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INTERPRETING MONTANA'S PATHBREAKING WRONGFUL DISCHARGE FROM EMPLOYMENT ACT: A PRELIMINARY ANALYSIS

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I. INTRODUCTION

In 1987 the Montana Legislature enacted its pathbreaking "Wrongful Discharge From Employment Act" (WDFEA).[1] With this legislation Montana became the first state in the nation to statutorily protect employees from "wrongful discharge."[2] Because of its pathbreaking nature, the Act has received considerable attention in the national press,[3] and been discussed extensively by leading employment law scholars.[4] It is clear that Montana's WDFEA serves as a paradigm for other states considering legislation of this kind, and indeed the "Uniform Employment Termination Act" recently drafted by the National Conference of Commissioners on Uniform State Laws contains several provisions modeled after the WDFEA.[5]

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1. MONT. CODE ANN. §§ 39-2-901 to 914 (1991). For an excellent analysis of the legislative history of this statute see Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94 (1990).

2. For over a decade prior to the Montana law's enactment, leading employment law scholars had been calling for such legislation. *See, e.g.*, Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481 (1976). But, until the Montana Legislature's 1987 enactment, no state in the nation had paid heed to such scholarly pronouncements.

3. *See, e.g.*, Barrett, *Wrongful-Dismissal Laws May Feel Effect of Dispute Before Montana's High Court*, Wall St. J., Nov. 8, 1988, at B1, col. 3; Dockser, *Wrongful-Firing Case in Montana May Prompt Laws in Other States*, Wall St. J., July 3, 1989, at B10, col. 1.

4. *See, e.g.*, Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAWS 96-99 (1990); Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 18-19 (1988); St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 58, 74-75 (1988); Gould, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation From a Comparative Perspective*, 67 NEB. L. REV. 28, 41 (1988). Professors Weiler, Summers, St. Antoine and Gould teach, respectively, at the Harvard, University of Pennsylvania, University of Michigan, and Stanford law schools.

5. For the text of the draft Uniform Employment-Termination Act ("Draft Act") see INDIVIDUAL EMPLOYEE RIGHTS MAN. 540:21 (BNA) (1991). *See also* Schramm, *supra* note 1, at 116 and n. 132. There are some significant areas, though, in which the Draft Act differs considerably from the WDFEA. *Compare* MONT. CODE ANN. § 39-2-904(2) (1991) (leaving

Consequently, the operation and interpretation of the WDFEA is of considerable importance not just to directly affected employees and employers, but also to those in other jurisdictions looking to it as a model statute. What follows is thus a preliminary analysis of how the WDFEA has been interpreted and applied during its past approximately five years of existence.

II. CONSTITUTIONALITY

A. Overview

The constitutionality of the WDFEA has been challenged in three cases before the Montana Supreme Court. The primary challenge came in the case of *Meech v. Hillhaven West, Inc.*[6] where the court, in a wide, sweeping opinion, upheld the constitutionality of the Act. Shortly thereafter, in *Johnson v. State*,[7] the court further upheld the constitutionality of the Act in a short opinion based on *Meech*. Finally, in the June 4, 1991 case of *Allmaras v. Yellowstone Basin Properties*,[8] the Montana Supreme Court further upheld the constitutionality of the WDFEA against a myriad of new constitutional challenges.

B. Meech v. Hillhaven West, Inc.

The *Meech* decision, as other observers have pointed out,[9] was a seminal one in terms of its interpretation of the Montana Constitution and the ability of the Montana Legislature to enact laws modifying common-law remedies. In *Meech*, the Montana Supreme Court overruled its earlier holding in *White v. State*[10] and held that the proper test to apply to a piece of legislation which reduced common-law remedies was whether the legislation had a "rational basis" meeting a "legitimate state interest," and *not* whether the legislation met a "compelling state interest."[11]

From an employment law perspective, however, *Meech* is important because it illustrates the realistic types of tradeoffs which may be necessary if a state legislature is to enact a wrongful dis-

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the employee's requisite probationary period up to the employer) with Draft Act § 3(b) (establishing a one-year probationary period). INDIVIDUAL EMPLOYEE RIGHTS MAN. 540:29 (BNA) (1991).

6. 238 Mont. 21, 776 P.2d 488 (1989).
7. 238 Mont. 215, 776 P.2d 1221 (1989).
8. 248 Mont. 477, 812 P.2d 770 (1991).
9. *See* Schramm, *supra* note 1, at 112-15.
10. 203 Mont. 363, 661 P.2d 1272 (1983).
11. *Meech*, 238 Mont. at 43-52, 776 P.2d at 496-502.

charge statute. Section 913 of the Montana WDFEA[12] explicitly mandates that "[e]xcept as provided in this part no claim may arise from tort or express or implied contract." Thus, pursuant to this statutory provision, the WDFEA preempts traditional common-law remedies in tort and contract for "wrongful discharge" in Montana. Despite the deleterious impact this has on employee rights, Professor Clyde Summers seems correct in his assessment[13] that a tradeoff of this kind is necessary if states are going to successfully enact wrongful discharge legislation. Moreover, the Montana Supreme Court seems correct in its holding in *Meech* that this tradeoff is one which is "rationally related" to a "legitimate state interest."

