

**APPLICATION FOR
DISTRICT COURT JUDGESHIP**

A. PERSONAL INFORMATION

1. Full name. Rebekah J. French
2. Birthdate. October 30, 1960
3. Current home address: [REDACTED]
4. Email address. [REDACTED]
5. Preferred phone number. [REDACTED]
6. Judicial position you are applying for. Eighth Judicial District Court
7. Date you became a U.S. citizen, if different than birthdate. N/A
8. Date you become a Montana resident. September 1, 2003.

I moved to Great Falls, Montana when I was 18 months old and remained a resident until I graduated from college in 1983. I moved back to Montana in 1986 and remained a Montana resident until I started working for the United States Department of Justice. I returned to Montana in 2003 to clerk for the Honorable Sam Haddon in the Great Falls Division of the United State District Court for the District of Montana.

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Great Falls High, Great Falls, Montana	High School Diploma	June 1979
Carleton College, Northfield, MN	BA	June 1983
University of Montana School of Law	JD	June 9, 1990

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

High School Graduated with high honors (top 10 in class of approximately 500), received double ruby and letter for speech and debate and was president of the team my senior year.

College: National Merit Scholar, graduated with honors, participated in student government, served as a freshman advisor my sophomore year, spent one trimester studying in France.

Law School American College of Trial Lawyers, Medal for Excellence in Advocacy, National Moot Court Competition (my 3-person team placed second in the regional competition and lost the semi-final round at the national competition to the team that won the competition). Wall Street Journal Award for excellence in business law. Represented law school at regional client counseling competition. Staff member of the Public Land Law Review. Graduated with high honors. Served as teaching assistant for legal writing for first year students my second year and for second year students my third year. Vice-president of Women's Law Caucus my second and third years.

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

June 4, 2018 to March 31, 2021: career law clerk for the Honorable Charles C. Lovell, Helena Division, United State District Court. Paul G. Hatfield Federal Courthouse, 901 Front Street, Helena, MT. Judge Lovell has taken inactive status and can no longer be reached at the federal courthouse in Helena. Although I have his personal contact information, I am reluctant to include it in a publicly filed document. You may contact me directly for that information.

June 2010 to June 1, 2018: associate counsel, State of Montana Department of Administration, Risk Management and Tort Defense Division, 1625 11th Ave., Middle Floor, Helena, MT

July 20, 2008 to May 27, 2010: Assistant United States Attorney, District of Montana, Great Falls Office, 119 1st Ave. N., Great Falls, MT

June 2005 to July 11, 2008: associate counsel, State of Montana Department of Administration, Risk Management and Tort Defense Division, 1625 11th Ave., Middle Floor, Helena, MT

October 13, 2003 to October 15, 2004: law clerk for the Honorable Sam E. Haddon, Great Falls Division, United State District Court. Judge Haddon now works in the Paul G. Hatfield Federal Courthouse, 901 Front Street, Helena, MT

September 14, 1992 to August 27, 2003: attorney, United States Department of Justice, Antitrust Division. Main address: 950 Pennsylvania Avenue, NW, Washington, DC 20530

August 6, 1990 to August 7, 1992: law clerk for the Honorable Charles C. Lovell, Helena Division, United State District Court.

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

Ninth Circuit Court of Appeals	March 16, 2009
United States District Court, District of Montana	November 16, 1990
Montana Supreme Court	October 12, 1990

I have been an active member of the State Bar of Montana since October of 1990.

During my ten plus years with the Antitrust Division of the United States Department of Justice, I appeared in federal court in the Northern and Southern Districts of Texas, the District of Kansas, and the DC District. As an attorney for the United States, I was not required to be formally admitted to those federal courts.

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc). During my three-year clerkship with Judge Lovell, my time was evenly divided between criminal and civil litigation. My work during the preceding seven years was devoted entirely to defending the State of Montana and its employees in civil litigation.
14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

