

APPLICATION OF

JEANA R. LERVICK

FOR

DISTRICT COURT JUDGESHIP
THIRTEENTH JUDICIAL DISTRICT

APPLICATION FOR
DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name.

Jeana Rose Lervick

2. Birthdate.

[REDACTED]

3. Current home address.

[REDACTED]

4. Email address.

[REDACTED]

5. Preferred phone number.

[REDACTED]

6. Judicial position for which you are applying.

Thirteenth Judicial District Judgeship (Yellowstone County)

7. Date you became a U.S. citizen, if different than birthdate.

N/A

8. Date you became a Montana resident.

I was born in Billings and after living in Chicago following law school, returned home on April 11, 2011.

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.

Billings Senior High School Billings, MT 1995 HS diploma

Montana State University Bozeman, MT 1999 Bachelor of Science
Interdisciplinary Studies
With Honors

DePaul University College of Law Chicago, IL 2002 Juris Doctor

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

Montana State University:

- MSU Honors Program and degree
- Panhellenic Greek Woman of the Year
- Alpha Gamma Delta Sorority
- Resident Housing Association Board
- Teaching assistant for political science and biochemistry courses

DePaul University:

- **Best Oralist, Saul Lefkowitz Moot Court Competition**
- **Intellectual Property Law Section**
- **National Moot Court Team**

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.

Yellowstone County **Billings, Montana**
Chief In-House Counsel, Deputy County Attorney, June 2020-present
 217 N. 27th Street (County Courthouse)
 Billings, Montana 59101

Felt, Martin, Frazier & Weldon, P.C.
Attorney, April 2017-June 2020
 2825 3rd Avenue N., Suite 100
 Billings, Montana 59101

Billings Public Schools
Executive Director, August 2011-August 2017
Board Clerk, May 2015-April 2017
415 N. 30th Street
Billings, Montana 59101

Billings, Montana

Greer, Burns & Crain, Ltd.
Attorney, February 2009-April 2011
300 S. Wacker Drive, Suite 2500
Chicago, Illinois 60606

Chicago, Illinois

Bell, Boyd & Lloyd LLP (n/k/a K&L Gates)
Attorney, July 2005-February 2009
70 West Madison Street, Suite 3100
Chicago, Illinois 60602

Chicago, Illinois

Cook, Alex, McFarron, Manzo, Cummings & Mehler, Ltd.
Associate Attorney, August 2002-July 2005
200 West Adams Street, Suite 2004
Chicago, Illinois 60606

Chicago, Illinois

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.

United States District Court, District of Montana 2014
State of Montana 2014
United States Court of Appeals for the Seventh Circuit 2010
United States Court of Appeals for the Federal Circuit 2008
Intellectual Property Law Association of Chicago 2002-2011 (I left Chicago)
United States District Court, Northern District of Illinois 2002
State of Illinois 2002 (I have let this admission go dormant this year, as I do not intend to return to Illinois)

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).

Over the past ten years my practice has focused almost exclusively on public service law. This has included civil litigation (approximately 50%), employment matters including defending employers before the Human Rights Bureau, mediation and arbitration (30%), other in-house counsel and advice (20%), and employer contract negotiation involving unions (10%).

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).

My legal career, both in Chicago and since returning home, has been unique in that it has focused significantly on dispute resolution. During my time serving school districts across Eastern Montana, particularly Billings Public Schools, I served as the lead during union negotiations.

Similarly, over the past decade my experience as a public servant has balanced between advocacy and defense of public entities. I have attended several legislative sessions, worked hand-in-hand with State and local governments, and have mediated local disputes. My current job as a Chief Deputy involves daily advising of the Yellowstone County Board of County Commissioners.

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.

Initially, my career was spent exclusively in federal courthouses across the country. More recently, the dispute resolution in which I have been heavily involved has been more administrative in nature. I have represented public employers through the Human Rights Bureau, as well as the arbitration process, on numerous occasions. Similarly, I have served as mediator of employment law-related issues.

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.

None.

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.

One of my more interesting cases in recent years involved a school district that had been wrongfully accused of racist acts. Prior to a contentious home basketball game, the Athletic Director of Reed Point Schools allowed into the gymnasium the bus driver for the team. A small group of parents, all Native American, were gathered at the door and believed that they heard her say she was only letting "white people in." The employee asserted she did not say such a thing and her testimony was supported by the bus driver. The ACLU represented the plaintiffs and the case received quite a bit of media attention. Ultimately the judge found the employee to be credible and the judge found no discrimination occurred. (Attachment A)

I have handled an array of challenging and complex legal issues at the heart of issues important to Montana. One recent issue was serving as litigation counsel for Miles City School District in a highly public case. A local attorney accused the district of ignoring and perpetuating sexual abuse by a non-employee through the 1990s. The abuse was not in question — a volunteer athletic trainer had admitted to his heinous acts. But the school district had been unaware of his actions and unable to protect the men who came forward with allegations. In today's climate, the school district's position was difficult to explain, particularly 30 years after the fact. Nonetheless I was able to knock out claims on summary judgment and set the case up as well as possible. (Attachment B)

The most unique aspect of my experience is where I began. At the beginning of my career, and given my science background, I focused on patent and trademark litigation for global companies. This practice took me all around the world on cases including Italy, Ireland, and Germany, as well as across the United States. Patent litigation is an extremely lengthy, expensive process that typically involves multimillion-dollar entities and years of contentious litigation. Combining my science background with my love of the law was an ever-changing and highly fulfilling practice and is unique to Montana lawyers.

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.

None.

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.

Much of my career over the past decade has centered on education. As in-house counsel I have been and continue to be tasked with providing guidance and imparting knowledge regarding the laws that affect our community most. Several of my engagements include:

- Serving as an assistant adjunct professor at Rocky Mountain College for its Education Law course. I met with aspiring principals and administrators regarding the legal issues, requirements and pitfalls of being an administrator in public schools. 2015-2017
- Seminar Law Group presenter for several Labor & Employment Law seminars. These seminars focused on best practices for public and private employers. 2012-present

- **Montana High School Association presentation on legal issues in high school athletics. Provided guidance and help to Athletic Directors and other administrators across the state regarding legal issues in sports. 2017**
- **School Board Education Seminars. Provided multiple presentations, education seminars and guidance talks to school districts across the eastern part of the State including Ekalaka School District, Shepherd School District, Broadus School District and Reed Point School District. 2011-2019**
- **As In-House Counsel for the County, I continue to provide educational talks and seminars to staff and elected officials regarding various employment-related and other legal issues. 2019-present**

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.

Giving to my community is extremely important to me. Pro bono projects and endeavors have been a key part of returning home to Billings. I have spent over 200 hours providing services to those who I have met through my church—St. Thomas the Apostle—as well as through various local civic organizations and word-of-mouth. These services include legal advice, drafting of end-of-life documents, assistance regarding non-profit building sites, and representation of individuals of limited means in disputes.

21. Describe the 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.

Montana Bar Association, Intellectual Property Law Section	2017-2019
Montana Bar Association, Education Law Section	2015-2019
Illinois Bar Association	2002-2010
Intellectual Property Law Association of Chicago	2002-2010

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

I extend my deep appreciation and respect to the many members of my family who have served in the U.S. Military. I have not had the honor.

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

Throughout my time working in administrative processes, I have had the opportunity to serve as mediator on a number of occasions. I would approximate that between 2015 and present, I have been involved in administrative conflict resolution between 20-30 times.

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

Much of my childhood was spent on my grandparents' farm in Garfield County. Through hard work, community and the importance of agriculture to our State, I learned some of the most valuable lessons I have carried through life. Farming and ranching are invaluable to development of values in our Montana children, and I know that the lessons I learned will continue to serve me throughout my career.

While working for Billings Public Schools, I also served as Executive Director of Human Resources. This time was pivotal to me both professionally and personally. HR allowed me to see the need to be judicious in my decisions, as well as to take all information into account. Many of these skills have made me a better lawyer and will continue to serve me as judge, should I be chosen, including lessons about human nature, about how our system of society is set up, and about progressive discipline in the workforce.

In addition, the experience I have gained with the County Attorney's Office has opened my eyes to the criminal world and all of its nuances. I have been fortunate enough to get to know the District Court judges, their staff, and the procedures and processes that judges go through every day. I believe that the relationships I have made will help me to seamlessly transition into the role of judge, should I be chosen.

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.

Public service is prevalent in both my professional and home life, including in the following capacities:

- **Religious Education Instructor, St. Thomas the Apostle Catholic Church**
 - 2014-2019
 - Weekly religious education instructor for third grade students
 - Lead school-age children in Bible studies, the tenets of the Catholic Church, and life skills
- **Treasurer, Yellowstone Soccer Association**
 - 2015-present
 - Officer of recreational soccer league that provides athletic opportunities to community, including low-income families
- **Board Member, Billings Public Library**
 - 2014-2016
 - City of Billings-appointed member of Library Board
 - Oversaw public library operations, as well as addressed concerns and complaints from the community. Worked with the City of Billings as quasi-governmental agency.
- **Volunteer and Team Mom for various athletic, civic and music-related youth groups**

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.

I served as the Board Clerk for Billings Public Schools from May of 2015 through August 2017, which was a sworn appointed position. My employment since 2010 has involved positions of public trust.

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, or 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.

No, I am extremely mindful of avoiding any conflicts that could affect the County.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

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? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

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

As a fourth-generation Montanan there is very little as important to me as my community. Being part of a farming community as a child instilled in me not only the importance of family, but also the resolve, grit and need to serve neighbors that are pivotal to Montana. After many years of practicing law in Chicago, I was blessed to be able to return home to raise my family in the greatest place on Earth. And I wanted to serve my community and sought out roles public service. Today, I seek to continue that goal of serving those around me, in an even larger capacity.

Two years ago, I found the opportunity to add criminal and local government experience with the Yellowstone County Attorney's Office. Spending time interacting almost daily with our district court judges opened my eyes to something I had not previously considered — becoming a judge. I was able to learn from the best of the best how the job is more than just holding others accountable. I have observed daily the involuntary commitment process, bankruptcies and family law issues, our judges' work in the drug courts, and, of course, their daily work on civil and criminal matters. Much of my career has prepared me for the job. I love my current position. I know with certainty that my skill set and temperament at this juncture in my life would allow me to serve my community even better as a district court judge.

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

Judges, I believe, must possess courage, a strong moral and ethical compass and patience.

Courage of conviction is profoundly important, as the decisions made by a district court judge impact the entire community. A judge must be willing to stand by his or her decision and be comfortable that it was the right one. Public servants are tasked with making calls that won't always be understood or appreciated, and a judge is first and foremost a public servant. Courage is a vital component to the position.

