Montana Law Review

Volume 66
Issue 2 *Summer 2005*

Article 3

7-2005

Resolving Employee Discharge Disputes under the Montana Wrongful Discharge Act (MWDA), Discharge Claims Arising Apart from the MWDA, and Practice and Procedure Issues in the Context of a Discharge Case

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RESOLVING EMPLOYEE DISCHARGE DISPUTES UNDER THE MONTANA WRONGFUL DISCHARGE ACT (MWDA), DISCHARGE CLAIMS ARISING APART FROM THE MWDA, AND PRACTICE AND PROCEDURE ISSUES IN THE CONTEXT OF A DISCHARGE CASE

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I. INTRODUCTION

Montana has undergone four distinct law-making periods regarding the legality of employee discharges.

The first period was the "at-will" employment period. During this period, absent an employment contract, the employment relationship between employers and employees could be terminated by either "at-will." Employers could discharge employees for cause or no cause.

In 1982, the second period was ushered in with the Montana Supreme Court's recognition that employment contracts

contained a covenant of good faith and fair dealing,[2] and in 1983, the court held that discharged employees alleging breach of the covenant had a tort claim.[3] Thereafter, the court developed the law surrounding the tort remedy. This period was criticized, by some, as being marked with uncertainty as to the law and for high plaintiff jury damage awards.

The third period commenced in 1987 when the Montana Legislature, reacting to these complaints, enacted the Wrongful Discharge from Employment Act, hereafter "the Act," or "MWDA."

Today, Montana law on employee discharges is largely defined by the MWDA. The Act defines three plaintiff claims arising out of discharge, limits plaintiff damages and makes the Act the exclusive discharge remedy (i.e., the MWDA preempts common law remedies).

The fourth period occurred in 1993, when the Montana Supreme Court determined the MWDA only preempted claims for "discharge," not for pre-discharge or post-discharge employer misconduct.

This article is the first comprehensive treatment of the MWDA and pre-discharge/post-discharge claims since 1996.[4] The article is divided into three topics: (1) the Montana Wrongful Discharge Act; (2) common law causes of action apart from the MWDA; and (3) practice and procedure issues that arise in discharge cases.

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2. In Gates v. Mont. Ins. Co., 196 Mont. 178, 184, 638 P.2d 1063, 1067 (1982), [hereinafter *Gates I*], the Montana Supreme Court determined that the implied covenant of good faith and fair dealing applied to employment contracts.

3. In 1983, one year after *Gates I*, the Gates case again came before the court. Gates v. Life of Mont. Ins. Co., 205 Mont. 304, 668 P.2d 213 (1983) [hereinafter *Gates II*]. In *Gates II*, the court declared that breach of the covenant of good faith and fair dealing was a tort (as opposed to a contract breach, which would entitle plaintiffs to damages based on "loss of bargain"), thus allowing plaintiffs to recover punitive damages and full consequential damages. *Id.*, 205 Mont. at 307, 668 P.2d at 214-15.

4. For three exceptional articles on the Montana Wrongful Discharge Act and the Montana Supreme Court's development of wrongful discharge common-law prior to, and shortly after the Act, see Shelly 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); LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94 (1990); and Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge From Employment Act (WDEA)*, 57 MONT. L. REV. 375 (1996).

II. THE MONTANA WRONGFUL DISCHARGE ACT

The MWDA provides discharged employees with three separate causes of action for wrongful employer discharges.[5] An employee has a cause of action where: (1) the employer does not have "good cause" for the employee's discharge; (2) the employee's discharge constitutes a violation of the employer's own written personnel policy; and (3) the employee's discharge is in retaliation for the employee's refusal to violate a "public policy" or for reporting a violation of a "public policy."[6]

A. Discharge

1. Discharge Generally

The Act defines "discharge" as a constructive discharge or any other termination of employment, including resignation,[7] elimination of the job, layoff for lack of work, failure to recall or rehire, and other cutbacks in the number of employees for legitimate business reasons.[8] This definition of discharge recognizes two types of discharge: (1) where the employer severs the employment relationship; and (2) in the case of a constructive discharge, where the employee severs the relationship. These will be discussed separately.

2. Constructive Discharge

A constructive discharge "is no less wrongful than an actual

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5. Motarie v. N. Mont. Joint Refuse Disposal Dist., 274 Mont. 239, 243, 907 P.2d 154, 156 (1995) (the Act provides three separate causes of action, two of which, public policy violation and violation of an employer personnel policy, are applicable to both probationary and permanent employees, while lack of "good cause" is applicable to only permanent employees).

6. MONT. CODE ANN. § 39-2-904(1) (2003) (emphasis added) provides:

(1) A discharge is wrongful only if:

(a) it was in retaliation for the employee's refusal to violate *public policy* or for reporting a violation of *public policy*;

(b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(c) the employer violated the express provisions of its own written *personnel policy*.

7. The inclusion of the word "resignation" in the definition of a "discharge" refers to an employee's voluntary secession of employment in the context of a "constructive discharge."

8. MONT. CODE ANN. § 39-2-903(2) (2003).

firing. . . ."[9] The Act defines a constructive discharge:

> [It] 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. [It] . . . 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.[10]

Determining whether there has been a constructive discharge "rests with the finder of fact who must decide, under the totality of circumstances, whether the employer has rendered working conditions so intolerable that resignation is the only reasonable alternative,"[11] and such a finding must be supported by more than the employee's subjective judgment that working conditions are intolerable.[12]

Telling an employee that he or she has a choice—resign or be fired—is a constructive discharge, even when the employee signed an acknowledgment that retirement was voluntary and accepted a retirement package.[13] For instance, telling a manager that he or she was terminated as manager, followed by an offer for a sales position, was considered a constructive discharge.[14]

However, a demotion, where the employee continued to work, was not considered a constructive discharge.[15] Rather, there must be a complete severance of employment.[16]

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9. Pankrantz Farms, Inc. v. Pankrantz, 2004 MT 180, ¶ 72, 322 Mont. 133, ¶ 72, 95 P.3d 67, ¶ 72.

10. MONT. CODE ANN. § 39-2-903(1).

11. *Pankrantz*, ¶ 72 (citing Jarvenpaa v. Glacier Electric Coop., Inc., 271 Mont. 477, 481, 898 P.2d 690, 692 (1995)).

12. Kestell v. Heritage Health Care Corp., 259 Mont. 518, 524, 858 P.2d 3, 11 (1993). *See also* Bellanger v. Am. Music Co., 2004 MT 392, 325 Mont. 221, 104 P.3d 1075.

13. *See* Jarvenpaa v. Glacier Electric Coop., Inc., 271 Mont. 477, 898 P.2d 690 (1995).

14. *See* Howard v. Conlin Furniture No. 2, Inc., 272 Mont. 433, 901 P.2d 116 (1995).

15. Clark v. Eagle Sys., Inc., 279 Mont. 279, 285, 927 P.2d 995, 998-99 (1996).

16. *Id. See also Pankrantz*, ¶ 73 (plaintiff, a shareholder employee of a family farm, was not constructively discharged when his salary was reduced and he continued to reside at the corporations ranch house and perform services to the corporation; salary cuts were consistent with past practices of reducing salaries for economic purposes and affected each shareholder equally).

3. *Discharge During the Probationary Period*

The Act provides that a lack of "good cause" claim is not available to probationary employees.[17] Montana Code Annotated section 39-2-904(2) states that:

> (a) During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason.[18]
>
> (b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire.[19]

As a general rule, a probationary employee may bring a claim for a "public policy" violation or a violation of the employer's own written "personnel policies," but a claim based on lack of "good cause" is subject to a motion to dismiss.[20] However, Montana police officers, and potentially other Montana public employees subject to a statutory probationary period, may be precluded from bringing any of the three separate claims for relief.[21]

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17. MONT. CODE ANN. § 39-2-904(1)(b).

18. *Id.* § 39-2-904(2)(a). This provision was added by the Legislature in 1987. *See* 1987 Mont. Laws 1765.

19. MONT. CODE ANN. § 39-2-904(2)(b). This provision was added by the Legislature in 2001. *See* 2001 Mont. Laws 3051.

20. The Act provides three separate causes of action, two of which, public policy violation and violation of an employer personnel policy, are applicable to both probationary and permanent employees, while lack of "good cause" is applicable to only permanent employees. *Motarie*, 274 Mont. at 243, 907 P.2d at 156. *See also* Bond v. The Bon, Inc., No. 97-35292, 1998 U.S. App. LEXIS 26947 (9th Cir. Oct. 16, 1998).

21. In Ritchie v. Town of Ennis, 2004 MT 43, 320 Mont. 94, 86 P.3d 11, the Montana Supreme Court determined that, because police officers are subject to specific statutory probationary periods, during which time their term may be revoked, Montana Code Annotated section 7-32-4113 provides that a police officer must "serve a probationary period of not more than one year . . . [and] [a]t any time before the end of such probationary term the mayor or the manager in those cities operating under the commission-manager plan, may revoke such appointment." A police officer who's employment was revoked during the probationary period has no claim under any of the three causes of action under the MWDA. *Ritchie*, ¶ 26. The court said allowing a claim under the MWDA for a probationary police officer "would be to substantially remove [the statutory] discretion and ignore that obligation a mayor has to determine who is fit to police the law of a town after reviewing conduct during a probationary period." *Id.* ¶ 24. The effect of *Ritchie*, as noted in Justice Leaphart's dissent, is that a probationary police officer may be discharged for refusing an employer directive to violate public policy or for reporting a public policy violation (i.e., whistle blower). *Id.* ¶ 39 (Leaphart, J., dissenting). At first glance, Justice Leaphart appears to have made an excellent point; a law enforcement officer may be discharged for refusing an employer directive to violate the law. See discussion of "public policy" violations *infra* pp. 341-43. There need not be an actual violation; it is sufficient that the employee reported what he reasonably believed to be a violation. *Motarie*, 274 Mont. at 243-45, 907 P.2d at 156-57 (1994).

If the employer is going to impose a probationary period and take advantage of the MWDA provision that, during the probationary period, it need not demonstrate "good cause," it must establish that the probationary period existed at the outset of the employee's employment and that it was in effect at the time of discharge.[22] An employer may provide a probationary period far in excess of six months.[23] However, it must be specific if it wants a probationary period in excess of the statutory six months.[24]

Where the purpose of the probationary period is to determine an employee's competence, not just a prescribed period of experience, and the employee's conduct or performance is not satisfactory during the prescribed probationary period, an employer may extend a probationary period to afford the employee additional time to obtain competence and for its review of the employee.[25] However, where the probationary period is prescribed by law, the employer may not extend the probationary period.[26]

B. Good Cause

The MWDA defines "good cause" as a "reasonable job-related grounds for dismissal based on a failure to satisfactorily

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Should probationary police officers be making ad hoc unilateral decisions regarding the "law," or should such an inexperienced officer be expected to defer to superiors on such questions?

Finally, *Ritchie* appears equally applicable to firefighters who are statutorily required to serve a six month probationary period and "thereafter the mayor or manager may nominate and, with the consent of the council or commission, appoint such . . . firefighters. . . ." MONT. CODE ANN. § 7-33-4122 (2003). *See also* Hunter v. City of Great Falls, 2002 MT 331, 313 Mont. 231, 61 P.3d 764.

22. Whidden v. John S. Nerison, Inc., 1999 MT 110, ¶ 21, 294 Mont. 346, ¶ 21, 981 P.2d 271, ¶ 21.

23. Hobbs v. City of Thompson Falls, 2000 MT 336, ¶ 18, 303 Mont. 140, ¶ 18, 15 P.3d 418, ¶ 18. *See also* Roos v. Kircher Pub. Sch. Bd. of Trs., 2004 MT 48, ¶ 3, 320 Mont. 128, ¶ 3, 86 P.3d 39, ¶ 3 (a Montana public school teacher normally serves a probationary period of three years).

24. *See* Mitchell v. V-1 Propane, 19 Mont. Fed. Rep. 409 (1995) (a date reference on which employee starts to receive benefits is not sufficient to establish a probationary period).

25. *Hunter*, ¶¶ 13, 18 (probationary firefighter not subject to a statutory probationary period of six months where "[n]othing in the statute limits a firefighter's probationary term to six months," and firefighter was orally informed that the probationary period may be extended if his performance was insufficient to advance from probationary to non-probationary status).

26. *See, e.g.*, *Hobbs*, ¶¶ 17-18 (police officers are subject to a statutory probationary period "of not more than 1 year").

perform job duties, disruption of the employer's operation, or other legitimate business reason."[27]

1. Good Cause Reasons for Discharge

The most common legitimate reasons for a discharge are based on: (1) employee conduct–employment "rule" violations[28] and/or failure to perform in conformity with the employer's legitimate expectations[29]; and (2) business needs unrelated with employee conduct (e.g., economic slowdown resulting in layoffs, business reorganization resulting in loss of positions, contracting out the work resulting in loss of positions, etc).[30]

2. Plaintiff's Attack of Defendant's Assertions of "Good Cause"

The plaintiff's attack of defendant's assertion of "good cause" involves one or more of the following biases: (1) *General Denial*–there is no plaintiff misconduct (i.e., the plaintiff did not commit a rule violation or have a performance failure), nor was there any other alleged "legitimate business reason" (e.g., no economic slowdown, reorganization, contracting-out, etc.); (2) *Pretext*–the defendant's alleged reason for discharge (e.g., employee misconduct/other legitimate business reason) may have occurred, but is asserted by the defendant merely as pretext to hide the real and impermissible reason for discharge;[31] (3) *Mitigating Factors*–the defendant's alleged

27. MONT. CODE ANN. § 39-2-903(5). *See* Cole v. Valley Ice Garden, L.L.C., 2005 MT 21, ¶ 28, 325 Mont. 388, ¶ 28, __ P.3d __, ¶ 28 (a non-MWDA case, where the court relies on the Act for guidance in determining the meaning of the employment contract term "cause").

28. The MWDA cites one example of this broad category: "disruption of the employer's operation." *Id. See also* Morton v. M-W-M, Inc., 263 Mont. 245, 868 P.2d 576 (1994) (plaintiff's conduct was dishonest and disloyal—plaintiff took vacation to tend to her family and used the vacation to work at a competitor restaurant). Other examples of typical employer rules relate to clocking in/out, gaining permission to leave work early, appropriate use of sick leave, insubordination, etc.