I was an Assistant to the Antitrust Division’s Director of Civil Non-Merger Enforcement for approximately eighteen months, starting in the spring of 1998 and ending in December 1999, when I returned to the Transportation, Energy and Agriculture Section. That position was, in some ways, similar to working as a law clerk for a federal judge, as I did whatever my boss needed done – which often meant reviewing, summarizing and editing documents prepared by attorneys with more seniority than I had. During this time, the Antitrust Division was prosecuting Microsoft in a civil case and its website was the most visited in the world. It fell to me to work with the Division’s IT personnel to re-design the website and to monitor what was put on the site to ensure that no confidential information was published. My work in this position required me to supervise paralegals, use my analytical and organization skills and also exercise tact, given that I was reviewing the work of more senior attorneys.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings. I last tried a civil jury case in federal court in June of 2014. I appeared in both state and federal court during my years as associate counsel for the State of Montana. Judge Lovell presided over two criminal jury trials and numerous civil hearings, including an evidentiary hearing on a complex attorney fee issue, during the almost three years that I clerked for him and I assisted him in all aspects of those trials and hearings.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

Robinson v. State Compensation Mutual Insurance Fund, 2018 MT 259

Ford v. Michael, 2017 MT 183N

Seipel v. Moore, 2012 MT 4N

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

- 1) *United States v. AMR Corp., American Airlines, Inc. and AMR Eagle Holding Corp.*

When I left my position as Special Assistant to the Director of Civil Nonmerger Enforcement, I was assigned to work on the team investigating complaints regarding predatory practices by American Airlines. The investigation led to the filing of a complaint on May 13, 1999 in the United States District Court for the District of Kansas. This case was challenging for me because I had never worked on a case in the airline industry or a case involving predation.

The term “predation” when used in the antitrust context, refers to a firm with a large market share (though not necessarily a monopoly) pricing lower than its competitors in an effort to prevent smaller competitors from gaining a foothold in the market. As a general rule, proving predation requires proving that the large firm is undercutting its competitor by pricing below cost. Finding proof of below cost pricing is particularly difficult in the airline industry, where the incremental cost of selling one extra ticket has been compared to the price of peanuts. On its face, the practice of lowering price and increasing service in response to a low-cost competitor, seems pro-competitive – which makes challenging such practices difficult.

Although much of the analytical and substantive work in this case was done by other attorneys and economists, I needed to understand our theories because I was assigned to oversee the discovery process. I was also responsible for consolidating and outlining the various sections of the government’s response to the defendants’ motion for summary judgment, prepared by many other attorneys assigned to the case. Having clerked for a federal district court judge, I was familiar with the legal standards for summary judgment.

This case was also challenging for me because in other cases I had worked on, the negotiations with opposing counsel had usually been done by more senior attorneys. In this case, I personally negotiated the stipulated protective order and many of the discovery issues raised in the case. I was assigned this task because I had researched issues relating to discovery in civil antitrust cases brought by the United States when working on the Microsoft case. Defendant was represented in these negotiations by a partner at a large litigation firm.

I was not solely responsible for preparing any of the documents in what is known in the Antitrust Division as the “predation case,” but if anyone reviewing this application is interested in reviewing any documents, they can be found on the Antitrust Division’s website at <https://www.justice.gov/atr/case/us-v-american-airlines-1999>.

Working on the “predation” case challenged my analytical and organizational skills. It also taught me important lessons about working with a large and diverse staff and with opposing counsel.

2) *United States v. Has the Eagle*, D.C. No. 4:09-19-SEH

Elwin Floyd (Jay) Has the Eagle murdered two well-loved residents of the Fort Belknap Reservation not long after I began working as an Assistant United States Attorney in the Great Falls Office. I presented the case to the grand jury and charged Mr. Has the Eagle with two counts of first-degree murder, two counts of felony murder and one count of burglary. He was convicted at trial of one count of first-degree murder, one count of second-degree murder, two counts of felony murder and one count of burglary.

This case was difficult for me for a number of reasons. Mr. Has the Eagle was represented at trial by Federal Defender Tony Gallagher, an experienced and talented criminal defense lawyer. Mr. Gallagher was allowed to present testimony from a social worker in support of his mitigation defense. I succeeded in limiting that testimony and the appeal was ably defended by Michael Lahr, as I left the US Attorney’s Office while the appeal was pending. *See United States v. Has the Eagle*, 423 F. App’x 726 (9th Cir. 2011). The stress of conducting my first murder trial against more experienced counsel and without co-counsel was magnified by the fact that Mr. Has the Eagle’s father was threatening a key witness. *See United States v. Has the Eagle, Sr.*, D.C. No. 4:10-38-SEH.