In this regard, a judge must make decisions based on fact and law, as opposed to opinion. A strong moral and ethical compass is vital to serve the needs of the community. Daily I have seen individuals and groups attempt to change opinions of the decision-makers of Montana. Only by combining the courage I mention above with the strong desire to support and serve can these individuals make the right decisions, without the taint of cultural sway.

Finally, as essential as the traits above is the need for a judge to be patient. A virtue I have gained over the years, patience is so very necessary when dealing with situations that are often laden with emotion. Holding our community members

accountable for their decisions is an act that requires a tremendous amount of patience.

These three values create the best possible decision-maker. It is my strong belief that my strengths lie in these areas and will serve me, should I be chosen to serve.

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

Having spent several years interacting with the State, the Montana Legislature, and local government, I have a keen understanding as to how vital our lawmakers, and those who implement the laws, are to our society. In my extensive experience, I understand how and why laws are created and how important it is that they be followed as intended. "Interpretation" of statute and our Constitution is really investigation into the intent of those who put the laws into motion and how our rules and regulations came to be. It is my own intent to honor that work in holding our citizens to the organized society laid out in our statutes and Constitution.

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.

Please see Attachment C.

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.

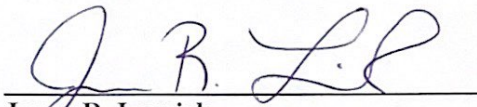
Honorable Nickolas C. Murnion
District Court Judge
16th Judicial District
c/o afritz@mt.gov
(406) 346-6109

Calvin J. Stacey, Esq.
Stacey & Funyak
cstacey@staceyfunyak.com
(406) 259-4545

Scott Pederson, Esq.
Deputy Yellowstone County Attorney
spederson@yellowstonecountymt.gov
(406) 256-2714

Thank you for your consideration.

Sincerely,

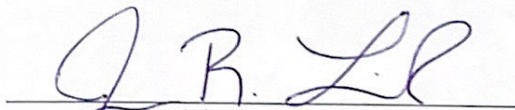

Jeana R. Lervick

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 M.C.A. § 2-2-106.

October 6, 2021
(Date)


(Signature of Applicant)

ATTACHMENT A

FILED

JAN 04 2019

SANDRA M. FOX, CLERK

BY

DEPUTY

**MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT
STILLWATER COUNTY**

**BRANDY GOESAHEAD, ELSWORTH
GOESAHEAD, WHITNEY HOLDS, and
EMERINE WHITEPLUME,**

Plaintiffs,

vs.

**REED POINT SCHOOL DISTRICT,
Superintendent MIKE EHINGER and Co-
Athletic Director TERESA BARE,**

Defendants,

Cause No. DV 18-09

Judge: Blair Jones

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

PROCEDURAL BACKGROUND

This matter was tried before the Court sitting without a jury on November 14, 2018. Plaintiffs Brandy Goesahead, Elsworth Goesahead, Whitney Holds, and Emerine Whiteplume ("Plaintiffs") were represented by Alex Rate and Jamie Iguchi. Defendants Reed Point School District, Superintendent Mike Ehringer and Co-Athletic Director Teresa Bare ("Defendants") were represented by Jeana Lervick and Jeffrey Weldon of Felt, Martin, Frazier & Weldon, P.C.

At trial, the Court heard testimony and received exhibits. From the evidence presented,

1 the Court makes the following:

2 **FINDINGS OF FACT**

3 ***Background***

4 1. The issues raised in the Plaintiffs' Complaint focus on a brief period on January 21, 2017.
5 On that date, Defendant Reed Point School District ("District"), together with its athletic partner
6 Rapelje School District, was hosting a series of boys' and girls' basketball games against Plenty
7 Coups High School, located in Pryor, Montana. The Plaintiffs are Native Americans.

8 2. Reed Point and Rapelje are small central Montana towns located approximately 35 miles
9 apart. Reed Point's high school population is typically fewer than 50 students. Thus, to ensure
10 their students have an opportunity to participate in athletics, the two school districts have entered
11 into an athletic co-operative arrangement.

12 3. At all relevant times relevant hereto, Defendant Mike Ehinger and Defendant Teresa Bare
13 were employed by the District.

14 ***Setting Up for the Game***

15 4. As Co-Athletic Directors for the District, Ms. Bare and Ms. Tricia Hess, had tasks to
16 accomplish before the District could host the games on the evening of January 21, 2017. Like
17 any small school district, staff, administrators, trustees and parents provide help so that District
18 events run smoothly.

19 5. The responsibilities of Ms. Bare and Ms. Hess that day included setting up facilities,
20 organizing workers, arranging cash boxes for tickets, concessions, and raffles, preparing clocks
21 and score tables, finding programs, preparing locker rooms and facilities for the officials, making
22 supplies ready, greeting teams and showing them to their locker rooms, and coordinating all
23 other details of hosting such an event.

24 6. As Ms. Hess stated during her deposition, "we're usually the first ones in the door and the
25 last ones out at the end of...an event." In addition to the duties described above, Ms. Hess
26 served as the varsity girls basketball coach and Ms. Bare served as the school secretary,
27
28

1 responsible for overseeing the financial aspects of the event.

2 7. Much of the preparation for a school event involves ensuring that the District is well-
3 represented to its own students and parents, as well as its visitors. Large numbers of spectators
4 make preparation and a good impression particularly important. As stated by Ms. Bare during
5 her deposition, "...there were a lot of things to do. And so we just like to make sure everything
6 is ready when we open those doors for our – our fans, the visiting fans. We want it to be a good
7 experience when people come to our school."

8 8. Another key element of setting up for events is the presence of one or more school
9 volunteers who serve as ticket-takers and admit paying members of the public. On January 21,
10 2017, the ticket-taker was responsible for setting up the location for admission, preparing the
11 cash box provided by Ms. Bare, confirming the amount of money in the cash box and
12 acknowledging responsibility for it, together with other related responsibilities. The ticket-taker
13 was expected to be at the school "early," around 3:30 (a full hour before the first game began)
14 and it was determined that the doors would open at that time. As noted on a video reviewed by
15 the Court, the ticket-taker was not present as late as 3:26 p.m. The evidence suggests that she
16 likely arrived shortly before 3:30 p.m. on January 21, 2017.

17 9. Generally, Ms. Hess and Ms. Bare arrived anywhere from two to two and a half hours
18 before an event. Ms. Hess arrived at approximately 1:30 or 2:00 o'clock that afternoon, while
19 Ms. Bare arrived shortly thereafter. When Ms. Hess and Ms. Bare arrived on January 21, 2017,
20 they were both unaware whether anyone else was in the building.

21 10. The school building typically remains locked when school is not in session. It is
22 reasonable to expect that, prior to the doors being opened for admission of the public, generally
23 anyone inside the building would be an employee of the District or would have been admitted by
24 an employee.

25 11. Upon entering the Reed Point School, Ms. Hess began preparing for the games, which
26 included turning on the lights in the gymnasium, where the games would be played. When Ms.
27 Hess entered the gym, she observed four or five Native American women sitting on the
28

1 bleachers. Although noting that they were spectators and not authorized to be in the locked
2 school building, Ms. Hess concluded that the women were not in the way of set-up, decided to let
3 them remain in the gym, and continued to go about her tasks. Ms. Hess did not ask the women
4 to leave, although the facility had not yet been opened to the public for the event.

5 12. When Ms. Bare arrived, she also noticed four women sitting in the visitors' section of
6 the gym. When they discussed the situation, Ms. Hess and Ms. Bare decided to allow the women
7 to remain in the gym and continued to prepare the school for the event.

8 13. The Native American women who were in the gym when Ms. Hess and Ms. Bare arrived
9 were Plenty Coups fans and relatives of the Plaintiffs. It is unknown how they entered the
10 locked building, but based on testimony of the Plaintiffs, the Defendants, and security video, it is
11 probable that a District student or employee let them into the building.

12 14. Over time, other student participants, staff, and volunteers arrived for the games — some
13 had let themselves into the building and some were admitted by Ms. Hess or Ms. Bare.

14 15. Ms. Hess and Ms. Bare admitted the Reed Point/Rapelje basketball players, their coaches
15 and other volunteers (including the Rapelje Superintendent/Athletic Director/Coach and his wife
16 who keeps statistics for the team), and the paid bus driver for the Rapelje players.

17 16. A custodian, student volunteers, a supervisor for the concessions stand, other basketball
18 players, and, eventually, the ticket taker were also present in the building prior to opening the
19 doors to the public.

20 17. During the time that Ms. Hess and Ms. Bare were preparing for the event, some Plenty
21 Coup fans arrived at the front door. The first of the Plaintiffs to arrive were Ms. Emerine
22 Whiteplume and Mr. Whitney Holds, with their son.

23 18. Ms. Whiteplume and Mr. Holds arrived at Reed Point and the school shortly thereafter,
24 at approximately 3:00 pm, one and a half hours before the first of three games was to commence.
25 Neither Ms. Whiteplume nor Mr. Holds contacted anyone at the school beforehand to find out
26 when the doors would be opened for the event.
27
28

1 19. When they approached the school, Ms. Whiteplume and Mr. Holds found the door
2 locked and did not see anyone inside. They indicated that it was not unusual to have to wait in
3 line before entering schools for such events, and they understood that those inside were busy
4 preparing for the event.

5 20. The Plaintiffs chose to arrive at the school an hour and a half before the games started.
6 Because school gymnasiums in smaller schools can be small, and because Pryor fans frequently
7 turn out in large numbers, Plaintiffs testified they typically arrive early to obtain a seat.

