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THE FIRST DECADE OF JUDICIAL INTERPRETATION OF THE MONTANA WRONGFUL DISCHARGE FROM EMPLOYMENT ACT (WDEA)

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I. INTRODUCTION

In the Montana Legislative Session of 1987 the Legislature passed the Wrongful Discharge from Employment Act (WDEA), which became effective July 1, 1987.[1] The Act is the only one of its kind adopted in the United States. Although the National Conference of Commissioners on Uniform State Law has drafted the Model Employment Termination Act, patterned after the Montana act,[2] no state but Montana has chosen to statutorily modify the so-called "termination-at-will" doctrine of employment law which has existed throughout American jurisprudence.[3] The WDEA has been referred to as the "Montana experiment."[4] The Act is unique in that, while it purports to preserve the "at-will" concept of employment law, it also expressly sets out three separate bases for a wrongful discharge action. It also sets limits on damages that can be recovered, and attempts to preempt all other common law remedies that were previously sought, sometimes quite successfully, in Montana courts in the several years immediately preceding the Act's adoption.[5] Its other hallmark is

1. MONT. CODE ANN. §§ 39-2-901 to -914 (1995) (originally enacted as 1987 Mont. Laws 641).

2. MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 75 (Supp. 1995).

3. The presumption that employment for an unspecified duration is "terminable at-will" was expressed in the oft-cited quotation that an employer was permitted "to without liability, discharge the employee for a good reason, a bad reason, or no reason at all." Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1054 (5th Cir. 1981). This was recognized as the "American Rule" in 1877. *See generally* HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER & SERVANT § 134 (1877); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

4. Michael Bennett, *Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge From Employment Act in Light of the United Kingdom's Unfair Dismissal Law*, 57 MONT. L. REV. 115 (1996).

5. *See, e.g.*, Flanigan v. Prudential Sav. & Loan Assoc., 221 Mont. 419, 720

its effort to implement alternative dispute resolution (arbitration) as a means to resolve employment discharge claims, by using the threat of imposition of attorneys' fees and costs as the means to induce litigants to utilize arbitration.[6]

Almost a decade has passed since Montana courts began their interpretation of the Act and their conclusion of cases arising before the Act's effective date. Many of the pre-Act cases were premised upon the judicially adopted doctrine of the implied covenant of good faith and fair dealing in the employment relationship.[7] The Montana Supreme Court and Montana federal courts have now concluded this transition, during which they have decided dozens of cases which have interpreted most, but not all, of the Act's salient provisions. This article catalogs and annotates those cases under each separate section of the Act which was the subject of the case decision. From these decisions a fairly workable set of judicial guidelines for interpretation of the Act has evolved, which will allow Montana courts and practitioners to provide some measure of coherent guidance to juries, clients, and litigants about the operation of the Act.

In discussing the subject of judicial decisions under the WDEA, it is necessary to discuss another employment law statute, the so-called Montana "Blacklisting" statute, which had its genesis in the 19th century in a totally different context than that of its modern use.[8] As will be shown, because of recent

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P.2d 257 (1986) (affirming a verdict in excess of one million dollars for lost wages, emotional distress, and punitive damages awarded on theories of recovery based upon negligence and breach of implied covenant of good faith and fair dealing); *see also* Shelley A. Hopkins & Donald C. Robinson, *Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future*, 46 MONT. L. REV. 1 (1985).

6. For a discussion of the legislative history and intent of the 1987 Montana Legislature in adopting the WDEA, see LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94 (1990); Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53 (1992).

Another commentator observed that the WDEA was enacted as a result of the Montana Supreme Court ignoring the statutorily imposed "at will" statute, MONT. CODE ANN. § 39-2-503, which has never been repealed. Beginning in 1982, and continuing for the next five years, the court's "supplementing" this Code provision with its adoption of the concept that an employer could terminate at will "except in bad faith or unfairly," effectively repealed the at-will rule. Andrew P. Morriss, *"This State Will Soon Have Plenty of Laws"—Lessons From One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359, 440 (1995). Morriss explains that the court provoked a backlash, leading to the 1987 statutory enactment of the WDEA. *Id.* at 441.

7. *See, e.g.*, Gates v. Life of Montana Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982); Dare v. Montana Petroleum Mktg. Co., 212 Mont. 274, 687 P.2d 1015 (1984).

8. MONT. CODE ANN. §§ 39-2-801 to -803 (1995) (originally enacted 1891 Mont.

Montana Supreme Court decisions, this statute now plays an important role in wrongful discharge cases in which so-called "service" letters (reasons for termination letters) play an important role. Finally, as might be expected, since adoption of the WDEA there have been a number of Montana judicial decisions involving procedural and related issues, such as after-acquired evidence, the effect of unemployment compensation decisions, insurance coverage, discovery, expert witnesses, and other procedural issues which affect the operation of the Act. Those related issues are also discussed in this article.

II. THE MONTANA WRONGFUL DISCHARGE FROM EMPLOYMENT ACT (WDEA)

A. Title and Purpose

39-2-902. PURPOSE.

This part sets forth certain rights and remedies with respect to wrongful discharge. Except as limited in this part, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

1. Constitutionality

In *Meech v. Hillhaven West., Inc.*,[9] the Montana Supreme Court held that the WDEA is not an unconstitutional infringement upon legal redress and access to the courts, and does not constitute a denial of equal protection.[10] The court held that the legislature has authority to provide a substitute for causes of action which are abrogated by statute and that no one has a vested interest in any rule of common law.[11] The court found that the Act survives constitutional scrutiny because it is rationally related to legitimate state interests, including promoting

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Laws § 3, at 258).

9. 238 Mont. 21, 776 P.2d 488 (1989) (overruling Pfost v. State, 219 Mont. 206, 713 P.2d 495 (1985)); White v. State, 203 Mont. 363, 661 P.2d 1272 (1983); Corrigan v. Janney, 192 Mont. 99, 626 P.2d 838 (1981)).

10. *Meech*, 238 Mont. at 24, 776 P.2d at 489-90.

11. *Id.* at 26-27, 34-36, 776 P.2d at 491, 496.

the financial interests of businesses in the state, limiting employers' liability through restrictions on recovery, and providing greater certainty in defining employers' duties.[12] The court determined that the WDEA provides a reasonably just substitute for the common law causes of action that it abrogates, including allowing recovery for claims for prejudgment interest and other benefits that were not allowed under common law actions.[13] In a similar suit to challenge the Act's limitation of a discharged employee's right to full legal redress, the supreme court, in *Johnson v. State*,[14] followed its decision in *Meech* and held that there is no constitutional guaranty to a particular cause of action.[15] Therefore, the court held, the Montana Legislature may alter common law causes of action, remedies, and redress.

2. *At-Will Employment Preserved*

In *Medicine Horse v. Trustees, Big Horn County School District*,[16] a school custodian was terminated by a school board for insubordination. The employee asserted a denial of due process because of the board's failure to provide written notice of reasons for termination or a pre-termination hearing, and because he had a property interest in his employment.[17] The Montana Supreme Court held that the Wrongful Discharge Act does not nullify the "at-will" rule set forth in section 39-2-503 of the Montana Code and that no property interest exists for an at-will public employee.[18] However, in *Boreen v. Christensen*,[19] the court held that a former employee of the Montana Department of Military Affairs who alleged a constructive discharge without due process was entitled to present his claim at trial and reversed a lower court order granting summary judgment.[20] The

12. *Id.* at 48-49, 776 P.2d at 504-05.
13. *Id.* at 49-51, 776 P.2d at 505-06.
14. 238 Mont. 215, 776 P.2d 1221 (1989).
15. *Johnson*, 238 Mont. at 216, 776 P.2d at 1222.
16. 251 Mont. 65, 823 P.2d 230 (1991).
17. *Medicine Horse*, 251 Mont. at 68, 791 P.2d at 231.
18. *Id.* at 72, 823 P.2d at 235 (Sheehy, J., dissenting); *see also* Hollister v. Forsythe, 270 Mont. 91, 889 P.2d 1205 (1995) (holding that the county attorney's secretary, as an at-will employee, had no property interest in her job); Stokes v. Lamma, 15 Mont. Fed. Rpts. (Mont. Law Week Co.) 32 (D. Mont. July 19, 1993) (holding no property interest exists in continued employment under Montana law for an "at-will employee" in a Montana county clerk and recorder's office (citing McCracken v. City of Chinook, 652 F. Supp. 1300 (D. Mont. 1987)).
19. 267 Mont. 405, 884 P.2d 761 (1994).
20. *Boreen*, 267 Mont. at 420, 884 P.2d at 770.

court held that administrative regulations mandating disciplinary actions against state employees be taken only for "just cause," as defined in its regulations, gave the employee a constitutionally protected property interest in a continued employment.[21] The court distinguished its decisions in *Medicine Horse*, *Stokes*, and *Hollister* on the grounds that *Boreen* could "point to some written contract, state law, or regulation which states or otherwise provides a specified term of employment and hence a property interest in continued employment."[22]

In *McKay v. Corr*,[23] the Montana Supreme Court refused to provide an "advisory opinion" in response to a certified question presented to it by the U.S. District Court for the District of Montana. The federal court certified the question of whether the "good cause" provision of the WDEA created a property interest in continued public employment. The federal court, relying upon *Boreen v. Christensen*, had ruled that the personnel policies and procedures of Cascade County operated to abrogate the at-will employment relationship by creating a specified term of employment and, thereby, provided the plaintiffs with a property interest in continued public employment.[24]

It appears, therefore, that public employees may have a constitutionally protected property interest in continued employment if there is some contract, rule, regulation, or law which infers a specified term of employment or a "just cause" requirement for discipline or termination. Absent such a contract or legal inference, there appears to be no inherent "property interest" in continued public employment. Thus the "at-will" doctrine for public employees still exists.

3. *Exclusivity of the Act*

In a case pre-dating the WDEA, *Mead v. McKittrick*,[25] the court held that state district court judges are immune from wrongful discharge liability when they discharge a personal secretary. Thus, county commissioners are immune from liability for a judge's allegedly arbitrary dismissal of a secretary employed by his predecessor.[26] The court reasoned that "historical-

21. *Id.* at 416, 884 P.2d at 767.
22. *Id.* at 420, 884 P.2d at 770.
23. No. 95-209 (Mont. Dec. 12, 1995).
24. *See McKay*, No. 95-209, at 2.
25. 223 Mont. 428, 431, 727 P.2d 517, 519 (1986).
26. *Mead*, 223 Mont. at 432, 727 P.2d at 519.

ly, judges have enjoyed absolute immunity for judicial acts."[27] Because a "judge's personal secretary occupies a distinct and unique status among district court employees," it was therefore not a violation of public policy for a newly elected district court judge to discharge his predecessor's secretary and select his own.[28] The court relied heavily upon the judicial immunity granted under section 2-9-112 of the Montana Code.[29] In *Burgess v. Lewis and Clark City-County Board of Health*,[30] the supreme court held that a county board of health was an agent of the county commissioners and therefore the state's governmental immunity laws applied to that county legislative body, pursuant to the provisions of section 2-9-111 of the Montana Code granting immunity for legislative acts. The court reasoned that there was no legislative intent under the WDEA to create remedies for discharged employees whose employment must be approved by a legislative body, when preceding statutes granting governmental immunity denied recovery.[31]

The Montana Supreme Court has been required to consider how the WDEA interfaces with other statutory remedies for employment claims. In *Tonack v. Montana Bank*,[32] a terminated bank employee brought an action both under the WDEA and the federal Age Discrimination in Employment Act (ADEA),[33] which grants state courts concurrent jurisdiction to address federal age discrimination claims. The court held that the preemption provisions of the WDEA prevented the plaintiff from maintaining concurrent age discrimination and wrongful discharge claims.[34] The court held that, while a plaintiff may bring concurrent WDEA and other statutory claims, the WDEA remedies will not be applied until it is subsequently determined that some other statutory remedy does not provide some measure of redress.[35] The *Tonack* decision tracked an earlier Montana federal court

27. *Id.* at 430, 727 P.2d at 518 (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).

28. *Id.* at 431, 727 P.2d at 519.