As mentioned above, Mr. Has the Eagle’s victims were well-loved members of the Fort Belknap community. Some of their relatives, those not called as witnesses, observed the trial and their support helped ease my stress and remind me why I was prosecuting this case. Those relatives also appeared at Mr. Has the Eagle’s sentencing, where he was sentenced to multiple concurrent life sentences.

3) *Robinson v. State Compensation Mutual Insurance Fund (State Fund)*

Ms. Robinson brought both facial and as-applied constitutional challenges to section 39-71-605 of the Montana Code, arguing that the section violated her right to privacy and the right to privacy of all workers’ compensation claimants by permitting workers’ compensation insurers to obtain multiple medical examinations of a claimant without first seeking a warrant or approval from the workers’ compensation court. She also brought a constitutional tort claim seeking damages, which was why the case was handled by the Risk Management and Tort Defense Division and assigned to me.

Ms. Robinson’s counsel brought multiple summary judgment motions, which were denied by Judge Sherlock. I wrote opposition briefs and argued the motions, which were denied. When Ms. Robinson filed her third motion for summary judgment, I filed a cross-motion for summary judgment on behalf of the State Fund. Judge McMahon granted the State Fund’s motion and Ms. Robinson appealed. I signed the State’s response to Ms. Robinson’s appeal brief on June 1, 2018, my last day as a state employee. I am not presenting the brief as a writing sample because

it exceeds the page limit and a small section was contributed by my co-counsel. It is available on the Montana Supreme Court's website.

This was one of many cases in which I defended the State of Montana and its employees against constitutional tort claims. It was more difficult for me than some of those cases because I had to learn workers' compensation law – a topic about which I knew nothing before being assigned to this case.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

“Free Exercise of Religion on the Public Lands,” 11 Pub. Land L. Rev. 197 (1990).

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

As a former member of the State Bar's CLE Institute and long-time member of the Women's Law Section (WLS), I planned and moderated a number of CLEs in the last ten years. These CLEs were all open to anyone interested in attending and were advertised through the Montana Lawyer, so I have listed the sponsor, rather than the group to which each was directed.

<u>CLE TITLE</u>	<u>DATE</u>	<u>Sponsor</u>
Maximizing Your Effectiveness as an Advocate	Oct. 4, 2013	CLE Inst. & WLS
Diverse Issues and Judge's Panel	April 4, 2014	CLE Inst.
Case Evaluation, Settlement & Mediation	May 8, 2015	CLE Inst.
Montana Women in the Law, Past, Present and Future	Oct. 2, 2015	CLE Inst. & WLS
Are the Rules Different When the Government is a Party?	May 6, 2016	CLE Inst.
Eastern Montana CLE	Oct. 7, 2016	CLE Inst.
Disability Right CLE	May 5, 2015	CLE Inst.
The Grit Project	Oct. 5, 2017	CLE Inst. & WLS
Ethics and Advocacy	May 11, 2018	CLE Inst.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

Although the State of Montana allows attorneys to offer *pro bono* service, it was difficult for me to do *pro bono* work while employed in the Risk Management and Tort Defense Division. I was prohibited from providing *pro bono* legal services while employed as a law clerk for the last three years. I therefore have not submitted *pro bono* hours of service to the Montana Bar Association for the past five years. However, during my years on the CLE Institute, I volunteered well over 50 hours a year to the State Bar. I also volunteer time to my church and to Family Promise of Greater Helena, an organization dedicated to helping homeless children and families obtain sustainable independence.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

Member, Uniform District Court Rules Commission 11/17/2017 to 6/1/2018

Member, CLE Institute 9/2013 to 9/2017

Women's Law Section – Board Member 10/2009 to 10/2015
10/2019 to present

Public Law Section – Board Member 9/2017 to present

Merit Selection Panel – United States Court,
District of Montana Fall 2005

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received. N/A

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

As a law clerk for two United States District Judges, I made recommendations, prepared bench memos and drafted proposed opinions in numerous civil and criminal cases.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

My parents owned a small business in Great Falls, Montana, where I worked through college and for approximately six months after my mother passed away in October of 2004.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

Family Promise of Greater Helena: I have served as a volunteer coordinator since the fall of 2013, when St. John's ELCA became a host congregation.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

My thirty plus years practicing law have been spent in public service, as an employee of the executive and judicial branches. I have never run for or been nominated for appointed office. I applied for a United States magistrate judge position in 2016, but was not selected.