8 21. At some point Ms. Hess opened the door and saw Ms. Whiteplume and Mr. Holds. Two
9 of the Plaintiffs testified Ms. Hess opened the door prior to the arrival of Mr. and Ms.
10 Goesahead, and two of the Plaintiffs testified Ms. Hess opened the door while Mr. and Ms.
11 Goesahead were present. Ms. Hess let them know that the "workers," (the ticket-taker) were not
12 there yet but should be arriving shortly. Ms. Whiteplume and Mr. Holds understood and were
13 not offended by the delay. Ms. Whiteplume stating during her deposition and at trial "it's a
14 pretty reasonable response. She said the workers weren't there." At approximately 3:10 p.m.,
15 Plaintiffs Brandy and Elsworth Goesahead arrived.
16

17 22. The parties all acknowledge that Plaintiffs continued to wait for the doors to the event to
18 open. Below is a summary of the testimony at deposition and at trial of each Plaintiff regarding
19 who they observed enter the building, how they were let in, and when:

20 23. Emerine Whiteplume:

- 21 • Players arrived via bus and were let in
- 22 • 1 player arrived separately, with a parent and they were let in
- 23 • 1 player arrived separately, without a parent and was let in
- 24 • An older gentleman with a chair arrived (the bus driver) and was let in
- 25 • Students and coaches were already in the building
- 26 • Upon entering the gym, Ms. Whiteplume saw players and coaches

27 24. Whitney Holds:

- 28 • Players arrived via bus (without adults) and were let in
- 1 player arrived, with two parents, and were let in
- An old man with a seat (the bus driver) arrived and was let in
- Upon entering the gym Mr. Holds saw Reed Point/Rapelje fans and Plenty Coups

1 fans, but nobody else

2 25. Elsworth Goesahead:

- 3 • Players arrived via bus and were let in
4 • 1-5 people arrived with pastries, presumably for a bake sale, and were let in
5 • A gentleman with a Reed Point chair (the bus driver) and was let in
6 • Students and staff were inside
7 • Upon entering the gym Mr. Goesahead saw approximately 27 fans, players and
8 coaches, approximately 5 of whom were Reed Point/Rapelje "fans" and 5 who
9 were Pryor fans

10 26. Brandy Goesahead:

- 11 • Kids with food arrived and were let in
12 • A man with a bleacher seat (the bus driver) arrived and was let in
13 • Ms. Bare, Ms. Hess and a male coach were inside
14 • Upon entering the gym, Ms. Goesahead saw "a couple other people"

15 27. Those associated with participating in or preparing for the event, such as players,
16 volunteers, coaches, and students, are not charged admission to the event. Their presence was
17 either necessary for the games to occur or their contributions to the District allowed them the
18 privilege of early entry.

19 28. Despite some differences in Plaintiffs' testimony regarding who was let into the
20 building, and apart from mistaking the bus driver for a paying member of the public, Plaintiffs
21 and Defendants testified consistently that those persons who they saw entering the building were
22 associated with the event.

23 29. The Plaintiffs all testified that Ms. Bare opened the door to the building for the "older"
24 gentleman the parties now acknowledge was the bus driver, Brent Self, and let him into the
25 building.

26 30. Mr. Self drove a bus of Rapelje players to the Reed Point School, and from Reed Point
27 back to Rapelje after the games.

28 31. When bringing the players to the school, Mr. Self dropped the participants at the
school's main door, where Plaintiffs were standing, then proceeded to park the bus. After
parking and securing the bus, he walked back to the main door carrying a blue bleacher chair and

1 knocked to be admitted.

2 *Plaintiffs' Contentions Regarding Ms. Bare's Comments*

3 32. When Ms. Bare opened the door to allow Mr. Self into the building, Plaintiffs testified
4 they heard Ms. Bare make a racially inappropriate comment.

5 33. Plaintiffs Emerine Whiteplume and Whitney Holds contend that Ms. Bare said "we are
6 only letting white people in."

7 34. Plaintiffs Ellsworth and Brandy Goesahead contend that Ms. Bare said "we don't have
8 any workers yet. We're only letting white people in."

9 35. When Ms. Bare let Mr. Self into the building, Mr. Goesahead stated, "did she just say
10 what I think she said?" Mr. Holds replied, "she just said 'we're only letting white people in.'"

11 36. Minutes after Mr. Holds' comment, Ms. Whiteplume posted what she perceived had
12 occurred to Facebook.

13 37. Mr. Self didn't hear Ms. Bare say anything. This is noteworthy as Mr. Self has Native
14 American heritage and would be sensitive to and have cause to be offended by improper racially
15 motivated comments.

16 38. Ms. Bare did not recall saying anything at all. However, she stated that she may have
17 said "we are only letting our people in," meaning those people associated with preparing for and
18 putting on the event.

19 39. Ms. Bare, who has completed diversity education, is certain that she did not say what
20 Plaintiffs contend they heard. Further, Ms. Bare was adamant that she is not the kind of person
21 who would say something so obviously wrong.

22 40. The video shows that, upon entering the school building, Mr. Self did not appear
23 shocked or upset.

24 41. Plaintiffs remained outside of the doors for approximately 5-10 minutes after Mr. Self
25 was let into the building, or until approximately 3:30 p.m.

26 42. As soon as the ticket-taker arrived, set up the table, cashbox, and other items, and made
27
28

1 adequate preparation for the event, the doors were unlocked and paying spectators were
2 permitted entrance to the school building.

3 43. Although Plaintiffs could not recall who opened the door to admit spectators, it was Ms.
4 Bare's recollection that she unlocked and opened the door and let Plaintiffs into the building.

5 44. Upon entering the building, Plaintiffs paid their entry fee, entered the gym, and joined
6 other spectators who had arrived prior to Ms. Bare and Ms. Hess.

7 45. Before and during the games, Plaintiffs posted on social media their perception of Ms.
8 Bare's comment, but did not approach Superintendent Ehinger, Ms. Bare, or any other staff
9 about the comment.

10 46. While in the gymnasium, Plaintiffs repeated to other spectators the comment attributed
11 to Ms. Bare.

12
13 *After the Games*

14 47. On the Monday following the events at issue here, Mr. and Mrs. Goesahead emailed
15 Superintendent Ehinger about the perceived discriminatory comment. Ms. Whiteplume and Mr.
16 Holds did not contact anyone at the District about what they had heard.

17 48. Superintendent Ehinger investigated the matter by interviewing Ms. Bare and Ms. Hess,
18 viewed the video of Mr. Self entering the building, and personally spoke with Mr. Self. Because
19 there were no other witnesses and the matter covered a short time frame, the Superintendent's
20 investigation of the event was brief. Mr. Ehinger responded by return email the Thursday after
21 the event empathizing with the Plaintiffs but finding insufficient reasons to conclude that Ms.
22 Bare had made the racially motivated comment. Mr. Ehinger notified the Goesaheads of his
23 findings suggesting that the Plaintiffs may have simply misheard Ms. Bare.

24 49. Before receiving a response from the District on the results of the District's
25 investigation, a meeting was held in Pryor, Montana. According to Plaintiffs, the story had
26 spread "like wildfire," likely due to the Facebook posts.

27 50. A school board member and Tribal elder called the meeting at Pryor to discuss several
28

1 topics with representatives of the American Civil Liberties Union (ACLU). Plaintiffs were asked
2 to speak at the meeting and to tell the ACLU the Plaintiffs understanding of what Ms. Bare had
3 said. The Plaintiffs provided the ACLU with statements of their story.

4 51. On May 24, 2017, the District received 12 complaints filed with the Human Rights
5 Bureau ("HRB.") The HRB complaints were filed by each of the Plaintiffs against each of the
6 Defendants alleging discrimination on the same bases as alleged in the Complaint filed in this
7 cause.

8 52. Plaintiff Brandy Goesahead testified that the instant Complaint was filed to combat the
9 prejudice and discrimination Native Americans face every day.

10 53. The Court gave special attention to the demeanor of the witnesses who testified at trial
11 and carefully considered the credibility of the testimony provided by each witness given the
12 nature of this proceeding and the conflicts in the testimony. The Court found that every witness
13 who testified was credible and sincerely believed that what they testified to was true. However,
14 the testimony is irreconcilable.

15 From the foregoing Findings of Fact, the Court draws the following:
16

17 **CONCLUSIONS OF LAW**

18 1. The Human Rights Commission's Administrative Rules set forth the applicable
19 standard of review to be applied by the Court in this cause.

20 2. To prove a claim of disparate treatment, a charging party must first establish a
21 *prima facie* case in support of the alleged violation. ARM 24.9.610.

22 3. To establish a *prima facie* case of discrimination based on disparate treatment, a
23 charging party must provide evidence from which the trier of fact can infer that adverse action
24 was motivated by consideration of the charging party's membership in a protected class. The
25 elements of a *prima facie* case will vary according to the type of charge and the violation, but
26 generally consist of proof that (i) the charging party is a member of a protected class; (ii) the
27 charging party sought and was qualified for an opportunity made available by the respondent;
28

1 and, (iii) the charging party was denied the opportunity because of membership in a protected
2 class. ARM 24.9.610(2)(a).

3 4. If a *prima facie* case of discrimination is established based on circumstantial
4 evidence, the respondent must produce evidence of a legitimate, nondiscriminatory reason for
5 the challenged action.

6 5. Once evidence of a legitimate, nondiscriminatory reason is provided, the charging
7 party must demonstrate that the reason offered is a pretext for unlawful discrimination. Pretext
8 requires evidence that the respondent's acts were more likely based on an unlawful motive, or
9 evidence that the explanation for the challenged action is not credible and is unworthy of
10 belief.

11 6. If a *prima facie* case of discrimination is established based on direct evidence, the
12 burden is on the respondent to prove by a preponderance of the evidence that an unlawful
13 motive played no role in the challenged action, or that the direct evidence is not credible and is
14 unworthy of belief. *See Mont. Fair Hous., Inc. v. City of Bozeman*, 854 F. Supp.2d 832, 844,
15 2012 U.S. Dist. LEXIS 25729.

16 7. The Court concludes that Plaintiffs have failed to establish a *prima facie* case of
17 discrimination, as the opportunity sought by Plaintiffs, namely entering the school building
18 prior to 3:30 pm, was not an opportunity made available by the District to paying spectators.
19 Plaintiffs were paying spectators and were therefore not denied an opportunity provided by the
20 District. The Court is unable to conclude by a preponderance of the evidence that the racially
21 inappropriate comment the Plaintiffs attribute to Ms. Bare was correctly perceived by the
22 Plaintiffs. The Court does not doubt that Plaintiffs believe what they say they heard. The
23 Court likewise recognizes the credibility of Ms. Bare's adamant denial that she did not make a
24 racist comment to the Plaintiffs, and that she is not the kind of person who would make such an
25 inappropriate comment. The Plaintiffs and Ms. Bare were equally credible witnesses and the
26 Court finds the testimony irreconcilable. Therefore, the exact nature of the comment is
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28

1 unproven.

2 8. Further, even if Plaintiffs had proven their case, the requested remedy is
3 unsupported in law. At trial, all Plaintiffs testified that an apology is the primary remedy
4 sought. While the Montana Supreme Court has not directly addressed such a request, several
5 courts have found that the law does not provide for such a remedy. *See Hamido v. Tenn. State*
6 *Univ.*, 2018 U.S. Dist. LEXIS 31633 at *8 (*quoting Woodruff v. Ohman*, 29 F. App'x 337, 346
7 (6th Cir. 2002) ("The purpose of the forced apology was undoubtedly to make Woodruff whole
8 in a sense not usually taken into account in the law. That sense is righting moral wrongs. The
9 law, however, is not usually concerned with procuring apologies to make morally right a legal
10 wrong done to the plaintiff.") Additionally, the defendant School District is a governmental
11 entity administered by a constitutionally established and elected Board of Trustees. Ordering
12 the District or any of its representatives to issue an apology may well implicate free speech
13 guarantees. In any event, the Court declines to order such a remedy in this cause.