29. The MWDA uses the term "failure to satisfactorily perform job duties." MONT. CODE ANN. § 39-2-903(5).

30. The MWDA specifically addresses this category by stating that discharge includes "elimination of the job, layoff or lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason." *Id.* § 39-2-903(2) (defining "discharge").

31. For example, a defendant might allege that a plaintiff had performance failures. The plaintiff may acknowledge such failures, but claim that they are asserted only to cover for the real and impermissible reason for discharge. That is, he was discharged because, as coach of the after-school little league team on which the defendant's daughter plays, he did not coach and/or play the daughter to the satisfaction

reason(s) for discharge may have occurred, but it is not a "reasonable job-related grounds for dismissal" (i.e., there were mitigating factors).[32]

In *Buck v. Billings Montana Chevrolet, Inc.*, the Montana Supreme Court stated that a legitimate reason "is a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business."[33] The U.S. District Court for the District of Montana has said that "[l]egitimacy is negated if the reason given for the discharge is invalid as a matter of law, if it rests on a mistaken interpretation of the facts, or if it is merely a pretext for some other illegitimate reason."[34]

Based on *Buck*, some Montana employers believe they are entitled to discharge an employee who failed to "satisfactorily perform job duties." The problem with this conclusion is that the failure to perform job duties must, under the Act's definition of good cause, be a "reasonable job-related grounds for dismissal."[35] However, it has been determined that not all failures to perform may properly be placed at the feet of the employee. In *Andrews v. Plum Creek Manufacturing,*[36] the Montana Supreme Court determined that an employee who received no training, no written job standards, no job evaluations, inadequate supervision, and no disciplinary warnings could survive a motion for summary judgment. The court rejected the employer's position that failure to perform job duties constitutes just cause, regardless of who is at fault. Implicitly, the court determined that, in determining "good cause," it is relevant to consider whether the employer is to blame for the employee's failures.[37]

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of the defendant. Or, alternatively, a defendant might allege that it experienced an economic slowdown, which necessitated the layoff of the plaintiff. The plaintiff may acknowledge the slowdown, but claim the real reason for the discharge was not the slowdown, but because of his treatment of the defendant's daughter on the little league team.

32. For a list of mitigating factors see *infra* pp. 381-82.

33. 248 Mont. 276, 281-83, 811 P.2d 537, 540-41 (1991) (new owner of a car dealership replaced executive manager, a long-term faithful employee of previous owner, pursuant to new owner's policy of replacing existing manager when purchasing a business–this is acceptable when employee occupies a "sensitive managerial or confidential position" but not so, for lower echelon employees).

34. Kelly v. Federal Express Corp., 28 Mont. Fed. Rep. 135, 147 (2001).

35. MONT. CODE ANN. § 39-2-903.

36. 2001 MT 94, ¶¶ 16, 24, 305 Mont. 194, ¶¶ 16, 24, 27 P.3d 426, ¶¶ 16, 24.

37. *Id.* ¶¶ 17-19. This does not result in the conclusion that an employee may criticize her supervision, create supervisor animosity, and then claim that her discharge

In *Marcy v. Delta Airlines*,[38] Judge Molloy, of the Montana Federal District Court, determined that a discharge was "arbitrary because an admittedly exemplary employee was summarily fired for mistakes in a time-keeping system that was shown to be imperfect and sloppily administered."[39] Thus, where the employee's performance failure is the fault (or at least partial fault) of the employer, the discharge may not be sustained.

A major obstacle the plaintiff must overcome in attacking the defendant's allegation of "good cause" is overcoming the defendant's likely motion for summary judgment. This topic is discussed in further detail later in this article.

C. Personnel Policy

1. Personnel Policy Generally

An employee discharge is wrongful where an employer violates the express provisions of its own written personnel policy.[40] Such a violation generally occurs in two situations: (1) where the employer violates its written policy that an employee may be discharged for only specified grounds, and the specified grounds are not present (i.e., the policy states that discharge is proper for a first offense only in the cases of insubordination, theft, striking a supervisor or co-employee, etc.); or (2) the written policy provides that discharge may occur only after an employee is accorded specified procedures that were not accorded the plaintiff (e.g., a hearing, progressive discipline, performance evaluations, training, transfer, etc.).

Some employers have policies that a discharge may occur only after some form of procedural process, including progressive discipline, or, in the absence of progressive discipline, for certain specified offences. For example:

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was unlawful based solely on supervisor animosity.

38. 21 Mont. Fed. Rptr. 507 (1997), *aff'd* 166 F.3d 1279 (9th Cir. 1999).

39. *Id.* at 511.

40. MONT. CODE ANN. § 39-2-904(1)(c). *See, e.g.*, Kearney v. KXLF Communications, Inc., 263 Mont. 407, 417-18, 869 P.2d 772, 778 (1994) (despite the fact that employer's formal personnel policies did not contain a policy requiring evaluations, it was a question of fact, to be determined by the jury, whether employer's personnel policy expressly required annual evaluations of all its employees where plaintiff's expert testified that such policy existed when other employees were evaluated by employer using a reprinted form, and a supervisor had issued a memorandum calling for evaluations).

1. Absent an offense defined in subsection (2), an employee will not be discharged absent progress/corrective discipline. Progressive/corrective discipline will normally include a verbal warning, a written warning, and a suspension prior to discharge. However, the nature and extent of the progressive/corrective discipline will depend on the circumstances.

2. The following shall be causes for immediate discharge:

a) Bringing illegal intoxicants, narcotics or other dangerous drugs to the work place, using such drugs while at the work place, or reporting for duty under the influence of such drugs;

b) Insubordination;

c) Bringing to or keeping at the work place any firearm or knife with a blade in excess of three inches or any other weapon. . . .

2. *Employer Unilateral Changes to Personnel Policies*

One issue that may arise is the effect, if any, of an employer's unilateral change in its written personnel policy during the term of the employee's employment.

In *Jewell v. North Big Horn Hospital District*, the Wyoming Supreme Court determined that the employer's unilateral change in its employee handbook, from a policy according more job security, to a policy according less security, is invalid absent the employer's retention of the right to make unilateral changes or specific considerations.[41] Finding no consideration, the court determined that the change in policy was invalid as to an employee employed at the time of the change.[42]

Thereafter, in *Arch of Wyoming, Inc. v. Sisneros*, the Wyoming Supreme Court determined that, where the employer's policy contained language on the last page of the handbook stating that the employer may unilaterally modify the handbook, it was precluded from making an effective modification for existing employees.[43] The court said the right to unilaterally modify must be "conspicuous and unambiguous," and the employer's later revision of the handbook, in which it moved the disclaimer from the last page to the first page, failed to change the nature of its relationship with its employees.[44]

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41. 953 P.2d 135, 137-38 (Wyo. 1998).

42. *Id.* at 138.

43. 971 P.2d 981, 984 (Wyo. 1999).

44. *Id. See also* Doyle v. Holy Cross Hosp., 708 N.E.2d 1140 (Ill. 1999) (employer inclusion of a disclaimer in handbook does not affect the rights of pre-existing employees where employer had not reserved the right to amend the handbook and provided no

Similarly, the Alabama Supreme Court determined that a seniority provision included in the company's "policy-and-procedure manual," which was only given to supervisors and not included in the "employee handbook," applied to non-supervisory employees when those employees were orally informed that the policy applied to them.[45] However, the employer's disclaimer was not effective absent evidence that the non-supervisory employees assented to the disclaimer.[46]

The California Supreme Court has determined that an employer may unilaterally terminate a policy that contains a specified condition of employment of indefinite duration, if the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested interests.[47]

D. Retaliation–Public Policy

A discharge is wrongful if it is in retaliation for an employee's refusal to violate public policy or for reporting a violation of public policy.[48] The Act defines a "public policy" as "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."[49] The policy must be one that is for the benefit of the public as a whole, not one that simply benefits a particular employee.[50]

To establish a public policy violation, it is not necessary that a plaintiff demonstrate the employer in fact violated the constitutional, statutory, administrative rule prohibition, or duty, but only that she had a reasonable good faith basis to believe that a violation had, or would, occur.[51] "Thus, regardless of whether the employee's report actually results in a citation or

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consideration other than continued employment).

45. Stokes v. Amoco Fabrics & Fibers Co., 729 So.2d 330, 332 (Ala. 1997).

46. *Id.*

47. Asmus v. Pac. Bell, 999 P.2d 71, 81 (Cal. 2000).

48. MONT. CODE ANN. § 39-2-904(1)(a).

49. *Id.* § 39-2-903(7).

50. *See* Foster v. Albertsons, Inc., 254 Mont. 117, 835 P.2d 720 (1992) (sexual harassment is against public policy–employee was discharged for refusing supervisor's sexual advances). *See also* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

51. *Motarie*, 274 Mont. at 244-45, 907 P.2d at 157 (the MWDA "protects a good faith 'whistle blower'"). *See also* Stuart v. Beech Aircraft Corp., 753 F. Supp. 317 (D. Kan. 1990), *aff'd*, 936 F.2d 584 (10th Cir. 1991). *But see* Bott v. Rockwell Int'l, 908 P.2d 909, 914 (Wash. Ct. App. 1996) (no cause of action where employee has only good faith belief that a violation has occurred; need an actual violation).

investigation, the test is whether the employee made the report in good faith."[52] Additionally, the employee complaint about the violation of public policy need only be directed to the employer, not the legal authority that has jurisdiction over the alleged violation.[53]

However, even if the court will allow a cause of action based on an employee's reasonable and good faith belief, there is no cause of action based on the employee's conduct that is merely a difference of opinion with the employer.[54] Additionally, even though the court will allow a cause of action based on the employee's honest and reasonable belief, it may not result in punitive damages because an arguable difference of opinion between the employer and the employee regarding the "duty/prohibition does not constitute 'actual fraud or malice'" necessary for punitive damages.[55]

The reason plaintiffs often include a "public policy" allegation in a complaint is that it is the only claim for which the statute provides for punitive damages. The Act provides that, if a public policy violation is established, 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. . . ."[56]

The following categories of behavior may involve "public policy" violations:[57]

1. Preserving the Integrity of the Judicial Process

Examples of conduct that involve preserving the integrity of the judicial process are: refusal to commit perjury on the employer's behalf;[58] refusal of an employer to grant an employee

52. *Motarie*, 274 Mont. at 245, 907 P.2d at 157.

53. *See* Phillips v. Gemini Moving Specialists, 74 Cal. Rptr. 2d 29 (Cal. Ct. App. 1998).

54. *See* House v. Carter-Wallace, Inc., 556 A.2d 353 (N.J. Super. Ct. App. Div. 1989) (no cause of action where action is based on a mere difference of opinion with employer).

55. *See* Trifad Entm't, Inc. v. Anderson, 2001 MT 227, 306 Mont. 499, 36 P.3d 363.

56. MONT. CODE ANN. § 39-2-905(2) (2003). In *Trifad*, the Montana Supreme Court defines the terms "actual fraud or actual malice." *Trifad*, ¶ 53. See also MONT. CODE ANN § 27-1-221 (2003), regarding proof of punitive damages.

57. *See generally* Nina G. Stillman, *Wrongful Discharge: Contract, Public Policy, and Tort Claims*, 614 PRACTICING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 843 (Oct.-Nov. 1999).

58. *See, e.g.*, Merkel v. Scowill, Inc., 570 F. Supp. 133 (S.D. Ohio 1983).

leave to honor a subpoena or serve jury duty; and exercise of a citizen's right to file suit.

2. Refusal to Commit or Participate in an Unlawful Act or Reporting of Same

If there is a statutory prohibition (e.g., against the release of pollutants) or duty (e.g., duty to file accurate and complete information with a regulatory agency) on the employer or others, an employer's demand that its employee violate the statute, under threat of discharge, creates a "retaliation" public policy claim.[59]

For example, assume a mental health service employee was discharged by her employer for allegedly unsatisfactory work performance and failure to follow the employer's rules. The employee argues that the real reason for her discharge was her advocacy for the mental health patients. She cites Montana statutes that require mental health organizations to address the needs of such patients and statutory professional standards that require health service professionals to do likewise. This fact situation gives rise to a claim based on a violation of public policy.[60]

If the statute that creates the duty/prohibition provides a private cause of action (i.e., the plaintiff employee may sue the employer directly under the statute), the plaintiff does not have a cause of action under the MWDA. The Act provides that it does not apply where a plaintiff has a "procedure or remedy" under a statute that provides a duty/prohibition.[61]

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59. Prohibition/duty statutes almost always concern health, safety, or welfare issues. Examples include: anti-trust laws, bankruptcy protection laws, consumer protection laws, public health and safety laws, official misconduct laws, codes of ethics, etc.

60. *See generally* Dabbs v. Cardiopulmonary Management Serv., 188 Cal. App. 3d 1437 (4th Dist. 1987) (nurse discharged for refusing to work on an understaffed shift that she felt endangered the heath and safety of the patients; statute provided the basis for the public policy violation supporting her wrongful discharge claim), *overruled on other grounds by* Gantt v. Sentry Ins., 4 Cal. Rptr. 2d 874 (1992).

61. MONT. CODE ANN. § 39-2-912 (2003). *See* Hash v. U.S. West Communications Serv., 268 Mont. 326, 332, 886 P.2d 442, 226 (1994) (Montana Human Rights Act provides the exclusive remedy for discrimination based on "protected class status" (e.g., gender, race, religion, etc.)); Deeds v. Decker Coal Co., 246 Mont. 220, 223, 805 P.2d 1270, 1271-72 (1990) (plaintiff has a right or remedy if and when the General Counsel issues a complaint alleging a violation of the National Labor Relations Board); Tonack v. Mont. Bank of Billings, 258 Mont. 247, 254-55, 854 P.2d 326, 331 (1993) (plaintiff may file suit under both the MWDA and the statute providing the duty/prohibition—here the Federal Age Act—but the MWDA suit will not proceed until it is determined that

3. Codes of Ethics

Professional employees frequently have ethical standards imposed by their professional organizations. Generally, these standards are not incorporated in statutory provisions or administrative rules. However, if these standards are incorporated into statutes or administrative rules, and the employer insists that the employee perform inconsistent with the professional standards coupled with retaliation for failing to do so, the employee will have a claim based on a public policy violation.