At the heart of the court's decision in *Meech* is something of a costs/benefits analysis of the WDFEA. The court noted that the legislative history of the Act had demonstrated that "lawmakers perceived an unreasonable financial threat to Montana employers from large judgments in common-law wrongful discharge claims."[14] The court pointed out that testimony indicated to the legislature that the large judgments in these types of cases could have the effect of discouraging employers from locating their businesses in Montana.[15] Thus, the limitations in the WDFEA on punitive damages and on the bringing of independent causes of action could be seen as helping improve the state's economic climate.[16] While the WDFEA put limits on the ability of employees to bring common law actions and recover damages in "unjust dismissal" cases, the Montana Supreme Court was quick to point out that the legislation also conferred considerable benefits on employees.[17] Most significantly, the court noted that employers in Montana would generally no longer be able to discharge an employee without "cause."[18] Instead, as a rule employers would be free to discharge non-probationary employees only if they could show "good cause," meaning some sort of reasonable job-related basis for the action.[19] The court asserted that this statutory "just cause" provision represented considerable new protection for the vast majority of Mon-

12. MONT. CODE ANN. § 39-2-913 (1991).

13. *See* Summers, *supra* note 4, at 18-19. For a further discussion along the same line of reasoning, see Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644 (1991).

14. 238 Mont. at 48, 776 P.2d at 504.

15. *Id.*

16. *Id.*

17. *Id.* at 50-51, 776 P.2d at 505-06.

18. *Id.* at 51, 776 P.2d at 506.

19. *Id. See also* MONT. CODE ANN. § 39-2-903(5) (1991).

tana employees.[20]

Finally, the Montana Supreme Court in *Meech* emphasized perhaps the most significant aspect of the WDFEA — the fact that it provides *certainty*.[21] As a recent empirical study of the evolution of unjust-dismissal legislation and legislative proposals points out, the development of state court common-law remedies for "unjust dismissal" has created a considerable degree of uncertainty for both employers and employees.[22] Indeed, the present common-law remedy system has operated a little bit like "Russian roulette," with employees occasionally winning lottery-size dollar awards but often receiving little or nothing at all. Conversely, employers are occasionally subjected to million-dollar plus judgments, but often get off scot-free.[23] Moreover, the court in *Meech* also noted the considerable legal and other transaction costs involved in common-law "unjust dismissal" litigation, and how many employees had difficulty availing themselves of their common-law remedies because of the requisite expenses.[24] Indeed, a recent survey found combined employee and employer legal fees to, on average, exceed $150,000 in such cases.[25] By providing a clear-cut and inexpensive remedial process for "unjust dismissal" cases the Montana Supreme Court in *Meech* held that the WDFEA served a legitimate state purpose.[26]

The court's holding in *Meech* was met, however, with a stinging dissent by Justice Sheehy, joined by Justice Hunt.[27] Justice Sheehy wrote that the day the court decided *Meech* represented "the blackest judicial day in the eleven years" he had sat on the Montana Supreme Court.[28] Justice Sheehy argued strenuously that the WDFEA had *not* provided any new rights for discharged workers, emphasizing that all such rights had heretofore been provided under common law.[29] He further contended that the new law was discriminatory in that it imposed "upon wrongfully discharged employees the burden of subsidizing a better business climate for wrongdoing employers," and that it is not a "legitimate state pur-

20. 238 Mont. at 51, 776 P.2d at 506.

21. *Id.*

22. *See* Krueger, *supra* note 13, at 646-50.

23. *See generally* Krueger, *supra* note 13.

24. 238 Mont. at 51-52, 776 P.2d at 506 (citing Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMP. REL. L.J. 404, 413 (1988)).

25. *See* Krueger, *supra* note 13, at 650.

26. 238 Mont. at 50, 776 P.2d at 505-06.

27. *Id.* at 52-69, 776 P.2d at 507-17. Justice Harrison wrote a separate dissent concurring partially with Justice Sheehy. *Id.* at 73-74, 776 P.2d at 520.

28. *Id.* at 52, 776 P.2d at 507.

29. *Id.* at 53-54, 776 P.2d at 507.

pose to protect employers from their unscrupulous acts."[30]

Justice Sheehy's arguments, however, seem somewhat specious. While many of the rights provided for Montana workers under the WDFEA were indeed provided by common-law, the WDFEA clearly added an element of *certainty* to the rubric of employee protection that was clearly never there before. Thus, it seems that the tradeoffs involved in the WDFEA do more than simply subsidize a "better business climate" or "protect employers from their unscrupulous acts." While the certainty contained in the WDFEA certainly benefits employers, it *also* benefits workers.[31] Consequently, it seems that the WDFEA does, overall, promote legitimate state interests on behalf of both these groups.

C. *Johnson v. State*

Johnson[32] was decided shortly after the *Meech* case, and turned on the same issues raised in *Meech*. The plaintiff in *Johnson* asserted that the WDFEA operated to deprive her of "full legal redress" and that no "compelling state interest" had been shown to justify this deprivation of rights.[33] The Montana Supreme Court dismissed this assertion pursuant to *Meech*, holding that the state legislature had the power to alter common-law causes of actions and remedies without demonstrating a "compelling state interest."[34] Justice Sheehy, for the reasons he expressed in his *Meech* dissent, emphatically dissented from this decision.[35]

D. *Allmaras v. Yellowstone Basin Properties*

Allmaras[36] represents the most recent challenge to the constitutionality of the WDFEA and was decided by the Montana Supreme Court on June 4, 1991. In this case the plaintiffs, in addition to alleging wrongful discharge pursuant to the WDFEA, also brought charges of common-law discharge and a violation of the "implied covenant of good faith and fair dealing."[37] The state trial court granted the defendant's motion for partial summary judgment on the latter two counts on the grounds that they had been preempted by the WDFEA. When the plaintiffs lost their jury trial

30. *Id.* at 67, 776 P.2d at 516.
31. *See supra* notes 21-26 and accompanying text.
32. 238 Mont. 215, 776 P.2d 1221 (1989).
33. 238 Mont. 215-16, 776 P.2d 1221.
34. *Id.* at 216, 776 P.2d at 1221-22.
35. *Id.* at 217, 776 P.2d at 1222.
36. 248 Mont. 477, 812 P.2d 770 (1991).
37. 248 at 479, 812 P.2d at 771.

on the first count, they appealed raising a variety of new constitutional challenges to the WDFEA.[38]