14
15 9. Montana law provides remedies for unlawful discrimination. When a party has
16 engaged in a discriminatory practice, the Department of Labor and Industry "shall order the
17 party to refrain from engaging in the discriminatory conduct," and the discriminatory practice
18 should be prevented and remedied. Section 49-2-506, MCA. Here, Plaintiffs allege that the
19 discriminatory practice consisted of not allowing Plaintiffs early entry to a basketball game
20 because they were Native Americans. However, requiring a school district to allow all
21 prospective spectators early entry to games or events, regardless of circumstance, is
22 unreasonable. The Court concludes by a preponderance of the evidence that Plaintiffs were
23 allowed entry into the school building when circumstances allowed for entry to all paying
24 spectators. There was no discriminatory practice by the District that must be remedied by order
25 of this Court.

26 From the foregoing Findings of Fact and Conclusions of Law, the Court enters the
27 following:
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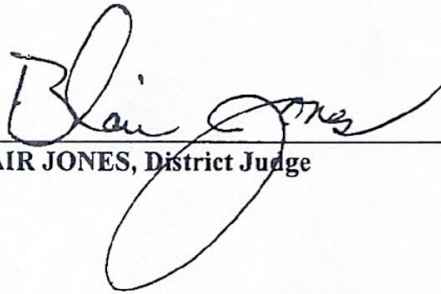
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ORDER

IT IS ORDERED that judgment shall be entered in favor of Defendants Reed Point School District, former Superintendent Mike Ehinger, and Co-Athletic Director Teresa Barc and against Plaintiffs Brandy GoesAhead, Elsworth GoesAhead, Whitney Holds, and Emerine Whiteplume.

IT IS FURTHER ORDERED that the Plaintiffs' Complaint is **DISMISSED** with prejudice.

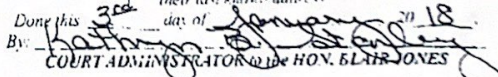
DATED this 3rd day of January, 2019.


BLAIR JONES, District Judge

cc: Alex Rate
Jamie Iguchi
Jeana Lervick
Jeffrey Weldon

CERTIFICATE OF SERVICE

*(This is to certify that the foregoing was duly served by mail
fax, or email upon the parties or their attorneys of record at
their last known address)*

Done this 3rd day of January, 2018.
By: 
COURT ADMINISTRATOR to the HON. BLAIR JONES

ATTACHMENT B

NO. _____
FILED

JUN 10 2019

HAZEL L. PARKER
CLERK OF DISTRICT COURT
DEPUTY *[Signature]*

HON. NICKOLAS C. MURNION
DISTRICT JUDGE
16th Judicial District, Dept. 2
P.O. Box 107
Forsyth, Montana 59327
(406) 346-6109

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, CUSTER COUNTY

B.M.(1), et. al.,

Plaintiffs,

vs.

JAMES E. "DOC" JENSEN, CUSTER
COUNTY HIGH SCHOOL DISTRICT NO. 1,
CUSTER COUNTY, MONTANA and JOHN
DOE A-Z,

Defendants,

CUSTER COUNTY HIGH SCHOOL
DISTRICT NO. 1, CUSTER COUNTY,
MONTANA, a public school district,

Cross-Plaintiff,

vs.

JAMES JENSEN, an individual,
Cross-Defendant.

Cause No. DV-2018-95

**ORDER RE: DEFENDANT'S MOTION
AND PLAINTIFFS' CROSS MOTION
FOR PARTIAL SUMMARY
JUDGMENT ON COUNTS V AND VII;**

Before the Court is the motion of Defendant, Custer County High School District No. 1, Custer County, Montana, ("School District") for partial summary judgment to dismiss

1 Plaintiff's Vicarious Liability claim (Count V) and Negligence Per Se claim (Count VII) on
2 March 6, 2019.

3 Plaintiffs filed a Response to the School District's motion for partial summary
4 judgment and a cross-motion for partial summary judgment as to Vicarious Liability
5 (Count V) and Negligence Per Se (Count VII) on March 15, 2019 and a Supplemental Brief
6 in Support of Motion for partial summary judgment on March 22, 2019. The School
7 District filed a Reply in support of its motion for partial summary judgment on March 29,
8 2019 and a Response in opposition to Plaintiffs' motion for partial summary judgment on
9 April 5, 2019. Plaintiffs filed a Reply in support of their motion for partial summary
10 judgment on April 15, 2019. All the matters are deemed to be fully briefed.

11 The School District contends that Plaintiffs' vicarious liability claim (Count V) is not
12 an independent stand-alone cause of action and should be dismissed. The School District
13 also argues that Plaintiffs' claim for negligence per se claim (Count VII) is improper as a
14 matter of law and should be dismissed.

15 Plaintiffs contend that the School District is vicariously liable because default was
16 entered against Defendant James E. "Doc" Jensen ("Jensen") for failure to respond in
17 Count II and the School District is vicariously liable as his employer.

18 Plaintiffs further contend that the School District had an affirmative duty to report
19 to the Department of Public Health and Human Services any suspected child abuse
20 committed by Jensen to children enrolled in the School District and failed to report as a
21 matter of law.

22 The matters came before the Court on May 17, 2019 for oral arguments. Plaintiffs
23 were represented by John Heenan, Heenan & Cook, Billings, Montana and Daniel Z. Rice
24 and Bryant S. Martin, Lucas & Tonn, P.C. Miles City Montana. The School District was

1 represented by Jeana R. Lervick, Felt, Martin, Frazier & Weldon, P.C. Billings, Montana.
2 As allowed pursuant to Rule 56 M. R. Civ. P., the Court has reviewed the complete Court
3 file including Motions, Affidavits, Exhibits attached to Affidavits and Pleadings, and has
4 reviewed the cited cases and statutes. Having now heard oral arguments and for good cause
5 appearing;

6 This Court's Order is supported by the Court's Memorandum submitted herewith.

7 **PROCEDURAL BACKGROUND**

8 The original Complaint was filed on September 21, 2018. The School District filed
9 an answer to the Complaint on October 15, 2018. A default was entered against Defendant
10 Jensen on October 15, 2018. Plaintiffs filed a First Amended Complaint on December 17,
11 2018. A Second Amended Complaint dated February 27, 2019 was filed on March 8, 2019.
12 The School District filed an Answer to the Second Amended Complaint on March 8, 2019.
13 The Second Amended Complaint contains the following claims:

- 14 1. Count I is a demand for equitable relief;
- 15 2. Count II alleges that Jensen engaged in multiple, separate incidents of non-
16 consensual harmful sexual contact, abuse and/or assault upon the Plaintiffs and
17 Plaintiffs have suffered injuries and damages as a direct and proximate result of
18 Jensen's acts.
- 19 3. Count III alleges negligent hiring, retention and supervision by the School
20 District of Jensen which caused injuries and damages to Plaintiffs;
- 21 4. Count IV alleges that the School District was negligent for failing to protect the
22 Plaintiffs from Jensen, both in school and outside, as part of school-sanctioned
23 athletics programs which caused Plaintiffs to sustain damage.
- 24

- 1 5. Count V alleges that Jensen was under the School District's direct supervision,
2 employ and control when he committed the wrongful and negligent acts to the
3 Plaintiffs and the District is liable for the negligent and wrongful conduct of
4 Jensen under the law of vicarious liability.
- 5 6. Count VI alleges that the School District fraudulently misrepresented and "failed
6 to disclose and/or actively concealed the dangers of sexual abuse of student
7 engaged in the athletics programs" with the intent of inducing Plaintiffs to rely
8 on the fraudulent representations and Plaintiffs and their parents acted to their
9 detriment in allowing Plaintiffs to participate.
- 10 7. Count VII alleges that the School District is negligent per se by failing to fulfill
11 their mandatory reporting obligations set forth in §41-3-201, MCA.

12 **STATEMENT OF FACTS**

- 13 1. Plaintiffs, as children, were students of the School District.
- 14 2. Defendant Jensen was an athletic trainer for the Custer County Cowboys
15 athletics teams.
- 16 3. As an athletic trainer, Defendant Jensen allegedly groomed and sexually abused
17 Plaintiffs.
- 18 4. In late 1997, School District Vice Principal Jack Regan received a complaint from
19 a parent regarding Defendant Jensen. The complaint was that some
20 inappropriateness was going on with Defendant Jensen and male students.
- 21 5. On December 15, 1997, the School District sent a Memorandum to Defendant
22 Jensen notifying him that the district had been "informed by at least three
23 individuals of situations involving male student athletes of CCHS and yourself
24

1 which would violate the spirit and intent of policies and administrative directives
2 concerning staff/student interactions." *Ex. 10, Plaintiff's Brief in Opposition.*

- 3 6. Plaintiffs allege that after the 1997 Memo was sent to Defendant Jensen, he
4 continued as the School District's athletic trainer for approximately 9 months.
5 7. Plaintiffs allege in their Supplement to Brief in Support of Plaintiffs' Motion for
6 Summary Judgment on Counts V and VII that Plaintiff, A.B., reported to coaches
7 that Defendant Jensen touched him inappropriately on approximately 12
8 occasions. The School District disputes the credibility of A.B.'s testimony.
9 8. Plaintiffs allege that Coach Jack Raymond witnessed inappropriate massages
10 with children. The School District has questions about the competency of Jack
11 Raymond's testimony in his deposition.
12 9. The School District did not report any suspected child abuse or neglect by
13 Defendant Jensen of any the Plaintiffs to the Department of Public Health and
14 Human Services.

15 MEMORANDUM

16 **Legal Standard for Summary Judgment**

17 Summary Judgment is proper when the pleadings, supporting documentary
18 evidence, admissions in open court, or supporting affidavits show no genuine issues of
19 material fact, and that the moving party is entitled to judgment as a matter of law. Rule
20 56(c), Montana Rules of Civil Procedure, provides, in pertinent part:

21 "...The judgment sought shall be rendered forthwith if the pleadings,
22 depositions, answers to interrogatories, and admissions on file, together with the
23 affidavits, if any, show that there is no genuine issue as to any material fact and
that the moving party is entitled to a judgment as a matter of law..."

24 The moving party must establish both the absence of genuine issues of material fact
and entitlement to judgment as a matter of law. *Bruner v. Yellowstone County*, 272 Mont.