29. *Id.*

30. 244 Mont. 275, 278, 796 P.2d 1079, 1081 (1990).

31. *Burgess*, 244 Mont. at 278, 796 P.2d at 1081.

32. 258 Mont. 247, 854 P.2d 326 (1993).

33. 29 U.S.C. § 621 (1994).

34. *Tonack*, 258 Mont. at 254-55, 854 P.2d at 331.

35. *Id.* at 255, 854 P.2d at 331. For a good discussion of the preemption provision of the WDEA, see M. Scott Regan, Note, Tonack v. Montana Bank: *Preemption, Interpretation, and Older Employees Under Montana's Wrongful Discharge from Employment Act*, 56 MONT. L. REV. 585 (1995).

decision, *Vance v. ANR Freight Systems, Inc.*,[36] in which the court held that discharge from employment may be violative of both state and federal laws proscribing discrimination in employment, and may also be violative of the WDEA, "where the factual predicate upon which the affected employee bases his claim under the [WDEA] is distinct from the factual predicate upon which the affected employee might otherwise base a claim under state or federal law prohibiting discrimination . . . ."[37]

In *Deeds v. Decker Coal Co.*,[38] the issue of preemption was addressed within the context of concurrent remedies sought by union employees who were discharged for allegedly engaging in strike misconduct. The terminated employees filed a WDEA action as well as an unfair labor practice charge with the National Labor Relations Board (NLRB).[39] The court held that if the NLRB provides a "procedure or remedy for contesting a dispute," then the statutory exemption of section 39-2-912 of the Montana Code applies.[40] The court ordered the district court to stay the state court action pending an NLRB resolution of the dispute.[41] If the NLRB issued a complaint, then the affirmative relief granted by the federal agency would constitute a preemption of the WDEA remedy.

WDEA claims and state discrimination claims under the Montana Human Rights Act (HRA)[42] are frequently combined in one action after a discharged employee properly invokes and exhausts the HRA remedy.[43] In *Sullivan v. Sisters of Charity of Providence*,[44] the court held that the district court properly bifurcated the plaintiff's discrimination claim from his wrongful discharge claim and disallowed plaintiff's demand for a jury trial of the discrimination claim. The court, citing *Vainio v. Brookshire*,[45] held that the Montana Human Rights Act does not guarantee a right to a jury trial in discrimination suits.[46]

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36. 9 Mont. Fed. Rpts. (Mont. L. Wk. Co.) 36 (D. Mont. Jan. 4, 1991).
37. *Vance*, 9 Mont. Fed. Rpts. (Mont. L. Wk. Co.) at 39-40.
38. 246 Mont. 220, 805 P.2d 1270 (1990).
39. *Deeds*, 246 Mont. at 222, 805 P.2d at 1271.
40. *Id.* at 223, 805 P.2d at 1271.
41. *Id.*
42. MONT. CODE ANN. §§ 49-1-101 to 49-5-511 (1995).
43. *See infra* notes 152-53 and accompanying text.
44. 268 Mont. 71, 80, 885 P.2d 488, 494 (1994).
45. 258 Mont. 273, 277, 852 P.2d 596, 599 (1993).
46. *Sullivan*, 268 Mont. at 80, 885 P.2d at 494. Because of the one year statute of limitations for bringing a claim under the WDEA and the necessity for obtaining a right to sue letter from the Montana Human Rights Commission (HRC), see MONT. CODE ANN. § 49-2-509 (1995), litigating a combined WDEA/discrimination suit is

B. Definitions

39-2-903. DEFINITIONS.

In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the

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often procedurally awkward. Generally, the right to sue letter is to be issued only if 12 months have elapsed since filing the complaint. MONT. CODE ANN. § 49-2-509(1)(b)(1995). Frequently the WDEA complaint, which must be brought within the one year period and usually before the HRC procedures are exhausted, must be amended to include a discrimination claim after the necessary right to sue letter has been obtained. Thus, parties frequently will move for a stay of the WDEA action until the HRC procedures are exhausted and an amended complaint bringing the discrimination claim can be included within the discovery schedule and other pre-trial scheduling orders of the court. *See generally* MONT. R. CIV. P. 16.

discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

1. Constructive Discharge

The Montana Supreme Court has been called upon to construe the statutory definition of "constructive discharge" in many cases. In *Kestell v. Heritage Healthcare Corp.*,[47] the court held that the determination of constructive discharge "depends on the totality of circumstances," but it "must be supported by more than the employee's *subjective* judgment that working conditions are intolerable."[48] The court cited a pre-WDEA employment discrimination case, *Snell v. Montana-Dakota Utilities Co.*,[49] which articulated virtually the same definition of constructive discharge as was later expressed by the legislature in this WDEA provision. In *Kestell*, the court held that the district judge properly allowed the jury to determine whether a highly qualified professional, who was an experienced supervisor abruptly removed from his post, isolated in a different wing of the hospital, and deprived of meaningful activity, was constructively discharged within the definition of the WDEA.[50]

Similarly, in *Weber v. State*,[51] a terminated employee presented evidence that he was abruptly notified that his position would be immediately downgraded while being falsely accused of mistakes and being made to feel unimportant in the organization.[52] The court held that a jury issue was presented to determine whether a constructive or actual discharge occurred when the employee tendered his resignation immediately following his demotion. However, in *Finstad v. Montana Power Co.*,[53] the Montana Supreme Court reversed a jury verdict which awarded damages for an employee who had alleged he had been constructively discharged when he refused to accept a lateral transfer from Cut Bank to Butte without any concomitant loss of responsibility or remuneration.[54] After a detailed factual analysis, the

47. 259 Mont. 518, 858 P.2d 3 (1993).
48. *Kestell*, 259 Mont. at 524, 858 P.2d at 7 (quoting Snell v. Montana-Dakota Utilities Co., 198 Mont. 56, 643 P.2d 841 (1982)) (emphasis added).
49. 198 Mont. 56, 643 P.2d 841 (1982).
50. *Kestell*, 259 Mont. at 518, 858 P.2d at 3.
51. 253 Mont. 148, 831 P.2d 1359 (1992).
52. *Weber*, 253 Mont. at 156, 831 P.2d at 1364.
53. 241 Mont. 10, 785 P.2d 1372 (1990).
54. *Finstad*, 241 Mont. at 29-30, 785 P.2d at 1383.

court held that there was *no* substantial credible evidence to support the jury's verdict and therefore reversed the judgment for the plaintiff employee.[55]

Another illuminating decision regarding constructive discharge was rendered by the Montana Supreme Court in *Howard v. Conlin Furniture.*[56] *Howard* involved a former manager of a store in a retail furniture chain who was notified that his employment as manager was terminated, but that he would be offered a salesperson's job at a substantially lower salary. The manager's earlier employment had been marked by sterling performance appraisals by the company's president, but his performance had allegedly deteriorated.[57] The former manager's wrongful termination suit raised the issue of whether he had been discharged, constructively or otherwise, or simply demoted.[58]

The court reversed the lower court's grant of summary judgment and held that the plaintiff had stated a claim of constructive discharge under the WDEA. The court noted that "this case does not involve a lateral transfer, nor a minor change in job description. This case involves absolute and final termination from a managerial position, followed by an offer of employment in a functionally different, and substantially inferior position, with the same employer."[59] The court concluded that "his refusal to accept an offer of a lesser position, at best, affects his duty to mitigate his damages. We conclude that when Howard was terminated from his managerial position, he was discharged from employment within the meaning of [WDEA]."[60]

Another constructive discharge situation presented itself in *Jarvenpaa v. Glacier Electric Cooperative, Inc.*,[61] in which a 30-year employee who had risen to the manager of operations position was suddenly notified that his employment would be terminated as of December 31, 1992, because of problems with his job performance. He was told, however, that he could avoid a dismissal by electing to accept a Special Early Retirement Package (SERP) which was also being offered to some other employees

55. *Id.* at 30, 785 P.2d at 1383.
56. 272 Mont. 433, 901 P.2d 116 (1995).
57. *Howard*, 272 Mont. at 435-36, 785 P.2d at 118.
58. *Id.*
59. *Id.* at 438, 785 P.2d at 119.
60. *Id.* at 438, 785 P.2d at 120.
61. 271 Mont. 477, 898 P.2d 690 (1994).

within the organization.[62] Following his acceptance of the retirement package, his suit for wrongful discharge was dismissed by the district court, because a voluntary retirement was not a "discharge" within the meaning of the WDEA.[63] On appeal the Montana Supreme Court reversed, holding that when an employer tells an employee to resign or be fired, the resulting resignation can be a constructive discharge.[64] The court took pains to note, however, that the mere offer of early retirement does not by itself constitute constructive discharge, observing that early retirement often provides a beneficial way for older employees to leave the work place.[65] Only when an offer of early retirement is coupled with an ultimatum—retire or be fired—can an "offer" of "voluntary retirement" be considered a constructive discharge.[66]

2. Discharge

The courts have also been required to apply the definition of "discharge" under the WDEA. In *Chapin v. RJR Nabisco and R. J. Reynolds*,[67] the court held that a reclassification of an assistant division manager to sales representative, who was then to be placed on probationary status for documented poor work performance as a manager, did not constitute a "discharge" under the WDEA. The court held that the WDEA applies only to discharge, not promotions or transfers to other positions.[68] However, in *Kearney v. KXLF Communications Inc.*,[69] the Montana Supreme Court allowed a constructive discharge claim which was a result of a demotion of a television news director to a sports broadcaster, where he was to be supervised by a former subordinate.[70] A jury issue existed as to whether a constructive discharge occurred in such a situation. Similarly, in *Arnold v. Boise Cascade Corp.*,[71] the employee voluntarily took another job after his employer failed to recall and rehire him pursuant to company policies which granted a right of recall to laid off em-

62. *Jarvenpaa*, 271 Mont. at 479, 898 P.2d at 691.
63. *Id.* at 479, 898 P.2d at 692.
64. *Id.* at 484, 898 P.2d at 694.
65. *Id.* at 482, 898 P.2d at 693.
66. *Id.*
67. 6 Mont. Fed. Rpts. (Mont. Law Week Co.) 196 (D. Mont. July 11, 1990).
68. *Chapin*, 6 Mont. Fed. Rpts. (Mont. Law Week Co.) at 202-203.
69. 263 Mont. 407, 869 P.2d 772 (1994).
70. *Kearney*, 263 Mont. at 410-11, 869 P.2d 773-74.
71. 259 Mont. 259, 856 P.2d 217 (1993).

ployees.[72] The court held that a jury issue existed as to whether a discharge occurred through the employer's failure to recall and rehire, or whether the discharge occurred as a result of a voluntary quit, i.e., the employee's unexplained failure to return to work.[73]

3. *Good Cause*

In one of the leading Montana Supreme Court decisions since adoption of the WDEA, the court in *Buck v. Billings Chevrolet, Inc.*,[74] applied the statutory definition of "good cause" to a difficult business situation which occurred when the purchaser of an automobile dealership terminated the former manager and replaced him with a manager from the purchaser's other automobile dealership organization. The new owner admitted that his termination decision was not based upon the prior work performance of the former manager. Rather, the new employer justified the termination as based upon a "legitimate business reason" within the statutory definition of "good cause." The court held that the employer was entitled to arbitrarily replace the manager with a person of its own choosing from within its own business organization.[75]

In defining a "legitimate business reason," the court held that such a reason is one 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 interest of the employee to secure employment.[76]

The court went on to note that it is inappropriate for courts to become involved in the day-to-day employment decisions of a business, particularly when they pertain to decisions regarding managerial employees.[77] However, the court cautioned that its holding in *Buck* was confined "only to those employees who occupy sensitive managerial confidential positions."[78] With respect

72. *Arnold*, 259 Mont. at 263, 856 P.2d at 219.
73. *Id.* at 264-265, 856 P.2d at 220.
74. 248 Mont. 276, 811 P.2d 537 (1991).
75. *Buck*, 248 Mont. at 282-83, 811 P.2d at 541.
76. *Id.* at 281-82, 811 P.2d at 540.
77. *Id.* at 282, 811 P.2d at 541.
78. *Id.* at 283, 811 P.2d at 541. The court suggested that a similar arbitrary

to non-managerial employees, the court held that the:

> employer's legitimate right to exercise discretion over whom it will employ must be balanced, however, against the employee's equally legitimate right to secure employment . . . The balance should favor an employee who presents evidence, and not mere speculation or denial, upon which a jury could determine that the reasons given for his termination were false, arbitrary or capricious, and unrelated to the needs of the business.[79]

The Montana Supreme Court has wrestled with the difficulty of determining whether motions for summary judgment for "good cause" discharges should be granted without a factual determination by the trier of fact as to whether or not "good cause" or a "legitimate business reason" supported the discharge. For example, in *Guertin v. Moody's Market, Inc.*,[80] the Montana Supreme Court held that the lower court had erroneously precluded an employee from submitting a wrongful discharge claim to the jury when she presented substantial evidence of good work performance which contradicted the sudden termination of the employee based upon a single incident of alleged inventory mismanagement. The court observed:

> Our review of the evidence convinces us that there is evidence to warrant submission of the wrongful discharge claim to the jury. . . . The evidence presented by Guertin demonstrates that she was performing her job satisfactorily and it provides a possible motive for her termination for other than good cause. The evidence she presented went to her argument that Moody's reasons for her termination were false, whimsical, arbitrary or capricious. This evidence counters the evidence presented by Moody's to support their contention that they terminated Guertin for good cause.[81]

However, in *Miller v. Citizens State Bank*,[82] the Montana Supreme Court affirmed a lower court's order granting summary judgment to the employer when it showed that the employee had received below standard written appraisals and at least three

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termination of a "lower echelon" employee may be violative of the Act, if the employee's interest in secure employment outweighed the alleged legitimate business interests of the employer. *Id.*

79. Kestell v. Heritage Health Care Corp., 259 Mont. 518, 526, 858 P.2d 3, 8 (1993) (citations omitted).

80. 265 Mont. 61, 874 P.2d 710 (1994).

81. *Guertin*, 265 Mont. at 69-70, 874 P.2d at 715.

82. 252 Mont. 472, 830 P.2d 550 (1992).

warnings of potential termination for unsatisfactory job performance. Similarly, in *Koepplin v. Zortman Mining Company*,[83] the court upheld the district court's order granting summary judgment for the employer for the termination of an employee due to verbal harassment and intimidation of co-employees, including egregious sexual harassment of female employees. Moreover, during the investigation of the terminated employee's conduct, he threatened to take his supervisor on a "trip to hell."[84] The court reasoned that there were no material facts presented to rebut the employer's legitimate business reason for termination.[85]

Likewise, in *Peter v. Peabody Coal*,[86] the court granted summary judgment to an employer when the discharge was based upon unsatisfactory work performance which had been documented on numerous occasions, resulting in warnings that discharge would occur if improvement was not seen. The court held that evidence presented by the plaintiff that a co-employee did not agree with the employer's decision had no bearing upon the employer's right to make personnel decisions. Since the plaintiff showed no credible evidence that discharge was motivated by any reason other than honest dissatisfaction with his work habits and performance, the employer was entitled to summary judgment.

In 1993, Montana legislators, apparently concerned about the rights of employees who smoke or drink alcoholic beverages, granted them protection from discharge based upon their "legal use of a lawful product . . . off the employer's premises during non working hours."[87] Termination for such use under such circumstances was declared to be "not a legitimate business reason" for termination.[88] An exception to that rule may occur if the employer acts within the provisions of sections 39-2-313(3) or (4) of the Montana Code, which would allow an employer to impose limits or prohibit employment of smokers or drinkers of alcoholic beverages because of job related responsibilities, bona fide occupational requirements, or conflict with the purposes of a non-profit organization. (e.g., American Cancer Society (smokers) or Alcoholics Anonymous (drinkers), or in accordance with sub-

83. 267 Mont. 53, 881 P.2d 1306 (1994).
84. *Koepplin*, 267 Mont. at 56, 881 P.2d at 1308.
85. *Id.* at 61, 881 P.2d at 1311.
86. 8 Mont. Fed. Rpts. (Mont. Law Week Co.) 234 (D. Mont. Sept. 6, 1990).
87. MONT. CODE ANN. § 39-2-903(5) (1995).
88. *Id.*

stance abuse programs.) However, there have been no reported judicial decisions interpreting this amendment to the Act.[89]

4. Violation of Public Policy

Not surprisingly, the Montana Supreme Court has been solicitous in protecting the rights of terminated employees who allege, and make a prima facie showing, that their termination was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy. In *Krebs v. Ryan Oldsmobile*,[90] the plaintiff alleged, and the employer admitted, that the employee was terminated for reporting alleged illegal drug activity by several coemployees, and for his acting as an informant to law enforcement officials investigating such activity on the employer's premises. The Supreme Court reversed a summary judgment granted by the lower court and remanded the case for trial on the public policy claim of the plaintiff, holding that there was substantial evidence which precluded summary judgment being granted to the employer.[91]

Similarly, in *Motarie v. Northern Montana Joint Refuse Disposal Dist.*,[92] the court again reversed a grant of summary judgment to an employer who was alleged to have terminated a probationary employee for his having allegedly reported a violation of public policy. The plaintiff's complaint alleged that the employer terminated him because he reported unsafe working conditions to the Occupational Safety and Health Administration (OSHA). The employer moved for summary judgment, arguing that it was undisputed that OSHA had not cited the employer for statutory violations. Thus, the employer argued, there could be no violation of public policy without evidence that the employer had actually violated a safety statute. The Supreme Court rejected the employer's contention and held that simply because the alleged report did not result in a citation, or even an investigation, does not necessarily insulate the employer from a retaliatory discharge claim based upon the reporting of a public policy violation. The court stated: "This retrospective reasoning is without merit. It fails to recognize that the WDFEA protects a good

89. The only other amendment of the WDEA also occurred in 1993, when the damages remedy was expanded to allow an employee to recover the expenses of searching for, obtaining, or relocating to a new job. *See* MONT. CODE ANN. § 39-2-905(1) (1995).

90. 255 Mont. 291, 843 P.2d 312 (1992).

91. *Krebs*, 255 Mont. at 297, 843 P.2d at 316.

92. ___ Mont. ___, 907 P.2d 154 (1995).

faith 'whistle blower'. Thus, regardless of whether the employee's report actually results in a citation or investigation, the test is whether the employee made the report in good faith."[93] Therefore, the employee's mere showing that he filed a report raised a genuine issue of material fact regarding an essential element of the WDEA, namely whether his discharge was in retaliation for a good faith reporting of what he "reasonably perceived" to be a violation of public policy.[94]

The most expansive reading of the public policy basis for a wrongful termination claim was expressed in the Montana Supreme Court decision in *Wadsworth v. State of Montana Dept. of Revenue*.[95] In *Wadsworth*, a real estate appraiser for the DOR was discharged for violating the department's conflict of interest rule which prohibited appraisers from engaging in independent fee appraisals and real estate business during off-duty hours.[96] Following a jury trial in which Wadsworth recovered $85,000 on a jury verdict based upon his claim that he was terminated in violation of public policy, the Montana Supreme Court affirmed the lower court judgment.[97]

The court reasoned that the conflict of interest rule unconstitutionally infringed upon the plaintiff's fundamental right to the opportunity to pursue employment, i.e., that he had a constitutionally protected, inalienable right to the opportunity of pursuing life's basic necessities which could not be infringed upon without the showing of a compelling state interest.[98] The court then reasoned that, while the Montana Constitution does not refer to "fundamental rights" in this context, "[i]t is primarily through work and employment that one exercises and enjoys this . . . fundamental constitutional right."[99] This then implicated section 39-2-904(1) of the WDEA because Wadsworth's termination was for his refusal to abide by a rule that was in contravention of public policy. The court noted that the public policy

93. *Motarie*, ___ Mont. at ___, 907 P.2d at 157 (quoting Krebs v. Ryan Oldsmobile, 255 Mont. 291, 296, 843 P.2d 312, 315 (1992)).

94. *Id.* However, in Buck v. Billings Chevrolet, Inc., 248 Mont. 276, 284, 811 P.2d 537, 542 (1991), the Montana Supreme Court rejected the contention, stating false reasons for an employee's discharge is a violation of public policy under the WDFEA. Moreover, the court held that a terminated employee must present evidence that the employee reported or refused to report a violation of public policy before the public policy provision of the Act may be invoked.

95. ___ Mont. ___, 911 P.2d 1165 (1996).

96. *Wadsworth*, ___ Mont. at ___, 911 P.2d at 1168.

97. *Id.* at ___, 911 P.2d at 1177.

98. *Id.* at ___, 911 P.2d at 1171.

99. *Id.* at ___, 911 P.2d at 1172.

"must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer; in addition, the policy must be fundamental, substantial, and well established at the time of discharge."[100] The court concluded that, because the state failed to show a compelling state interest in prohibiting Wadsworth's moonlighting activity, Wadsworth properly stated a wrongful discharge based upon a WDEA public policy violation.[101]

C. Elements of Wrongful Discharge

1. Public Policy

Other than its decisions in *Krebs*, *Buck*, *Motarie*, and *Wadsworth*, the Montana courts have explored only infrequently the myriad of employment circumstances and situations in which an alleged public policy violation might be presented. However, both the state and federal courts in Montana, as well as in other jurisdictions, have dealt with the public policy issue in cases arising prior to the effective date of the WDEA.[102] For example, in *Boldt v. U-Haul Co. of Idaho and AMERCO*,[103] the Montana federal court held that the alleged unfair treatment of subordinate employees did not constitute a violation of public policy.[104] To constitute a public policy violation, plaintiff's claims must "involve a matter of public concern, not a personal matter."[105] However, a discharge based upon an alleged retaliation for reporting violations of statutes regarding hours of work "is a matter affecting the public health, safety and welfare and could make out a claim for public policy violations." However, the federal court held that mere violation of a personnel policy is not violation of a public policy. Similarly, in *Rupnow v. City of Polson*,[106] an employment discharge case which proceeded the effective date of the WDEA, the Montana Supreme Court held that an alleged violation of the city's personnel policy is not a

100. *Id.* at ____, 911 P.2d at 1176 (citing Gantt v. Sentry Ins., 824 P.2d 680, 684 (Cal. 1992)).

101. *Wadsworth*, ____ Mont. at ____, 911 P.2d at 1175.

102. For a good discussion of the basic concepts of proof of violation of public policy and numerous cases from other jurisdictions, see generally 2 HENRY H. PERRIT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 7.19 to .28 (3rd ed. 1992 & Supp. 1996).

103. 6 Mont. Fed. Rpts. (Mont. Law Week Co.) 119 (D. Mont. July 2, 1990).

104. *Boldt*, 6 Mont. Fed. Rpts. (Mont. Law Week Co.) at 131.

105. *Id.* at 129.

106. 234 Mont. 66, 761 P.2d 802 (1988).

violation of public policy.[107]

In the pre-WDEA case of *Foster v. Albertsons, Inc.*,[108] the Montana Supreme Court held that sexual harassment is against public policy for the purposes of a cause of action for a discharge from employment which violates public policy, if the termination occurs in retaliation for the employee's refusal to welcome a supervisor's alleged sexual advances.[109]

2. *Termination Not for Good Cause*

Both the state and federal courts in Montana have been required to measure when good cause has been sufficiently presented to justify and support an employer's motion for summary judgment. In *Morton v. M.W.M., Inc.*,[110] the Montana Supreme Court reversed an order granting summary judgment because genuine issues of fact existed when the parties related widely divergent reasons for the employee's termination.[111] The employer alleged that the employee was summarily terminated because he was working for a competitor and had falsely represented vacation requests. The employee countered with substantial evidence that the vacation request had not been falsified and that the other employer was not a competitor.[112] The court held that the trier of fact must resolve those fact issues and determine whether the employee was discharged for good cause.

Similarly, in *Howard v. Conlin Furniture*,[113] the court reversed a summary judgment granted to the employer when the facts established in discovery demonstrated that a store manager who began with high praise for his work, but later suffered from

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107. *Rupnow*, 234 Mont. at 71, 761 P.2d at 805.