The first constitutional challenge raised by the plaintiffs was that the WDFEA, by placing a cap on the amount of damages recoverable for wrongful discharge, violates the right of juries to determine damages pursuant to the Montana Constitution.[39] The Montana Supreme Court dismissed this constitutional challenge for lack of "standing," holding that since the plaintiffs were found by a jury not to have been wrongfully discharged under the WDFEA, they were not directly injured by the Act's cap on damages. Consequently, they lacked legal standing to challenge the constitutionality of the Act's limitations in this regard.[40]

The plaintiffs in *Allmaras* further alleged that the WDFEA violated the privileges and immunities and equal protection clauses of the Montana Constitution. The gist of their argument was that the WDFEA operated unfairly in that certain groups of employees, e.g., those covered by collective bargaining and other agreements, are excluded from the Act's coverage while employees such as the plaintiffs are included under the ambit of the Act and prohibited from seeking common-law remedies.[41] The Montana Supreme Court was quick to point out, however, that common-law remedies were never available to employees covered by collective bargaining agreements or other contracts who were required to pursue remedies under these agreements.[42] Common-law remedies were only available to "at will" employees such as the plaintiffs, and since the WDFEA now provides the same general scope of coverage by statute the court held that the plaintiffs were not adversely affected by (and thus lacked standing to challenge the constitutionality of) the WDFEA.[43] Moreover, the court, pursuant to its decision in *Meech*, held that the state legislature had the power to pass, for legitimate policy reasons, statutes that "take away causes of action or constrict liability."[44] Thus, the Montana Supreme Court struck down the plaintiffs' charges that the WDFEA unconstitutionally eliminated their common-law rights and remedies.

The plaintiffs in *Allmaras* also raised claims that the WDFEA unconstitutionally violated the contracts clause of the Montana

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 481, 812 P.2d at 772.
42. *Id.*
43. *Id.*
44. *Id.* at 482, 812 P.2d at 773 (citing *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 33, 776 P.2d 488, 495 (1989)).

Constitution as well as substantive due process.[45] The Montana Supreme Court found these claims not fully documented and generally superfluous.[46] All the justices of the court concurred with the *Allmaras* opinion.[47]

E. Summary

In *Meech* and *Allmaras* the Montana Supreme Court broadly upheld the constitutionality of the WDFEA. While the court's opinion in *Allmaras* leaves open some questions, such as whether the Act's limitation on damages violates the right of juries to determine damages under the Montana Constitution, it seems highly likely that the state high court will continue to construe the Montana Constitution in such a way as to uphold the WDFEA. The court, as it forcefully expressed in *Meech*, feels that the Act represents a positive furthering of legitimate state interests and a reasonable "tradeoff" of rights from the perspective of both employers and employees.

III. DEFINING "GOOD CAUSE"

A. Overview

The most significant section of the WDFEA is probably Montana Code Annotated section 39-2-904(2), which states that for non-probationary employees a discharge is "wrongful" if it was not for "good cause."[48] The statute in section 39-2-903(5) then defines "good cause" to mean "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."[49] This definition, however, while reasonably specific, still leaves considerable room for interpretation, a job the Montana Supreme Court embarked on in the cases of *Buck v. Billings Montana Chevrolet, Inc.*[50] and *Cecil v. Cardinal Drilling Co.*[51]

B. Buck v. Billings Montana Chevrolet, Inc.

Buck involved a plaintiff who for nearly fifteen years had served as a top executive at a car dealership principally owned by

45. *Id.* at 483, 812 P.2d at 773.
46. *Id.*
47. *Id.*
48. MONT. CODE ANN. § 39-2-904(2) (1991).
49. MONT. CODE. ANN. § 39-2-903(5) (1991).
50. 248 Mont. 276, 811 P.2d 537 (1991).
51. 244 Mont. 405, 797 P.2d 232 (1990).

his father-in-law.[52] The plaintiff's employment with his father-in-law's company was without a contract or specified term, and when the auto dealership was sold to another company the plaintiff was discharged.[53] There was no question regarding Buck's considerable competence, and the acquiring company offered him a lesser managerial slot with the dealership if he wanted to stay with the firm.[54] The acquiring company, though, had a tradition of putting its own long-term employees in the top dealership jobs and then frequently affording these employees the chance to purchase the dealership. The company pursued this same strategy at Billings Montana Chevrolet.[55] The plaintiff decided not to accept the proffered lower level managerial position and brought suit for "wrongful discharge" under the WDFEA. He asserted that his discharge was not for "good cause."[56]

In reviewing the charge, the Montana Supreme Court noted that the original legislative definition of "good cause" for discharge did not contain the phrase "legitimate business reason," and that the Montana Legislature specifically added this language to allow for discharges based on "legitimate economic reasons such as lack of work or elimination of the job."[57] The court observed that this language protected employee interests by mandating that employers have a "legitimate" reason for the discharge, while at the same time affording management the discretion "to make employment decisions for business reasons."[58]

The Montana Supreme Court conceded, however, that the legislature had not provided any precise definition of the term "legitimate business reason."[59] Interestingly, the court further noted that precise guidance was not available on the question from other cases in Montana or elsewhere.[60] The court thus formulated its own definition of the term as follows:

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52. 248 Mont. at 279, 811 P.2d at 539.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 280, 811 P.2d at 540.

58. *Id.*

59. *Id.*

60. *Id.* In his classic article Professor Clyde Summers stated that this "uncharted territory" has long been "mapped in considerable detail by arbitrators." *See supra* note 2, at 521. The Montana Supreme Court in *Buck* confusingly states that it examined "arbitration cases from the National Labor Relations Board." 248 Mont. at 281, 811 P. 2d at 540. The NLRB, however, does not really "arbitrate" cases, and there is no indication that the court looked in the best possible place for guidance—the large amassed body of arbitral decisions and law.