E. Exemptions

The MWDA provides for three exemptions: (1) employees who have a procedure or remedy under any other state or federal statute for contesting the discharge must rely upon those statute(s) to contest the discharge, not the MWDA; (2) employees covered by a written union-management collectively bargained agreement for a specific term must rely on their contract remedies for contesting the discharge; and (3) any employee covered by a written employment agreement for a specific term must rely on contract remedies for contesting the discharge.[62] The purpose of these exemptions is to assure that an unlawfully discharged employee may rely on the MWDA only as a last resort in contesting the discharge. If the employee has an alternative statutory cause of action and/or a contract cause of action, those claims are the employee's exclusive cause of action.

1. A Statute, Other Than the MWDA, Providing a Procedure or Remedy for Contesting the Discharge

The prospective plaintiff is to rely on any other Montana state or federal statute that provides a procedure or remedy for

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plaintiff does not have a cause of action under duty/prohibition statute).

62. MONT. CODE ANN. § 39-2-912 provides:

This [Act] 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. The 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, disability, 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.

contesting the discharge. So, for example, if a former employee alleges that she was discharged because of her gender, she must contest the discharge by bringing a sex discrimination action under the Montana Human Rights Act[63] and/or Title VII of the Federal Civil Rights Act of 1964.[64] The Montana Supreme Court has held that the Montana Human Rights Act provides the exclusive remedy for cases alleging a discriminatory discharge based on protected class status, as defined in the Montana Human Rights Act (e.g., race, gender, religion, age, handicap, color, national origin, etc.).[65]

When there is an alternative procedure or remedy, a plaintiff may pursue that cause of action concurrently with a MWDA suit. However, the plaintiff will not be entitled to remedial relief under the MWDA until it is determined that the other statutory remedy does not provide some measure of redress.[66] If it is ultimately determined that the plaintiff is not entitled to a remedy under the "other" federal or state statute, she may proceed with the MWDA case.[67]

Accordingly, the plaintiff will want to file all state and federal claims for relief—particularly to protect against statute of limitations problems—and seek a motion to stay the MWDA case until it is determined if remedial relief is obtained elsewhere. However, the U.S. District Court for the District of Montana has allowed a plaintiff to proceed simultaneously on alternative theories under the Montana Human Rights Act and the MWDA.[68]

2. *Written Collective Bargaining Agreement*

In cases where an employee is covered by a union-management collective bargaining agreement, the employee's rights set forth in the agreement are her exclusive discharge rights.[69]

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63. MONT. CODE ANN. §§ 49-2-101 to 602 (2003).

64. 42 U.S.C. 2000e (2000).

65. *Hash*, 268 Mont. at 332, 886 P.2d at 446.

66. *Tonack*, 258 Mont. at 255, 854 P.2d at 331.

67. Shultz v. Stillwater Mining Co., 277 Mont. 154, 157, 920 P.2d 486, 488 (1996).

68. Salvagni v. Placer Dome U.S., Inc., 23 Mont. Fed. Rep. 1, 3 (1997).

69. Indeed, assuming the employer is in the private sector (e.g., Albertsons, as opposed to a governmental employer) and is also a statutorily defined "employer" for the purposes of the Federal National Labor Relations Act, the federal Act preempts the MWDA, and the employee must pursue the method provided in the collective bargaining agreement to contest the discharge. *See* discussion *infra* pp. 352-53. *See also* Barnes v.

If, as is the normal case, the collective bargaining agreement has a grievance procedure that includes the right to contest the discharge, the employee must exhaust the grievance procedure before instituting a MWDA action.[70] "[U]nion employees 'must attempt use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress,' for a 'contrary rule which would permit an . . . employee to completely sidestep available grievance procedures in favor of a lawsuit has little to recommend it.'"[71]

Additionally, if the collectively bargained agreement makes arbitration the exclusive remedy for contesting a grievance not resolved in the employee's favor, arbitration is the employee's exclusive remedy.[72]

The fact that the union determines that a bargaining unit member's discharge grievance lacks merit, and, thus, refuses to take the matter to arbitration, does not allow the unit member to avoid the exclusivity of the collectively bargained grievance procedure/arbitration provisions and bring a claim under the MWDA.[73] Additionally, the fact that the bargaining unit member was denied a forum to litigate her dispute is not inconsistent with the MWDA, nor is the Act unconstitutional because she is deprived a remedy or access to a court when the

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Stone Container Corp., 942 F.2d 689, 693 (9th Cir. 1991); Local Union No. 206, Int'l Bhd. of Elec. Workers v. Qwest Corp., 30 Mont. Fed. Rep. 543 (2003) (bargaining unit employee could not sue for breach of contract for discharge as his exclusive remedy was provided for in the collective bargaining agreement; agreement provided that he may file a grievance, but, because he had been employed less than a year, he was precluded from seeking arbitration).

70. *See, e.g.*, Lueck v. United Parcel Serv., 258 Mont. 2, 8, 851 P.2d 1041, 1045 (1993) (involving a private sector employer); McKay v. State, 2003 MT 274, ¶ 28, 317 Mont. 467, ¶ 28, 79 P.3d 236, ¶ 28 (involving a public sector employer).

71. *Lueck*, 258 Mont. at 8, 851 P.2d at 1044-45 (citing Brinkman v. Mont., 224 Mont. 238, 244, 729 P.2d 1301, 1305-06 (1986)).

72. *See generally McKay*, 317 Mont. 467, 79 P.3d 236. In *McKay*, the court stated, "The purpose of the rule is to encourage arbitration of disputes. . . . To allow a member of the collective bargaining unit to completely sidestep available procedures would . . . exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements and effectively deprive employers and unions of the ability to establish a uniform and exclusive method for the orderly settlement of employee grievances." *Id.* ¶ 25 (citing Small v. McRae, 200 Mont. 497, 504, 651 P.2d 982, 986 (1982), and *Brinkman*, 224 Mont. at 245, 729 P.2d at 1306). *See also* LaFournaise v. Mont. Dev. Ctr., 2003 MT 240, ¶ 19, 317 Mont. 283, ¶ 19, 77 P.3d 202, ¶ 19 (an arbitration provision included in a collectively bargained agreement is not a contract of adhesion because arbitration provisions are negotiated into the contract by employer and union).

73. *LaFournaise*, ¶¶ 24-29.

union refused to take her case to arbitration.[74] This is true for employees employed both in the private sector and for those employed by a the State of Montana or any subdivision of the state.[75]

3. Written Contracts of Employment

The Act also excepts employees covered by written contracts of employment for a specific term. Undoubtedly, the largest class of Montana employees who have written contracts of employment for a specific term are school teachers (tenured and non-tenured).[76]

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74. *Id.*

75. *See Lueck*, 258 Mont. 2, 851 P.2d 1041 (involving a private sector employer), and *McKay*, 317 Mont. 467, 79 P.3d 236 (involving a public sector employer).

76. The Montana Code provides the circumstances under which both tenured and non-tenured teachers may be discharged.

NON-TENURE TEACHERS:

The procedure for dismissing a non-tenured teacher is set out in Montana Code Annotated section 20-4-207 (2003). A non-tenured teacher may be terminated "before the expiration of teacher's employment contract for good cause." MONT. CODE ANN. § 20-4-207(1) (2003). The legislature did not define "good cause" or provide any guidelines.

Dismissal of a teacher may be recommended by (1) a district superintendent; (2) a principal in a district without a superintendent; or (3) a county superintendent or a trustee in a district without a superintendent or a principal. *Id.* § 2-4-207(2). A person recommending the dismissal of a teacher must give notice of the recommendation in writing to each trustee of the district and the teacher. This notice must state clearly and explicitly the specific reasons for the recommendation. *Id.* § 2-4-207(2)(b).

Once the recommendation has been received by the trustees, they must notify the teacher of his or her right to a hearing before the trustees. Such notice must be delivered either by certified mail or by personal notification with a signed receipt returned. Unless the teacher has waived the right to a hearing, the teacher and the trustees shall agree to a hearing date not less than 10 days or more than 20 days from the date of notice of the dismissal. *Id.* § 20-4-207(3)(a).

Unless the recommendation was made by a county superintendent, the person recommending the dismissal may suspend the teacher with pay until the hearing date if the teacher's behavior, that led to the recommendation, is contrary to the welfare of the students or the effective operation of the school district. *Id.* § 20-4-207(4).

Any teacher who had been dismissed may appeal the dismissal in writing within 20 days under the guidelines set forth in Montana Code Annotated section 20-4-204. If the teacher is not covered by a collective bargaining agreement, the appeal is made to the county superintendent. If the teacher is covered by a collective bargaining agreement, the appeal shall be directed to an arbitrator. *Id.* § 20-4-207(5).

TENURE TEACHERS:

A tenured teacher is a teacher (not including superintendents or specialists) who has accepted an offer of employment for "the fourth consecutive year of employment . . . in a position requiring teacher certification." *Id.* § 20-4-203. Like the non-tenured teacher, the tenured teacher may be discharged for "good cause." *Id.* § 20-4-203(4). The individuals who may recommend discharge of a tenured teacher are the same as those who may recommend the discharge of a non-tenure

The Montana Supreme Court has determined that, if the parties enter into a written contract of employment for a specified term, the employees' rights are governed by that agreement and not the MWDA.[77] A written contract's failure to contain a "specific term" does not trigger the MWDA's exemption, and the discharge claim may be brought under the MWDA.[78] A written contract of employment that states that the employee serves "at will" does not exempt the employee from the MWDA.[79]

F. Limitation of Actions

The Act has a one-year statute of limitations (i.e., suits "must be filed within 1 year after the date of discharge").[80] The "date of discharge" commences from the date the "employee is no longer earning compensation from the employer, . . . and this can only occur upon a complete severance of the employer-employee relationship."[81]

If the employer maintains written internal procedures,[82] under which an employee may appeal a discharge within the organizational structure of the employer, the employee must

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teacher, and the appeal process for both tenured and non-tenured teachers is also the same.

There are, however, slight variations in the notice requirements. Under Montana Code Annotated section 20-4-204, the person recommending the termination of a tenure teacher's services is not required to give notice to the teacher as they are under Montana Code Annotated section 20-4-207. Instead, the notice is only required to be given by the trustees (in the same manner set forth in Montana Code Annotated section 20-40-207), and, in addition, the trustees are required to give the teacher a copy of Montana Code Annotated section 20-40-204 for informational purposes.

See generally Baldridge v. Board of Trustees, Rosebud County Sch. Dist. No. 19, 287 Mont. 53, 951 P.2d 1343 (1998); Michelle Bryan, Note, Baldridge v. Board of Trustees: *A Case for Reform of Montana's Tenured Teacher Dismissal Process*, 61 MONT. L. REV. 251 (2000).

77. Farris v. Hutchinson, 254 Mont. 334, 340, 838 P.2d 374, 378 (1992); Schaal v. Flathead Cmty. Coll., 272 Mont. 443, 447, 901 P.2d 541, 543 (1995).

78. Basta v. Crago, Inc., 280 Mont. 408, 415, 930 P.2d 78, 82 (1996). *See also* Swain v. Mont. Cincha Co., 288 Mont. 538, 963 P.2d 456 (1998) (non-citeable opinion).

79. *See* Schillo v. Avista Communications of Mont., Inc., 30 Mont. Fed. Rep. 436, 439 (2002) (citing Whidden v. John C. Nerison, Inc., 1999 MT 110, ¶ 21, 294 Mont. 346, ¶ 21, 981 P.2d 271, ¶ 21).

80. MONT. CODE ANN. § 39-2-911 (2003).

81. Redfern v. Mont. Muffler, 271 Mont. 333, 335-36, 896 P.2d 455, 456 (1995) (fact that employee had accrued five days of vacation time, which he was compensated for on discharge date, does not extend statute of limitations an extra five days).

82. Other than those specified in Montana Code Annotated section 39-2-912.

first exhaust those procedures prior to filing a MWDA claim. The employee's failure to initiate and exhaust available internal procedures is an employer defense to an action brought under the MWDA.[83] If the employer's internal procedures are not completed within ninety days from the date the employee initiates the internal procedures, the employee may file a MWDA action, and the employer's internal procedures are considered exhausted. The one-year statute of limitation period is tolled until the procedures are exhausted, but the employer's internal procedures may not extend the statute of limitation period more than 120 days.[84]

If the employer maintains written internal procedures, under which an employee may appeal a discharge within the organizational structure of the employer, the employer must, within seven days of the date of the discharge, notify the discharged employee of the existence of such procedures and supply the discharged employee with a copy of them.[85]

G. Remedies[86]

The MWDA provides that the normal remedies consist of lost wages[87] and fringe benefits[88] for a period not to exceed four

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83. *See* Offerdahl v. Mont., 2002 MT 5, ¶ 20, 308 Mont. 94, ¶ 20, 43 P.3d 275, ¶ 20 (employer's policy required plaintiff to file a grievance; plaintiff's earlier statement, that he planned to file a grievance, did not satisfy the filing requirement) *Id.* ¶¶ 14-15.

84. MONT. CODE ANN. § 39-2-911(2).

85. MONT. CODE ANN. § 39-2-911(3). *See* Eadus v. Wheatland Mem'l Hosp. & Nursing Home, 279 Mont. 216, 220, 926 P.2d 752, 755 (1996) (failure to notify plaintiff of the internal procedures, and supply her with a copy of those procedures, relieves plaintiff from exhausting the procedures prior to filing suit despite the fact that a copy of the procedures has been supplied to her in the past). *See also* Casiano v. Greenway Enter., Inc., 2002 MT 93, 309 Mont. 358, 47 P.3d 432 (failure of employer to supply employee with notice and copy of procedures relieved employee from complying with employer's internal procedure; employer orally notified plaintiff of the procedures on the day of discharge, but failed to provide a written copy of the procedures within seven days) *Id.* ¶¶ 18-19, 21.

86. *See* MONT. CODE ANN. § 39-2-905.

87. Montana Code Annotated section 39-2-903(6) defines "lost wages" as "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."