108. 254 Mont. 117, 835 P.2d 720 (1992).

109. *Foster*, 254 Mont. at 126, 835 P.2d at 726; *see also* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (public policy tort requires that the policy concerns of the employee/employer controversy implicate some policy related to the general public's interest rather than to some issue regarding management of the particular enterprise). The Montana courts have not yet been required to specifically determine whether an alleged public policy violation under the WDEA is implicated when termination is alleged to have occurred as a result of an employee's mere exercise of statutory rights that are primarily beneficial to the employee, such as service on a jury or filing of a worker's compensation claim. *See, e.g.*, Patton v. J.C. Penney Co., Inc., 719 P.2d 854 (Or. 1986) (no public policy tort for employee dismissed for dating co-worker, rejecting argument that the employee's constitutional rights of privacy in association were abridged by a dismissal for such a reason).

110. 263 Mont. 245, 868 P.2d 576 (1994).

111. *Morton*, 263 Mont. at 251, 868 P.2d at 580.

112. *Id.*

113. 272 Mont. 433, 901 P.2d 116 (1995).

a deterioration of work performance, rebutted each claim of poor work performance with evidence to the contrary or provided reasonable explanations.[114] The court concluded that "these claims, denials, and counterclaims raise a factual issue as to whether Howard was terminated for good cause within the meaning of Montana Code Annotated § 39-2-903(5) of the Wrongful Discharge from Employment Act."[115]

However, both the Montana Supreme Court and the federal courts have affirmed or granted summary judgment motions made by employers who have demonstrated no genuine issue of material fact with regard to the good cause claim. For example, in *Miller v. Citizens State Bank*,[116] the court affirmed a dismissal of an action for wrongful discharge when it was demonstrated that the employee had received below standard written performance appraisals and had received at least three warnings of potential termination unless job performance improved.[117] There was no demonstration by the employee that the discharge was motivated for other or improper reasons.[118] Likewise, the Montana federal courts have granted summary judgment in cases involving an allegation that the termination was not for good cause. In *Jones v. Peabody Coal*,[119] the court held that questions of good cause do not automatically require findings by a trier of fact.[120] Judge Shanstrom determined that when an employer shows sufficient facts to show there was good cause to terminate, the plaintiff has an obligation to respond with sufficient facts to raise a genuine issue of material fact that termination was for some reason other than for good cause.[121] Simply challenging managerial discretion in exercising a reduction in force does not, Judge Shanstrom ruled, meet that burden. Similarly, in *King v. M.C.A., Inc.*,[122] the federal district court granted summary judgment to an employer who discharged an em-

114. *Howard*, 272 Mont. at 440, 901 P.2d at 120-21.

115. *Id.* at 440, 901 P.2d at 120; *see also Guertin*, 265 Mont. at 61, 874 P.2d at 710.

116. 252 Mont. 472, 830 P.2d 550 (1992).

117. *Miller*, 252 Mont. at 474-75, 830 P.2d at 551-52. In Karell v. American Cancer Soc'y, 239 Mont. 168, 175, 779 P.2d 506, 510 (1989), the court held, in a case arising prior to adopting the WDEA, that employees need not be warned that their job is in jeopardy before a termination occurs.

118. *Miller*, 252 Mont. at 474, 830 P.2d at 552; *see also* Koepplin v. Zortman Mining, 267 Mont. 53, 62, 881 P.2d 1306, 1312 (1994).

119. 9 Mont. Fed. Rpts. (Mont. Law Week Co.) 274 (D. Mont. Feb. 25, 1991).

120. *Jones*, 9 Mont. Fed. Rpts. (Mont. Law Week Co.) at 278.

121. *Id.* at 278-79.

122. 20 Mont. Fed. Rpts. (Mont. Law Week Co.) 367 (D. Mont. Jan. 25, 1996).

ployee for poor work performance. The terminated employee responded by admitting that he "initially made mistakes," but that he had "learned from my mistakes and at the time I was terminated, I wasn't making any more mistakes than any of the other employees and I certainly didn't deserve to be terminated . . . ."[123]

3. *Written Personnel Policies*

The leading case involving an employer's violation of the express provisions of its own written personnel policy is *Kearney v. KXLF Communications*.[124] The Montana Supreme Court held that the trial court erred when it directed a verdict against an employee who demonstrated through testimony of an expert witness that the employer had violated its policy of performing annual written evaluations of all of its employees, and that such a policy existed in written form.[125] As a result, the plaintiff was discharged for reasons about which he was not forewarned and had not had the opportunity to correct. The court stated: "[W]e conclude that conflicting inferences could be drawn from this evidence and that reasonable persons could conclude that KXLF had an established and express policy of performing annual evaluations which it violated with respect to Kearney."[126]

However, the court has rejected the claim that an employer must follow "industry standards" in evaluating work performance, and that it must have written guidelines or policies in order to do so. In *Miller v. Citizens State Bank*,[127] the court simply refused to impose any additional duties in this regard other than those imposed by the statute itself.[128] Similarly, in *Featherman v. S. E. Rykoff & Co.*,[129] the federal district court held that it "cannot read extraneous statements into a written policy that is silent on the hierarchy of discipline methods."[130] Hence, the court held that there is no requirement to follow written progressive discipline policies when progressive discipline is not explicitly required under the employer's written

123. *King*, 20 Mont. Fed. Rpts. (Mont. Law Week Co.) at 369.
124. 263 Mont. 407, 869 P.2d 772 (1994).
125. *Kearney*, 263 Mont. at 418, 869 P.2d at 778.
126. *Id.*
127. 252 Mont. 472, 830 P.2d 550 (1992); *see also* discussion *infra* notes 163-64 and accompanying text.
128. *Miller*, 252 Mont. at 473, 830 P.2d at 552.
129. 10 Mont. Fed. Rpts. (Mont. Law Week Co.) 300 (D. Mont. May 22, 1991).
130. *Featherman*, 10 Mont. Fed. Rpts. (Mont. Law Week Co.) at 304.

personnel policies.[131]

D. Remedies

39-2-905. REMEDIES.

(1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-2-904(1).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in subsections (1) and (2).[132]

1. Determining Lost Wages

In *Weber v. Montana,*[133] the Montana Supreme Court held that the use of the word "may" in the remedies statute authorizes a jury instruction that the award of four years economic losses is "discretionary," not mandatory.[134] Similarly, in *Tyner v. Park County,*[135] the court affirmed a verdict which had granted zero damages to an employee that the jury found to have been wrongfully discharged.[136] The court held that the employer had presented sufficient evidence of mitigating factors pursuant to section 39-2-905 of the Montana Code to justify the zero damage

131. *Id.*
132. MONT. CODE ANN. § 30-2-905 (1995).
133. 253 Mont. 148, 831 P.2d 1359 (1992).
134. *Weber*, 253 Mont. at 153, 831 P.2d at 1362; *see also* discussion *infra* note 132 and accompanying text.
135. 271 Mont. 355, 897 P.2d 202 (1995).
136. *Tyner*, 271 Mont. at 361-62, 897 P.2d at 206-07.

award even though the jury had found that the employee had been wrongfully discharged.[137] The employee was unemployed for only five months and had turned down a job before accepting one at a higher wage than that which he had earned with the defendant employer.[138]

In *Arnold v. Boise Cascade Corp.*,[139] the court held that an employee may testify as to his wage losses and his "approximations" of lost benefits, and that the employee's counsel could present evidence of damages during summation based upon the employee's testimony.[140] In *Weiler v. Leibenguth*,[141] the court held that whether a plaintiff is entitled to lost wages when he returns to being a full-time student at the university is a jury question involving mitigation of damages.[142] According to *Weiler*, if the jury determines that returning to school occurred only after diligent efforts to find other work proved fruitless, then the jury may award lost wages.[143] In *Morton v. M-W-M, Inc.*,[144] the court held that an employee who has a second job may legitimately claim lost wages from a primary, full-time job from which he was terminated.[145] In *Myers v. Department of Agriculture*,[146] a pre-Act case, the court held that unemployment compensation benefits are to be an offset to a jury's award of lost wages.[147]

E. Limitations of Actions

39-2-911. LIMITATION OF ACTIONS.

(1) An action under this part must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures,

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137. *Id.*
138. *Id.* at 362, 897 P.2d at 207.
139. 259 Mont. 259, 856 P.2d 217 (1993).
140. *Arnold*, 259 Mont. at 265-67, 856 P.2d at 221-22.
141. 1 Mont. Fed. Rpts. (Mont. Law Week Co.) 360 (D. Mont. Mar. 21, 1989).
142. *Weiler*, 1 Mont. Fed. Rpts. (Montana Law Week Co.) at 367-68.
143. *Id.* at 366, 367-68.
144. 263 Mont. 245, 868 P.2d 576 (1994).
145. *Morton*, 263 Mont. at 251, 868 P.2d at 580.
146. 232 Mont. 286, 756 P.2d 1144 (1988).
147. *Myers*, 232 Mont. at 286-87, 756 P.2d at 1144. In 1993 the legislature amended the WDEA to allow the discharged employee to offset the interim earnings deduction by "any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment." MONT. CODE ANN. § 39-2-905(1) (1995). There have been no judicial decisions involving this amendment.

other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).[148]

1. *When the Statute Commences to Run*

One of the early Montana Supreme Court decisions involving the one-year statute of limitations, *Allison v. Jumping Horse Ranch, Inc.*,[149] initially created confusion over when the statute of limitations commences to run. In *Allison*, the court held that the one-year statute does not begin to run until the employee is no longer earning compensation from the employer, which can occur only upon a "complete severance" of the employer-employee relationship.[150] The court followed an analysis that is similar to that found in federal employment discrimination cases.[151] Consequently, the plaintiff in *Allison* was allowed to expand the statute of limitations by more than a year following notification of termination, extending the limitations period until all employment compensation had been terminated.[152]

The reason the *Allison* decision initially created confusion is

148. MONT. CODE ANN. § 39-2-911 (1995).
149. 255 Mont. 410, 843 P.2d 753 (1992).
150. *Allison*, 255 Mont. at 414, 843 P.2d at 756.
151. *Id.*
152. *Id.* at 414, 843 P.2d at 756.

that the case essentially switched courses from an earlier decision, *Martin v. Special Resource Management, Inc.*[153] In *Martin*, a case decided two years prior, the court held that an actionable cause for termination arose upon notice of termination, not upon the actual date of termination, even though the effects of the loss of the job did not occur until actual compensation was terminated.[154] Thus, an employee who was informed of termination on June 16, 1987, effective as of July 17, 1987, was held to have been time barred from filing her wrongful discharge suit on June 28, 1988, which was more than one year after notification but less than one year after compensation had been terminated.

In *Walch v. University of Montana*,[155] a case decided after *Allison*, the court followed its decision in *Martin*, and attempted to distinguish its *Allison* decision.[156] Subsequently, in *Redfern v. Montana Muffler*,[157] the court again followed its *Martin* decision and barred a suit in which the employee attempted to extend the one-year statute of limitations by one year plus the five days of earned vacation time which had been given to him after notice of termination.[158] The court held that his argument that he was still "earning compensation," under the *Allison* theory was without merit and that the suit was thus not timely filed.[159] Therefore, despite the *Allison* aberration, it is now clearly the rule under the WDEA that the one-year statute of limitations begins upon notification of termination, not upon the date of actual severance or upon the end of compensation.

The WDEA also requires, in sections 39-2-911(2) and (3) of the Montana Code, that if an employer maintains written internal grievance procedures which allow an employee to appeal a discharge within the organizational structure of the employer, then the employee must first exhaust those procedures prior to filing an action, so long as the terminated employee receives notice of the internal review procedure at least seven days after termination. In *Hoffman v. Town Pump, Inc.*,[160] the Montana Supreme Court held that the district court had properly granted a directed verdict because of the terminated employee's failure to

153. 246 Mont. 181, 803 P.2d 1086 (1990).
154. *Martin*, 246 Mont. at 185, 803 P.2d at 1089.
155. 260 Mont. 496, 861 P.2d 179 (1993).
156. *Walch*, 260 Mont. at 501-03, 861 P.2d at 182-83.
157. 271 Mont. 333, 896 P.2d 455 (1995).
158. *Redfern*, 271 Mont. at 336, 896 P.2d at 457.
159. *Id.*
160. 255 Mont. 415, 843 P.2d 756 (1992).

exhaust his right to pursue an internal procedures review even though the seven-day notice had not been given.[161] The employer's failure to give the notice was excused because the plaintiff had filed a suit on the very day of the discharge, thereby effectively precluding the employer from complying with the statute.[162]

F. Exemptions

39-2-912. EXEMPTIONS.