> [a] legitimate business reason is a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business. In applying this definition, one must take into account the right of an employer to exercise discretion over who it will employ and keep in employment. Of equal importance to this right, however, is the legitimate interests of the employee to secure employment.[61]

The court then went on to apply this definition to the case at bar.

The court noted that the plaintiff was an "exemplary employee" but that the acquiring company had a general policy of putting its own people in the top dealership management slot which had been held by the plaintiff. The court observed that this was a logical business policy for the acquiring company particularly because it was based in Louisiana, and thus had particular needs to see that its Montana operations were supervised by someone it could clearly trust.[62] The court held that "[i]t would be against common sense and rationality" for it to hold that such justifications "do not constitute a legitimate business reason" of the kind set forth in section 39-2-903(5) of the Act.[63] The court stated that the decision to terminate the plaintiff was not "false, whimsical, arbitrary nor capricious and it had a logical relationship to the needs of the business."[64]

In an aside, however, the court cautioned that its holding in *Buck* was "confined only to those employees who occupy sensitive managerial or confidential positions."[65] The court held that under the same circumstances an owner might not "hold the right to terminate employees who hold duties which do not require the exercise of broad discretion."[66] The court then directly stated that "[a] company's interest in protecting its investment and in running its business as it sees fit is not as strong when applied to lower echelon employees, and may therefore be outweighed by their interest in continued, secure employment."[67]

While the distinction between upper echelon and lower echelon employees in terms of employment rights is one which has commanded considerable scholarly attention,[68] and is one directly

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61. *Buck*, 248 Mont. at 281-82, 811 P.2d at 540.
62. *Id.* at 282, 811 P.2d at 541.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *See, e.g.*, Bartholet, *Application of Title VII to Jobs In High Places*, 95 HARV. L. REV. 947 (1982).

incorporated in other statutes such as the National Labor Relations Act,[69] it is *not* one which is directly incorporated into the WDFEA.

The distinction is, however, one which raises important issues regarding who is most likely to need unjust dismissal protection and at what organizational level that protection should be overridden by the rights of management to manage the workplace. Results from recent empirical studies have been mixed, with some studies showing that unskilled and semi-skilled workers are most in need of this type of protection,[70] while other studies have pointed to the strong need for this type of protection at the executive level.[71] Moreover, to the extent that firms continue the present trend of reducing layers of managerial hierarchy and "empowering" workers at lower levels of the organization,[72] this distinction may become a more difficult one for the courts to make. In any event, it will be interesting to follow the extent to which the Montana Supreme Court develops this further distinction in the future.

C. Cecil v. Cardinal Drilling Co.

Donald Cecil started working in 1981 as a top executive for the defendant.[73] In early 1988 he was passed over for a promotion to president of the company although he had been informed it was "likely" he would receive this position.[74] Nevertheless, he was at this same time promoted to the position of company executive vice president, told that his job was "secure," and given a raise.[75] Mr. Cecil was a good employee and had "no performance deficiencies on his record."[76]

On July 18, 1988, however, Mr. Cecil's employment with the company was terminated effective immediately. He was given no prior warning of possible discharge or indeed any indication of poor performance. On September 29, 1988, Mr. Cecil filed suit al-

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69. *See* 29 U.S.C. § 152(3) (1982) (excluding supervisors from coverage under the Act).

70. *See* Youngblood, Trevino & Favia, *Reactions to Unjust Dismissal and Third Party Dispute Resolution: A Justice Framework*, forthcoming in *Employ. Resp. and Rts. J.* (1992). *See also* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1941-42 (1983).

71. *See* Parmerlee, Near & Jensen, *Correlates of Whistleblowers' Perceptions of Organizational Retaliation*, 27 ADMIN. SCI. Q. 17 (1982); Near & Miceli, *Retaliation Against Whistle Blowers: Predictors and Effects*, 71 J. APPL. PSY. 137 (1986).

72. *See Fortune*, May 7, 1990 at 53; Swasy & Hymowitz, *The Workplace Revolution*, Wall St. J., Feb. 9, 1991 at R6, col. 1.

73. 244 Mont. 405, 406, 797 P.2d 232, 233 (1990).

74. *Id.* at 407, 797 P.2d at 233.

75. *Id.*

76. *Id.* at 408, 797 P.2d at 234.

leging "wrongful discharge" pursuant to the WDFEA.[77]

The issue in the case was what constituted a "legitimate business reason" for discharge under the WDFEA. The company claimed that the reason it fired Mr. Cecil was an anticipated decline in the price of crude oil. Falling crude oil prices meant that the company would be operating fewer drilling rigs and would have to cut back on expenditures. The Montana Supreme Court stated that "economic conditions" constitute a "legitimate business reason" for an employer to act to reduce his or her workforce.[78] The court further stated that employers "must be given discretion" as to who they will "employ and retain in employment."[79] Thus, in the court's opinion, the burden fell on the plaintiff to show some other non-economic motive or reason for his termination. Since the plaintiff in the instant case did not proffer any such alternative rationale, his case was dismissed.[80]

Interestingly, the Montana Supreme Court did not focus, as it did in *Buck*,[81] on the fact that the plaintiff was an "upper echelon" employee and that the employer thus had broader discretion with regard to discharging him. Instead, in *Cecil*, the court simply stated that Montana employers still, under the WDFEA, retained broad authority to terminate employees for real economic reasons, and that absent some showing by plaintiffs of other motivations for such terminations, terminations of this kind would be upheld. Thus, the *Cecil* case establishes that while under the WDFEA Montana employers cannot discharge employees without "good cause," even "anticipated" economic reversals meet the requisite test of "cause" for discharge.