88. Montana Code Annotated section 39-903(4) defines "fringe benefits" as "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 termination." Some fringe benefits are intended to vest from the commencement of employment, or, at least upon the completion of the probationary period, e.g., medical and life insurance. However, an employer may not want vacation and possible sick leave benefits to vest until after the employee worked a certain period of time, e.g., six months,

years from the date of discharge, together with interest. The award is not mandatory, but within the discretion of the trier of fact.[89]

"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 interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment."[90]

The employee may recover punitive damages for a retaliation based on a public policy claim "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" public policy.[91] Montana law defines "clear and convincing" and "actual fraud or actual malice."[92]

Apart from the remedies stated above, "[t]here is no right under any legal theory to damages for wrongful discharge . . . for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages. . . ."[93]

H. Arbitration

Montana Code Annotated sections 39-2-914 and 39-2-915 authorize the arbitration of MWDA suits and provides

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and that they do not vest entirely until the completion of an ever longer time period. For example, in the case of "vacation leave," an employer may want to give an employee ten days of leave during the first year of employment, but not intend vesting of all ten days upon the commencement of employment, but that vesting begins one month from the start of employment and that the full vesting occurs proportionally over the remaining ten months, at the rate of one day per month. If the employer wants proportional vesting it should make it clear in the benefit plan. Otherwise, the benefits may be deemed to vest upon the commencement of employment. *See* Carbery v. Tundra Holdings, Inc., 2002 MT 292N, 313 Mont. 422, 63 P.3d 513 (non-citeable opinion) (employer was forced to admit that full vacation leave vested upon the commencement of worker's employment even though employee was discharged after only one month of employment).

89. Weber v. State, 253 Mont. 148, 153, 831 P.2d 1359, 1362 (1992); Tyner v. Park County, 271 Mont. 355, 361-62, 897 P.2d 202, 206-07 (1995).

90. MONT. CODE ANN. § 39-2-905(1). *See also* Weiler v. Leibenguth, 1 Mont. Fed. Rptr. 360, 364-68 (1989) (employee that returns to school after making a diligent effort to find work has properly mitigated and jury may award lost wages).

91. MONT. CODE ANN. §§ 39-2-904(1)(a), 905(2).

92. *See* Trifad Entm't, Inc. v. Anderson, 2001 MT 227, ¶ 53, 306 Mont. 449, ¶ 53, 36 P.3d 363, ¶ 53 (defining "actual fraud" and "actual malice"). *See also* MONT. CODE ANN. § 27-1-221(5) (regarding the standard of proof required for punitive damages).

93. MONT. CODE ANN. § 39–2-905(3). *See Cole*, 2005 MT 21, 325 Mont. 388, __ P.3d __ (contract providing for liquidated damages in the event of breach).

incentives for parties to arbitrate. Subsection 914 provides:

> (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:[94]
>
> > (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. Once an offer to arbitrate has been accepted, neither the district court nor the parties have a right to continue a previously filed lawsuit.[95] The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.[96]

Section 39-2-915 provides:

> 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.[97]

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94. If the offer to arbitrate fails to specifically comply with the requirements listed in Montana Code Annotated section 39-2-914(2)(a), (b), and (c), the offer is voidable. Penden v. La. Pac. Corp., 27 Mont. Fed.Rptr. 517, 519-21 (2000).

95. *See* Burkhart v. Semitool, Inc., 2000 MT 201, ¶ 23, 300 Mont. 480, ¶ 23, 5 P.3d 1031, ¶ 23 (once an offer to arbitrate has been accepted, neither the district court, nor the parties have a right to continue a previously filed lawsuit).

96. MONT. CODE ANN. § 39-2-914 (2003).

97. MONT. CODE ANN. § 39-2-915. *See* Haider v. Frances Mahon Deaconess Hosp., 2000 MT 32, ¶¶ 3-4, 298 Mont. 203, ¶¶ 3-4, 994 P.2d 1121, ¶¶ 3-4 (discussing district court's award of plaintiff's attorney fees when employer refused plaintiff's request for arbitration and plaintiff subsequently won in district court); Moore v. Imperial Hotels Corp., 285 Mont. 188, 194, 948 P.2d 211, 215 (1997) (award of attorney fees includes fees incurred on appeal to the Montana Supreme Court).

I. MWDA Preemption of Common-Law Remedies

The MWDA provides that "no claim for discharge may arise from tort or express or implied contract."[98] The MWDA preempts common law tort or contract actions arising out of the discharge. However, a plaintiff may properly state a claim arising out of the employment relationship and involving a discharge where that claim is separate or independent of the discharge.[99] If a common law claim could not arise "but for" the discharge, the plaintiff's claims are inextricably intertwined with, and based upon the termination and are preempted by the Act.[100] These "separate and independent" claims are discussed later.[101]

J. Federal Preemption of the MWDA

Federal preemption of the MWDA under the Supremacy Clause of the U.S. Constitution[102] (i.e., federal law preempts contrary state law) arises any time Congress has enacted legislation that provides the exclusive remedy for employees contesting a discharge. Typically, preemption of the MWDA occurs in two contexts: (1) where the National Labor Relations Act or the Labor-Management Disclosure Act of 1959 applies; and (2) where the Employee Retired Income Security Act applies.

1. National Labor Relations Act (NLRA) & Labor-Management Disclosure Act (LMDA) Preemption

a. NLRA

The NLRA prohibits statutorily defined private sector

98. MONT. CODE ANN. § 39-2-913 (2003).

99. Beasley v. Semitool, Inc., 258 Mont. 258, 263, 853 P.2d 84, 87 (1993) (in an action for breach of contract, breach of the covenant of good faith and fair dealing, and wrongful discharge, plaintiff alleged that employer failed to abide by representations it made during his employment; court determined that, although plaintiff had been discharged, his contract claims were separate from the discharge).

100. Kulm v. Mont. State Univ.-Bozeman, 285 Mont. 328, 333, 948 P.2d 243, 246 (1997) (university professor, who took a position with the understanding the job would last up to four years, was terminated after one year and sued for fraud and negligent representation; the Montana Supreme Court held that his common law claims would not have arisen but-for the termination and, thus, were preempted).

101. *See infra* p. 354.

102. U.S. CONST. art. VI.

employers from discriminating against employees and employment applicants for current or past union activities or for engaging in protected concerted activities (e.g., strikes and other collective activities). It also provides for contract lawsuits for alleged employer breach of the collectively bargained agreement. The Act has been determined to preempt state law that addresses: (1) conduct either protected or prohibited by the Act (*Garmon* preemption);[103] (2) conduct neither protected nor prohibited, but intended by Congress to be left to the free play of economic force between unions and employers;[104] and (3) conduct that involves an interpretation of collectively bargained agreements.[105]

The typical state law claim that is preempted by *Garmon* involves an employee discharged for engaging in union activity.[106] In *Bassette v. Stone Container Corp.*, the Ninth Circuit Court of Appeals determined that an expired collectively bargained agreement, prior to a bargaining impasse, contained a grievance-arbitration provision that preempted a bargaining unit member's MWDA suit.[107] However, when a plaintiff's retaliatory discharge suit involves claims other than the National Labor Relations Act protections/prohibitions (e.g., sexual harassment), and does not turn on any meaning of the collective agreement, the suit is not federally preempted,[108] but plaintiff's exclusive remedy may be other than the MWDA.[109]

b. LMDA

The LMDA regulates internal union affairs (e.g., the union member-union relationship) and preempts state law that

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103. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245-46 (1959). *Garmon* does not preempt matters of peripheral concern to the federal scheme or matters deeply rooted in local feelings. *Id.* at 243-44.

104. Local 20, Teamsters v. Morton, 377 U.S. 252, 258-59 (1964); Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wis. Employment Relations Comm'n., 427 U.S. 132, 149-51 (1976).

105. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 403-12 (1988). This is often not considered a separate category of NLRA preemption, but, in actuality, is considered as part of *Garmon* preemption. *See* Bassette v. Stone Container Corp., 25 F.3d 757 (9th Cir. 1994).

106. *See Deeds*, 246 Mont. 220, 805 P.2d 1270 (1990) (alleging employer retaliatory action against employees engaged in strike).

107. 25 F.3d at 760.

108. Foster v. Albertsons, Inc., 254 Mont. 117, 127, 835 P.2d 720, 727 (1992). *See also* Miller v. County of Glacier, 257 Mont. 422, 426-27, 851 P.2d 401, 403 (1993).

109. *See supra* pp. 344-45.

interferes with this relationship. The Montana Supreme Court has determined that the LMDA authorizes elected union officers to appoint their own administrative subordinates (e.g., hire and fire) and, consequently, a MWDA action by a subordinate who had been discharged by an elected union officer has been held preempted.[110]

2. Employee Retirement Income Security Act (ERISA) Preemption

The purpose of ERISA is to insure that employees with employment-related retirement and welfare benefits (other than retirement, such as insurance, vacation, sick leave, etc.) are regulated. There are three common employee causes of action under ERISA: (1) wrongful employer denial of benefits;[111] (2) wrongful employer interference with an employee's attainment of any right to participate in a benefit plan;[112] and (3) wrongful employer discrimination against employees for exercising any right under the benefit plan.[113]

ERISA preemption occurs when an employee brings a MWDA suit alleging that the employer's "motive" for the discharge involved denial, interference or discrimination regarding employment plan benefits.[114] There is no preemption if the loss of benefits is a mere consequence of the termination, rather than the principal motivating factor.[115]

III. COMMON LAW CAUSES OF ACTION APART FROM THE MWDA

As discussed previously, the MWDA preempts any claim for discharge that "may arise from tort or express or implied contract."[116] However, if the plaintiff's/employee's claim does not arise from "discharge," the employee may state a tort or contract claim apart from the MWDA. The Montana Supreme Court has

110. Vitullo v. Int'l Bhd. of Elec. Workers, Local 206, 2003 MT 219, ¶ 32, 317 Mont. 142, ¶ 32, 75 P.3d 1250, ¶ 32.

111. 29 U.S.C. § 1132(a)(1) (2000).

112. *Id.* § 1140 (2000).

113. *Id.*

114. Campbell v. Aerospace Corp., 123 F.3d 1308, 1312-14 (9th Cir. 1997) (ERISA preempts state law wrongful termination claims only when plaintiff's principal theory involves a benefit-related motive); Sorosky v. Burroughs Corp., 826 F.2d 794, 799-800 (9th Cir. 1987) (the issue on ERISA preemption is employer motive). *See also* 29 U.S.C. § 1144 (2000).

115. *Campbell*, 123 F.3d at 1313.

116. MONT. CODE ANN. § 39-2-913.

determined that the MWDA only preempts claims for "discharge," not for pre-discharge or post-discharge conduct.[117] Thus, if an employer violates any rights of an employee derived from an employment contract (express or implied), or violates any legal duties apart from contract (i.e., a tort), in a context other than "discharge," the employee has a claim apart from the MWDA.

Plaintiffs have been particularly inventive in pleading tort and contract claims arising out of the employment relationship, but not directed at discharge. Plaintiffs often cite three reasons for such claims: (1) to collect greater damages than provided under MWDA;[118] (2) to obtain a longer statute of limitations;[119] and (3) to avoid the possibility that the defendant will seek to arbitrate (because non-MWDA claims are not subject to the Act's arbitration provision, e.g., a plaintiff may refuse to arbitrate without risk).[120]

A. Contract Claims Not Preempted by the MWDA

In *Beasley v. Semitool,* the plaintiff/former employee brought three claims against his former employer: (1) breach of an oral contract (based on promises of bonuses, raises, higher bonuses, and stock options); (2) breach of the implied contract covenant of good faith and fair dealing; and (3) wrongful discharge.[121] A Montana district court, on the employer's motion for summary judgment, dismissed the plaintiff's express contract claims and implied contract claim involving the covenant of good faith and fair dealing.[122] The Montana Supreme Court reversed, and reinstated both of the contract

117. *Beasley,* 258 Mont. at 263, 853 P.2d at 87. For other similar cases, *see* Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA),* 57 MONT. L. REV. 375, 403-07 (1996).

118. Damages are limited to lost pay and benefits and interest for a term not to exceed four years. The employee may also recover reasonable amounts expended in searching for, obtaining, or relocating to new employment. From that amount, interim earnings must be deducted. MONT. CODE ANN. § 39-2-905(1). Punitive damages are available based on a retaliation/public policy violation and then only if the plaintiff demonstrates by "clear and convincing evidence that the employer engaged in actual fraud or actual malice." *Id.* § 39-2-905.

119. The statute of limitations under the MWDA is one year. *Id.* § 39-2-911(1); *Redfern,* 271 Mont. at 335, 896 P.2d at 456.

120. If the plaintiff rejects the defendant's offer to arbitrate, and the plaintiff loses at trial, the plaintiff is responsible for the defendant's attorney fees. MONT. CODE ANN. § 39-2-915.

121. 258 Mont. at 260, 853 P.2d at 85.

122. *Id.,* 258 Mont. at 260, 853 P.2d at 85.

claims.[123] The court determined that the contract claims were independent of the plaintiff's termination, and, thus, were not preempted by the MWDA.[124]

The court distinguished an earlier case, *Dagel v. City of Great Falls*,[125] where the dismissal of the plaintiff's contract and tort claims (breach of the convent of good faith and fair dealing) were proper because they were "completely and inextricably intertwined" with the plaintiff's discharge.[126] In *Dagel*, the plaintiff's claims involved an alleged employer promise of continued employment.[127] Clearly, when the contract claims relate to promises of continued employment, procedural rights prior to any discharge, and contract conditions for discharge, the contract claims are intertwined with the discharge itself. Indeed, if the procedural rights prior to discharge and the conditions for discharge are in writing, a claim under the MWDA may be asserted for violation of the employer's "written personnel policy."[128]

Typically, employment contracts, either express or implied, involve employer promises of wages, hours, fringe benefits, or other terms and conditions of employment, including the duration of the relationship, and the conditions on which the relationship may be terminated. *Beasley* stands for the proposition that if the alleged contract breach addresses wages, hours, fringe benefits, or other terms and conditions of employment apart from discharge, there is no preemption.[129]

B. Tort Claims Not Preempted by the MWDA

If the employer "duty" is imposed by "law," rather than contract, the employee may have a tort action.[130] From the

123. *Id.*, 258 Mont. at 263-64, 853 P.2d at 87.

124. *Id.*, 258 Mont. at 263-64, 853 P.2d at 87.

125. 250 Mont. 224, 819 P.2d 186 (1991).

126. *Beasley*, 258 Mont. at 263, 853 P.2d at 86-87.

127. *Id.*, 250 Mont. at 237, 819 P.2d at 194.

128. MONT. CODE ANN. § 39-2-904(1)(c) (discharging an employee is wrongful when "the employer violated the express provisions of its own written personnel policy").

129. A plaintiff's claims of breach involving the alleged failure of the employer to pay the prescribed wages/salary (including promised increases), provide benefits (health, retirement, vacation, leave, etc.), or grant other terms or condition employment (e.g., advancement, training, autonomy, etc.) are apart from any discharge. *See Beasley*, 258 Mont. 258, 853 P.2d 84.