This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. Such statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, handicap, creed, religion, political belief, color, marital status, and other similar grounds.

(2) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

1. Other Statutory Claims Available

Montana courts have made it unequivocally clear that wrongful discharge suits that are premised upon the provisions of the Montana Human Rights Act (HRA) are preempted by that Act and may not be brought under the WDEA, at least until after the terminated employee has exhausted the HRA remedies and obtained a right to sue letter. In *Hash v. U.S. West Communication Services*,[163] the court followed its earlier 1990 decision in *Harrison v. Chance*,[164] which held that a 1987 legislative amendment made the HRC the exclusive remedy for sexual discrimination. The court stated:

> The legislature clearly intended that the Act be the exclusive remedy for discrimination claims. We adopted this intent in Harrison and maintain it in the instant case. To permit parties

161. *Hoffman*, 255 Mont. at 418-19, 843 P.2d at 758-59.
162. *Id.* at 418, 843 P.2d at 758.
163. 268 Mont. 326, 886 P.2d 442 (1994).
164. 244 Mont. 215, 797 P.2d 200 (1990).

to delay filing with the HRC until the HRC filing time ran out and then file their claims directly in district court would, in a sense, gut the Act. We reaffirm our decision that the HRC is the exclusive remedy for Hash's discrimination claim.[165]

2. *Collective Bargaining Agreements*

The courts strictly refuse to allow employees covered under collective bargaining agreements to bring actions under the WDEA. In *Fellows v. Sears, Roebuck & Company*,[166] the Montana Supreme Court affirmed the district court's grant of summary judgment to the employer who was sued by a terminated union employee covered under the collective bargaining agreement.[167] Without discussing the WDEA, the court cited the pre-Act case of *Brinkman v. State*,[168] which had required an employee covered by a collective bargaining agreement to utilize and exhaust the labor contract's dispute resolution procedures as the exclusive remedy for an unjust discharge.[169] In *Bridgewater v. Department of Institutions*,[170] the court affirmed summary judgment on a constructive discharge claim as to an employee covered under a collective bargaining agreement which contained grievance provisions for settling disputes.[171] The court held that the employee must exhaust his contractual remedies and follow the grievance procedure before suing under the WDEA. The court, citing *Small v. McRae*,[172] held that only when it is certain that the collective bargaining agreement is not susceptible to an interpretation that covers the dispute, may an employee sidestep the provisions of the collective bargaining agreement.[173]

Similarly, the Montana federal courts have precluded union employees from circumventing the collective bargaining agreement to bring an action under the WDEA. In *Barnes v. Stone*

165. *Hash*, 268 Mont. at 332, 886 P.2d at 446; *accord* Bruner v. Yellowstone County, 272 Mont. 261, 900 P.2d 901 (1995); Frandrich v. Capital Ford Lincoln Mercury, 272 Mont. 425, 901 P.2d 112 (1995); Houser v. Exxon Corp., 19 Mont. Fed. Rpts. (Mont. Law Week Co.) 431 (D. Mont. July 26, 1995).
166. 244 Mont. 7, 795 P.2d 484 (1990).
167. *Fellows*, 244 Mont. at 11, 795 P.2d at 486.
168. 224 Mont. 238, 729 P.2d 1301 (1986).
169. *Fellows*, 244 Mont. at 10, 795 P.2d at 485.
170. No. 94-362 (Mont. Aug. 25, 1995) (unpublished decision).
171. *Bridgewater*, No. 94-362, at 8.
172. 200 Mont. 497, 651 P.2d 982 (1982).
173. *Bridgewater*, No. 94-362, at 5.

Container Corp.,[174] the Ninth Circuit Court of Appeals held that an action under the WDEA was preempted by the National Labor Relations Act (NLRA) in an action by terminated union employees who engaged in strike misconduct and who unsuccessfully filed an unfair labor practice charge with the NLRB.[175] Similarly, in *Bassette v. Stone Container Corp.*,[176] the court, relying upon *Barnes*, held that a union employee who was discharged after impasse in collective bargaining was in no different position than the employees in the *Barnes* case.

3. *Written Contracts of Employment*

In *Farris v. Hutchinson*,[177] the Montana Supreme Court held that nothing in the WDEA forbids parties from entering into a contract which is exempt from the Act and which allows discretionary rights of employers to avoid renewing specific term contracts without a showing of good cause. The court held that the employer had no obligation to abide by the "good cause" requirements of the Act if the employer and the employee agree to a written contract of employment which is exempt under the provisions of section 39-2-912(2) of the Montana Code.[178]

Similarly, in *Schaal v. Flathead Community College*,[179] Dr. Schaal was hired by the college under a series of one-year employment contracts, which incorporated the procedures and policies of the college, but did not contain any provisions for renewal upon expiration.[180] After he was notified by the president of the college that he would recommend non-renewal of the contract for the following academic year, Professor Schaal filed suit, contending that in addition to a breach of contract claim, he was entitled to assert a wrongful discharge claim under the WDEA.[181] The district court dismissed the wrongful discharge claim on summary judgment, a ruling which was summarily affirmed on appeal by the Montana Supreme Court.[182]

174. 942 F.2d 689 (9th Cir. 1991).
175. *Barnes*, 942 F.2d at 693.
176. 12 Mont. Fed. Rpts. (Mont. Law Week Co.) 544 (D. Mont. Oct. 9, 1992).
177. 254 Mont. 334, 838 P.2d 374 (1992).
178. *See Farris*, 254 Mont. at 341, 838 P.2d at 378.
179. 272 Mont. 443, 901 P.2d 541 (1995).
180. *Schaal*, 272 Mont. at 445, 901 P.2d at 542.
181. *Id.*
182. *Id.* at 447, 901 P.2d at 543.

G. Preemption of Common Law Remedies

39-2-913. PREEMPTION OF COMMON-LAW REMEDIES.

Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.

1. Unrelated Torts and Contracts

Although at first blush the preemption provision of the WDEA would appear to absolutely preclude any common law tort or contract claims, the Montana Supreme Court, in *Beasley v. Semitool, Inc.*,[183] articulated an important exception. Beasley contended that, in pre-employment negotiations to induce him to locate to Montana, the employer made oral promises of stock options, bonuses, and opportunities for advancement which were not specifically set forth in a letter offering him the position which he accepted.[184] Following his receipt of excellent job evaluations, he transferred to a sister company.[185] He alleged that the transfer was accompanied by oral promises of raises, higher bonuses, and stock options.[186] Two years later he resigned, citing the company's failure to keep its compensation-related promises.[187]

The Montana Supreme Court agreed with the terminated employee's contention that his contract claims, arising from the employer's failure to abide by its alleged contractual representations during his employment, could be asserted separately from his WDEA claim, reasoning that his breach of contract claim occurred both prior to and independent of his resignation.[188] The court reversed the summary judgment ruling that the WDEA provided Beasley's exclusive remedy.[189] The court distinguished *Dagel v. City of Great Falls*,[190] which involved a tort claim for issues surrounding the plaintiff's actual discharge.[191] Beasley's contract-based claims arose from the employer's breach

183. 258 Mont. 258, 853 P.2d 84 (1993).
184. *Beasley* 258 Mont. at 259, 853 P.2d at 84.
185. *Id.* at 260, 853 P.2d at 85.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Beasley*, 258 Mont. at 262, 853 P.2d at 86.
190. 250 Mont. 224, 819 P.2d 186 (1991).
191. *Beasley*, 258 Mont. at 262, 853 P.2d at 86.

of his employment contract rather than from an alleged wrongful discharge. Consequently, Beasley was to be allowed to present his remaining contract-based claims because they were not barred by the WDEA's preemption provision.[192] The court noted that the operative words in the preemption provision were "for discharge."[193] The court concluded that "[s]ection 39-2-913 of the Montana Code bars claims for discharge arising from tort or implied or express contract, but does not bar all tort or contract claims merely because they arise in the employment context."[194]

Following *Beasley*, the Montana federal courts have had the occasion to determine whether terminated employees may assert "*Beasley* claims" along with their WDEA claims. For example, in *Keyes v. Pfizer, Inc.*,[195] the plaintiffs' supervisor engaged in abusive, profane, and outrageous conduct towards them throughout the course of their employment, eventually causing one plaintiff to suffer severe physical health problems and eventually causing both employees to resign rather than tolerate their boss's emotional abuse.[196] In addition to their WDEA claim, the plaintiffs alleged a separate claim for intentional and negligent infliction of emotional distress which had occurred throughout the employment relationship that was independent of the discharge event.[197] The Magistrate, adhering strictly to the language of section 39-2-913 of the Montana Code, held that a separate and independent claim for intentional infliction of emotional distress was barred by the WDEA, notwithstanding the *Beasley* rationale.[198]

However, in *McRae v. Vaage*,[199] U.S. District Judge Paul Hatfield expressly overruled Magistrate Holter's decision in *Keyes*. Citing *Beasley*, Judge Hatfield held that a separate fraud claim may be pursued by the employee notwithstanding the preemption provision of the WDEA.[200] Judge Hatfield stated:

> To the extent *Keyes* stands for the proposition that an employee, forced to terminate his employment because of the intol-

192. *Id.*
193. *Id.*
194. *Id.*
195. 15 Mont. Fed. Rpts. (Mont. Law Week Co.) 261 (D. Mont. Nov. 18, 1993).
196. *See Keyes*, 15 Mont. Fed. Rpts. (Mont. Law Week Co.) at 261-62.
197. *Id.* at 261.
198. *Id.* at 264-66.
199. 18 Mont. Fed. Rpts. (Mont. Law Week Co.) 342 (D. Mont. Feb. 7, 1995).
200. *McRae*, 18 Mont. Fed. Rpts. (Mont. Law Week Co.) at 354-57.