IV. Section 912 Preemption

A. *Overview*

Section 912 of the WDFEA states that the provisions of the Act do not apply to discharges which are "subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute."[82] This section goes on to say that such statutes include "those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that pro-

77. *Id.*
78. *Id.* at 409, 797 P.2d at 234.
79. *Id.*
80. *Id.* at 409-10, 797 P.2d at 234-35.
81. *See supra* notes 52-67 and accompanying text.
82. Mont. Code Ann. § 39-2-912(1) (1991).

hibit unlawful discrimination" based on a variety of criteria.[83] Section 912 also mandates that the WDFEA does not apply to a discharge of an employee "covered by a written collective bargaining agreement or a written contract of employment for a specific term."[84] In three recent cases, *Deeds v. Decker Coal Co.*,[85] *Irving v. School District No. 1-1A*,[86] and *Fellows v. Sears, Roebuck & Co.*,[87] the Montana Supreme Court has discussed the parameters of Section 912 of the WDFEA.

B. Deeds v. Decker Coal Co.

In *Deeds*[88] the Montana Supreme Court dealt directly with interpreting the first part of section 912 of the WDFEA, its exemption of discharges subject to state or federal statutes. The case involved 152 employees who were discharged by the company for strike misconduct.[89] These and other employees had gone on strike when their union's collective bargaining agreement with the company expired on October 1, 1987. At the end of the strike, on June 28, 1988, the company recalled various of the strikers but refused to reinstate the above-referenced 152 employees because of "serious strike misconduct."[90] These 152 discharged employees filed charges with the U.S. National Labor Relations Board claiming that their discharges represented unlawful retaliation for union activity, and *also* filed charges in Montana state court for "wrongful discharge" under the WDFEA. In the Montana state court action the employer successfully moved for dismissal of the case because the plaintiffs were already pursuing the issue before the U.S. National Labor Relations Board pursuant to the U.S. National Labor Relations Act, and because under section 912 the WDFEA does not apply to discharges that are subject to a federal statute. The plaintiffs appealed this issue to the Montana Supreme Court.[91]

The plaintiffs focused their appeal on the specific language of section 912 of the WDFEA. They first contended that their labor relations dispute was not covered by section 912 because it did not deal with "discrimination" and that all of the statute's exemptions

83. *Id.*
84. MONT. CODE ANN. § 39-2-912(2) (1991).
85. 246 Mont. 220, 805 P.2d 1270 (1990).
86. 248 Mont. 460, 813 P.2d 417 (1991).
87. 244 Mont. 7, 795 P.2d 484 (1990).
88. 246 Mont. 220, 805 P.2d 1270 (1990).
89. *Id.* at 222, 805 P.2d at 1271.
90. *Id.*
91. *Id.*

were purportedly based on "unlawful discrimination."[92] The Montana Supreme Court dismissed this contention stating that the list of causes of action in section 912(1) was "not meant to be all inclusive" and pointing to the section's additional language exempting from WDFEA coverage claims brought on "other similar grounds."[93]

The court then went on, however, to hold that the cause of action was *not* covered by section 912 of the WDFEA, and that the 152 employees could thus bring a case for "wrongful discharge" under the WDFEA in Montana state court. The court's decision centered on the fact that "no other state or federal statute providing a procedure or remedy for contesting the dispute" had yet taken effect.[94] The Montana Supreme Court distinguished between the filing of a "charge" with the U.S. National Labor Relations Board, and the Board's issuance of a formal "complaint." Under NLRB procedures the filing by an employee or group of employees of a "charge" alleging an unfair labor practice by an employer begins the procedure in an unfair labor practice case.[95] The NLRB then investigates the "charge" and if it finds that an unfair labor practice has probably occurred it issues a "complaint" in the case, setting the stage for an administrative law proceeding.[96]

The Montana Supreme Court in *Deeds* held that only if the NLRB should "eventually decide to enter into the dispute by filing a complaint on behalf of the discharged employees" would a "procedure or remedy for contesting the dispute" be set in motion, triggering the statutory exemption under section 912.[97] Since no formal "complaint" had yet been issued in the case, no such "procedure" had yet taken place, and the Montana Supreme Court ruled that the plaintiffs should be permitted to bring a case for "wrongful discharge" in state court under the WDFEA.[98]

If NLRB procedure is examined from a more formalistic perspective it appears that the initial "charge" filed by an employee or labor organization sets the Board's unfair labor practice determination process in motion. By permitting parties to file cases in

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92. *Id.*

93. *Id.* at 223, 805 P.2d at 1271. It also seems that the court could have rejected this assertion that the plaintiffs' claims before the NLRB likely did involve "discrimination" pursuant to 29 U.S.C. § 158(a)(3) (1982).

94. 246 Mont. at 223, 805 P.2d at 1271.

95. *See* J. Getman & J. Blackburn, LABOR RELATIONS: LAW, PRACTICE & POLICY 52 (2d ed. 1983).

96. *Id.*

97. 246 Mont. at 223, 805 P.2d at 1271.

98. *Id.* at 223, 805 P.2d at 1271-72.

state court pending NLRB investigation of a case, the Montana Supreme Court seems to be setting up a situation where if the NLRB does issue a "complaint" there will be duplicative causes of action before both a federal administrative law judge (under the National Labor Relations Act) and a state trial court (under the WDFEA). Even if the Montana Supreme Court is reluctant to allow the filing of a "charge" with the NLRB to totally prohibit an employee from pursuing a cause of action under the WDFEA, it could at least emulate the procedure followed under section 911 of the Act with respect to requiring employee exhaustion of written employer internal grievance procedures before filing under the WDFEA.[99] Thus, employees could be prohibited from filing under the WDFEA *pending* NLRB investigation of their unfair labor practice "charge." As with employee exhaustion of internal grievance procedures, the one year statute of limitations under the WDFEA would be tolled for up to 120 days pending the completion of the NLRB's investigation. If the NLRB decided not to issue a "complaint" in the case, the party would then be free to file in state court under the WDFEA. In any event, the possibility of duplicative causes of action before the NLRB and the state courts raised by the Montana Supreme Court in *Deeds* does not seem to be a positive one, and the issue appears to be ripe for further consideration by both the Montana Legislature and the Montana Supreme Court.

