental’s satisfaction, and it was impossible for him to know which areas needed more work. Moreover, the Performance Management Plan also contained goals which could not be measured.

The termination was also without good cause because Delta Dental increased Doug Weber’s job duties to include account service issues, but then failed to provide Doug with the tools, training, or access to systems which would have enabled him to address service issues in a timely fashion. If Doug had access to the appropriate systems, he could have answered service questions in “real time,” instead of waiting for another Delta Dental employee, located in another state, to get back to him. Delta Dental failed to answer Doug Weber’s questions about the Performance Management Plan; failed to provide him with a job description; and failed to provide him with the tools he needed to be successful under the Performance Management Plan.

Delta Dental also violated the express provisions of their own written personnel policy by failing to use the Performance Management Plan to ensure a fair method of discipline, and to provide Doug an opportunity to correct problems under the plan.

II. SUMMARY JUDGMENT STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). “[A] party seeking summary judgment always bears the

initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (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 fact-finder to return a verdict for the nonmoving party. *Id.*

Entry of summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp.*, 477 U.S. at 322. “A moving party without the ultimate burden of persuasion at trial—usually, but not always, a defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.” *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir.2000). “In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Id.*

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 actually does exist. *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 may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed.R.Civ.P. 56(c); *Matsushita*, 475 U.S. at 586, n. 11. Again, the opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson*, 477 U.S. at 248;

T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987), and that the dispute is genuine, *i.e.*, the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson*, 477 U.S. at 248 (“summary judgment will not lie if the dispute about a material fact is “genuine,” that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party”).

To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.” *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the “purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita*, 475 U.S. at 587.

In resolving a summary judgment motion, the Court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed.R.Civ.P. 56(c). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the Court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587. “In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party.” *Freeman V. Arpaio*, 125 F.3d 732, 735 (9th Cir.1997), abrogated on other grounds as noted in *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir.2008).

A. The Montana Wrongful Discharge from Employment Act (“WDEA”)

An employee bears the burden of proving wrongful discharge. *Delaware v. K-Decorators, Inc.*, 973 P.2d 818, 829 (Mont.1999) ; *Schwartz v. Metro Aviation, Inc.*, 2009 WL 352599, at 4 (D.Mont.2009) (citing *Becker v. Rosebud Operating Services, Inc.*, 191 P.3d 435, 24 (Mont.2008)).

The WDEA provides:

A discharge is wrongful only if:

- (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
 - (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or
 - (3) the employer violated the express provisions of its own written personnel policy.
- MCA § 39–2–904.

Montana law defines “good cause” as “reasonable job-related grounds for dismissal based on 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 ‘a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business.’ “ *Delaware*, 973 P.2d at 829 (quoting *Buck v. Billings Montana Chevrolet*, 811 P.2d 537, 540 (Mont.1991)).

The plaintiff ultimately has the burden of proving a claim. But when a summary judgment motion is at issue in a case involving a WDEA claim, the employer, as the moving party, bears “ ‘the burden of establishing there [are] no issues of material fact regarding good cause [...] entitling [the employer] to judgment as a matter of law.’ “ *Schwartz*, 2009 WL 352599, at 4 (quoting *Arnold v. Yellowstone Mountain Club, LLC*, 100 P.3d 137, 24 (Mont.2004)). When an employer satisfies this initial burden, the employee can survive summary judgment on the good cause issue by “either prov[ing] 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.” *Id.* (quoting *Becker*, at 24 (internal quotations and citation omitted)). A court may grant summary judgment, however, if the nonmoving party fails to present any evidence identifying a genuine issue of material fact respecting the WDEA claim. *Id.* (citing *Arnold*, 100 P.3d 137, ¶ 26).

In considering a WDEA claim, the Court “must balance an employer's right and discretion to determine who it will employ and who it will retain in employment against the employee's legitimate interests to secure employment.” *Id.* (citing *Vettel–Becker v.*

Deaconess Medical Center of Billings, Inc., 177 P.3d 1034, 38 (Mont.2008) (citing *Buck*, 811 P.2d at 540)). “The balance should favor an employee who presents evidence, 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.” *Id.*

III. ARGUMENT

A. Delta Dental wrongfully terminated Doug Weber’s employment

Delta Dental wrongfully terminated Doug Weber’s employment as it failed to follow the guidelines in its own Performance Management Plan. SGI ¶¶7,8,9.¹ The PMP required evaluation meetings with Doug every 30 days. SGI ¶8. The PMP also contained goals which could not be measured. SGI ¶7. Likewise, Delta Dental failed to give Doug the tools, support and training he needed and asked for so that he could perform his job duties in a timely fashion. SGI ¶¶3, 4, 12, 14, 20. If Doug had access to the systems he requested, he could have performed all of the duties and requirements outlined in the PMP. SGI ¶¶21, 24. Delta Dental failed to respond to Doug’s inquires about the PMP, and failed to work with Doug to accomplish any goals set forth in the PMP. SGI ¶¶10, 12, 13, 14, 15, 17, 18, and 20.