1 261, 264, 900 P.2d 901, 903 (1995). Once the moving party has met its burden, the
2 opposing party must present material and substantial evidence, rather than mere
3 conclusory or speculative statements, to raise a genuine issue of material fact. *Gonzales v.*
4 *Walchuk*, 2002 MT 262, ¶ 9, 312 Mont. 240, 59 P.3d 377.

5 The purpose of summary judgment is to eliminate the burden and expense of
6 unnecessary trials. *Hughes v. Pullman*, 2001 MT 216, ¶ 20, 306 Mont. 420, 36 P.3d 339.
7 However, "all reasonable inferences which may be drawn from the offered proof must be
8 drawn in favor of the party opposing summary judgment." *Cape v. Crossroads*
9 *Correctional Center*, 2004 MT 265, ¶ 12, 323 Mont. 140, 99 P.3d 171. Where the movant
10 has met its burden of showing that no genuine issues of material fact exist, the opposing
11 party bears the burden of establishing an issue of material fact. The opposing party's facts
12 must be material and of a substantial nature, and not fanciful, frivolous, or conjectural.
13 *Fleming v. Fleming Farms, Inc.*, 221 Mont 237, 241, 717 P.2d 1103, 1105 (1986).

14 Summary judgment is an extreme remedy and should never be substituted for a trial
15 if a material fact controversy exists. *Howard v. Conlin Furniture No. 2, Inc.* (1995), 272
16 Mont. 433, 436, 901 P.2d 116, 118-19. If there is any doubt regarding the propriety of the
17 summary judgment motion, it should be denied." *Emery v. Federated Foods*, 262 Mont.
18 83, 90, 863 P.2d 426, 431 (1993).

19 **A. Vicarious Liability**

20 The School District contends that Count V of the Second Amended Complaint
21 should be dismissed because Plaintiffs are asserting a claim of "Vicarious Liability" which is
22 not an independent cause of action. In oral arguments, Plaintiffs conceded that "Vicarious
23 Liability" is not a stand-alone cause of action but urged the Court to adopt it with regard to
24 Count II because Defendant Jensen did not answer any of the complaints and his default

1 has been entered. It should be noted that Count II only involves allegations against
2 Defendant Jensen. Defendant Jensen also defaulted in the School District's action against
3 him. Plaintiffs contend that Defendant's default to the allegations contained in Count II is
4 an "admission" of guilt by Jensen. The same argument could apply to his failure to answer
5 the School District's action against him and he would have "admitted" by his default that he
6 deceived the School District and that he was not an employee.

7 The School District maintains that under the concept of vicarious liability, a
8 principal may be held liable for the acts of an agent but it is not a separate claim for
9 damages. In *Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 64, 342 Mont. 29,
10 ¶ 64, 179 P.3d 481, ¶ 64, Plaintiffs asserted claims for negligent supervision, failure to
11 provide a safe workplace, breach of fiduciary duty, negligent and intentional infliction of
12 emotional distress and "respondent superior." The Supreme Court held that "respondent
13 superior is not a free-standing or independent cause of action; rather it is a doctrine of the
14 law of agency by which the consequences of one person's actions may be attributed to
15 another person." *Id.* at ¶ 64, (citing *Restatement (Third) of Agency* § 2.01; *Kornec v. Mike*
16 *Horse Mining & Milling Co.*, 120 Mont. 1, 7-8, 180 P.2d 252, 256 (1947); *Vainio*, 258
17 Mont. at 279, 852 P.2d at 600 (1993)). Respondent superior is not a stand-alone claim
18 under Montana law. The School District's argument is well taken and Count V as a stand-
19 alone vicarious liability claim should be dismissed. This holding does not preclude
20 Plaintiffs from arguing that vicarious liability applies to the other claims in the Second
21 Amended Complaint.

22 Plaintiffs' contention that the School District be held vicariously liable for Jensen's
23 conduct pursuant to Count II of the Second Amended Complaint is not properly before the
24 Court. Plaintiffs moved for partial summary judgment as to vicarious liability against the

1 School District (Count V) and Negligence Per Se (Count VII). There is no reference in
2 Plaintiffs' motion for partial summary judgment to Count II of the Second Amended
3 Complaint. Plaintiffs primary argument is that since Defendant Jensen failed to respond
4 and default was entered against him on October 15, 2018, the School District as his
5 employer is responsible for his wrongful acts. Plaintiffs cite Restatement (Second) of
6 Agency §214 in support. The issue of whether the School District is vicariously liable for
7 the wrongful acts of Defendant Jensen has not been fully briefed by the parties and was not
8 part of the cross motion for partial summary judgment filed by Plaintiffs. The issue before
9 the court is whether Count V alleging vicarious liability as a stand-alone cause of action.
10 The Court concludes that vicarious liability is not a stand-alone cause of action and does
11 not reach any conclusion regarding whether vicarious liability applies to any of the other
12 claims for negligence including Count II. Plaintiffs' motion for partial summary judgment
13 regarding Count V should be denied.

14 **B. Negligence Per Se**

15 The School District argues that Count VII of the Second Amended Complaint should
16 be dismissed because it alleges negligence per se and asserts that the School District had a
17 mandatory duty to report child abuse to the Department of Health and Human Services
18 ("Department"). The School District further contends that the standard applicable in
19 December of 1997 when the first complaint was received was that a school district was only
20 required to report suspected or known parental or defined caretaker abuse and that if they
21 received reports of abuse or neglect committed by Defendant Jensen, they were not
22 required to report at that time. After reviewing the applicable statutes of the State of
23 Montana applicable in December of 1997, the Court believes the School District's position
24 is well taken.

1 In 1997 the School District was required to report cases to the Department if they
2 suspected a child was abused or neglected. "Child abuse or neglect" means "harm to child's
3 health or welfare or threatened harm to a child's health or welfare." §41-3-102(6)(a), MCA
4 (1997). A "child" means any person under 18 years of age. §41-3-102(b), MCA (1997).
5 "Abused or neglected" was defined as the "state or condition of a child who has suffered
6 child abuse or neglect" §41-3-102(2), MCA (1997). The term "child abuse or neglect"
7 included "harm or threatened harm to a child's health or welfare by the acts or omissions of
8 a person responsible for the child's welfare" §41-3-102(6)(a)(b), MCA (1997). "Harm to
9 child health or welfare" meant harm that occurred whenever a parent or other "person
10 responsible for child's welfare" committed sexual abuse. §41-3-102(9)(b), MCA (1997). At
11 this point, one could conclude from reading these statutes that Defendant Jensen as an
12 athletic trainer for the School District was a person responsible for the student's welfare
13 and if he committed sexual abuse of the student, the School District would be required to
14 report it to the Department if they had reason to believe it happened. This conclusion
15 would be further supported by §41-3-201(1), MCA (1997) which provided that "when the
16 professionals and officials listed in subsection (2) know or have reasonable cause to
17 suspect, as a result of information they receive in their professional or official capacity, that
18 a child is abused or neglected, they shall report the matter promptly to the department..."
19 This statute further provided in subsection (2) that professionals and officials required to
20 report includes "school teachers, other school officials, and employees who work during
21 regular school hours." §41-3-201(2)(d), MCA (1997). Again, reading these statutes together
22 it appears that the school officials working for the school district had an obligation to
23 report suspected child abuse. However, since Defendant Jensen is not the parent of the
24 children allegedly abused in this case, one must look at the definition of "a person

1 responsible for a child's welfare" to determine if harm to a child's welfare occurred by a
2 statutorily defined caretaker. The statute that is dispositive on the issue of whether the
3 school had a mandatory reporting obligation in December of 1997 is §41-3-102(1), MCA
4 (1997) which defined "a person responsible for a child's welfare" as the following:

- 5 (a) *The child's parent, guardian, foster parent or an adult who resides in the same*
6 *home in which the child resides;*
- 7 (b) *A person providing care in a day-care facility;*
- 8 (c) *An employee of a public or private residential institution, facility, home, or*
9 *agency; or*
- 10 (d) *Any other person responsible for the child's welfare in a residential setting.*

11 Defendant Jensen was not a parent, guardian, foster parent or an adult who resided
12 in the same home as the child for any of the Plaintiffs in this case. This case does not
13 involve a day-care facility or a public or private residential institution, facility, home or
14 agency. The last definition (Subsection d) which was apparently intended to apply to any
15 other person responsible for a child's welfare only applies to a residential setting. In
16 December of 1997, the mandatory reporting requirements applied to school officials if they
17 believed a parent had abused a child. They applied if the school officials suspected a child
18 was abused in a day-care facility, residential institution of by a person responsible for a
19 child's welfare in a residence. There was no statutory requirement in December of 1997 to
20 report suspected child abuse committed by an employee or agent of a school.

21 This deficiency in the mandatory reporting requirement was corrected in 2011 when
22 the Montana Legislature added the following language to §41-3-201(1), MCA 2011-2017):

23 *41-3-201. Reports. (1) When the professionals and officials listed in subsection (2)*
24 *know or have reasonable cause to suspect, as a result of information they receive*
in their professional or official capacity, that a child is abused or neglected by
anyone regardless of whether the person suspected of causing the abuse or neglect
is a parent or other person responsible for the child's welfare, they shall report the
matter promptly to the department of public health and human services.
(emphasis supplied).

1 The portion underlined is the new language added by the 2011 legislature. It is clear
2 that after 2011, the mandatory reporting requirements applied to anyone regardless of
3 whether they were a parent or other person responsible for the child's welfare. There is no
4 ambiguity in the mandatory reporting requirements in 1997. They clearly did not apply to
5 child abuse or neglect committed by school officials unless they were parents or other
6 specified custodian. The 2011 legislature broadened the cases which require mandatory
7 reporting to the Department. It is imperative that if the legislature is going to impose a
8 mandatory reporting requirement, the statutes specifically give notice of what
9 circumstances require the reports to be given. This is especially true since §41-3-207(1),
10 MCA, provides a penalty for the failure to report: "Any person, official, or institution
11 required by law to report known or suspected child abuse or neglect who fails to do so or
12 who prevents another person from reasonably doing so is civilly liable for the damages
13 proximately caused by such failure or prevention." If the legislature is going to impose civil
14 liability for failure to report, the law should specifically identify all parties who are required
15 to report. The 1997 statutes did not mandate a report in this case involving the allegations
16 of child abuse by Defendant Jensen

17 The 1997 statutes did not provide notice to the School District that they were
18 required to report suspected abuse and neglect involving anyone other than those defined
19 as "a person responsible for a child's welfare" which did not include reports of alleged child
20 abuse or neglect committed by school employees or agents. The lack of notice and the
21 School District's understanding of their reporting requirements in 1997 is supported by the
22 deposition of Dr. Fred Anderson who stated "I think the reporting statutes were much
23 different in 1999 than they are today. I think they changed sometime in the early 2000's.
24 (Ex D 35:5-11). This Court cannot go back 22 years and impose a mandatory reporting

1 requirement where it is clear the legislature failed to include child abuse and neglect by
2 school officials as "persons responsible for a child's welfare".