C. *Irving v. School Dist. No. 1-1A*

Irving involved a high school teacher who was employed for three years, but whose contract was not renewed for the requisite fourth year needed to receive tenure.[100] The school district justified its action by maintaining that the plaintiff's job was eliminated as part of a necessary reduction-in-force. The plaintiff, however, maintained that she was the victim of "continual harassment" and among a variety of allegations asserted a violation of the WDFEA.[101] The majority of the Montana Supreme Court summarily upheld a lower court's dismissal of the plaintiff's WDFEA claim pursuant to section 912 of the Act. The court noted that section 912(2) holds that the WDFEA does not apply to a discharge of an employee "covered by a written collective bargaining agreement."[102] Because the plaintiff was covered by such an agreement

99. MONT. CODE ANN. § 39-2-911(2) (1991).
100. 248 Mont. 460, 463, 813 P.2d 417, 419 (1991).
101. *Id.*
102. *Id.* at 469, 813 P.2d at 422.

at all relevant times, she was barred from bringing a cause of action under the Act.[103]

The court's decision, however, brought a strong dissent from Justices Trieweiler and Hunt charging that the court, from an "inadequate record," had issued an "expansive decision" denying a plaintiff's rights.[104] These justices noted that while the plaintiff had "absolutely no rights" under the requisite collective bargaining agreement, she was precluded from recovery under the WDFEA and through other avenues because she was formally covered by a collective bargaining agreement during the relevant time period.[105] They pointed out that such an approach seemed to "leave untenured teachers uniquely unprotected under Montana law from retaliatory action by their employers."[106] These justices felt that based on the record in the instant case, they were "unwilling to arrive at such a sweeping conclusion."[107]

D. Fellows v. Sears, Roebuck & Co.

The plaintiff in *Fellows* started working for Sears, Roebuck in 1975 as a store clerk.[108] In 1984, at the request of management, she transferred to a position as a service clerk. At the time of the transfer, the plaintiff averred that the company's store manager assured her that the transfer would not affect her seniority and that she could transfer back to her former position at any time.[109] In both the store clerk and service clerk positions, the plaintiff was represented by a union and covered by a collective bargaining agreement.[110] In late 1987 the plaintiff was laid off from her service clerk position, and about a year later her employment in this position was formally terminated.[111] Her request at that time to be transferred back to her former store clerk position was denied, and she filed suit in state court on a variety of grounds including "wrongful discharge."[112] The state court dismissed her suit on the grounds that it was preempted by federal labor law which establishes a federal district court cause of action for disputes regarding collective bargaining contracts entered into pursuant to the Na-

103. *Id.*
104. *Id.* at 471, 813 P.2d at 423.
105. *Id.*
106. *Id.*
107. *Id.*
108. 244 Mont. 7, 8, 795 P.2d 484, 484 (1990).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 9, 795 P.2d at 485.

tional Labor Relations Act.[113] The Montana Supreme Court upheld the lower court's decision, holding that the plaintiff's assertions involved interpretation of her collective bargaining agreement and that this is to be done under federal law in federal district court.[114]

Interestingly, the court never mentioned section 912 of the WDFEA, which exempts from WDFEA coverage employees covered by a written collective bargaining agreement. Moreover, the plaintiff apparently did allege in her amended complaint a violation of the WDFEA.[115] Perhaps even more interesting, though, is that the court in its July 17, 1990 opinion failed to mention the United States Supreme Court's 1988 opinion in *Lingle v. Norge Division of Magic Chef, Inc.*[116] In *Lingle* the United States Supreme Court held that state wrongful discharge claims in tort raised by unionized employees covered by collective bargaining agreements are *not* preempted by federal labor law if no interpretation of the collective bargaining agreement is required.[117] While it is unclear from the opinion whether the plaintiff pleaded any tort violations, it seems somewhat surprising that a case as important as *Lingle* to the general issue at bar was not cited. In any event, the Montana Supreme Court's 1990 decision in *Fellows* is not one that effectively elucidates the current status of the law on several important issues.

V. SECTION 913 PREEMPTION

A. *Overview*

As developed above,[118] the preemption of common-law remedies contained in section 913 of the WDFEA has been at the heart of the controversy over the constitutionality of the Act. Section 913 states that except as provided in the Act, "no claim for discharge may arise from tort or express or implied contract."[119] The "tradeoff" involved in this statutory provision was affirmed by the

113. *Id.*; *See* 29 U.S.C. § 185(a) (1982). *See also Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957) (upholding the development of a federal "common law" to enforce collective bargaining agreements under the National Labor Relations Act).

114. 244 Mont. at 10-11, 795 P.2d at 485-86.

115. *Id.* at 9, 795 P.2d at 485.

116. 486 U.S. 399 (1988).

117. *Id.* at 409-10. For a good discussion of *Lingle* see Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance After Lingle v. Norge Div. of Magic Chef, Inc.*, 41 HASTINGS L.J. 1149 (1990).

118. *See supra* notes 6-47 and accompanying text.

119. MONT. CODE ANN. § 39-2-913 (1991).

Montana Supreme Court in *Meech*, and to date there has only been one case before the court dealing with non-constitutional aspects of that provision. Moreover, that case, *Martin v. Special Resource Management Inc.*,[120] dealt with a procedural, as opposed to substantive, interpretation issue.