> erable conduct of his employer, is precluded, under *any circumstances*, from maintaining a tort action against his employer for the intentional infliction of emotional distress, I respectfully disagree with the holding in the case. Such a broad interpretation of the preemptive effect of Section 39-2-913 would clearly be at odds with the rationale expressed by the Montana Supreme Court in *Beasley*. In *Beasley*, Justice Gray emphasized the purpose of the [WDEA] was to "set forth certain rights and remedies with respect to wrongful discharge." This statement reflects the court's understanding that the Wrongful Discharge Act provides a remedy to an employee deprived of his or her right to be free from wrongful discharge as defined in [the WDEA]. *Beasley* does not stand for the proposition that [the WDEA] operates to preclude an employee who is subjected to tortious conduct on the part of an employer, that is separate and independent from the claim of wrongful discharge, from seeking legal redress upon that separate and independent claim. Indeed, *Beasley* stands for the opposite.[201]

By a narrow 4-3 margin, the Montana Supreme Court has clearly left open the possibility of allowing an independent tort of negligent retention of a supervisor who engages in misconduct against an employee which results in an employee's discharge. In *Bruner v. Yellowstone County*,[202] a legal secretary in the Yellowstone County Attorney's office resigned her employment, claiming that she had been continually sexually harassed by a deputy county attorney. Without utilizing the mandatory requirements of the Montana Human Rights Act to pursue her sexual harassment claim, she brought suit alleging negligent retention and sexual harassment.[203] While the court unanimously concluded that the sexual harassment claim was barred by virtue of the plaintiff's failure to utilize the provisions of the Montana Human Rights Act,[204] four members of the court also concluded that plaintiff had failed to demonstrate any basis for the application of the tort of negligent retention.[205] However, dissenting Justices Leaphart, Hunt, and Trieweiler all would have recognized the tort of negligent retention in Montana and would have reversed the grant of summary judgment as to that claim.[206] Justice Leaphart defined the tort of negligent reten-

201. *Id.* at 357-58 (citations omitted).
202. 272 Mont. 261, 900 P.2d 901 (1995).
203. *Bruner*, 272 Mont. at 903.
204. *See supra* notes 163-65 and accompanying text.
205. *Bruner*, 272 Mont. at 267, 900 P.2d at 905.
206. *Id.* at 269, 900 P.2d at 906 (Leaphart, J. dissenting).

tion to arise "when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his [or her] unfitness, and the employer fails to take further action such as investigating, discharge or reassignment."[207] In application of such a tort to Bruner's claim in the case before it, Justice Leaphart observed:

> The district court in the case at hand, found that Bruner's claim for negligent retention was found in unrelenting sexual harassment during her employment and that the exclusive remedy for this type of conduct (sexual harassment) is found in the Montana Human Rights Act. I disagree. Exclusivity only applies if the two remedies share indispensable ailments. Sexual harassment under the HRA and negligent retention do not share indispensable ailments. The HRA requires proof of discrimination. The tort of negligent retention does not.[208]

In a specially concurring opinion, Justice Nelson stated that "as far as I am concerned, that issue [adoption of the tort of negligent retention] remains to be decided in the future."[209]

Even prior to the *Bruner* decision, Federal District Court Judge Hatfield in the *McRae* case had already disagreed with the contention that Montana did not recognize the tort of negligent retention/supervision.[210] He had also rejected the employer's contention that the tort of negligent retention/supervision is preempted by the Wrongful Discharge from Employment Act.[211] Judge Hatfield stated: "The court disagrees that the WDEA operates to preclude a discharged employee from maintaining an independent tort claim against an employer merely because the tort arose in the employment context."[212] Judge Hatfield's federal colleague, U.S. District Judge Jack Shanstrom, was also reluctant to dismiss an independent tort claim in *Marcy v. Delta Air Lines*.[213] The court held that to dismiss an intentional infliction of emotional distress claim, based upon allegations of tortious conduct occurring after the dis-

207. *Id.* (Leaphart, J., dissenting) (citing Yunker v. Honeywell, 496 N.W.2d 419, 423).

208. *Id.* at 270, 900 P.2d at 906-07 (Leaphart, J., dissenting).

209. *Id.* at 272, 900 P.2d at 908.

210. *McRae*, 18 Mont. Fed. Rpts. (Mont. Law Week Co.) at 350.

211. *Id.* at 353.

212. *Id.* at 351 n.5 (citing Beasley v. Semitool, Inc., 258 Mont. 258, 262-63, 853 P.2d 84, 86-87 (1993)).

213. 18 Mont. Fed. Rpts. (Mont. Law Week Co.) 391 (D. Mont. Sept. 6, 1994).

charge, would be premature.[214] However, the court ruled that the defendants might challenge the sufficiency of the claim through a motion for summary judgment or at trial.[215]

H. Arbitration

39-2-914. ARBITRATION.

(1) A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated under this part.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) A neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

(b) The arbitration must be governed by the Uniform Arbitration Act, Title 27, chapter 5. If there is a conflict between the Uniform Arbitration Act and this part, this part applies.

(c) The arbitrator is bound by this part.

(3) If a complaint is filed under this part, the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

(4) A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

(5) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under this part. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.[216]

A number of procedural issues and problems surrounding the implementation of the arbitration provision of the Act remain to be addressed by the Montana courts. In *Rudel v. Univer-*

214. *Marcy*, 18 Mont. Fed. Rpts. (Mont. Law Week Co.) at 400.

215. *Id.*; *see also* Kelly v. Safeway Stores, 5 Mont. Fed. Rpts. (Mont. Law Week Co.) 429 (D. Mont. Apr. 27, 1990). In *Kelly*, the employer filed criminal charges against an employee for theft, as to which he was subsequently exonerated. In this pre-Act case, Judge Lovell allowed a malicious prosecution and intentional infliction of emotional distress claim to survive a motion for summary judgment. *Kelly*, 5 Mont. Fed. Rpts. (Mont. Law Week Co.) at 438.

216. MONT. CODE ANN. § 39-2-914 (1995).

sal Underwriters Ins. Co.,[217] the issue was raised as to the status of a WDEA suit pending an arbitration decision. In *Rudel*, the employer offered to arbitrate and the employee accepted, but the parties could not agree upon an arbitrator and moved the court to appoint one.[218] The employer also moved to dismiss the lawsuit pending the arbitration proceeding.[219] The court held that it should retain jurisdiction of the case to resolve disputes which might arise during arbitration.[220] Thus, the defendant's motion to dismiss was denied, pending appointment of the arbitrator and his or her final decision.[221]

In *May v. First National Pawnbrokers*,[222] the court discussed the standards for setting aside arbitration awards under the WDEA. The court refused to adopt the "manifest disregard of the law" standard for vacating arbitration awards, given the strictly limited judicial review available under the Montana Uniform Arbitration Act (MUAA).[223]

I. Effect of Rejection of Arbitration

39-2-915. EFFECT OF REJECTION OF OFFER TO ARBITRATE.

A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.[224]

In 1992 the Montana Supreme Court decided *Hoffman v.*

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217. 10 Mont. Fed. Rpts. (Mont. Law Week Co.) 333 (D. Mont. June 18, 1991).

218. *Rudel*, 10 Mont Fed. Rpts. (Mont. Law Week Co.) at 333.

219. *Id.*

220. *Id.* at 338.

221. *Id.* In a case involving a written employment contract, which was within the scope of the Federal Arbitration Act, the Montana Supreme Court held that a stay of proceedings was proper in the plaintiff employee's suit seeking damages under several theories arising out of plaintiff's termination. *Gibson, Jr., Inc. v. James Graff Comm., Inc.*, 239 Mont. 335, 780 P.2d 1131 (1989).

222. 269 Mont. 19, 887 P.2d 185 (1994).

223. *May*, 269 Mont. at 27, 887 P.2d at 190; *see also* MONT. CODE ANN. § 27-5-312 (1995). The district court shall vacate an award only if: (a) the award was procured by corruption, fraud, or other undue means; (b) there was evidence of partiality by an arbitrator or corruption or misconduct; (c) the arbitrator exceeded his/her powers; (d) the arbitrator refused to postpone the hearing upon sufficient cause; (e) there was no valid agreement to arbitrate. MONT. CODE ANN. § 27-5-312 (1995).

224. MONT. CODE ANN. § 39-2-915 (1995).

Town Pump, Inc.,[225] in which an employer that had successfully defended a wrongful discharge suit sought attorneys' fees under this provision of the WDEA. The court refused to allow attorneys' fees, reasoning that there must be a written agreement to arbitrate before the attorneys' fees provisions of the WDEA are triggered.[226] Because of the apparent failure of the court to explain this incongruous result, the 1993 Montana Legislature amended the statute so that a unilateral *offer* to arbitrate that is refused automatically triggers the attorneys' fees provisions. Therefore, no agreement to arbitrate is required.[227] In *Kearney v. KXLF Communications, Inc.*,[228] the court followed its *Hoffman* decision, and again denied attorneys' fees because the offer to arbitrate had occurred before the 1993 legislative amendment.[229]

III. MONTANA'S BLACKLISTING STATUTE

PART 8. BLACKLISTING AND PROTECTION OF DISCHARGED EMPLOYEES.

39-2-801. EMPLOYEE TO BE FURNISHED ON DEMAND WITH REASON FOR DISCHARGE.

It is the duty of any person after having discharged any employee from his service, upon demand by such discharged employee, to furnish him in writing a full, succinct, and complete statement of the reason of his discharge and if such person refuses so to do within a reasonable time after such demand, it is unlawful thereafter for such person to furnish any statement of the reason of such discharge to any person or in any way to blacklist or to prevent such discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed in this part.[230]

39-2-802. PROTECTION OF DISCHARGED EMPLOYEES.

If any person, after having discharged an employee from his service, prevents or attempts to prevent by word or writing of

225. 255 Mont. 415, 843 P.2d 756 (1992).
226. *Hoffman*, 255 Mont. at 419-20, 843 P.2d at 759.
227. MONT. CODE ANN. § 39-2-915 (1995).
228. 263 Mont. 407, 869 P.2d 772 (1994).
229. *Kearney*, 263 Mont. at 414, 869 P.2d at 776.
230. MONT. CODE ANN. § 39-2-801 (1995).

any kind such discharged employee from obtaining employment with any other person, such person is punishable as provided in 39-2-804 and is liable in punitive damages to such discharged person, to be recovered by civil action. No person is prohibited from informing by word or writing any person to whom such discharged person or employee has applied for employment a truthful statement of the reason for such discharge.[231]

A. Service Letters

In *Galbreath v. Golden Sunlight Mines, Inc.*,[232] the employer discharged an employee for his failure to provide medical documentation of his lengthy absence from work. At trial, the employer presented evidence that the reason for the request was based upon its discovery that the employee had opened his own business and had been working at it on a virtually full-time basis during his absence.[233] Additionally, the employer showed that it had evidence to believe that the original industrial accident which had precipitated the absence was faked.[234] The Montana Supreme Court reversed a jury verdict for the defendant employer and remanded the case to the trial court with instructions to preclude all evidence which was not specifically referred to in the employment termination letter. Because the termination letter only stated that the employee was discharged for failing to provide medical documentation of his absence, the district court erred by allowing the employer to show why the medical documentation was requested. The majority opinion relied heavily upon a pre-WDEA decision, *Swanson v. St. John's Lutheran Hospital*.[235]

In *Swanson*, an employer who had terminated a nurse for her failure to participate in abortion procedures, was held to have been precluded from introducing evidence at trial of the nurse's poor work performance and other valid reasons for the

231. MONT. CODE ANN. § 39-2-802 (1995).
232. 270 Mont. 19, 890 P.2d 382 (1995).
233. *Galbreath*, 270 Mont. at 23, 890 P.2d at 385.
234. *Id.*
235. 182 Mont. 414, 597 P.2d 702 (1979) (requiring employers to carefully consider the content and detail of the employment termination letters that employers plan to present upon employee termination). It should be noted that in *Galbreath* the reasons for the termination letter did not originate from the employee's request; rather, the letter was prepared by the employer to present at the time of termination. *Id.* In light of this decision employers must carefully consider the content and detail of such letters.

discharge.[236] The court in *Swanson* ruled that reasons other than those stated in the discharge letter were irrelevant and should have been excluded.[237] However, in *Weber v. State*,[238] the court had no criticism of an employer who countered the plaintiff's evidence of good work performance by presenting rebuttal evidence of his poor work performance.[239] Similarly, in *Barrett v. Asarco, Inc.*,[240] a case arising prior to the effective date of the WDEA, the court held that an employer may properly show that an employee acted in bad faith in an employment termination suit predicated upon a breach of the implied covenant of good faith and fair dealing.[241]

B. After-Acquired Evidence

In *Houchin v. Clover Club*,[242] the plaintiff was terminated for theft of gasoline through unauthorized charges. Subsequent to the termination, the employer also discovered that the employee had made a false statement on his employment application and argued that this was an additional grounds for discharge which could be shown at trial.[243] The Montana federal court held that under the WDEA, "after-acquired" evidence is not relevant.[244] Rather, "the evidence could be relevant to limit [the plaintiff's] damages to the time between the actual wrongful discharge and the time plaintiff would have been discharged for falsifying his employment application."[245] Similarly, in a case predating the WDEA, the Montana Supreme Court in *Flanigan v. Prudential Federal Savings & Loan Ass'n*,[246] held that an employer may not properly present evidence at trial to support the discharge when that evidence was not known or presented until after the employee's termination from employment.[247]

The rationale of the Montana decisions precluding after-acquired evidence to support a discharge appears to have been affirmed by the United States Supreme Court in a decision