130. *See* Dan B. Dobbs, THE LAW OF TORTS § 3 (2000) ("contract duties are created by the promises of the parties, while tort duties are created by the courts and imposed as rules of law").

perspective of the plaintiff, a tort action is superior to a contract breach because the remedies for a tort are superior to those for a contract breach. Accordingly, plaintiffs, when possible, will seek a claim in tort rather than contract.

1. Breach of the Covenant of Good Faith

As noted, in 1982, prior to the enactment of the MWDA, the Montana Supreme Court recognized that employment contracts contain an implied covenant of good faith and fair dealing,[131] and, a year later, held that discharged employees, alleging breach of the implied covenant, had a tort cause of action.[132] Initially, plaintiffs relied upon this tort claim in discharge cases. However, after the enactment of the MWDA, which preempts common law claims arising from tort or contract, the court held that breach of the covenant was preempted when it was alleged in the context of a discharge. However, the court has held that the implied covenant is not preempted when it is based on allegations apart from discharge. In *Beasley v. Semitool,* the court allowed the plaintiff, a former employee, to rely on the implied covenant when the allegations involved the employer's failure to comply with promised employee benefits prior to discharge (i.e., pre-termination of oral promises of stock options, bonuses, raises, even higher bonuses and advancement).[133]

2. Intentional or Negligent Infliction of Emotional Distress

The Montana Supreme Court has stated that the tort of infliction of emotional distress is applicable in the employment context. The tort combines the separate torts of intentional and negligent infliction of emotional distress and is established upon proof that the defendant inflicted serious or severe emotional distress on the plaintiff, and such distress was the reasonably foreseeable consequence of the defendant's negligent or intentional act or omission.[134] Serious or severe emotional distress occurs "only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it."[135]

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131. *See supra* note 2.

132. *See supra* note 3.

133. 258 Mont. 258, 262, 853 P.2d 84, 86.

134. Sacco v. High Country Indep. Press, 271 Mont. 209, 232, 896 P.2d 411, 425 (1995).

135. *Id.*, 271 Mont. at 234, 896 P.2d at 426.

There is no recovery "where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor had knowledge."[136] "Other factors to be considered in determining the severity of emotional distress are the intensity and duration of the distress, circumstances under which the infliction of emotional distress occurred, and the party relationships involved."[137] Damages for negligent infliction are limited to compensatory damages. Punitive damages may arise when there is allegation of intentional misconduct and the requirements for statutory punitive damages are proven.[138]

3. Defamation

The Montana Supreme Court recognizes that the tort of defamation may arise in the employment context.[139] Typically, defamation occurs when the employer makes defamatory remarks about a plaintiff during the plaintiff's employment or after employment has terminated.[140] However, truth is a complete defense.[141]

4. Interference with Prospective Business Relationship/Advantage

With this tort, a third party interferes with a discharged employee's ability to obtain future work or pursue other advantages (e.g., prospective business relationships). The interference may be by any means, but in the employment context, it is usually accomplished by communicating negative information to prospective employers, or others, about the

136. *Id.*, 271 Mont. at 234, 896 P.2d at 426.

137. Renville v. Fredrickson, 2004 MT 324, ¶ 13, 324 Mont. 86, ¶ 13, 101 P.3d 773, ¶ 13 (citing *Sacco*, 271 Mont. at 234, 896 P.2d at 426). *See also* Marcy v. Delta Airlines, 18 Mont. Fed. Rptr. 391 (1994).

138. *See* MONT. CODE ANN. § 27-1-220 (2003) (providing for punitive damages); MONT. CODE ANN. § 27-1-221 (providing the required proof for punitive damages–clear and convincing evidence of actual fraud or actual malice).

139. *Sacco*, 271 Mont. at 239, 896 P.2d at 429. *See also* MONT. CODE ANN. § 27-1-801 (2003) (definition of defamation); MONT. CODE ANN. § 27-1-804 (2003) (when defamation is privileged).

140. *Sacco*, 271 Mont. at 214, 896 P.2d at 414 (post-discharge statements to police that plaintiff had stolen company property). Meehan v. Amax Oil & Gas, Inc., 796 F. Supp. 461, 466 (Colo. 1992) (post-discharge statement that plaintiff did a terrible job).

141. *See* Frigon v. Morrison-Maierle, Inc., 233 Mont. 113, 760 P.2d 57 (1988); Palmisano v. Allina Health Systems, 190 F.3d 881 (Minn. 1999) (defamatory statements about former manager's over billing are privileged).

plaintiff. Intentional, and in some instances negligent interference, coupled with defendant's lack of privilege (i.e., no reasonable justification for the interference), is necessary to state a claim.[142]

Traditionally, courts have relied on the defendant's motive, (e.g., ill will or spite) in considering whether the action was privileged. However, if a defendant's activity is a form of "speech," regulation of such speech raises potential constitutional objections, the same objections that arise in defamation cases. Here, the defendant is not liable unless the statement is false, and the defendant is negligent or reckless in failing to state the truth.[143] The only advantage of the tort, over defamation, appears to be that the defendant's wrongful conduct may be other than speech, and, if so, the potential constitutional issues do not arise.

5. Intentional Interference with Existing Business/Employment Relationship

This tort accords plaintiffs a claim against a defendant who has unlawfully interfered with the plaintiff's contractual relationship with another person. In the employment context, the plaintiff must claim the defendant, a third-person, has unlawfully interfered with the employment contract the plaintiff had with her employer. The Montana Supreme Court has recognized this tort and stated that the elements of proof are: (1) that a contract was entered into; (2) that its performance was refused; (3) that such refusal was induced by the unlawful and malicious acts of the defendant; and (4) that damages have resulted to the plaintiff.[144]

The Montana Supreme Court has gone a step further, holding that negligent interference (malice is not required) with a contractual duty states a claim for relief.[145] The court, citing *Prosser, Law of Torts*, states that negligent interference may occur: (1) where a third party negligently interferes with a plaintiff's contractual relationship with another (i.e., third party

142. *See* PROSSER & KEETON ON THE LAW OF TORTS 1010 (W. Page Keeton ed., West Publishing 5th ed. 1984).

143. *Id.* at 1011. *See also* Gertz v. Robert Welsh, Inc., 418 U.S. 323, 339 (1974) (if plaintiff is not a public figure, some degree of fault is required as to falsity); N.Y. Times v. Sullivan, 376 U.S. 254, 280 (1964) (if plaintiff is a public figure, intentional or reckless falsehood is required).

144. Phillips v. Mont. Ed. Ass'n., 187 Mont. 419, 423, 610 P.2d 154, 157 (1980).

145. Hawthorne v. Kober Const. Co., 196 Mont. 519, 522, 640 P.2d 467, 469 (1982).

negligent interference with a plaintiff's employment contract with the employer); or (2) where a contract is between a third party and the employer, and that relationship creates a duty of the third party to the plaintiff/employee.[146] For example, in the latter instance, a defendant could enter into a contract with an employer to supply materials that are necessary for the employer to complete a project. A plaintiff may state a claim for relief if the employer has hired the plaintiff to perform the actual work on the project, and the defendant negligently fails to deliver the materials to the employer, which results in the plaintiff losing work and money.[147]

6. Fraud/Fraudulent Inducement/Misrepresentation

This claim for relief is based on the allegation that the compensation the plaintiff was to receive, how his work was to be assessed, or the other terms and conditions of his employment (e.g., security or promised future benefits) were misrepresented, either at the time of hire, or during the employment relationship.

Montana has recognized claims for actual fraud, constructive fraud, and negligent misrepresentation.

a. Actual Fraud

The Montana Supreme Court has specified nine elements for proof of actual fraud:[148] (1) a representation; (2) falsity of the

146. *Id.*, 196 Mont. at 523-24, 640 P.2d at 470.

147. *Id.*, 196 Mont. at 524, 640 P.2d at 470. The Hawthorne case was not an employment case per se. The facts were: Kober Construction entered into a contract to construct a building at the Billings Metra and contracted with PDM who was to furnish steel for the construction. *Id.*, 196 Mont. at 521, 640 P.2d at 469. The plaintiff, Hawthorne, was hired by Kober to erect the building with the steel supplied by PDM. *Id.*, 196 Mont. at 521, 640 P.2d at 469. Based on representations of PDM and Kober regarding the delivery date of the steel, the plaintiff believed that it could start construction in May or June. *Id.*, 196 Mont. at 521, 640 P.2d at 469. Shipment of the steel was not made until October, and it was shipped in the sequence promised. *Id.*, 196 Mont. at 521, 640 P.2d at 469. As early as March, PDM and Kober knew that the steel would not be available for shipment, but neither informed the plaintiff. *Id.*, 196 Mont. at 521, 640 P.2d at 469. The plaintiff sued both Kober and PDM. *Id.*, 196 Mont. at 521, 640 P.2d at 469. The court held: "by entering into a contract with Kober, PDM has placed itself in such a relation toward Hawthorne, that the law will impose upon PDM an obligation, sounding in tort, to act in such a way that Hawthorne will not be injured." *Id.*, 196 Mont. at 524, 640 P.2d at 470.

148. The elements for proof of actual fraud typically are:

a. A misrepresentation of existing material fact;

b. Made with knowledge of falsity;

representation; (3) materiality of the representation; (4) speaker's knowledge of the falsity of the representation or ignorance of its truth; (5) speaker's intent that it should be relied upon; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation; (8) the hearer's right to rely on representation; and (9) consequent and proximate injury caused by the reliance on representation.[149]

For example, if the employer states facts that are known to create a false impression, unless other facts are disclosed, the plaintiff has a claim for fraudulent concealment or nondisclosure.[150] Where an employer told employees that the facility was growing, when a plan existed to close it, the employees have a claim of intentional or reckless misrepresentation.[151]

b. Constructive Fraud

Constructive fraud does not require all of the proof elements of actual fraud.[152] While actual fraud hinges on a defendant's knowledge and wrongful intent, constructive fraud does not.[153] Constructive fraud is present when a defendant, by words or conduct, creates a false impression concerning important matters and subsequently fails to disclose the relevant fact.[154]

c. Negligent Misrepresentation

The elements of proof for the tort of negligent misrepresentation are: (1) the defendant made a representation as to a past or existing material fact; (2) the representation was untrue, (3) regardless of actual belief, the defendant made the representation without any reasonable grounds for believing it

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c. An intention to induce plaintiff to rely;
d. Justifiable reliance by the plaintiff; and
e. Damages.

See, e.g., Harrison v. Fred S. James, P.A. Inc., 558 F. Supp. 438, 442-43 (Pa. 1978).

149. Bartlett v. Allstate Ins. Co., 280 Mont. 63, 67, 929 P.2d 227, 231-32 (1996). *See also* May v. ERA Landmark Real Estate of Bozeman, 2000 MT 299, ¶ 21, 302 Mont. 329, ¶ 21, 15 P.3d 1179, ¶ 21.

150. Berger v. Sec. Pac. Info. Sys. Inc., 795 P.2d 1380, 1385 (Colo. 1990).

151. Meade v. Cedarapids Inc., 164 F.3d 1218, 1221 (Or. 1999).

152. H-D Irrig. Inc. v. Kimble Properties, Inc., 2000 MT 212, ¶ 26, 301 Mont. 34, ¶ 26, 8 P.3d 95, ¶ 26 (the elements are stated in MONT. CODE ANN. § 28-2-406 (2003)).

153. Durbin v. Ross, 276 Mont. 463, 470, 916 P.2d 758, 762 (1996).

154. *H-D Irrig.*, ¶ 25.

to be true; (4) the representation was made with the intent to induce the plaintiff to rely on it; (5) the plaintiff was unaware of the falsity of the representation, acted in reliance upon the truth of the representation, and was justified in relying upon the representation; and (6) the plaintiff, as a result of its reliance, sustained damage.[155]

7. Prima Facie Tort

Montana does not recognize prima facie tort.[156]

8. Negligent Retention/Supervision

"The tort of negligent retention arises when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee [usually a supervisor] that indicated his [or her] unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment."[157] The plaintiff, another employee, alleges that, had the employer not been negligent, the other work problems would not have occurred.

9. Invasion of Privacy

The common law right to privacy results in the following tort actions: (1) appropriation of another's name or likeness; (2) unreasonable publicity given to another's private life; (3) publicity that unreasonably places another in a false light before the public; and (4) an unreasonable intrusion upon the seclusion of another.[158]

The Montana Supreme Court had defined an invasion of privacy as a "wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or

155. Yellowstone II Dev. Group, Inc. v. First Amer. Title Co., 2001 MT 41, ¶ 78, 304 Mont. 223, ¶ 78, 20 P.3d 755, ¶ 78, *cited with approval in* Osterman v. Sears, Roebuck & Co., 2003 MT 327, ¶ 32, 318 Mont 342, ¶ 32, 80 P.3d 435, ¶ 32.

156. *See* Pospisil v. First Nat'l Bank of Lewistown, 307 Mont. 392, 37 P.3d 704 (2001). It is recognized that a prima facie tort exists where the defendant intends to interfere with the plaintiff's economic interests, but "has done nothing that is otherwise tortuous at all." Dobbs, *supra* note 130, § 45.

157. Bruner v. Yellowstone County, 272 Mont. 261, 269, 900 P.2d 901, 906 (1995) (Leaphart, J., dissenting). *See also* McRae v. Martin Vaage & Norwest Mort., Inc., 18 Mont. Fed. Rptr. 342 (2002).

158. Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 377 (Colo. 1997).

humiliation to a person of ordinary sensibilities."[159] Determining whether the action is "wrongful" requires a balance of the employer's legitimate business interests against the invasion of employee privacy.

One possible plaintiffs' claim could involve an employer's unlawful release of employment records or the disclosure of other confidential information about the employee (e.g., unreasonable publicity given to another's private life or unreasonable intrusion upon the seclusion of another).

a. Unreasonable Publicity Given to Another's Private Life

Unlike defamation, a cause of action for unreasonable publicity requires disclosure of information about another's private life.[160] The cause of action usually arises when an employer's agent discloses private information about the plaintiff. For example, a claim may exist where an employer/former employer reports that the plaintiff cried and was distraught upon learning that one of his numerous grievances had been denied and discloses its conclusion that the plaintiff had mental problems.[161]

b. Tort for the Claim of False Light Invasion of Privacy

This claim has four elements: "(1) the publicizing of a matter concerning another that (2) places the other before the public in a false light, when (3) the false light in which the other is placed would be highly offensive to a reasonable person, and (4) the actor knew of or acted in reckless disregard as to the falsity of the publicized matter."[162]

c. Publicity that Unreasonably Places Another in a False Light Before the Public

The elements for a cause of action are: "(1) the defendant

159. Rucinsky v. Hentchel, 266 Mont. 502, 505, 881 P.2d 616, 618 (1994) (quoting Sistock v. Northwestern Telephone Systems, Inc., 189 Mont. 82, 92, 615 P.2d 176, 182 (1980)).