3 Plaintiffs argue that definition of child abuse or neglect in §41-3-201, MCA (1997)
4 was broader because subsection (b) provided that the "term **includes** harm or threatened
5 harm to a child's health or welfare by the acts or omissions of a person responsible for the
6 child's welfare." (emphasis supplied). Since the term "includes" is in the statute, Plaintiffs
7 argue that it should be interpreted broadly to include school officials reporting child abuse
8 by school employees or agents. The definition of "person responsible for the child's
9 welfare" is still applicable and does not apply to Defendant Jensen for any alleged acts
10 committed as a school employee or agent.

11 Plaintiffs argue that the doctrine of *loco parentis* charges school districts with the
12 responsibility to supervise children under their control. *Campos v. Prosser Sch. Dist. No.*
13 *116*, 2008 U.S. Dist. LEXIS 80504 (E.D. Wash.2008). This doctrine does not impose a
14 mandatory duty to report suspected child abuse or neglect to the Department.

15 Plaintiffs cite a Twentieth District Court case, *Watchtower Bible v. Reyes*, Cause No.
16 DV-16-84 in support of their contention that §41-3-201, MCA provides a broader
17 interpretation of what child abuse is required to be reported. This case cites §41-3-201(4),
18 MCA which allows any person to make a report but does not require a report. That is the
19 same distinction in this case. The School District was allowed to make a report but was not
20 required to do so.

21 Plaintiffs cite *Gross v Myers*, 229 Mont. 509, 510, 748 P.2d 459 (1987) where a
22 report was made by a mother about abuse of her daughters 16 years prior by her husband
23 who not the father of the victims. This case involved the potential liability of a clinical
24 social worker for reporting the alleged abuse by the step-father 16 years after it happened.

1 The primary issue was whether the social worker was required to report suspected child
2 abuse that occurred 16 years before and thus did not constitute *current* child abuse which
3 was defined as "imminent risk of harm." *Id* at 513. The Court found that the social worker
4 had a reasonable cause to suspect child abuse, the report was proper and she was not
5 personally liable. The issue of whether the step-father was "person responsible for the
6 child" did not arise. The *Gross* case was primarily focused on the liability of the social
7 worker for making a report and is clearly distinguishable from this case. Under the
8 Montana law in 1997, the report by the social worker would have been proper under §41-3-
9 201(4), MCA which allows any person who has reasonable cause to suspect that a child is
10 abused or neglected to make a report. The *Gross* case did not expand the statutory
11 definition of persons required to report cases of abuse and neglect.

12 A claim for negligence *per se* requires a duty to arise from a statutorily imposed
13 obligation. *Prindel v. Ravalli Cty.*, 2006 MT 62, ¶ 29, 331 Mont. 338, ¶ 29, 133 P.3d 165, ¶
14 29. There was no mandatory duty to report the alleged child abuse by an employee or agent
15 of the School District and thus the elements of negligence *per se* have not been met. This
16 does not mean that the issue of non-reporting by the School District cannot be raised under
17 the general negligence claims in the Second Amended Complaint. "(E)ven if a violation of a
18 statute does not constitute negligence *per se*, such violation may nonetheless be considered
19 as evidence of negligence". *Id*. The Court is not suggesting that there has been a violation
20 of the reporting requirements. There appears to be genuine issue of material fact regarding
21 that issue. It is noting that the School District was permitted to report the alleged abuse
22 under §41-3-201(4), MCA. but was not required to do so.

23

24

1 **IT IS HEREBY ORDERED AS FOLLOWS:**

- 2 1. The School District's Motion for partial summary judgment dismissing Plaintiffs'
- 3 vicarious liability claim (Count V) is GRANTED and Count V is hereby
- 4 dismissed.
- 5 2. The School District's Motion for partial summary judgment dismissing Plaintiffs'
- 6 Negligence Per Se claim (Count VII) is GRANTED and Count VII is dismissed.
- 7 3. Defendants' cross Motion for Summary Judgment as to Vicarious Liability
- 8 (Count V) is DENIED.
- 9 4. Defendants' cross Motion for Summary Judgment as to Negligence Per Se
- 10 (Count VII) is DENIED.
- 11 5. The Clerk of Court shall mail or deliver a copy of this document to counsel of
- 12 record.

13 DATED this 6th day of June, 2019.



Nickolas C. Murnion

NICKOLAS C. MURNION
DISTRICT JUDGE

ATTACHMENT C

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ATTORNEY FOR RESPONDENTS

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS**

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NOs. 1570-2019 AND 1572-2019:

JEANOR ANDERSEN MALONEY,)	
)	
Charging Party,)	
)	
vs.)	RESPONDENTS' VERIFIED
)	MOTION FOR SUMMARY
YELLOWSTONE COUNTY AND BOARD)	JUDGMENT AND BRIEF IN
OF COUNTY COMMISSIONERS,)	SUPPORT
)	
Respondents.)	
_____)	

Respondents Yellowstone County and its Board of Commissioners (collectively "the County") hereby move for summary judgment on grounds that there is no genuine issue of material fact and the County is entitled to judgment as a matter of law. This Motion is supported by the following Brief:

STATEMENT OF UNCONTROVERTED FACTS

1. The Respondents are Yellowstone County and its Board of County Commissioners; they are referred to collectively as the "County" unless otherwise stated.
2. The County is governed by a three-member elected Board of County Commissioners. The current Board of Commissioners are Chairman Denis Pitman,

Commissioner John Ostlund and Commissioner Don Jones. During the relevant time-period of this matter, Commissioner Jones was not yet elected, and Commissioner Robyn Driscoll served in his stead. (Ex. A, Affidavit of Dwight Vigness, ¶3)(Ex. G, Deposition of Robyn Driscoll, 10:2-4).

3. Yellowstone County is comprised of multiple departments and divisions of local government. One such division is the Yellowstone County Attorney's Office ("CA Department"). The CA Department is responsible for prosecution of criminal matters throughout the County, as well as civil complaints made against the County. (Ex. B, Affidavit of Scott Twito, ¶3).

4. In the present matter, the Charging Party claims that the County discriminated against her while she was employed as an attorney in the CA Department of the County.

Hiring the Charging Party

5. In late 2016, Yellowstone County Attorney employees reached out to the Charging Party in an effort to convince her to work for the CA Department as a prosecutor. (Ex. C, Deposition of ~~Eleanor Maloney~~, 23: 20-25).

6. The Charging Party had, in the less than five years since graduating law school, worked for a law firm, the public defender's office, and the Attorney General's office. (Ex. C, 10:10 – 11:18). County Attorney Twito believed that the Charging Party's reputation as an outstanding attorney would make her a tremendous fit with the department. (Ex. B, ¶4).

7. County Attorney Twito had to work to convince the Charging Party to come to work for the CA Department, as the Charging Party had not been looking to leave the Attorney General's office. (Ex. B, ¶4)(Ex. C, 14:13-14; 22:25 – 23:18).

8. Mr. Twito and the Charging Party had a number of discussions regarding pay and benefits before the Charging Party would agree to accept the position. Ultimately, the County Attorney Twito offered the Charging Party a significantly higher salary than was typical of new attorneys in his department. (Ex. B, ¶5).

9. When hiring new attorneys, it is part of County Attorney Twito's routine to notify new employees that they should take a close look at the County's benefits and, if they have questions, to let him know. (Ex. B, ¶6).

10. In particular, County Attorney Twito typically provides the new employee with a benefit sheet that discusses both plans offered by the County and how to choose which to take. (Ex. B, ¶7).

11. County Attorney Twito had this discussion with the Charging Party, as well. To the best of his recollection, she did not ask any questions or have any concerns regarding the insurance plans at the time. (Ex. B, ¶8)(Ex. C, 27:1-11).

12. At the time of her hire, the Charging Party was known as Michael Andersen. (Ex. C, 5:14 – 6:4).

13. The Charging Party attended a new employee orientation in spring of 2017. (Ex. C, 25:2-16). While the Charging Party recalls signing up for the traditional health insurance plan at orientation, she does not recall receiving the insurance plan given out at orientation. (Ex. C, 27:1-3).

14. All new employees are given a copy of the existing insurance plans, including coverage and exclusions, at new employee orientation. (Ex. A, ¶8).

The County's Insurance Plans

15. The County offers to its employees two self-funded insurance plans ("Plans"). Self-funded means that the County's insurance plans are controlled ultimately by the County. (Ex. A, ¶4).

16. The County's insurance plans are overseen by its third-party administrator ("TPA"). The TPA covers ministerial matters, as well as oversees the grant or denial of employee claims in accordance with the Plans, including whether a service is "medically necessary." (Ex. A, ¶5)(Ex. F, Deposition of Kevan Bryan, 11:10 – 12:25).

17. Over the years, the County has had different TPAs. In recent years, these TPAs have been Blue Cross and Blue Shield and EBMS. At the time in question, the County's TPA was EBMS. *Id.* As of January 1, 2020, the County changed from EBMS to Blue Cross and Blue Shield, after the County had significant disagreements with EBMS. (Ex. G, 16:13 – 17:3)(Ex. A, ¶5).

18. The County assumes that its TPAs and consultants are well-versed in the subjects for which they are hired. (Ex. E, Deposition of Dwight Vigness, 39:24 – 40:4).

19. For the most part, the County has historically not asked that its Plans be changed when it changes TPA. This is largely because it relies on the TPA to notify it if changes need be made, as well as the fact that employee benefits are largely negotiated with the County's eight unions and significant changes could create labor-related issues. (Ex. G, 16:13 – 17:3)(Ex. J, Deposition of Denis Pitman, 96:15-25).

20. When the County switched to EBMS as its TPA in 2016, EBMS did not recommend making any changes to the Plans. (Ex. G, 17:20 – 18:2).

21. The County's insurance plans are reviewed and adjusted at least semi-annually by the Yellowstone County Health Insurance Advisory Committee. (Ex. F, 10:1-7).

22. Largely for privacy reasons, the County is typically not aware of specific medical claims, including denial of claims, unless an employee notifies the County of such. (Ex. E, 23:4-10)(Ex. H, Deposition of Kevin Gillen, 21:19 – 22:4).

23. The County's insurance plans are funded by County taxpayer dollars, through a permissive levy placed on County citizens through their property taxes, and through the employees of the County themselves. (Ex. F, 9:7-25; 21:20 – 22:14).