After Doug was terminated, Brittany Chandler, the primary ICMI employee who complained about Doug’s response time, was hired by Delta Dental and assumed most of Doug Weber’s duties that she complained about. SGI ¶21. She had a vested interest in whether or not Doug Weber continued to work for DDIC. Likewise, Jim Dole, was demoted, and took over Doug Weber’s job after Doug’s termination. *Id.* Jim Dole had a vested interest in whether or not Doug Weber continued to work for Delta Dental.

Doug Weber was hired by Delta Dental in early 2008 as an Account Executive (AE). SGI ¶1. Jim Dole was his immediate supervisor. In 2009, Delta Dental unilaterally changed Doug’s job to include Account Management (AM) duties. SGI ¶2. Doug was

¹All factual citations by the Plaintiff are to the Statement of Genuine Issues, filed seperately by the Plaintiff and refered to as “SGI.”

then expected to perform both his Account Executive (AE) job, plus take on the added service responsibilities of and Account Manager (AM). Id. Jim Dole had never really performed any AM duties and was unable to assist Doug with these new AM service responsibilities. SGI ¶¶2, 3, 4. Doug received no training for the AM job. SGI ¶¶4, 10, 20.

Likewise, there was a system conversion in 2010, but Doug was not provided with training on the new system. SGI ¶¶4, 12, 14. Doug was scheduled to attend the system conversion training in the spring of 2010, but his supervisor, Jim Dole, cancelled his attendance with no explanation. SGI ¶¶14, 15. Doug Weber did not receive access to any systems to allow him to readily and easily solve service issues. SGI ¶¶14, 20. He did not have the same access to systems that the prior Account Managers who serviced Montana, Denese Borseth and Rochelle Hallins, had when they were handling the service issues in Montana. SGI ¶¶21, 22.

Since he had no access to any systems, the only way Doug could solve service problems for any of the groups in Montana was to contact other Delta Dental employee in Texas, Georgia and California. SGI ¶¶3, 4, 12, 13, 14, 20. He could only do this through email and telephone communications. Id. When he was performing both AE and AM duties, he would start his work day at 6:00 a.m. from his home in Helena. Id. Due to the time difference, he could only phone or email Delta Dental employees in Georgia, as it would be 8:00 a.m. in their location. Id. Doug would often end his work day at 6:00 p.m., as he could continue to try and contact Delta Dental employees who were located in Pacific time zones. Id.

In 2010, prior to and during the time Doug was put on a Performance Management Plan, Delta Dental was short-staffed and was experiencing several problems with its system conversion. SGI ¶¶4, 13, 14, 15. Numerous layoffs and terminations occurred, and sometimes departments were manned entirely by temporary employees. SGI ¶¶14, 15. It was extremely difficult for Doug to get someone to respond to his service inquiries. SGI ¶¶3, 4, 12, 13, 14, 20. Montana was a long way from Georgia, and his service issues were not always a priority to other Delta Dental employees who were working to keep their own

heads above water. Id. Doug kept Jim Dole constantly informed about all service issues, and the difficulty he was experiencing in getting prompt replies from others at Delta Dental. SGI ¶¶3, 4, 12, 13, 14, 20.

B. Tracking Spreadsheet/logs referred to by Defendant’s witnesses were not produced in Discovery

ICMI was Delta Dental’s primary client in Montana. Doug worked with Brittany Chandler, an ICMI employee, on many service issues. SGI ¶¶21, 22, 23. They kept a communication log, so that all service issues, and their progress, could be monitored. SGI ¶¶22, 23, 24. Doug was in constant communication with Brittany Chandler, and Jim Dole, regarding all ICMI service issues. Id. Doug came to work every day, and answered as many emails and phone calls as he possibly could. Id. The tracking spreadsheet, to which both Jim Dole and Brittany Chandler have referred in their Declarations, would clearly show this. Id. However the tracking records have never been produced by Delta Dental in this case. Id.

If all the tracking logs referred to by both Jim Dole and Brittany Chandler are produced, it would show that Doug was in contact with Jim Dole and Brittany Chandler on all service issues for ICMI. Id. Doug never ignored any service issues. Id. The tracking logs show Doug handled and answered hundreds of emails. Id. However, for the sake of its argument for this Summary Judgment Motion, Delta Dental only selected 17 examples of emails where Doug supposedly “failed to respond.” SGI ¶¶22 and 23. Likewise, during the system conversion in 2010, DDIC gave Doug Weber “talking points” on how to respond to customers whose service issues were not being handled in a timely fashion. SGI ¶¶15 and 16. DDIC has also failed to provide a copy of those talking points in this case. Id.