160. Midwest Glass Co. v. Stanford Dev. Co., 339 N.E.2d 274, 277 (Ill. 1975).

161. Bratt v. Int'l Bus. Machs. Corp., 467 N.E.2d 126, 130 (Mass. 1984).

162. Lence v. Hagadone Invest. Co., 258 Mont. 433, 444, 853 P.2d 1230, 1237 (1992), *overruled on other grounds in Sacco*, 271 Mont. 209, 896 P.2d 411. The tort was applied in the employment context in Peden v. Louisiana-Pac. Corp., 26 Mont. Fed. Rptr. 117 (2000) (plaintiff alleged that his employer made statements falsely implicating that he was guilty of serious wrongdoing and that he posed a real threat to other employees).

placed the plaintiff in a false light before the public; (2) the false light would be highly offensive to a reasonable person; and (3) the defendant acted with knowledge or reckless disregard for the falsity of the statement."[163]

d. Unreasonable Intrusion upon the Seclusion of Another

These cases generally involve the employer who obtains information from an employee where the employee has a reasonable expectation of privacy. Recently, these causes of action often involve the employer monitoring employee activity and communications (e.g., telephone, FAX, E-mail, etc.)[164]

e. Lie Detector Tests

Montana prohibits employer lie detector tests.[165] Federal law also prohibits employer use of lie detector tests on current employees, except when the employer is investigating a specific incident.[166]

f. Telephone Surveillance of Employees Under Federal Law

The Federal Wiretapping Act provides that unconsented interception and disclosure of communications over a telephone can constitute an offense punishable by a $10,000 fine, imprisonment, or both, and can subject the interceptor to civil liability for compensatory and punitive damages.[167] The law provides an exemption if interception is in "the ordinary course of business."[168] However, because the parameters of the business exemption are not clear, a business is well advised to obtain employee consent as permitted under the law.[169]

In addition to the statute, the Federal Communications

163. Frobose v. Am. Savings & Loan Ass'n, 152 F.3d 602, 617 (Ill. 1998).

164. Deal v. Spears, 980 F.2d 1153, 1158 (8th Cir. 1992) (disclosure of employee's conversations with her boyfriend).

165. MONT. CODE ANN. § 39-2-304 (2003).

166. Employee Polygraph Protection Act, 29 U.S.C. §§ 2002, 2006(d) (1988). In such a case, four specific requirements must be met. *See id.* § 2006(d).

167. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, 2511, 2520, 2522 (2003).

168. *See id.* § 2510(5)(a)(1)(i).

169. *Id.* § 2511(2)(d) ("It shall not be unlawful under this chapter for a person" . . . to intercept communication of an employee where the employee "has given prior consent to such interception" unless the interception is "for the purpose of committing any criminal or tortious act in violation of" state or federal law.).

Commission ("FCC") has published a tariff rule, applicable to interstate communications, that, when telephone conversations are recorded, all parties to the conversation must give their written consent to the conversation prior to the recording, or oral consent must be obtained on the recording at the start of the recording. Alternatively, a "beep-tone" repeated at intervals of approximately fifteen seconds might by used when the recording equipment is operating. Finally, Montana makes it a crime to record human conversations without the knowledge of all parties[170] or to purposely intercept electronic communications.[171] This criminal statute may serve as the basis for a civil tort suit.

g. Privacy Issues Associated with E-mail

The Electronic Communications Privacy Act of 1986[172] amends the Wiretapping Act[173] and provides against improper e-mail interception, attempted interception, disclosure, use, and unauthorized access. The Act reaches beyond common carriers to include private communications systems used by many employers. Civil relief includes compensatory and punitive damages and attorney fees and costs.[174] Criminal penalties include fines and imprisonment.[175]

Again, the important exception is "consent" (i.e., whether the employee consented to the interception or monitoring). An employer may avoid the Act by informing employees that communications will be monitored pursuant to a business purpose. Even with notice to employees, the employer must make sure that employees are not given a "reasonable expectation of privacy" that some communications are to remain "private." For example, material stored on computers when the employee selects the password can implicate this issue. If the employer does not want employee private information stored on its computers, the employer must ensure it does not give employees any "reasonable expectation of privacy."[176]

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170. MONT. CODE ANN. § 45-8-213(1)(c) (2003).

171. *Id.* § 45-8-213(2) (2003).

172. *See id.* §§ 2520, 2701 (2003).

173. *See supra* note 167.

174. 18 U.S.C. § 2520(b).

175. *See id.* §§ 2511(4)(a), 2701(a).

176. *But see* Flanagan v. Epson America, Inc., No. BC007036 (Cal. Super. Ct., Jan. 4, 1981) (dismissing employee's charges of improper e-mail interception based on another statute, the Stored Wire and Electronic Communication and Transactional Records

C. Negligence Actions–Preempted by the MWDA

Several tort actions have been recognized in other jurisdictions, but appear to be preempted by the MWDA. The preemption would be based on the argument that the claims are intertwined with the discharge itself.

1. Right to Fair Procedure

To state a cause of action, the plaintiff must prove denial of:
1. Adequate notice of the charges;
2. A reasonable opportunity to respond; and
3. Adverse action causing damages.[177]

2. Negligent Performance Appraisal

The claim is based on the allegation that the employer negligently failed to give the employee honest appraisals and warnings.[178]

3. Negligent Investigation

The claim is based on the employer's negligence in performing an investigation of wrongdoing, which resulted in the discharge.[179]

4. Negligent Record Keeping

The claim is based on the employer's negligent maintenance of employment records, which resulted in the discharge.[180]

5. Negligent Training

The claim is based on the employer's negligence in training

Access Act). However, the safe bet is for employers to inform employees that they have no expectation of privacy regarding e-mail communications over company servers.

177. Pinsker v. Pac. Coast Soc'y of Orthodontists, 526 P.2d 253, 255 (Cal. 1977); Ezekial v. Winkley, 572 P.2d 32, 35 (Cal. 1977).

178. Chamberlain v. Bissell, Inc., 547 F. Supp. 1067, 1081 (W.D. Mich. 1992). *But see* Mitchell v. Gen. Motors Corp., 439 N.W.2d 261, 267 (Mich. App. 1989). Other courts have refused to recognize the tort. *See, e.g.*, Tollefson v. Roman Catholic Bishop, 219 Cal. App. 3d 843, 857 (4th Dist. Div. 1 1990); Mann v. J.E. Baker Co., 733 F.Supp. 885, 888 (M.D. Pa. 1990).

179. *See, e.g.*, Corbally v. Kennewick Sch. Dist., 973 P.2d 1074, 1076 (Wash. Ct. App. 1999) (refusing to recognize the tort).

180. *See, e.g.*, Prouty v. Nat'l R.R. Passenger Corp., 572 F.Supp. 200, 206 (D.C. 1983) (refusing to recognize the tort).

the plaintiff, which was the cause of the plaintiff's employment-related wrongdoing.[181]

IV. PRACTICE AND PROCEDURE ISSUES

A. Employer Documentation–Development of Employee Policies–Documentation of Employee Performance & Rule Violations[182]

1. Why Have Policies

Written policies and procedures (generally referred to as "personnel policies," employment manuals, or employee handbooks) can play a critical role in an employer's ability to support disciplinary and discharge actions taken against an employee. In Montana, employers are not required to have personnel polices and procedures, but if they do, they are required under the MWDA to follow the express provisions of those policies. While there is some argument that an employer who adopts written personnel policies and procedures risks breaching the MWDA under Montana Code Annotated section 39-2-904(3), most employers recognize that written policies can

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181. *See, e.g.*, Budd v. Am. Sav. & Loan, 750 P.2d 513, 515 (Or. Ct. App. 1988) (refusing to recognize the tort).

182. This subtopic of the article was written by Dr. Lynda L. Brown. Dr. Brown has nearly thirty years of experience in the field of human resources management and career development and is certified by the Society for Human Resource Management as a Senior Human Resource Professional (SPHR). She is an adjunct faculty member for the School of Business at the University of Montana and teaches Strategic Human Resource Management for the MBA program and for the Department of Marketing and Management. She owns her own management consulting practice, independently consulting and training on a variety of human resource issues, and she serves as an expert witness in discrimination and employment cases. Her work in organizational development and organizational behavior includes for-profit and non-profit organizations.

Dr. Brown has a Ph.D. from Florida State University, an M.Ed. from the University of Oklahoma, and a B.S. from the College of William and Mary. She holds a national leadership position with the Society for Human Management (SHRM), the world's largest professional association of human resource practitioners. She is currently a member of SHRM's Board of Directors for the Human Resource Certification Institute (HRCI). HRCI develops certification standards as well as the testing and training materials for certifying human resource professionals worldwide. Dr. Brown is past president of the SHRM Foundation, the Society's research and development arm. She served as chair of the national Research Committee for SHRM and was appointed to the task force that developed the Society's Code of Ethics. Dr. Brown worked with the Foundation on its research initiative on human resource practices in small businesses. She is widely published, including a chapter on performance appraisal in EFFECTIVE HUMAN RESOURCE MANAGEMENT TECHNIQUES (2d ed. 1996).

communicate the employer's expectations about employee performance and compliance with work rules. By committing these expectations to writing, an employer can rely on them later to demonstrate intent. If standards and rules are only communicated verbally and are ill-defined, the employer is less able to assert that they have been communicated consistently and unambiguously to all the employees. By explicitly stating a policy or expectation in a handbook or manual, the employer is also communicating its importance to the effective operation of the business. Employers, without explicit policies and standards, are also more vulnerable to arbitrary or capricious enforcement by managers and supervisors.

An employer alleging a rule or policy violation on the part of an employee needs to be able to reference a specific rule and to confirm that the rule was communicated to the defendant. In the absence of a written policy or standard, a discharged employee can challenge its existence, question whether it serves a legitimate business purpose, and rebut the employer's argument regarding consistency in enforcement. In a decision to terminate an employee because of conduct or performance, the employer needs to point to clearly articulated performance expectations, explain how actual performance is measured against the standards, and defend how the standards are important to the overall operation. In addition, expert witnesses, for both the plaintiff and the defendant, will rely on the existence or absence of written policies and performance standards in examining the circumstances of the termination and the employer's past practice with respect to enforcement of rules and standards with other similarly situated employees.

When employers adopt written policies and procedures in an employee personnel manual or handbook, distributed to all employees rather than scattered throughout a series of memos or other documents, supervisors can readily point to the rule or standard that has been violated. The employer can also link other documentation, such as written warnings, performance evaluations, written complaints, and training records to a specific policy, standard, or procedure. Employees who have signed a written acknowledgment of receipt of the rules and standards of the employer will be less able to argue that the expectations were not clear or communicated uniformly.

2. Job Descriptions and Performance Standards

While not considered policies per se, and not included in the

policy handbook, written job descriptions and performance standards also document communication with employees. Section 39-2-903(5) of the MWDA defines "good cause" to include failure to satisfactorily perform job duties. In a wrongful discharge claim, an employer who has to explain exactly how an employee failed to perform satisfactorily will benefit from a written list of job duties or a position description, along with documented feedback to the employee about the execution of those specific duties. Position descriptions should also describe how the job fits into the operation of the business, making it easier to justify how failure to meet performance standards is linked to the effective operation of the business. The description should include duties or standards expected of all employees, based on the type of employer or work place, such as attendance, appearance, teamwork, and customer service, as well as requirements unique to the individual employee's job.

Written warnings, performance appraisals, or other communication to the employee, with respect to unsatisfactory performance, should refer to the job description and performance standards and any efforts or resources expended to help the employee improve. If the job description and written performance standards are signed by the employee, it will be easier for the defendant to contend that the employee understood the expectations of the employer with regard to job performance.

Job descriptions should be used in conjunction with any performance feedback, especially written evaluations, and when poor performance is the cause for termination, job descriptions are important in documenting any gaps between the employer's expectations and the employee's actual performance on the job. Job descriptions which define the essential functions of the position are also important in defending claims of discrimination or violations of the Family Medical Leave Act or Americans with Disabilities Act.

3. Recommended Written Policies

Key policies and workplace rules should be committed to writing and incorporated into a handbook or employee personnel manual. Generally, more is not better, either with the number of policies and procedures or level of detail. The policies should be as concise as possible, stating only what is necessary, yet unambiguous to the employee and easily administered by supervisors and managers. Otherwise the employer invites the

argument it failed to follow its own policies. Employers should use language that is straightforward and avoid the use of words that imply promises of fairness, equitable treatment, or guarantees of long-term employment and job security.

Trying to capture the minute details of day-to-day-life in an organization can be overwhelming to both employees and supervisors and diminish the importance of the rules and standards that need to be understood and complied with by all employees. Pages and pages of dos and don'ts increase the chances an obscure policy or procedure will be overlooked or violated unintentionally, opening the door for a violation of Montana Code Annotated section 39-2-904(1)(a)(3). Written rules and standards should provide the foundation of "good cause," and a handbook or manual should include only policies and procedures that, if not adhered to, will result in a disruption of the employer's operation or constitute some other legitimate business reason under Montana Code Annotated section 903(5). At a minimum, in Montana, written policies should include:

Sexual harassment: describe the conduct that is prohibited, reporting requirements and alternatives, and privacy expectations of both parties. (Increasingly policies include prohibitions against other forms of harassment (e.g., religious, racial, etc.) and a policy of zero tolerance for workplace violence).

Policy statements: affirm compliance with state and federal regulations, including non-discrimination (EEO), affirmative action (if applicable), and the Americans with Disabilities Act.

Grievance procedure: Montana Code Annotated section 39-2-911(2) requires an employee to first access the employer's internal complaint process before filing a MWDA action. The grievance procedure doesn't have to be complex, and the time frames should be realistic to avoid violating the provisions of the policy. The employer has to ensure that a copy of the grievance procedure is given to any terminated employees within seven days of termination.