24. While the County is the party ultimately responsible for decisions related to the benefits provided to its employees, it relies extensively on the recommendations of its TPA and consultants. (Ex. D, Deposition of County 30(b)(6) 9:6-22)(Ex. E, 13:14-14:21; 17:7-14).

25. In particular, the specifics of Plan documents, while approved by the Board, were created by the TPA and reviewed by the County's insurance consultant. *Id.*

26. The Plans contain fifty-four (54) different exclusions from coverage. (Ex. K, pp. 66-69).

27. It is now, and was at the time, the County's assumption that the exclusions are present in insurance plans in order to stem costs associated with providing insurance coverage. (Ex. E, 17:7-14) (Ex. G, 21:12 – 22:14)(Ex. I, Deposition of John Ostlund, 24:3-12).

28. The determination as to whether individual procedures fall within an exclusion, as well as whether the process is "medically necessary" within the provisions of exclusions, is one typically made by the TPA. (Ex. E, 17:1-18:6; 24:15-24)(Ex. G, 25:15-23).

29. As detailed in the Plans, when an employee has a dispute over a claim, they first attempt to work it out with the TPA. The general process for doing so is (1) pre-authorization

must be submitted for whatever services the member wants paid; (2) a claim must be on file for the services; (3) the member can appeal the pre-authorization denial if and when that pre-authorization is submitted. Once that process is completed, the member may appeal EBMS's determination to the County. (Ex. K, p. 16)(Ex. O).

30. After the processes detailed in the Plans are completed, any unresolved issues may be brought before the Board. The Board of Commissioners is the "last place" in the County's organizational processes. (Ex. G, 10:20 – 11:5).

31. Rarely, if ever, are the decisions of the TPA overturned by the County. For example, in recent years all such requests — including one from a County Commissioner — were denied by the Board of County Commissioners. (Ex. I, 15:18 – 17:8).

The Charging Party's Concerns

32. The Charging Party officially started work with the County on February 13, 2017. (Ex. A at ¶7).

33. At the time of the Charging Party's hire, she had been aware that she wanted to seek gender confirmation surgery for nearly fifteen (15) years. (Ex. C, 14:22-24). Knowing as early as 1992 that the process would be "ridiculously expensive," the Charging Party at that time reached out to various third parties in the hopes that they would cover the medical costs. (Ex. C, 15:7-20; 16:10-11).

34. In the spring of 2017, the Charging Party began counseling and hormone replacement therapy in association with gender confirmation. (Ex. C, 19:9 – 20:16) (Ex. O).

35. Before beginning therapy and counseling, the Charging Party did not talk to anyone at the County or EBMS about the processes or payment. (Ex. C, 28:15-25).

36. In the fall of 2017, the Charging Party learned that EBMS believed that payments made in error by EBMS to service providers would need to be recovered. It is the County's understanding that this led to discussions between the Charging Party and EBMS regarding the Plans and coverage for the treatment she sought. *Id.*

37. Following these discussions and in a letter dated April 11, 2018, the Charging Party sought from EBMS pre-approval for consults for facial feminization surgery. The April 11, 2018 letter was copied to the County and indicates that the Charging Party was already undergoing hair removal and had been on hormone replacement therapy for "over six months." This request was necessary to begin the process for disputing a claim. (Ex. P)(Ex. D, 26:11-27:5)(Ex. C, 29:15 – 30:3)(Ex. M)(Ex. N)(Ex. K).

38. On April 12, 2018, the Charging Party provided the County with a letter asking her direct supervisor, Chief Deputy Attorney Scott Pederson, to look into the "possibly discriminatory" practice of excluding medical services as part of its Plans. The Charging Party noted in her April 12, 2018 letter that she had asked EBMS to reconsider its position on its denial of payment for services. (Ex. Q).

39. It is the Charging Party's belief that her April 12, 2018 letter was a request to the County to amend its insurance policy. (Ex. C, 31:20 – 32:4). The County did not recognize the letter as a formal request and had a number of subsequent conversations with the Charging Party regarding the proper process for altering the Plans. (Ex. A, ¶¶11-16).

40. On April 23, 2018 — prior to receiving final denial of claims from EBMS — the Charging Party met with the Board of County Commissioners, the Director of Human Resources Dwight Vigness, and civil in-house attorney Kevin Gillen. (Ex. E, 43:17-21).

41. The Charging Party states that she believed she met with the Commissioners at this time in order to ask for both an exception to the policy, and to ask that the policy be changed. (Ex. C, 38:2-12).

42. At the time, the County viewed the meeting as an employee concern. (Ex. E, 45:17-23)(Ex. J, 79:1-18).

43. The County Commissioners hold approximately three discussion meetings a week, most weeks of the year. (Ex. F, 15:11 – 16:23). At these meetings, any number of topics are brought for discussion, including employee requests for discussion. *Id.*

44. County Commissioners cannot take action on items on their discussion agendas. Instead, County Commissioners can only take formal action at a Regular Meeting of the Board. (Ex. A, ¶13)(Ex. G, 48:14-24).

45. For a substantive change to be made to an Insurance Plan, the Board of Commissioners must go through a lengthy and involved process. In particular, the process typically takes time and requires meetings of the County Insurance Committee, notifications to each of the Unions, and input from the County's TPA and consultant. (Ex. A, ¶14).

46. Removing an exclusion altogether involves a complicated process and consideration of a number of factors including reinsurance and stop loss, as well as the collective bargaining agreement of each of the County's Unions. (Ex. E, 47:13 – 48:24).

47. The Charging Party and Human Resources Director Dwight Vigness had a number of conversations regarding the processes relating to the Plans. (Ex. A, ¶15).

48. On May 24, 2018, the Charging Party resigned her employment with the County, effective Monday June 18, 2018. (Ex. N).

49. At the time the Charging Party left employment with the County, the County was waiting on EBMS to finalize its decision on the Charging Party's appeal. (Ex. D, 10:7-18)(Ex. E, 50:3 – 51:1)(Ex. G, 50:2-14).

50. Prior to as well as following the meeting, however, the County's legal department and HR fully reviewed the issues brought up by the Charging Party, knowing they were likely to eventually come to the County for determination. (Ex. G, 28:14-24; 42:21 – 45:25)(Ex. H, 49:13 – 50:19).

51. Included in the County's review of the issue was a discussion including EBMS's legal department, to get EBMS's take on the issue. (Ex. H, 45:4-22). At the time, EBMS's legal team said that the issue was "up in the air" but Civil Attorney Kevin Gillen came away from the meeting with the clear, unequivocal understanding that there were no legal requirements to provide transition-related care funding. (Ex. G, 45:17-22; 47:16 – 48:5).

52. The County even went so far as to seek out information from the Human Rights Bureau and to advise the Charging Party's Union to file an action for declaratory relief, so as to determine its obligations under the law. (Ex. A, ¶12)(Ex. H, 48:9-22).

53. On May 11, 2018, the Charging Party was notified by EBMS of an adverse pre-notification determination. This allowed the Charging Party to appeal the decision to EBMS through the process described in the Plans. (Ex. K).

54. The denial of services was not of particular surprise, as the Plans clearly exclude such procedures. However, the processes detailed in the Plans had to be followed before exceptions or changes to them could be considered by the County. (Ex. K)(Ex. L).

55. Yet the County at no point in time made a determination on the Charging Party's issue, as it was not yet ripe for it to do so. (Ex. G, 34:9-11; 38:16-19; 42:17-20).

56. The Charging Party opened the door to frank conversations within the County and, in particular, the CA Department, about transgender issues. The County had training (in addition to its standard human rights and civil rights trainings), explored issues such as gender-neutral restrooms, and provided the Charging Party with significant amounts of time off to address related issues. (Ex. B. ¶¶11-14)(Ex. H, 97:10-22).

57. In response to the Charging Party notifying the County of her intent to seek gender reassignment, the County held sensitivity training for its staff in the County Attorney's office. (*Id.*)(Ex. E, 27:6-21).

ARGUMENT

The Charging Party in this matter understandably attempts to create new law. However, this is not the proper case for doing so. It is indisputable that, under the circumstances of this case, the County did not discriminate against her. A *prima facie* case of discrimination cannot be established and the County is entitled to summary judgment as a matter of law.

Legal Standard

Any party may move for summary judgment on all or part of a claim. Rule 56(a) M.R.Civ.P. The judgment sought is mandatory if the pleadings, the discovery and disclosure materials on file show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Rule 56(c)(3) M.R.Civ.P.; *Peterson v. Eichhorn*, ¶12, 2008 MT 250, 344 Mont. 540, 189 P.3d 615. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." M.R.Civ.P. 56(c). The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials (particularly where, as

here, scarce resources of a public entity are involved). *Klock v. City of Cascade*, (1997), 284 Mont. 167, 173, 943 P.2d 1262, 1266.

When a respondent moves for summary judgment on a Human Rights Act case, the analysis depends on whether the Charging Party's allegations are supported by alleged direct or circumstantial evidence of discrimination. Montana courts have defined direct evidence cases as those in which the parties do not dispute the reason for the employer's action, but only whether those actions constitute illegal discrimination. *Reeves v. Dairy Queen, Inc.*, 1998 MT 13, ¶16, 287 Mont. 196, ¶16, 953 P.2d 703, ¶16. In such cases, the Charging Party must first establish a *prima facie* case of unlawful discrimination with direct evidence. If established, the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action. *EEOC v. Alton Packaging Corp.* (11th Cir. 1990), 901 F.2d 920, 925. Rule 24.9.610 A.R.M. Here, the Charging Party cannot prove a *prima facie* case of discrimination as a matter of law, and no unlawful motive played any role in the County's actions.

I. THE CHARGING PARTY QUIT PRIOR TO THE COUNTY TAKING ANY ACTION.

Here, the Charging Party cannot establish a *prima facie* case of discrimination. As an initial matter, it is at best undetermined by courts whether the Charging Party is a member of a protected class. Widely, the protected class of "sex" includes pregnancy, maternity, sexual harassment and sexual orientation, however authorities are split as to whether transgender is encompassed. In Montana, it is clear that gender identity or expression or sexual orientation is not part of the Montana Human Rights Act, and a recent legislative bill to change that failed last legislative session. *See* 2019 MT HB465.

Regardless, even assuming that the Charging Party's contention that she is part of a protected class is later determined in Montana, she was not denied services or otherwise

subjected to adverse action by Respondents in circumstances raising a reasonable inference that she was treated differently than similarly situated people.