E. PROFESSIONAL CONDUCT AND ETHICS

27. 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, provide the details. No.
28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details. No.
29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence. No.
30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number). No.
31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details. No.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

I own rental property in Great Falls. I am in the process of selling one property, which has two rental units. My other property is a single-family home, which I intend to move into when I move to Great Falls.
33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? Yes.
34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

In considering how to answer this question, I spent a lot of time thinking about the events that led me to become a lawyer and choose a career in public service. I decided that I wanted to be a lawyer when I was in the third grade. My understanding of what attorneys did was mainly based on watching “Perry Mason” with my parents and I liked the idea of defending innocent people and finding the real perpetrator. I have since realized that “Perry Mason” does not represent the reality of what any lawyers – even lawyers who practice criminal defense – actually do.

I first met an Eighth Judicial District Court judge when I was a senior at Great Falls High (go Bison!) and participated in an independent study designed to help me explore my desire to practice law. As part of the program, I met each of the judges in the Eighth Judicial District Court – there were three at the time – and observed proceedings in their courtrooms. One judge in particular invited me to his chambers to explain each hearing that I observed. I mention this experience in part because it demonstrates that every good judge is also a teacher, whether taking time to explain his or her judicial philosophy to a high school student or his or her sentencing decision to a criminal defendant and the defendant’s victims.

The idea of being a judge first occurred to me when Professor Natelson asked me if I had considered pursuing a judicial career during my second year in law school. My response was that I probably would never become a judge because I would have to run for election and I was not a politician. I recognize that if I am chosen for this appointment, I will need to run for election next year. Although I still maintain that I am not a politician, I respect the Montana system which allows Montana voters to choose their judges. I intend to run as a non-partisan candidate and think that my history in Great Falls will help in my election efforts. I own a house in Great Falls and intend to move back to Great Falls eventually, whether or not I am chosen for this judgeship.

My first job out of law school was clerking for the Honorable Charles C. Lovell. At that time, Judge Lovell had the largest civil case load of any federal judge in Montana. He also presided over criminal proceedings in the Butte, Missoula, and Helena divisions. When I returned to Montana, after working for the Antitrust Division for ten plus years, I spent a year clerking for the Honorable Sam E. Haddon. Clerking for Judge Lovell and Judge Haddon gave me insight into the importance of having qualified individuals working at the district court level, whether in state or federal court.

Every decision made by a district court judge has a potentially life changing impact on the parties to the case and that impact can stretch beyond the parties. This is even more true for state district court judges, who are charged with presiding over family law and abuse and neglect cases.

When the current opening in the Eighth Judicial District opened last fall, I seriously considered applying for it, as serving the people of Montana as a district court judge would be a fitting cap

to my career in public service. At that time, Judge Lovell was not ready to take inactive status and my loyalty to him prevented me from applying for the judgeship. When the position opened up again, I felt that I was being called to apply.

36. What three qualities do you believe to be most important in a good district court judge?

1. **Balance.** State district court judges must be neutral and cannot allow their personal feelings to interfere in their decision making. They must also put aside any allegiance to prior employers and clients. I had to engage in this process when I left the Department of Justice and clerked for Judge Haddon. Although I spent most of my career with the Antitrust Division working in D.C. on civil cases, I was detailed to the United States Attorney's Office in Great Falls, Montana from September 2001 through March 2002 and appeared before Judge Haddon in that capacity. I had to go through the same process when I became Judge Lovell's career clerk in June of 2018. Judge Lovell presided over a number of cases in which the State of Montana was a party during the almost three years that I clerked for him.

District court judges must also set aside any allegiance to a particular side – particularly if prior to appointment or election they spent most of their career on a particular side. Although my criminal practice was as a federal prosecutor, I have some experience in working in a public defender's office. I interned as an investigator for the Hennepin County Public Defender's Office after graduating from college.

The civil cases that I handled while working for the State of Montana involved defending the State and its employees in tort claims, but at times I was consulted about cases in which the State was pursuing a civil remedy as a plaintiff. More importantly, my work with the Antitrust Division gave me experience representing a plaintiff in complex civil litigation.

State district court judges must also balance the many cases competing for their time, giving the proper attention to each. While it is important to engage in thorough review of any issue and provide sufficient reasoning to allow a decision to be reviewed, parties also need to have their cases decided as promptly as possible.

Having clerked for two district court judges and worked as a criminal prosecutor, I know how difficult the sentencing process can be. District court judges must balance the need to hold people accountable for their criminal acts while recognizing that everyone is entitled to compassion and a chance at redemption.