236. *Swanson*, 182 Mont. at 425-26, 597 P.2d at 709-10.
237. *Id.*
238. 253 Mont. 148, 152, 831 P.2d 1359, 1362 (1992).
239. *Weber*, 253 Mont. at 152, 831 P.2d at 1361.
240. 245 Mont. 196, 202-03, 799 P.2d 1078, 1082 (1990).
241. *Barrett*, 245 Mont. at 200-02, 799 P.2d at 1081.
242. 16 Mont. Fed. Rpts. (Mont. Law Week Co.) 62 (D. Mont. Jan. 18, 1994).
243. *Houchin*, 16 Mont. Fed. Rpts. (Mont. Law Week Co.) at 63.
244. *Id.* at 66.
245. *Id.* at 66.
246. 221 Mont. 419, 720 P.2d 257 (1986).
247. *Flanigan*, 221 Mont. at 428, 750 P.2d at 264.

arising within the context of a suit for age discrimination. In *McKennon v. Nashville Banner Publishing*,[248] a 62-year old secretary was laid off after 40 years with her employer. Before her layoff she stole confidential documents from her employer's office, allegedly in an effort to determine whether the company's stated reasons for discharge (financial difficulties) were genuine or a mere pretext for age discrimination. Plaintiff admitted at her deposition she had copied and removed the private documents.[249] The U.S. Supreme Court held that the after-acquired evidence of the employee's misconduct that would have resulted in termination does not necessarily foreclose all damages to a former employee, although it does prevent the employee from obtaining reinstatement and front pay under the Age Discrimination in Employment Act, and in general limits the backpay to the time between the discharge and discovery of the misconduct.[250] The Court noted that in exceptional circumstances courts can adjust the backpay award to prevent injustice to either party.[251] The Court further indicated that trial courts must use equitable considerations in analyzing the factual variations which will inevitably occur in such cases.[252]

IV. PROCEDURAL AND RELATED ISSUES

A. Unemployment Compensation Decisions

The Montana Supreme Court has been required on several occasions to determine the effect of a decision of the Department of Labor and Industry of the State of Montana regarding a terminated employee's eligibility for unemployment compensation benefits. In *Niles v. Carl Weissman & Sons, Inc.*,[253] the court held that a final decision from an administrative agency that an employee was not entitled to unemployment compensation is not *res judicata* as to the employee's separate claim in district court

248. 130 L. Ed.2d 852 (1995).
249. *McKennon*, 130 L. Ed.2d at 859.
250. *Id.* at 864.
251. *Id.*
252. *Id.*; *see also* Botchek v. Osco Drug, 909 F.2d 1458 (9th Cir. 1990) (unpublished) (affirming Botcheck v. Osco Drug, No. CV 87-78M (D. Mont. Feb. 8, 1989), *cited in* MONT. L. WK., Feb. 25, 1989, at 6, where the court held that a previous employer's "negative response" to an inquiry regarding the applicants work performance and personality did not constitute blacklisting).
253. 241 Mont. 230, 786 P.2d 662 (1990) (distinguishing Nasi v. Dept. of Highways, 231 Mont. 395, 753 P.2d 327 (1988)).

for an action under the WDEA.[254] The court reasoned that the legal issues in the unemployment compensation proceeding, which dealt with whether there was disqualifying misconduct, are not the same as the "good cause" issue which is presented in a WDEA action.[255]

B. *Insurance Coverage*

Generally, the Montana courts have held that ordinary comprehensive liability insurance policies do not provide coverage for suits brought under the WDEA. In *Daly Ditches Irrigation District v. National Surety*,[256] the Montana Supreme Court held that a comprehensive general liability insurance policy did not provide coverage for wrongful discharge claims, but noted that there may be coverage for some torts associated with a wrongful termination case, e.g., defamation, libel, and other claims defined under the policy.[257] In *Maule v. St. Paul Mercury Insurance*,[258] the Ninth Circuit, in an unpublished decision, affirmed the decision of the Montana federal court[259] which held that WDEA claims are not covered by an employer's comprehensive general liability policy. The employer's argument that the discharge was unintentional was held to be contrary to the WDEA, which does not provide for a "negligent termination" action which might otherwise implicate a liability insurance policy.[260]

Similarly, in *Essex Insurance Co. v. Counterpoint, Inc.*,[261] the Montana federal court held that a wrongful discharge action under the WDEA was not covered by a professional liability insurance policy.[262] The court reasoned that business decisions involving termination of employees did not involve the "professional services" which were covered by the policy.[263] The Montana federal court in *Essex* distinguished it from the case of

254. *Niles*, 241 Mont. at 236, 786 P.2d at 666.

255. *Id.*; *accord* Myers v. Dept. of Agric., 232 Mont. 286, 756 P.2d 1144 (1988); Majerus v. Skaggs Alpha Beta, 245 Mont. 58, 799 P.2d 1053 (1990); Fetherston v. Asarco, 635 F. Supp. 1443 (D. Mont. 1986).

256. 234 Mont. 537, 764 P.2d 1276 (1988).

257. *Daly Ditches*, 234 Mont. at 540-41, 764 P.2d at 1277-78.

258. 904 F.2d 41 (9th Cir. 1990) (unpublished).

259. *See* Maule v. St. Paul Mercury Ins., No. 89-35580 (D. Mont. May, 24 1990), *cited in* MONT. L. WK., June 2, 1990, at 5.

260. *Id.*

261. 19 Mont. Fed. Rpts. (Mont. L. Wk. Co.) 526 (D. Mont. Aug. 3, 1995).

262. *Essex*, 19 Mont. Fed. Rpts. (Mont. Law Week Co.) at 532.

263. *Id.* at 530.

Missoula School District v. Pacific Employers Insurance Co.,[264] in which the Montana Supreme Court had held in a declaratory judgment suit that school board trustees were in fact covered under their insurance policy for a discharge settlement reached with a tenured teacher who challenged her termination under the Tenured Teachers Act.[265] In *Missoula Sch. Cty. Dist.*, the supreme court rejected the insurer's contention that the discharged employee's claim was "strictly and solely a claim for breach of the employment contract and that the damages she received in her settlement were for breach of that contract."[266] The court mandated that coverage under the particular insurance agreement be accorded to the insured employer because the insurer had promised to pay "all sums which the trustees became legally obligated to pay as damages as a result of claims first made during the policy period by reason of any act, error, or omission in services rendered in the discharge of school district duties . . . ."[267] The court concluded that there was no question that the discharged employee's claim "arose by reason of omission in services rendered in the discharge of the trustee's duties.[268] Thus for purposes of the issue before the court, [the insurance agreement] provided coverage to the school district for the conduct that gave rise to the teacher's claim."[269]

C. Defamation and Privileges

The Montana courts have been required to address whether terminated employees may assert defamation and libel claims because of allegedly false statements made by an employer in the course of an investigation or termination of an employee. In *Wall v. Corral West Ranchwear, Inc.*,[270] the terminated employee asserted that the employer had made false statements in a letter to the unemployment compensation commission of the Montana Department of Labor and Industry, and that he had been further defamed because the company president had requested the preparation of a document detailing allegedly false

264. 263 Mont. 121, 866 P.2d 118 (1993).
265. *Essex*, 19 Mont. Fed. Rpts. (Mont. Law Week Co.) at 532; *see also* MONT. CODE ANN. § 20-4-207 (1995) (codifying the Tenured Teachers Act).
266. *Missoula Sch. Dist.*, 263 Mont. at 128, 866 P.2d at 1122.
267. *Id.* at 129, 866 P.2d at 1122.
268. *Id.*
269. *Id.*
270. 17 Mont. Fed. Rpts. (Mont. Law Week Co.) 489 (D. Mont. Aug. 23, 1994).

allegations of theft.[271] The Montana federal court held that the employer's communications with the Montana Department of Labor and Industry were clearly privileged communications made in "an official proceeding authorized by law."[272] Likewise, other internal company documents used to document theft allegations were held to be qualifiedly privileged pursuant to section 27-1-804(1) of the Montana Code, because they were made "to a person interested therein . . . by one . . . who is requested by the person interested to give the information."[273]

Similarly in *Bridgewater v. Department of Institutions*,[274] the terminated employee alleged several defamatory statements had been made to the county attorney's office, the press, and others, about the employee's alleged involvement in providing prescription and non-prescription drugs to patients at the Montana State Mental Hospital.[275] The court affirmed the lower court's grant of summary judgment. The court concluded that the communications, made in the proper discharge of an official duty, were privileged publications pursuant to section 27-1-804 of the Montana Code.[276] Thus, even statements of a state official to the press as a part of an on-going investigation were made in his official capacity, and were absolutely privileged.[277]

D. Discovery

The Montana courts have been required to address the problems which frequently arise in employment termination or discrimination actions, when information about coemployees and supervisors are sought by the terminated employee during discovery. In *Mitchell v. Metropolitan Life Ins.*,[278] the Montana federal court denied a discovery request for a broad category disclosure of the identity of certain employees, due to the fact that production of the records would be burdensome and involved privacy issues.[279] However, information as to two specific fellow

271. *Wall*, 17 Mont. Fed. Rpts. (Mont. Law Week Co.) at 490.
272. *Id.* at 490-91 (quoting Skinner v. Posteria, 194 Mont. 257, 633 P.2d 672, 676 (1981)).
273. *Id.* at 491 (quoting MONT. CODE ANN. § 27-1-804 (1993)).
274. No. 94-362 (Mont. Aug. 25, 1995) (unpublished opinion).
275. *Bridgewater*, No. 94-362, at 2.
276. *Id.* at 8.
277. *See id.*
278. 7 Mont. Fed. Rpts. (Mont. Law Week Co.) 475 (D. Mont. Nov. 5, 1990).
279. *Mitchell*, 7 Mont. Fed. Rpts. (Mont. Law Week Co.) at 479.

employees was deemed discoverable.[280] The court noted that privacy issues could be alleviated through the imposition of protective orders.[281]

Similarly, in the context of employment discrimination claims, the Montana Supreme Court in the case of *Montana Human Rights Division v. City of Billings*[282] upheld the employer's claim that the personnel records of co-employees were subject to the constitutional privacy protection of the 1972 Montana Constitution.[283] However, the court went on to hold that a "compelling state interest" existed in disclosure of such private and confidential information in an employment discrimination claim.[284] The court, reasoning that discrimination claims could not be properly investigated or analyzed without access to comparative information that necessarily required disclosure of the records of other employees, held that privacy interests could be protected through measures that insured the confidentiality of employees' records that were produced during the course of the litigation.[285]

E. Expert Witnesses

In wrongful discharge suits brought before the adoption of the WDEA, plaintiffs had successfully utilized expert witness testimony to support termination claims based upon the theory of the breach of the implied covenant of good faith and fair dealing.[286] Following adoption of the WDEA, the Montana courts addressed the use of expert witnesses in employment termination litigation in several decisions. In *Heltborg v. Modern Machinery*,[287] the court upheld the use of expert witness testimony if the testimony was confined to ultimate issues of fact.[288] However, in *Heltborg* the court held that an expert witness was erroneously allowed to present legal conclusions on the precise

280. *Id.* at 475.
281. *Id.*
282. 199 Mont. 434, 649 P.2d 1283 (1982).
283. *See Montana Human Rights Div.*, 199 Mont. at 443-44, 649 P.2d at 1288 (citing MONT. CONST. art. II, § 10).
284. *Id.* at 446-47, 649 P.2d at 1290.
285. *Id.*
286. *See, e.g.*, Flanigan v. Prudential Fed. Sav. & Loan, 221 Mont. 419, 429, 720 P.2d 257, 263 (1986) (holding that expert witness was properly allowed to testify that the employer had committed 13 violations of its own policies); Crenshaw v. Bozeman Deaconess Hosp., 213 Mont. 488, 503-04, 693 P.2d 487, 494-495 (1984).
287. 244 Mont. 24, 795 P.2d 954 (1990).
288. *Heltborg*, 244 Mont. at 32, 795 P.2d at 958.

issue to be presented to the jury; the witness repeatedly stated legal conclusions which amounted to instructing the jury on how to decide the case.[289] Similarly, in *Kizer v. Semitool, Inc.*,[290] the court again held that a plaintiff's expert witness was erroneously allowed to render legal conclusions that the employer had breached the implied covenant of good faith and fair dealing, and that the employer's reduction in force was not legitimate.[291] The court emphasized that expert witnesses are not allowed to render legal conclusions on the very issues to be decided by the jury.[292]

However, in *Kearney v. KXLF Communications, Inc.*,[293] an expert witness was properly allowed to testify that the employer had violated its own personnel policies by failing to perform annual written evaluations of employees pursuant to the employer's own written forms which had been developed and used for that purpose.[294] Similarly, in *Boyer v. Navajo Northern and Black Eagle (Montana Refining)*,[295] the Montana federal court denied an employer's motion to exclude the testimony of the same expert who had been used improperly in the *Kaiser* and *Heltborg* cases (presumably so long as the expert did not repeat his legal conclusions).