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C. Performance Management Plan

On May 24, 2010, Doug was presented with a 90 Performance Management Plan (PMP). SGI ¶6 The plan stated that there were “several examples” where ICMI had lost

confidence in Doug due to a lack of response in some service areas. Id. The plan required that ICMI's confidence and trust in Doug be restored. Id.

Prior to receiving the PMP, Doug had received every merit raise available. SGI ¶¶1,19. Doug maximized his KSO's; and met every employment goal. Doug never had a single disciplinary action prior to the PMP. SGI ¶1,19.

Although there were internal problems with Delta Dental's service at this time (Delta Dental had just gone through a system conversion starting in April of 2010), Doug tried to be the person who would accept the responsibility for the problems, even though he had no way to personally solve many of the issues. SGI ¶¶13, 14. Doug could not control when or what type of response that he would receive from the other people at Delta Dental to support his work. SGI ¶¶3, 4, 14, 15, 16.

There was a meeting scheduled on May 26, 2010 at 1:00 pm for Jim Dole, Robert Budd and Doug Weber to discuss the PMP. SGI ¶6. On the morning of May 26th, Jim Dole sent Doug an email requesting that he send any questions that he had for the meeting to him and Robert Budd by 12 noon that day. Id. Doug did as they requested, and submitted his questions by email by 12 noon. Doug then went to Jim's office for the meeting, and was told the meeting had to be postponed because they did not have the answers to Doug's questions. Id. Doug's questions were very simple: Where was the authority for the PMP? What rights does Doug have? Id. Delta Dental never answered the initial questions until on or about June 18, 2010. Id. As of that date no meeting had yet occurred to discuss the PMP.

A telephonic meeting finally occurred to discuss the PMP on June 24, 2010, 30 days after Doug received the PMP. SGI ¶¶6, 9. The meeting on June 24, 2010 was extremely short. SGI ¶9. Doug questioned the PMP and was told that Delta Dental would consult with its legal team and that Doug should seek legal representation. Id.

Since the June 24th meeting was occurring exactly 30 days into the plan, Doug asked what his evaluation was for the first 30 days under the PMP. Id. Robert Budd stated that he was not prepared to give an evaluation at that time. Id. He then stated that he would

instead “re-start” the 90 days for the PMP on that day – June 24, 2010. Id. The very fact that Robert Budd “re-started” the plan indicates he knew he was required and expected to evaluate Doug’s work at 30 day intervals. He was unprepared to do so on June 24th, after the first 30 days, so he “re-started” the plan. Id. Unfortunately, Robert Budd, nor anyone else, ever evaluated Doug on any 30 day interval thereafter. Id. During the June 24th phone call, Robert Budd also said that if Doug had additional questions, that he would review them and work with Jim Dole to facilitate a response. Id.

Doug immediately started to work on a written reply to Robert Budd’s offer to answer any questions and concerns about the PMP. Doug sent a letter to Robert Budd on July 12, 2010. SGI ¶10. Robert Budd, nor anyone else at DDIC, ever responded to this letter. Id. After the meeting on June 24, 2012, no one at Delta Dental, including Jim Dole and Robert Budd, ever mentioned or discussed the PMP with Doug Weber until October 1, 2010, the day Doug was terminated. SGI ¶¶8, 9, 17.

During the summer months the Delta Dental system conversion was causing problems in all areas of sales and service with ICMI and Doug’s other groups in Montana. SGI ¶13, 14, 15, 16, 20. This exacerbated the issues between Delta Dental and ICMI. Id. Since there was no reply to his letter to Robert Budd and no mention of the PMP, Doug had every reason to believe he was in compliance with the Performance Management Plan. All during this time, Doug was in continual contact and discussions with Jim Dole about sales and service issues on Delta Dental groups. SGI ¶¶13, 14. Jim Dole never referred to the PMP. SGI ¶17. Other than on June 24, 2010, there never were any meetings about Doug’s performance under the PMP, even though Jim Dole and Doug were always discussing issues with ICMI without any mention of the PMP. Id. Doug was never given any evaluation of his performance under the plan. Id.

On October 1, 2010, Doug was called into Jim Dole’s office. Robert Budd and James McPhail, Delta Dental’s legal counsel were on the phone and Doug was told that he was terminated. SGI ¶18. Doug was told that the reason for his termination was his failure to successfully complete the PMP. Id.