Today the Charging Party contends that the County discriminated against her by either (a) failing to grant her a special exception to one of its 54 exclusions or (b) failing to change the County's insurance plan to remove the exclusion that affected the Charging Party. Each request has a separate process to be followed before the County can take action and neither process was completed when the Charging Party quit.

The County absolutely bears the ultimate responsibility for its insurance Plans. However, when an employee wishes to do something outside of what those Plans provide, there are specific processes that the County must follow before it can decide whether or not to grant such a request. Here, though the Charging Party's situation was complicated by multiple similar and related requests, the processes that the County needed to occur did not and therefore no decisions were made that even could be discriminatory.

A. If the Charging Party was Asking the County to Overturn the Decision of EBMS, the Decision Had Not Yet Been Made.

One of the Charging Party's contentions is that the County did not grant her an exception to the exclusion. Not only is this action (or lack thereof) not discriminatory, the issue was not yet one that the County could address when the Charging Party left employment.

As detailed in the Plans, the process for appealing a determination that a Plan will not pay a medical bill is generally as follows: (1) pre-authorization must be submitted for whatever services the member wants paid; (2) a claim must be on file for the services; (3) the member can appeal the pre-authorization denial if and when that pre-authorization is submitted. Once that process is completed, the member may appeal EBMS's determination to the County.

As admitted to by the Charging Party, what, exactly, took place during her final months of employment with the County was somewhat complicated. In fact, the Board of Commissioners each have different recollections of the matter, based in large part on their limited involvement up to the point where Charging Party quit. In sum, however, the relevant actions that took place are as follows:

- April 11, 2018 Charging Party asks EBMS for a determination of coverage and pre-approval for consults for facial feminization surgery.
- April 12, 2018 Charging Party writes to her supervisor asking that the County "look into" the exclusions of the Plans.
- May 11, 2018 EBMS provides pre-notification determination that the services were properly denied under the Plan. Determination states that "the Plan does not require authorization or approval from the Claim Administrator prior to services being rendered," and states that any appeal should go to EBMS.
- May 16, 2018 Charging Party appeals to EBMS pre-notification determination.
- May 17, 2018 EBMS "acknowledges receipt" of the Charging Party's appeal and states that a decision will be made within thirty (30) days, per the Plans (June 16, 2018).
- May 24, 2018 Charging Party resigns employment with the County and indicates her last day will be June 18, 2018, a Monday.
- June 18, 2018 Charging Party's last day of employment.
- Late June 2018 EBMS issues denial of appeal.

Clearly, the EBMS appeal was still pending long after the Charging Party resigned and even after she left the County. Without a final EBMS decision, the County had nothing to overturn. Accordingly, there was no action the County could have taken prior to her leaving.

Far from “placing the blame” on its TPA, the County simply asserts that the Charging Party’s frustration is misplaced and the County’s actions reasonable. As a public entity, the County lives through processes. Regardless of the outcome of EBMS’s analysis, the process was necessary as it was set forth in the Plans. The County could not act until EBMS denied the claims and that did not occur until after the Charging Party quit, rendering action by the County moot.

This timeline did not stop the County from exploring the issue, nor the Charging Party from approaching the Commissioners about her complaint. As the Plans clearly excluded the procedures, it was not a surprise that EBMS denied the claims and would likely do so with the appeal. It did, however, make the discrimination alleged by the Charging Party impossible.

B. If the Charging Party was Asking the County to Remove the Exclusion from the Plans, the Involved Process Had Not Yet Begun.

The Charging Party alternately contends that discrimination occurred because the County did not amend its Insurance Plans to remove the exclusion. In doing so, the Charging Party relies heavily (and did at the time) on the belief that any and all insurance policies that contain such an exclusion are inherently discriminatory. However, the Charging Party’s argument as it pertains to the County fails on two bases — (1) such is not a matter of law, and (2) the Charging Party quit before the County even began the process of reviewing the policy.

1. The Charging Party’s Contentions that Self-Funded Plans Have Been Explicitly Legally Required to Remove the Exclusion is Inaccurate.

Prior to resigning her position with the County, the Charging Party provided HR and the County’s legal department, as well as her supervisors, with considerable amounts of legal support for her contention that the exclusion was discriminatory on its face. However, it was determined that no blanket prohibition exists that creates a legal prohibition to the County’s

Plans. The County reviewed legal research on the matter but found the cases and related materials to be distinguishable. The County sought guidance from both EBMS's legal department and the Human Rights Bureau.¹ And at the time, as well as today, no precedential law was found that directly affected the County's Plans. Nonetheless, the County continued to review the matter (and continues to today), in order to be mindful of whether a change was prudent. And, as discussed below, the issue of whether the County desires to have the exclusion or exclusions removed is one that requires considerable study.

2. The Charging Party's Vague Request that the Plans Be Altered Required a Considerable Process that Had Not Begun.

The Charging Party indicates that her request to the County that it amend its insurance plans came in the form of an April 12th letter to her direct supervisor, Scott Pederson. However, as the Charging Party was likely aware, the process for changing the benefits offered by a public entity are both complex and timely.

The Board of County Commissioners does oversee the operations of the County, including the benefits offered to its employees. However, the BOCC is subject to a slew of employment, open meeting, and procedural laws and requirements and does not simply make changes without a great deal of discussion, input and analysis. This was explained to the Charging Party by Dwight Vigness on more than one occasion. And as a senior deputy county attorney, the Charging Party should have understood the complexities of government.

The County's self-funded insurance plans are a somewhat unique animal, distinguishable from those of other entities. As a public entity, the County is obligated to include many parties in its decisions. Montana has a long-standing policy to encourage the practice and procedure of

¹ The County acknowledges that neither EBMS nor the Human Rights Bureau were able to provide legal advice to the County. However, as the area of law is so unsettled, the County's desire for the input of both was highly prudent.

collective bargaining to arrive at friendly terms suitable for both employees and employers. Section 39-31-305(2) MCA; Section 39-31-101 MCA. As such, the County's plans are not examined in the same fashion as others and are likewise not simply or easily altered.

In particular, changes to the County's insurance plans must be vetted through the Yellowstone County Health Insurance Advisory Committee ("Committee"). This Committee meets semi-annually and is comprised of employees, elected officials, Human Resources and outside consultants. The Committee receives professional consultation on the Plans, including uses and costs, and then advises the Board of Commissioners about renewal and adjustments to the Plans. The Committee met on or about June 11, 2019, by which point the Charging Party had resigned employment with the County. All County Attorney department attorneys, including the Charging Party, receive summary information regarding the content, frequency and purpose of the Committee's meetings from their attorney representative.

Finally, an in-depth review of the financial considerations of such a change would have to be made. As the Charging Party herself indicated, the procedures she was seeking had the potential to be exceptionally expensive. And as Financial Director Kevan Bryan testified at his deposition, the County had not yet done such an analysis. It was believed, however, by the County based on its understanding of exclusions in general, as well as the Charging Party's comments, that such a change could likely be extremely expensive for the County. As a steward of the public funds paying for such a change, it would have had to have been examined extensively.

II. THE CHARGING PARTY WAS NOT TREATED DIFFERENTLY AS A RESULT OF HER STATUS.

The Charging Party cannot maintain her claim, as the County did not deny her opportunities provided to others. In essence, the Charging Party argues that all insurance

exclusions are discriminatory. Yet the County's long-standing exclusions contain no unlawful motive in asking Charging Party to adhere to them like all other employees.

A. The Exclusion the Charging Party Alleges is Discriminatory is One of 54 Pre-Existing Exclusions of the Plans.

The exclusion referred to by the Charging Party is one of 54 exclusions to insurance coverage under the County's Plans. These exclusions were put into place by the County's third-party administrator long prior to the Charging Party coming to work at the County. They were put into the Plans, the County believes, for legitimate business reasons.

Here, the Charging Party provides no evidence of similarly situated people being treated differently, namely, being granted an exception to one of the 54 exclusions or being given similar medical treatment. In fact, County has track-record of not allowing exceptions. Most recently, a County Commissioner requested an exception and was denied by his fellow Commissioners. The Charging Party cannot demonstrate that, had the County ultimately denied her request for an exception, it would have done so because of the Charging Party's sex.

The County's response to the Charging Party's concerns was proper, typical and necessary. The procedures for both a request for exception, and for changing insurance policies were being followed and were in process when Charging Party concluded them by quitting. The Plans themselves had not been found inappropriate. In short, Charging Party can point to no action by the County that could be deemed anything other than a typical, standard and non-discriminatory procedure. Had the process continued to the level of being addressed by the County Commissioners, it is anyone's guess whether additional research or new case law would have led to a different result. But at the time the County had no findings that it had to bypass its process to change the Plans. To-date, it still does not.

B. The Charging Party Was Not Treated Disparately from Other Employees and the County at All Times Treated the Charging Party with Compassion and Understanding.

Indisputably, the County's overall response to the Charging Party's intended gender confirmation procedures was exceptional. Immediately the County began discussions regarding how to best educate the Charging Party's colleagues about the process. Training was held to help answer questions that colleagues may have. And the Charging Party was at all times treated with dignity and respect.

During her employment with the County, the Charging Party struggled in her day-to-day work. In particular, the Charging Party had difficulty with a number of judges before whom she practiced. According to the Charging Party, her difficulties were with one particular judge with whom she had a difference of opinion. Yet even the Charging Party admits that her supervisor changed assignments so that the Charging Party did not need to practice before the judge. In short, not only was the Charging Party not treated differently than her colleagues, she was given every advantage to succeed in her employment.

Since the Charging Party brought the issue to light, the County has continually reviewed whether changing the exclusion is something that it needs to, can, or should do. That consideration, one of many, will continue to be considered. But the principles of employee benefits are not the issue in this matter. The determination of the HRB is to be whether the County discriminated against the Charging Party. And as discussed above, it did not do so.

[CONTINUED ON NEXT PAGE]

Accordingly, in light of the above, it is respectfully requested that summary judgment in favor of Respondents be granted.

DATED this 25th day of February 2020.

By J. R. L.
Jeana Lervick
Yellowstone County Attorney's Office

Verification

STATE OF MONTANA)
 : ss.
County of Yellowstone)

Jeana R. Lervick, Chief Civil Deputy County Attorney, being first duly sworn upon her oath, deposes and says:

That Yellowstone County and Board of County Commissioners (collectively "the County") are respondents in the above-titled action; that she has read the foregoing Motion for Summary Judgment and Brief in Support, and that the facts and matters set forth therein are true to the best of her knowledge, information and belief.

J. R. L.
Jeana R. Lervick

SUBSCRIBED AND SWORN to before me this 25th day of February 2020.

Lacey Lessard
Lacey Lessard
Notary Public for the State of Montana
Residing at Billings, Montana.
My commission expires May 5, 2020