2. **Courage.** District court judges must exercise their independent judgment and are often called on to make unpopular decisions. This requires courage, particularly when they have to face election shortly after their appointment.

3. **Broad based legal knowledge/analytical skills.** District court judges in Montana must be generalists. In addition to handling criminal and civil tort cases, they review decisions made by administrative law judges, decide constitutional issues, and preside over probate cases, family law, and child abuse and neglect cases.

Although most of my trial experience has been in federal court, the Montana Rules of Evidence and Civil Procedure are sufficiently similar to the Federal Rules that my learning curve should be reasonable. In defending tort claims brought against the State by individuals convicted of state crimes, I educated myself on Montana criminal law and procedure.

Having defended licensing boards for the State of Montana, I am familiar with MAPA and understand the review process engaged in by the district court.

While I have never practiced family law or probate law, I am confident that I will be able to learn what I need to handle family law cases and probate cases.

Having represented Child Protection Specialists and the Child and Family Services Division of the Department of Public Health and Human Services in a number of cases while working for the Risk Management and Tort Defense Division, I am familiar with the statutes and rules relating to abuse and neglect cases.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

It is hardly surprising that my personal judicial philosophy has been shaped by that of the two judges for whom I clerked. Though their styles are different, Judge Lovell and Judge Haddon are both “judicial conservatives” - a judicial philosophy to which I also ascribe. When interpreting Montana statutes and the Montana Constitution, judges must look first to the plain language of the statute or constitutional provision at issue. District court judges also look to the precedent of the Montana Supreme Court when interpreting Montana statutes and the Montana Constitution. There are times when judges must also consider whether the provision at issue conflicts with the United States Constitution. Judges should not use their authority to advance a personal agenda.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.
39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

The Honorable Charles C. Lovell. During his 36 years on the bench, Judge Lovell's practice has been to respond to inquiries by phone, rather than write reference letters. He is willing to answer inquiries about my work for him. As noted above, I can provide you with his contact information, but am not willing to make it publicly available.

The Honorable Sam E. Haddon, Paul G. Hatfield Federal Courthouse
901 Front Street, Suite 3100A, Helena, MT 59626
406/457-4910.

Like Judge Lovell, Judge Haddon will respond to questions, if contacted.

Lori Harper Suek
Assistant United States Attorney
2601 2nd Ave. N, Suite 3200
Billings, MT
406/247-4645
Lori.suek@usdoj.gov

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

June 1, 2021

/s/ Rebekah J. French

(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 Tuesday, June 1, 2021

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

FILED

05/19/2017

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 17-0119

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 17-0119

EUGENE FORD,

Appellant,

vs.

MIKE BATISTA (Director) Dept. of
Corrections, LEROY KIRKEGARD
(Warden) Montana State Prison, KEN
ARNOLD (Facility Main. Manager)
and ROYCE SKOLCOLIK
(Maintenance Manager),

Appellees.

APPELLEES' ANSWER BRIEF

On appeal from Judgment of the Montana Third Judicial District Court,
Cause No. DV 15-48
The Honorable Ray J. Dayton, Presiding

APPEARANCES

Eugene Ford
DOC ID # 10205
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Deer Lodge, MT 59722

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Counsel for Defendants and Appellees*

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STATEMENT OF THE ISSUE

1. Whether the District Court correctly granted the motion to dismiss of Defendants/Appellees Mike Batista, Leroy Kirkegard, Ken Arnold, and Royce Skolcolik?

STATEMENT OF THE CASE

Plaintiff/Appellant Eugene Ford (Ford), an inmate at Montana State Prison, sued the Director of the Department of Corrections (Batista) and the Warden (Kirkegard), Facility Manager (Arnold), and Maintenance Manager (Skolcolik) of Montana State Prison, alleging that he was unfairly denied a pay increase that he was entitled to receive under a policy promulgated by the Department of Corrections for the work he performed as an inmate worker. The State of Montana voluntarily appeared and defended the individual defendants because they were all sued for conduct arising out of the course and scope of their employment by the State. In general, the State agrees with Ford's recitation of the procedural history of this case. The district court applied the proper standard for a motion to dismiss, accepted the factual allegations of Ford's complaint as true, and correctly dismissed Ford's complaint for failure to state a claim because as an inmate at Montana State Prison, Ford has no employment rights under Montana law.