In *Miller v. Citizens State Bank*,[296] the Montana Supreme Court was urged to adopt a new standard of "good cause" based upon whether the employee "satisfied the general obligations of an employee described" in section 39-2-401 of the Montana Code[297] and "whether the employer followed industry standards of progressive discipline."[298] The court rejected the contention "in light of the statutory definition adopted by the legislature" defining good cause.[299] Based upon the court's decision in that case, expert testimony that an employer did not follow industry standards of progressive discipline, or adopt other enlightened

289. *Id.*
290. 251 Mont. 199, 824 P.2d 229 (1991).
291. *Kaiser*, 251 Mont. at 207, 824 P.2d at 233.
292. *Id.*
293. 263 Mont. 407, 869 P.2d 772 (1994).
294. *Kearney*, 263 Mont. at 417, 869 P.2d at 778.
295. No. CV-93-52-GF (D. Mont. Dec. 1, 1994), *cited in* MONT. L. WK., Dec. 10, 1994, at 7.
296. 252 Mont. 472, 830 P.2d 550 (1992).
297. MONT. CODE ANN. § 39-2-402 (1995) states: "One who for good considerations agrees to serve another must perform the service and must use ordinary care and diligence therein so long as he is employed."
298. *Miller*, 252 Mont. at 474, 830 P.2d at 552.
299. *Id.*

personnel policies, would not be allowed in an action brought under the WDEA, which limits an employee's claim to the case where the employer violated the "express" provisions of its "written" personnel policies.[300]

F. Recovery of Attorneys' Fees

In *Myers v. Department of Agriculture*,[301] the Montana Supreme Court held that a suit to recover for a wrongful termination and resulting lost wages does not give rise to a claim for recovery of attorneys' fees under the attorneys' fee provision of the Montana Wage Protection Act.[302] Without discussion the court summarily concluded that, because the Montana Wage Protection Act was not the basis for the plaintiff's recovery, attorneys' fees were not to be allowed.[303] However, the action arose prior to the adoption of the WDEA.[304]

G. Ethical Considerations

Wrongful discharge litigation almost universally requires the discharged employee's attorneys to contact and interview, or depose, managerial and supervisory employees, as well as non-supervisory, co-employees of the plaintiff. This litigation dynamic frequently implicates Rule 4.2 of the Rules of Professional Conduct which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[305]

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300. *Id.*

301. 232 Mont. 286, 756 P.2d 1144 (1988).

302. *Myers*, 232 Mont. at 292, 756 P.2d at 1148 (discussing MONT. CODE ANN. §§ 39-3-204 to -206, -214 (1987)).

303. *Id.* at 292, 756 P.2d at 1148.

304. *But see* Gagliardi v. Denny's Restaurants, Inc., 815 P.2d 1362, 1374-75 (Wash. 1991). The Washington Supreme Court held that attorneys' fees which are allowed under provisions of the Washington wage protection statutes may also be applied to recovery of wages which are recovered in a wrongful discharge suit, notwithstanding the defendant employer's argument that the plaintiff was awarded "back wages," not "wages owed" under the wage protection statute. The Washington court refused to adopt the rationale of *Myers*, that wages within the scope of the Wage Protection Act are wages *actually* earned, and not wages which *could* have been earned but for an allegedly wrongful discharge. *Id.*; *see also Myers*, 232 Mont. at 292, 756 P.2d at 1147.

305. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1996).

In *Porter v. ARCO Metals Co.*,[306] the Montana federal court discussed the parameters of allowable *ex parte* contact with former employees of the defendant employer, some of whom were former managerial employees who had been involved in the personnel action at issue.[307] The court concluded that both ex-employees and current employees could be contacted *ex parte* "so long as they do not have significant managerial responsibility in the matter in question."[308] The Montana federal court cited a "thorough and well reasoned opinion" of the Washington Supreme Court in which the court held that the term "party" as used in the Code of Professional Conduct encompasses "only those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, i.e., those employees who have 'speaking authority' for the corporation."[309] Plaintiff's counsel may not make *ex parte* contact with employees fitting this description.

H. Burden of Proof

In *Kenyon v. Stillwater County*,[310] the Montana Supreme Court addressed the burden of proof requirements of both the employee and employer in litigating a combined WDEA and age discrimination claim.[311] A former secretary for a county attorney brought an action contending that her termination was predicated on both age discrimination[312] and the county's failure to follow its personnel policies[313] and was without good cause.[314] In response to the employer's motion for summary judgment, the district court concluded the employer had shown a non-discriminatory reason for Kenyon's termination—poor work performance—and that plaintiff had failed to respond with facts showing a discriminatory motivation for her discharge.[315] The Montana Supreme Court agreed.[316] In citing the United Supreme Court decision in *McDonnell Douglas Corp. v. Green*,[317] the

306. 642 F. Supp. 1116 (D. Mont. 1986).
307. *Porter*, 642 F. Supp. at 1117-18.
308. *Id.* at 1118.
309. Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984).
310. 254 Mont. 142, 835 P.2d 742 (1992).
311. *Kenyon*, 254 Mont. at 147-48, 835 P.2d at 745-46.
312. *Id.* at 148, 835 P.2d at 744.
313. *Id.* at 149-50, 835 P.2d at 747.
314. *Id.* at 149, 835 P.2d at 746.
315. *Kenyon*, 254 Mont. at 148, 835 P.2d at 745.
316. *Id.*
317. 411 U.S. 792 (1973).

Montana Supreme Court held that the *McDonnell-Douglas* shifting burden of proof requirements applied to the claim before it.[318] Thus, the plaintiff must first establish a prima facie case based upon facts which would support a reasonable inference that he or she was denied employment because of discriminatory criteria.[319] If that burden is met, the employer must rebut the inference of discrimination with evidence of legitimate, non-discriminatory reasons why plaintiff was not hired or was terminated.[320] Upon such a showing, the burden shifts back to the employee to demonstrate with specific facts that the employee's explanation is a pretext.[321] The court went on to conclude that in the case before it the plaintiff had failed to present facts to support an inference that the employer's explanation for dismissal was a pretext and rejected the employee's "conclusionary assertions of discrimination" contained in her affidavit opposing the motion for summary judgment.[322]

However, in *Heiat v. Eastern Montana College*,[323] the Montana Supreme Court substantially modified the *Kenyon* rule. The court concluded that in *Kenyon* it had mistakenly followed the lead of many state and federal courts and had erroneously superimposed the three-step *McDonnell-Douglas* trial analysis into the summary judgment context, without specifically noting that the plaintiff's burden in defending against a motion for summary judgment differs from the plaintiff's burden at trial.[324] At trial the *McDonnell-Douglas* and *Kenyon* three-step process is still logical.[325] However, at the summary judgment stage the *Kenyon* rule is not appropriate.[326] Accordingly, the court in *Heiat* overruled that portion of *Kenyon* which required a plaintiff to initially "adduce facts which, if believed, supports reasonable inference that he or she was denied an employment opportunity" and, in rebuttal, to "demonstrate with specific facts that the employer's explanation is a pretext."[327] The court went on to explain:

> Instead, we now adopt an analysis consistent with the *Burdine*

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318. *Kenyon*, 254 Mont. at 148, 835 P.2d at 745.
319. *Id.*
320. *Id.* at 148, 835 P.2d at 746.
321. *Id.* at 147-48, 835 P.2d at 745-46.
322. *Id.* at 148, 835 P.2d at 746.
323. ___ Mont. ___, 912 P.2d 787 (1996).
324. *Heiat*, ___ Mont. at ___, 912 P.2d at 793.
325. *Id.*
326. *Id.*
327. *Id.* at ___, 912 P.2d at 793 (citing *Kenyon*, 254 Mont. at 148, 835 P.2d at 146).

> test, yet more compatible with the traditional analysis used in the summary judgment context. The plaintiff must allege a prima facie case . . . by asserting that plaintiff is a member of a protected class, and that a male colleague with the same credentials, who performs substantially the same work, receives a higher salary. The employer seeking summary judgment must then come forward with a legitimate nondiscriminatory reason for the disparity. If the employer comes forward with a legitimate nondiscriminatory reason, the plaintiff must then, in addition to having alleged a prima facie case in the complaint, produce evidence that establishes her prima facie case as well as evidence which raises an inference that the employer's proffered reason is pretextual.[328]

The court concluded that the test "we now establish for a plaintiff in a discrimination case to survive a motion for summary judgment comports with Rule 56, M.R.Civ.P., in that a plaintiff is required to raise an *inference* of pretext, as opposed to *proving* pretext."[329] The court's opinion might suggest that a similar shifting of the burden of proof would apply to a motion for summary judgment filed in a retaliatory discharge suit under the public policy provisions of the WDEA in which the employer's true motivation for the termination is similarly at issue.

V. CONCLUSION

Whether or not the WDEA has met the expectations of the Montana business community when it was enacted can be debated.[330] Likewise, whether this innovative effort to balance the rights of employers and employees has actually resulted in a fair allocation of rights and remedies between their competing interests, can also be debated.[331] Certainly, whether the Act has pro-

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328. *Id.*; *see also* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993) (refining the *McDonnel Douglas* and *Bourdine* tests by requiring the plaintiff to show that a false reason was given and that discrimination was the reason).

329. *Heiat*, ___ Mont. at ___, 912 P.2d at 794.

330. The "good cause" provision of the Act would appear to have expanded, not restricted, the opportunities of terminated employees to challenge employment termination decisions. While not faced with what they perceived to be the more uncertain standards under common law challenges to the "at-will" rule, Montana employers are now perhaps faced with more frequent "garden variety" litigation of ordinary discharge claims. The Act also has done little to change the fact that the discharge claim is most likely to be resolved only after a full blown jury trial.

331. The four-year limitation on recoveries has been arguably unfair to the older worker who may have been unemployed for more than four years. Indeed, in some cases workers in their forties and fifties may experience an extremely lengthy period of unemployment, particularly in the occupational fields in which they may have

vided actual certainty and precise definition to how employment disputes should be resolved is also open for further discussion.[332]

However, the Montana WDEA has in fact resulted in a workable scheme that is understandable and predictable. In just less than a decade, judicial decisions interpreting the WDEA have, for the most part, fleshed it out appropriately. They have provided positive and rational interpretations of its most unique features and have, again, for the most part, been true to the intent of its framers. The decisions of the courts in Montana have certainly provided insight and guidance to future Montana legislators who may wish to clarify the Act or adjust the rights and remedies of the competing interests it addresses. These decisions also suggest substantive and procedural improvements for legislators in other jurisdictions who may be considering adoption of similar legislation.

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devoted most of their working careers. *See* Regan, *supra* note 35, at 599-602. Ironically, younger or minimum wage employees may also suffer from the restrictions on remedies because their over-all four year wage loss may not be substantial enough to justify pursuit of such a claim.

332. Whether or not the Act has caused parties to employment disputes to utilize arbitration is highly debatable. Certainly, the frequent reports of the district court trial verdicts in wrongful discharges cases reported in the MONTANA LAW WEEK, compared to the rare reports of an arbitration decision, would suggest that the WDEA has not induced the extensive use of arbitration that some proponents of the WDEA had envisioned. The apparent lack of arbitration in employment disputes may be the result of the Act's making a party risk an award of attorneys' fees to the opposing party the fulcrum point for choosing arbitration over litigation. Also, the lack of discovery in arbitration greatly handicaps the plaintiff employee, who needs to obtain discovery of documents and witnesses who are uniquely in the possession or employment of the employer.