B. *Martin v. Special Resource Management, Inc.*

Martin involved a dismissal of a long-time employee of a subsidiary of the Montana Power Company. On June 16, 1987, the employee was informed that she would be terminated on July 17, 1987, due to a general company reduction-in-force.[121] After receiving this notice, however, the employee became aware that her position was not going to be eliminated, but rather going to be filled by the company's new president's personal secretary.[122] The plaintiff instituted a suit in state court on June 28, 1988, alleging, among other things, a breach of the implied covenant of good faith and fair dealing.[123] The lower court ruled that the WDFEA, enacted July 1, 1987, preempted this claim as the plaintiff's claim did not fully accrue until the date of her termination, which was July 17, 1987.[124]

The plaintiff argued that an actionable cause for termination in the case arose on her being notified of her termination on June 16, 1987. This date was before the WDFEA, and specifically section 913 of the WDFEA preempting common-law remedies, became effective. The Montana Supreme Court agreed and emphasized that it was the *decision* to terminate the plaintiff that created the cause of action, and that this decision was made before the WDFEA became effective. Accordingly, the plaintiff was allowed to proceed with her common-law causes of action.[125]

Once again, the *Martin* case is clearly a procedural one and does not involve an interpretation of the substance of section 913 of the WDFEA. The case is important because it so dramatically highlights the significance of section 913 of the Act. Because the plaintiff was notified of her termination before July 1, 1987, she was able to pursue common-law remedies for "wrongful discharge." Employees notified of termination after July 1, 1987, however, cannot pursue such remedies, but must proceed under the WDFEA

120. 246 Mont. 181, 803 P.2d 1086 (1990).
121. *Id.* at 182, 803 P.2d at 1087.
122. *Id.*
123. *Id.*
124. *Id.* at 182-83, 803 P.2d at 1087.
125. *Id.* at 185, 803 P.2d at 1089.

despite the fact that they may perceive, as did the plaintiff in the instant case, the common law approach to be more favorable. The WDFEA clearly represents a dramatic shift in the way Montana employees can attempt to redress what they perceive as an "unjust" dismissal.

VI. GOVERNMENTAL IMMUNITY

A. *Burgess v. Lewis and Clark City-County Board of Health*

The plaintiff in this case was employed at the Scratch Gravel Sanitary Landfill District, a unit created by the Lewis and Clark County Board of County Commissioners.[126] On July 1, 1988, the Lewis and Clark City-County Board of Health was designated by the County Commissioners as the Board of Directors for the Landfill District. On July 7, 1988, the Board of Health sent the plaintiff a letter terminating his employment due to budgetary changes in the new budget approved by the Board. The letter from the Board encouraged the plaintiff to apply for a different position as a landfill equipment operator, although the Board then apparently hired a different applicant for this position.[127] The plaintiff brought a suit for "wrongful discharge" under the WDFEA, and the Board of Health moved to dismiss under the theory that "governmental immunity" afforded under another Montana statute insulated acts of the Lewis and Clark County Commissioners from suit under the WDFEA.[128] The lower court granted the Board of Health's motion to dismiss, and the Montana Supreme Court ultimately affirmed.[129]

The issue before the Montana Supreme Court was whether an employee of a local governmental entity could bring an action under the WDFEA, or whether such an action was prohibited under section 2-9-111 of the Montana Code Annotated[130] which at the time stated that governmental entities are generally immune from suits for their actions. The court noted that section 2-9-111 had been interpreted broadly, and that the section applied to the Board of Health as an "agent" of the County Commissioners. Thus, the Board of Health was immune from suit for "wrongful discharge" under the WDFEA.[131]

The court also rejected the plaintiff's arguments that the WDFEA, since it was passed ten years after the 1977 governmental

126. 244 Mont. 275, 796 P.2d 1079 (1990).
127. *Id.* at 276, 796 P.2d at 1080.
128. *Id.*
129. *Id.*
130. MONT. CODE ANN. § 2-9-111 (1989).
131. 244 Mont. at 277, 796 P.2d at 1081.

immunity statute, limited the county's immunity in the area of "wrongful discharge." The Montana Supreme Court said that nothing in the WDFEA suggested a legislative intent to grant recovery where immunity statutes had previously denied recovery. The court held that the plaintiff had failed to present "any logical support" for his contention in this regard.[132]

The Montana Supreme Court in *Burgess* thus broadly limited the applicability of the WDFEA to local governmental employees in the state. In 1991, however, the Montana Legislature, in possible response to the *Burgess* decision, amended section 2-9-111 of the Montana Code. These amendments narrowed the definition of "legislative act" in the statute, and specifically stated that "administrative actions undertaken in the execution of a law or public policy" were not to be entitled to immunity from suit under the statute.[133] This amendment would appear to permit suits by local governmental employees under the WDFEA, at least to the extent such suits are not otherwise statutorily preempted.

VII. EMPLOYEE HANDBOOKS

A. Overview

Of all the areas involving judicial encroachment on the strict doctrine of "employment-at-will," the area of "employee handbooks" has perhaps been the most explosive. Over the past decade, courts in a majority of states have held that promises embodied in employers' personnel handbooks may be legally binding on employers.[134] Montana is, however, the first state to hold by statute that employer violations of written personnel policies are unlawful.[135] Section 904 of the WDFEA directly states that a discharge is "wrongful" under the statute if the employer "violated the express provisions of its own written personnel policy."[136] To date, the Montana Supreme Court has interpreted section 904 in only one case, *Buck v. Billings Montana Chevrolet, Inc.*[137]

B. The Buck Case and Employee Handbooks

While the Montana Supreme Court in *Buck* generally affirmed

132. *Id.*

133. MONT. CODE ANN. § 2-9-111(c)(ii) (1991).

134. *See* Note, *Unilateral Modification of Employment Handbooks: Further Encroachments On The Employment-At-Will Doctrine*, 139 U. PA. L. REV. 197, 208-09 and n. 76 (1990).