STATEMENT OF FACTS¹

On May 18, 2011, the Department of Corrections revised its Inmate Compensation Table. Compl. ¶ 8 (May 26, 2015). The Inmate Compensation Table contains three levels of pay categories for each work assignment. Compl. Ex. A 4. There is a note at the bottom of the Inmate Compensation Table stating: “MSP must work within their current budget for inmate compensation.” *Id.*

The Yard Crew Boss agreed with Ford that with his seniority he would qualify for the pay increase to \$3.25 per day under category level 3. Compl. ¶ 9. Montana State Prison Maintenance Manager Skolcolik disagreed and informed the Low Yard Crew that there would be no raises to \$3.25 per day and that several employees would be laid off as a result of the revised policy. Compl. ¶ 10. Skolcolik explained that the only people getting the \$3.25 per day would be the inmates working “outside the fence for the ‘Work Dorm’, as an encentive [sic] pay.” *Id.* Ford submitted an informal resolution form asking that Skolcolik’s decision be reviewed and his back pay be provided. Compl. ¶ 11. Facilities Manager Arnold denied the request for back pay. Compl. Ex. B. Ford submitted a formal grievance. Compl. ¶ 12. The grievance was denied because “this is a

¹ Because Ford’s complaint was dismissed for failure to state a claim, this Statement of Facts is drawn from Ford’s complaint and the documents attached to it.

privilege not a right.” Compl. Ex. C. Ford submitted a grievance appeal to the Warden. Compl. ¶ 13. The appeal was denied. Compl. Ex. D. Ford submitted a grievance appeal to the Corrections Division. Compl. ¶ 14. Ford’s appeal was denied by Director Batista, who determined that MSP was “handling/applying the correct pay in your case.” Compl. Ex. E.

STANDARD OF REVIEW

This Court reviews “a district court’s ruling on a motion to dismiss pursuant to Rule 12(b)(6), M.R. Civ. P., *de novo*.” *Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6. This Court may consider documents attached to and incorporated into the complaint when considering the correctness of the district court’s decision. *Id.* at ¶ 11. Although this Court must accept as true all well-pleaded allegations in the complaint, and construe the complaint in the light most favorable to the plaintiff, the Court need not “accept as true legal conclusions or allegations that lack factual basis.” *Harris v. St. Vincent Healthcare*, 2013 MT 207, ¶ 14, 371 Mont. 133, 305 P.3d 852. The Court may uphold the district court’s dismissal of Ford’s complaint “on any basis supported by the record, even if the district court applied a different rationale.” *Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 25, 365 Mont. 375, 286 P.3d 241.

SUMMARY OF ARGUMENT

The district court correctly dismissed Ford's complaint because Ford has no constitutional right to be paid for the work he performs at Montana State Prison and therefore cannot claim he is the victim of discrimination or an equal protection violation because he is allegedly paid less than other inmates. Even if this Court were to consider Ford's argument that he qualifies as a "class of one" for equal protection purposes, the Court should affirm the district court because the complaint demonstrates that prison officials had a legitimate reason for refusing to raise Ford's wage.

ARGUMENT

I. **The district court correctly dismissed Ford's discrimination and equal protection claims because Ford has no employment rights under Montana law.**

The Montana Legislature has enacted statutes that bar inmates from making claims against the State based on their work at state prisons. "An inmate of a state prison may be required to . . . (2) perform general maintenance and repair work on prison grounds and facilities and assist in providing services essential to the administration of the prison, . . ." Mont. Code Ann. § 53-30-151(2015). "An inmate working pursuant to 53-30-151 is not an employee, either public or private,

and employment rights accorded other classes of workers do not apply to such inmates.” Mont. Code Ann. § 53-30-152 (2015).