Termination payment provision: specify that the final payment of wages will be made on the next regular payday or fifteen days from separation, whichever occurs first, otherwise a terminated employee must be paid immediately upon separation from employment.

Drug testing policy: if the employer plans to conduct drug tests, define the circumstances and specify that it will be done pursuant to a qualified testing program (Montana Code Annotated section 39-2-207) with written policies and

procedures adopted sixty days before implementation.

Probationary period: unless the employer chooses a probationary period of a different length, the MWDA stipulates that the introductory/probationary period is six months. However, to make sure it is clear to both supervisors and employees, employers should specify the length of the probationary period in the written policies even if it is not different from the statutory six months.

Confidentiality: specify the need for and the scope of confidentially expected of each employee regarding employer interests that it seeks to keep confidential (e.g., trade secrets) and employee interests (e.g., health records), which the employer is to keep confidential.

Conflict of interest: specify the types of activities that might constitute a conflict of interest and the process for reporting any potential conflicts.

Compliance with Family Medical Leave Act (FMLA): for employers with fifty or more employees within a seventy-five mile radius, explain eligibility and the method for documentation and computation of leave used (calendar year or rolling twelve months) without summarizing the entire law. Non-FMLA covered employers should specify if they have their own leaves of absence policies.

Compliance with the Fair Labor Standards Act (FLSA): state the intent to comply with provisions of wage and hour laws and to correct any unintentional violations once brought to the employer's attention.

Vacation and/or sick leave policies: explain how paid time off is earned and accrued. In Montana, employers cannot have a "use it or lose it" vacation accrual policy, but they may cap the total number of hours that can be accrued.

General description of benefits and eligibility: avoid describing the precise details of insurance coverage or the retirement savings plan, but explain how to get more specific information.

Pay periods/paydays, workweek (for non-exempt employees) and holiday schedules/eligibility: specify the beginning and end of the workweek, policies about rest breaks and meal periods, and other scheduling policies, including flextime and telecommuting.

Use of employer property: use of computers, telephones (including personal and business cell phone use, and safety issues) along with an email/computer/internet policy, and

privacy expectations/monitoring practices.

General rules of conduct: attendance and tardiness (what constitutes job abandonment), appearance or dress code, conduct of personal business/interruptions/visitors, smoking in the workplace, substance abuse, and violence in the workplace.

Productive work environment expectations: state the business necessity for supervisor/co-worker/employee cooperation.

Disciplinary/corrective action policy: provide a general explanation of how misconduct or performance problems will be addressed, while maintaining flexibility depending on the specific circumstances. Avoid a laundry list of types of offenses and expected punishment to avoid being locked into a specific response.

Personnel records: while there is no requirement for maintaining personnel records in Montana, having a central repository for documents helps ensure that documentation on employee conduct, including evaluations, will be available if needed to defend a claim of wrongful termination. Specify where such records will be maintained, their contents, and access by the employee.

Acknowledgment of receipt of handbook and disclaimers: include a signed notice of receipt acknowledging understanding and acceptance of the standards and expectations as a condition of employment, acknowledgment that the policies do not constitute an employment contract, and a commitment to maintain required confidentiality. Specify the employer's right to revise the policy and inform the employees of changes.

Written policies that clarify workplace rules helps eliminate potential misunderstanding on the part of either the employee or employer. The tone can be clear about the employer's expectations with regard to compliance without being overly negative or threatening. Many employers adopt language in their written policy manuals that conveys trust and mutual respect.

B. Discovery

A plaintiff's discovery in a wrongful discharge suit, as in any other suit, may rely upon production of documents, interrogatories, requests for admissions, and depositions. With a large employer who reduces decision making to writing, production of documents is the leading form of discovery. It is often recommended that demands upon the defendant to

produce documents be filed with the service of the complaint. Pursuant to Montana Rule of Civil Procedure 4(e)(1), a plaintiff has three years "after filing a complaint to have a summons issued and accomplish service." Accordingly, plaintiffs' counsel may file a complaint to toll the short one-year statute-of-limitations of the MWDA[183] and have plenty of time to prepare and tailor a production of documents list.

The following are some sample production demands and some sample interrogatories. Requests for admissions and depositions are typically tailored to the information gained from document productions and interrogatories. However, a plaintiff may want to take a very early deposition of the person who made the decision to discharge the plaintiff. From the outset, it is often important to establish the reason for discharge and the information the decision maker possessed at the time the decision to terminate was made.[184]

1. Production of Documents

Counsel for plaintiffs should consider the following as documents he or she may want to request for production:

1. Files kept by the defendant, including, but not limited to his or her personnel file and files kept by the supervisor, department manager or any other individual employed by the defendant.

2. Files described in Request #1 for similarly situated employees or witnesses who will be asked to testify.

3. Files described in Request #1 for the person or persons who were consulted, recommended or determined to discharge the plaintiff.

4. The plaintiff's payroll records during employment with the defendant.

5. All job descriptions for any position ever held by the plaintiff, including any modifications thereof.

6. All documents, formal or informal, which evaluate, assess, describe or compare the performance of the plaintiff with other employees or rate the plaintiff's performance relative to performance standards.

7. All documents that relate to employee benefits.

8. All documents submitted to the decision maker(s) supporting the decision to discharge/layoff the plaintiff.

9. All documents relating to the decision to terminate/layoff the

183. MONT. CODE ANN. § 39-2-911.

184. *See* disussion of after acquired evidence, *infra* pp. 393-96.

plaintiff that were prepared by the decision maker, any management personnel or anyone involved in the decision to terminate or layoff.

10. All documents that relate to, or address, the plaintiff's performance and/or employment rule violations, including comments, counseling, warnings or discipline.

11. All documents which reflect awards, commendations, or other positive notations concerning the plaintiff's work performance, training, knowledge, education, ability, or other positive attributes.

12. All documents which discuss or describe, in any way, the reason or reasons for the plaintiff's discharge or layoff.

13. All documents which support defendant's position as to why the plaintiff was selected for layoff or discharge.

14. All documents, including allegations, charges, investigations, reports, memos, findings, directives, etc., related to any wrongdoing by the plaintiff.

15. All documents that relate to any workplace, department, work area, etc., reorganization and/or employee workforce/hour reductions during the following time period: _____.

16. All documents (including personnel and policy manuals, handbooks, memorandum, or rule statements of procedure) which address, reflect, or constitute defendant's rules regarding personnel, employee, human resource policies, or practices of the defendant for the following time period: _____.

17. The name and hire date of all employees hired during the following time period: _____.

18. The name and date of all employees who were reassigned to perform any duty, or duties, that the plaintiff performed prior to his/her discharge/layoff.

19. All documents describing, or relating to, the process by which the plaintiff's successor was selected, specifically including any documentation regarding the recruiting, interviewing or selection process, or the qualifications or selection guidelines used in selecting the plaintiff's replacement.

20. The name and date of all employees who ceased employment for any reason (discharge, layoff, voluntarily quit, reassignment, etc.), three years prior to the plaintiff's discharge/layoff.

21. The name and date of all employees who ceased employment, for any reason (discharge, layoff, voluntarily quit, reassignment, etc.), since the discharge/layoff of the plaintiff.

22. The performance evaluations of all employees (or certain prescribed employees) during the following time period: _____.

23. The discipline records, including warnings, suspensions, layoffs and discharges for all employees (or all employees working

or assigned classifications) during the following time period: _____.

24. All records pertaining to investigation and/or consideration of discipline (warnings, suspensions, layoffs, and discharges) of all employees (or certain prescribed employees) during the following time period: _____.

25. All documents relating to the plaintiff's claim, and the defendant's position regarding such claim, for unemployment compensation with the State of Montana.

26. All documents which the defendant plans to use at trial.

2. Interrogatories

Counsel for plaintiffs should consider the following interrogatories he or she may want answered:

1. Identify the person answering these interrogatories.

2. Why was the employment of (plaintiff) terminated? Please state in precise detail each and every reason that played any role in the termination decision and explain what role each factor played.

3. During the entire time period (plaintiff) was employed by the defendant, was his/her work performance unsatisfactory? If the answer is yes, please state:

a. Precisely what way or ways his performance was unsatisfactory.

b. The dates or periods during which his performance is alleged to have been unsatisfactory;

c. Is there is any documentation or evidence supporting the claim of unsatisfactory performance and, if so, identify what it is;

d. Identify all persons having knowledge of the alleged unsatisfactory performance;

e. Whether (plaintiff) was ever warned, counseled or disciplined in any way concerning the alleged unsatisfactory performance and, if so, when, by whom, and in what form (i.e., oral warning, written disciplinary warning, suspension, etc.). If your answer to this interrogatory is in the affirmative, please produce any document, including any tape recording, which relates in any way to such claimed warning.

4. During the entire time period (plaintiff) was employed by the defendant, did he or she violate work or employee rules? If so, please state:

a. What rules were violated?

b. The dates or periods when the rule violations occurred?

c. Whether there is any documentation or evidence

supporting the claim of unsatisfactory performance and, if so, identify what it is;

d. Identify all persons having knowledge of the alleged rule violation;

e. Whether (plaintiff) was ever warned, counseled or disciplined in any way concerning the alleged rule violation(s) and, if so, when, by whom and in what form (i.e., oral warning, written disciplinary warning, suspension, etc.). If your answer to this interrogatory is in the affirmative, please produce any document, including any tape recording, which relates in any way to such claimed warning.

5. Who decided to terminate (plaintiff)?

6. Identify each person who participated in any way in the decision to terminate (plaintiff) and, in connection with that decision, describe in precise detail exactly what each person identified did or said and when he or she did and/or said it.

7. Identify the date of and participants in any meeting, conversation, or discussion, however informal, at which the termination or possible termination of (plaintiff) was discussed by officers, managers, supervisors of the (defendant), and describe in detail what was said and by whom.

8. Precisely what were (plaintiff's) duties at the time of his/her termination? If a job description exists which states the above referenced job duties, please produce the job description in addition to answering this interrogatory.

9. How much was (defendant) paying (plaintiff) at the time of termination?

10. Has (plaintiff) been replaced? If so, identify the person or persons who replaced him. Further, as to any person or persons whom (defendant) has employed or assigned to replace (plaintiff), please provide a copy of any and all correspondence between (defendant) and the person replacing (plaintiff), together with a detailed description of his or her exact educational background, work experience and other qualifications for the position. Finally, state in precise detail exactly why (defendant) employed said person or persons to replace (plaintiff).

11. If (plaintiff) was replaced, state the duties of (plaintiff's) replacement.

12. How much is (defendant) paying (plaintiff's) replacement?

13. Identify every person terminated by the (defendant) from January 1, [year] to date, specifying each person's name, age, date of birth, position, duties, date of termination, reasons for termination and salary/wage at termination. In addition, for each person identified, state whether his or her duties were reassigned to others (including new hires and/or then existing employees). If duties were reassigned, identify the person or persons to whom they were reassigned, specifying (in addition to all of the

information requested above) the date on which such duties were assumed, the reason for reassigning the duties, and the salary of the person(s) assuming such duties.

14. Please provide a list of all full-time employees as of January 1 and June 1 of each year since [year], stating each employee's name, date reported, position or job title, date of hire, and salary/wage as of date of reporting.

15. During the period from January 1, [year] through the present, was, or is, there any business or general liability insurance in force covering you and/or your business? If so, state as to such insurance coverage: (a) the name and address of each insurance company; (b) the number of each policy; (c) the limits of liability stated in each policy; and (d) the name and address of the local agent for each such policy.

16. Identify any witnesses you believe may have any information concerning any issues in this lawsuit and provide a detailed description of the information you believe them to have.

17. Identify any witnesses you expect to call at the trial of this matter.

18. Identify any exhibits you plan to use at trial.

19. Identify any documents, which you believe contain information, relating in any way to any issue in this litigation.

C. Rule 12(c) Motion for Judgment on the Pleadings & Rule 56 Motion for Summary Judgment

Under Rule 12(c) of the Montana Rules of Civil Procedure, a Motion for Judgment on the Pleadings may be made by either party after the pleadings are closed, but within such time as not to delay the trial. If such a motion is accompanied by matters outside the pleadings (e.g., depositions, answers to interrogatories, admissions, affidavits, etc.), the motion shall be treated as a Motion for Summary Judgment under Montana Rule of Civil Procedure 56.[185]

It is quite common for a defendant or former employer to seek either a motion for judgment on the pleadings or, even more likely, a motion for summary judgment. The burden of proof is on the moving party to demonstrate entitlement to judgment,[186] and all reasonable inferences are to be drawn in

185. Am. Med. Oxygen Co. v. Mont. Deaconess Med. Ctr., 232 Mont. 165, 167, 755 P. 2d 37, 39 (1988).

186. Mathews v. Glacier Gen. Assurance Co., 184 Mont. 368, 378, 603 P.2d 232, 238 (1979).

favor of the party opposing summary judgment.[187] The Montana Supreme Court has stated:

> [S]ummary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' The initial burden rests upon the moving party, who may rely upon the pleadings, depositions, answers to interrogatories, admissions on file and affidavits to establish that no genuine issue exists as to any material fact. The burden then shifts to the party opposing the motion. That is, the adverse party must respond to the summary judgment motion, and 'set forth specific facts showing that there is a genuine issue for trial.' If the adverse party does not so respond, 'summary judgment, if appropriate, shall be entered against the adverse party.'
>
> [Summary judgment] . . . is properly granted to the moving party if the adverse party fails to respond with specific facts showing that a genuine issue exists as to a material fact. . . . [E]vidence sufficient to raise a genuine issue of material fact, 'must be in proper form and conclusions of law will not suffice; the proffered evidence must be material and of a substantial nature, not fanciful, frivolous, gauzy or suspicious.' [188]

Evidence that the asserted reason for discharge is "false or pretextual" may satisfy a plaintiff's burden.[189] Once the court determines there is a material question of fact, the motion must be denied.[190] A material fact "is one which is relevant to an element of a claim or defense, and its materiality is determined by the substantive law governing the claim or defense."[191]

1. Summary Judgment in the Context of Plaintiff's Lack of "Good Cause" Allegation

In the event a plaintiff pleads that the discharge[192] was

187. Meyer v. Creative Nail Design, Inc., 1999 MT 74, ¶ 15, 294 Mont. 46, ¶ 15, 975 P.2d 1264, ¶ 15.

188. Old Elk v. Healthy Mothers, Healthy Babies, Inc., 2003 MT 167, ¶¶ 15-16, 316 Mont. 320, ¶¶ 15-16, 73 P.3d 795, ¶¶ 15-16. *See also* Schillo v. Avista Communication of Mont., 30 Mont. Fed. Rept. 436 (2002).