135. MONT. CODE ANN. § 39-2-904(3) (1991).

136. *Id.*

137. 248 Mont. 276, 811 P.2d 537 (1991).

the plaintiff's discharge for "good cause" under the WDFEA, it remanded to the lower court a claim by the plaintiff that his discharge was in violation of the employer's own written personnel policies and thus constituted a violation of section 904(3) of the WDFEA. The plaintiff maintained that various provisions of the dealership's written employment manual assured his continued employment so long as his performance and the economic circumstances remained "satisfactory."[138] Since there was no question about his job performance, and there was no evidence as to poor "economic circumstances" for the dealership, the plaintiff argued that his discharge represented a violation of the dealership's employment manual and was unlawful under section 904(3) of the WDFEA.[139]

Discussing the plaintiff's contentions, the Montana Supreme Court cited one specific provision from the Billings Montana Chevrolet dealership's handbook which stated: "[o]ur dealership is still growing. You are thus assured of steady employment as long as you are producing for us. We expect each of our employees to be maximum producers, always doing their part in accomplishing our business objectives."[140] The court then noted the plaintiff's contentions that he never failed to "produce" for the company. It also noted, however, that the company did offer the plaintiff alternative employment as a fleet manager, which the plaintiff turned down.[141] But the court went on to further note that the plaintiff stated "that he did not accept this position because he did not think it was a genuine offer and would actually result in a later dismissal."[142] The Montana Supreme Court held that if the above facts were true the plaintiff might have a cause of action under section 904(3) of the Act, and remanded the issue to the lower court "to determine the effect of language of the handbook" and whether the offer of another job was made in "good faith."[143]

The Montana Supreme Court in *Buck* appears to be giving a fairly wide range of latitude to the language contained in section 904(3) of the WDFEA. Section 904 of the Act speaks of employer violations of "express" provisions of employer personnel policy, and it seems that the language contained in the Billings Chevrolet handbook was not extraordinarily "express." The assurance of

138. *Id.* at 284, 811 P.2d at 542.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 285, 811 P.2d at 542.
143. *Id.*

"steady employment" turned on employees continuing to be "producing" and doing their part in accomplishing the dealership's "business objectives."[144] Certainly, one could argue that with the sale of the dealership the dealership's "business objectives" clearly shifted, and the kind of special "production" the former owner's son-in-law offered was no longer all that significant. In any event, future interpretation of section 904(3) will clearly be an important part of the WDFEA.

VIII. Future Issues

The cases decided to date by the Montana Supreme Court in many respects raise as many questions as they settle. Certainly, the *Buck* and *Cecil* cases have not fully explicated the perhaps most critical section of the WDFEA, section 903(5) defining "good cause," and the Montana Supreme Court has appeared reluctant to follow the precedents established in this area in arbitral and other forums.[145] In addition, the lower echelon/upper echelon employee dichotomy set forth by the court in *Buck* also clearly needs to be better clarified.

While the constitutionality of the Act now seems fairly well established (despite some of the loose ends exposed in the *Allmaras* case), some of the issues discussed at length in *Meech* as part of the constitutional debate still seem to be quite alive. Indeed, as the *Deeds* case illustrates, the precise parameters of section 912's federal, state, and collective bargaining exemptions, for one, need to be much better established.

Moreover, there are a host of issues that need to be addressed regarding the efficacy of the day-to-day operation of the Act. Are parties pursuing cases under the Act despite its statutory limits on monetary relief? (To date it appears that they are, despite Harvard Law Professor Paul Weiler's concerns that the statute's cap on recoveries would make it difficult for aggrieved parties to find lawyers willing to take their cases.)[146] What about the options afforded parties under section 914 of the Act[147] to resolve disputes through arbitration rather than litigation? Are parties taking full advantage of this effective alternative dispute resolution

144. *Id.* at 284, 811 P.2d at 542.

145. *See generally* M. Hill & A. Sinicropi, Management Rights: A Legal and Arbitral Analysis (1986); *see also* Summers, *Arbitration of Unjust Dismissal: A Preliminary Proposal*, in The Future of Labor Arbitration Law In America 159 (1976).

146. *See* Weiler, *supra* note 4.

147. Mont. Code Ann. § 39-2-914 (1991).

method?[148] (To date, the sketchy evidence indicates that they may not be taking such full advantage.) These and other important questions are worthy of further exploration and investigation.

IX. CONCLUSION

Over the last fifteen years there has been a torrent of judicial activity modifying various aspects of the rigid "employment-at-will" doctrine. Nevertheless, only one state, Montana, has to date enacted comprehensive legislation protecting employees from "wrongful discharge." The National Conference of Commissioners on Uniform State Laws' recently proposed model "Employment Termination Act" (similar to the Montana statute) may help set the stage for the enactment of legislation of this kind in other states.[149] Consequently, the initial interpretations of the Montana statute by the Montana Supreme Court are of interest not only to those in Montana, but to observers throughout the country who view the WDFEA as a model for reform in their own jurisdictions. For as "wrongful discharge" protection for all employees in the country becomes more of a reality,[150] the State of Montana will continue to be at the vanguard of reform.

148. In his pathbreaking articles advocating "wrongful discharge" legislation Professor Clyde Summers advocated the use of arbitration to resolve all "wrongful discharge" disputes. *See* Summers, *supra* note 2, *Individual Protection*; Summers, *Arbitration Of Unjust Dismissals*, *supra* note 145.

149. Wall St. J., Sept. 10, 1991, at 1, col. 5; Jackson & Schantz, *A New Frontier In Wrongful Discharge*, PERSONNEL J., Jan. 1991 at 101.

150. Professor Alan Krueger, for example, feels that the further enactment of state legislation of this kind is inevitable. *See* Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 IND. & LAB. REL. REV. 644, 658 (1991).