Ford cannot “avoid the effect of the above-quoted statutes and ‘end run’ the intent of the legislature” by citing the Montana Constitution. *Quigg v. South*, 243 Mont. 218, 220, 739 P.2d 831, 832 (1990). The plaintiffs in *Quigg*, male inmates at Montana State Prison, claimed they were the victims of sexual discrimination because they were paid less than female inmates for essentially the same jobs. *Id.*, 243 Mont. at 219, 739 P.2d at 831. In deciding *Quigg*, the Montana Supreme Court rejected plaintiffs’ attempt to avoid the legislature’s clear intent to prohibit inmates from asserting rights held by private and public employees to be free from discrimination in employment and to receive minimum wage by relying on general anti-discrimination statutes. *Id.*, 242 Mont. at 220, 739 P.2d at 832. In reaching this decision, the Montana Supreme Court relied on federal cases holding that prison inmates cannot claim they are entitled to minimum wage based on “the theory of civil rights deprivation” when a state statute authorizes the correctional facility to require them to work. *Id.*

The district court followed this Court’s decision in *Quigg* and correctly determined that Ford’s claim should be dismissed because he has no employment rights under the Montana Constitution. Therefore the alleged failure to pay him

the same wage as inmates doing similar work outside the fence did not form the basis for either a discrimination or equal protection claim. Although the Court could affirm the district court's decision and end its analysis at this point, the State addresses Ford's equal protection argument below.

II. Ford cannot rely on the "class of one" theory to support his equal protection claim.

Ford cites *Village of Willowbrook v. Olech*, 528 U.S. 62, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) to argue that he can bring an equal protection claim even though he is not a member of a traditionally recognized protected class. In *Olech*, the United States Court of Appeals for the Seventh Circuit held that "a plaintiff can allege an equal protection violation by asserting that state action was motivated solely" by spite. 528 U.S. at 564, 120 S. Ct. at 1074, 145 L.Ed.2d at 1063. The United States Supreme Court affirmed, holding that Olech could assert a class of one claim based on the Village's "irrational and wholly arbitrary" demand. 528 U.S. at 565, 120 S. Ct. at 1075, 145 L.Ed.2d at 1063. Ford's reliance on *Olech* is misplaced. Ford does not claim that the refusal to raise his wage was based on spite or was irrational. Indeed, Ford's complaint establishes that prison officials had a legitimate basis for refusing to raise his wage to \$3.25 per day. The decision was made to raise the wages of those inmates working outside the fence as an incentive. Compl. ¶ 10. Such an incentive was apparently not needed for

workers inside the fence. The decision was also based on budgetary considerations, as demonstrated by the fact that the policy, by increasing the daily wages while not increasing the overall budget, caused the need to lay off some workers. Compl. ¶ 10.

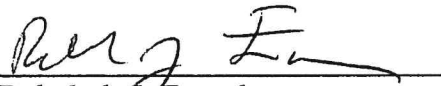
This Court has consistently held that prison administrators “are accorded ‘wide ranging deference’ in adopting and executing policies to preserve internal order and discipline among the inmates.” *Jellison v. Mahoney*, 1999 MT 217, ¶ 12, 295 Mont. 540, 986 P.2d 1089 (1999), quoting *Whitley v. Albers*, 475 U.S. 312, 321 - 322, 106 S. Ct. 1078, 1085, 89 L.Ed.2d 251, 262 (1986). Prison administrators should similarly be accorded deference in interpreting their own policies and preserving their budgets. DOC Policy No. 5.1.1 allows each facility to develop an inmate compensation procedure, and requires the facility to stay within its annual budget allocation. Compl. Ex. A. There is nothing in the policy or the compensation table that requires a particular inmate be paid in the level three category. This Court should affirm the district court’s decision because Ford’s complaint demonstrates that prison officials had a legitimate basis for not raising his wages to \$3.25 per day.

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CONCLUSION

This Court should affirm the district court's order dismissing Ford's complaint because Ford has no constitutional right to be paid for the work he performs at Montana State Prison and therefore cannot claim he is the victim of discrimination or an equal protection violation because he is allegedly paid less than other inmates. The Court should also reject Ford's equal protection argument because prison officials had a legitimate reason for refusing to raise his wage to \$3.25 per day.

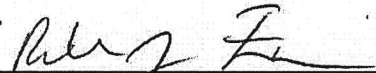
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CERTIFICATE OF COMPLIANCE

I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

DATED this 19th day of May, 2017.



Rebekah J. French
Associate Counsel

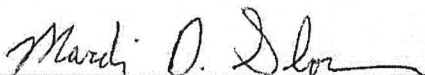
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **APPELLEES' ANSWER BRIEF** was mailed, postage prepaid, by U.S. mail, to the following:

Eugene Ford
DOC ID # 10205
Montana State Prison
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Deer Lodge, MT 59722

Pro Se Plaintiff and Appellant

DATED this 19th day of May, 2017.



Mardi Slocum
Legal Assistant