189. Delaware v. K-Decorators, Inc., 1999 MT 13, ¶ 58, 293 Mont. 97, ¶ 58, 973 P.2d 818, ¶ 58.

190. It is for the jury, not the court, to resolve the question of fact. Andrews v. Plumb Creek Mfg., 2001 MT 94, ¶ 21, 305 Mont 194, ¶ 21, 27 P.3d 426, ¶ 21.

191. Local Union No. 206, Int'l Bhd. of Elec. Workers v. Qwest Corp., 30 Mont. Fed. Rep. 543 (2003). For an interesting summary judgment case, see *Cole,* 2005 MT 21, 325 Mont. 388, __ P.3d __.

192. For a case regarding a defendant's motion for summary judgment in a

without "good cause," the defendant may seek dismissal based on the allegation that the plaintiff committed a rule violation, the plaintiff was guilty of a performance failure, the plaintiff disrupted the employer's operation, or there was a legitimate business reason for the plaintiff's dismissal (e.g., economic slowdown, business reorganization, contracting work out, etc.).[193] In the event of such a motion, the plaintiff must demonstrate: (1) General Denial–there was no plaintiff misconduct (e.g., the plaintiff did not commit a rule violation or have a performance failure) nor were there any other alleged "legitimate business reasons" (e.g., there was no economic slowdown, reorganization, contracting-out, etc); (2) Pretext–the defendant's alleged reason for discharge (e.g., employee misconduct or other legitimate business reason) may have occurred, but it is asserted by the defendant merely as pretext to hide the real, impermissible reason for discharge;[194] and (3) Unreasonableness or mitigating factors–the defendant's alleged reason(s) for discharge may have occurred, but they are not "reasonable job related grounds for dismissal" (e.g., there existed mitigating factors or mitigating circumstances that made the discharge unreasonable).[195]

a. Basic Denial–Plaintiff Committed No Misconduct Nor Was There Other Legitimate Business Reasons for the Discharge

A plaintiff's first allegation may be general denial, that is, she is not guilty of misconduct (e.g., did not commit a rule violation or performance failure, nor is there "other legitimate business reason" to justify her discharge). Consequently, there is a substantial fact question whether the reasons asserted for the discharge are "false, or arbitrary or capricious." The truth or falsity of the employer's allegation presents a question of fact to

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"constructive discharge" case, see *Bellanger v. Am. Music Co.*, 2004 MT 392, ¶ 12, 325 Mont. 222, ¶ 12, 104 P.3d 1075, ¶ 12.

193. Buck v. Frontier Chevrolet Co., 248 Mont. 276, 280-81, 811 P.2d 537, 540 (1991).

194. Kelly v. Fed. Express Corp., 28 Mont. Fed Repts. 135, 147 (2001) ("Legitimacy is negated if the reason given for the discharge is invalid as a matter of law, [or] if it rests on a mistaken interpretation of the facts . . . .").

195. *Id.* at 147 (citing MONT. CODE ANN. § 39-2-903(5) (1999)). The allegation of unreasonableness/mitigation is that, while a plaintiff may admit to some employment related misconduct or acknowledge there was an economic slowdown, her discharge was unreasonable, and, therefore, unlawful, because of the existence of mitigating factors.

be resolved by the jury.[196]

b. Pretext–Plaintiff May Acknowledge Misconduct or Other Business Reason, but Assert this is Not the Real Reason for Discharge

A plaintiff may also argue that the defendant's charge of misconduct, or other legitimate business reason, may or may not be true. However, it is not the real reason for the discharge and is being asserted only to conceal some other illegitimate reason. Courts have recognized "pretext" as a legitimate basis for defeating a defendant's allegation of "good cause."[197] Evidence of pretext is sufficient to defeat a defendant's motion for summary judgment because it presents a question of fact to be resolved by a jury.[198] The jury is always permitted to determine the employer's true reason for discharging the employee. An example from this category would be where an employer charges an employee with misconduct in an effort to conceal that the real reason for discharge was animosity, which is unrelated to job performance.[199]

c. Unreasonableness/Mitigating Factors

A plaintiff's third argument may be to acknowledge some misconduct on the plaintiff's part, or the existence of some other

196. *Id.* ("'Legitimacy' is negated if the reason given for the discharge is invalid as a matter of law, [or] if it rests on a mistaken interpretation of the facts . . .") (citing Marcy v. Delta Airlines, 166 F.3d 1279, 1284 (9th Cir. 1999)). *See also* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 896 (Mich. 1980).

The allegation of pretext is that the employee may or may not have been guilty of misconduct or there was a "legitimate business reason," but that reason(s) is asserted by the defendant to conceal an otherwise illegitimate reason for the discharge. For example, the defendant alleges that the plaintiff had performance failures. The plaintiff may acknowledge such failures, but claim that they are asserted only to cover for the real and impermissible reason for discharge (e.g., the discharge was because as coach of the after-school little league team on which the defendant's daughter plays, the plaintiff did not coach and/or play the daughter to the satisfaction of the defendant). Or alternatively, the defendant alleges that it experienced an economic slowdown which necessitated the layoff of the plaintiff. The plaintiff may acknowledge the slowdown, but claim the real reason for the discharge was not the slowdown, but because of his treatment of the defendant's daughter on the little league team.

197. *Kelly*, 28 Mont. Fed. Repts. at 147 ("'Legitimacy' is negated if the reason given for the discharge is . . . merely a pretext for some other illegitimate reason").

198. *Toussaint*, 292 N.W.2d at 896.

199. *Buck*, 248 Mont. at 281-82, 811 P.2d at 540 (explaining that good cause must be based on a job related grounds for dismissal and "have some logical relationship to the needs of the business").

valid business reason, but that the situation did not constitute "reasonable" job related grounds for dismissal. The plaintiff may argue the presence of mitigating factors that present a substantial fact question whether the discharge was unreasonable, without a "legitimate business reason," or was "arbitrary or capricious." Mitigating factors may include:

i. The employer failed to properly inform the employee of its expectations (e.g., performance standards and/or rules) and the consequence of not fulfilling those expectations. Employees have the right to be properly informed of the employer's rules and expectations and the consequence of not fulfilling those expectations before being discharged.

ii. The rule or performance standard that the employee violated was not reasonably related to the needs of the enterprise. Rules and performance standards not reasonably related to the employer's needs impose unrealistic expectations on employees and discharge for failure to perform in conformity with such expectation is unreasonable, arbitrary or capricious, and without a legitimate business reason.

iii. The employer failed to discharge other employees with similar conduct (i.e., disparate treatment). Employees have the right to consistent and predictable employer responses to rule violations and performance failures.[200]

iv. The employer failed to provide the employee with proper training or supervision.[201]

v. The "employer may be liable for negligence in violating its own written employment policies [negligent reduction in workforce] or for failing to make a proper investigation [of the employees alleged misconduct] before discharge."[202]

vi. Minor violations or performance failures by an otherwise acceptable employee absent prior warnings or other discipline. It may not be considered a "reasonable job related ground for dismissal" to discharge an otherwise acceptable employee for a first time, minor offense or performance failure. While the Montana Supreme Court has determined that the concept of "good

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200. *Toussaint*, 292 N.W.2d at 897 (stating "[a]n employer who only selectively enforces rules or policies may not rely on the principle that a breach of a rule is [cause for discharge], there being in practice no real rule.").

201. *See* Andrews v. Plumb Creek Mfg., 2001 MT 94, ¶¶ 7, 15-16, 305 Mont. 194, ¶¶ 7, 15-16, 27 P.3d 426, ¶¶ 7, 15-16 (claiming that employer failed to provide adequate training, written job standards, job evaluations, supervision, and disciplinary warnings); Marcy v. Delta Air Lines, Inc., 18 Mont. Fed. Repts. 391 (1994) (dealing with employee discharge for mistakes in a time-keeping system, which was shown to be imperfect and poorly administered).

202. Kizer v. Semitool, 251 Mont. 199, 210, 824 P.2d 229, 236 (1991) (citing Flanigan v. Prudential Fed. Sav. & Loan Ass'n, 221 Mont. 419, 720 P.2d 257 (1986); Crenshaw v. Bozeman Deaconess Hosp., 213 Mont. 488, 693 P.2d 487 (1984)).

cause," as used in the MWDA, does not include the requirement of progressive discipline as a matter of law,[203] its use by employers certainly addresses the requirement that the employer have a "reasonable" ground for dismissal. As a fact issue, it may be unreasonable to discharge an otherwise good employee for a first time, minor rule violation or performance problem. Such a situation presents a substantial issue of fact that should be presented to the jury.

vii. It may not be considered "reasonable job related grounds for dismissal" if the employer "provokes" the employee's wrongful conduct that the employer then relies upon to justify the discharge.[204] A common situation is where an employer "badgers" an employee, provoking an incident for which the employee is charged with insubordination and discharged. Because the employer improperly provoked insubordination, the insubordination was not good cause for discharge.[205]

D. Proving & Defending: The Role of Motive and Causation

As noted above, the MWDA creates three claims for relief against a former employer arising out of a discharge: (1) where a non-probationary employee is discharged in absence of "good cause"; (2) where an employee is discharged for violation of the employer's "own written personnel policy"; and (3) where an employer retaliates against an employee for refusal to violate a public policy" or for "reporting a violation of public policy." Motive plays an important role in "public policy" and "good cause" claims, but it has no role in "personnel policy" claims. However, "causation" is an important element in "personnel policy" claims (e.g., the personnel policy violation resulted in the discharge).

1. Personnel Policy Claims

When a plaintiff's unlawful discharge claim charges the former employer with violating its "own written personnel policy," the employer's motive is irrelevant, that is, the discharge is unlawful if it is inconsistent with a written

203. *See* Miller v. Citizens State Bank, 252 Mont. 472, 830 P.2d 550 (1992).

204. *See* Elliott v. Shore Stop, Inc., 384 S.E.2d 752 (Va. 1989); Heller v. Champion Int'l Corp., 891 F.2d 432 (2d Cir. 1989).

205. *See* Soliz v. Great Western Bank, 78 Cal. Rptr. 2d 696 (Cal. App. 4th 1998) (stating that where employee's own improper conduct creates employer animosity, employee may not be permitted to contest his discharge based on improper employer animosity).

personnel policy irrespective of motive.[206] Whether the former employer knew of the policy, knew that it was acting inconsistently with the policy, or even cared, is totally irrelevant.[207] If discharge was inconsistent with the policy, it is unlawful.

However, the issue of causation is important. The mere existence of a policy violation in the context of a discharge does not make the discharge unlawful unless the plaintiff demonstrates that there is a "causal" link between the personnel policy violation and the cause for discharge. The plaintiff must demonstrate not merely that she was discharged at a time when the employer was violating or had violated its own written personnel policies, but that there was a causal link between the employer's violation and the discharge.

For example, if the employer's written personnel policies require an employer to perform periodic employee evaluations, and the employer fails to do so, discharging an employee for "poor performance" may be unlawful because, if the employer had periodically evaluated the employee, the employee would have known of any deficiencies and could have self-corrected. Alternatively, if the same employee was discharged for "theft" or for an unprovoked or otherwise unprivileged workplace "battery of a supervisor," there may be no "causal connection" between the employer's failure to evaluate the employee and the cause for discharge. Thus, for personnel policy claims, there must be a causal link between the personnel rule and the reason for discharge. Certainly, if the employee were discharged for theft from a cash register and the employer failed to follow two of its own written policies (e.g., to annually provide "sexual harassment training" and its procedure for delivering the employee's last paycheck) that have no causal link to the cause of discharge, the personnel policy rule violations would not constitute a proper claim for relief.[208]

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206. The Act provides that a discharge is wrongful if "the employer violated the express provisions of its own written personnel policy." MONT. CODE ANN. § 39-2-904(c). There is no requirement of wrongful intent or motive. *See id.*

207. *See* Dobbs, *supra* note 130, § 166 ("plaintiff must prove not merely that she suffered harm sometime after the defendants act occurred, but that the harm was caused in fact by the defendant's conduct.").

208. The question of causation may involve a legitimate question of fact, and, if so, a trial court should not enter a motion to dismiss for summary judgment. If there is a material question of fact, such as a causal link between the employer's failure to follow its own written personnel policies and the cause for discharge, the motion should be denied and the matter submitted to a jury. *See, e.g., Soliz*, 78 Cal. Rptr. 2d 696.

2. Public Policy Retaliation Claims: Single and Dual Motives

If a plaintiff's claim for relief is that the employer retaliated against him for "refusal to violate a public policy" or for "reporting a violation of public policy," the plaintiff must prove the "motive" for the discharge was retaliation for either "refusal to violate a public policy" or for "reporting a violation of public policy."[209]

It is possible that the employer will only deny the plaintiff's allegation, and the issue is whether the plaintiff can prove the impermissible motive (e.g., the discharge was because the plaintiff refused to violate public policy) in a single motive case. However, typically, the employer will offer an alleged "legitimate" motive for the discharge (e.g., the reason for the discharge was the plaintiff's poor performance). In that event, the trier-of-fact will be presented with two motives: a lawful motive (e.g., poor performance) and an unlawful motive (e.g., retaliation for "refusal to violate a public policy" or for "reporting a violation of public policy"). This is a "dual motive" case.

3. Good Cause Claims: Single and Dual Motives

Similarly, if a plaintiff's claim for relief is that the employer lacked "good cause" for the discharge, the issue of "motive" plays an important role.

To demonstrate "good cause," the employer must articulate and offer evidence that it had "reasonable job related grounds for dismissal" or that there was some other legitimate business reason—a permissible motive.[210] If the plaintiff does not challenge the employer's motive, but challenges the accuracy of the allegation (e.g., he was not a poor performer, and/or his level of performance was not reasonable job related grounds for dismissal) the case is referred to as a "single motive" case.

Alternatively, if the plaintiff alleges that the defendant's asserted motive is pretext (e.g., not worthy of belief) and attempts to demonstrate that another "impermissible" motive (e.g., non-job related) was the real reason for the discharge (e.g., that the plaintiff had a non-work related conflict with his

209. The Act does not make all retaliatory discharges unlawful, only those based on the employee's refusal to violate public policy or for reporting a violation of public policy. MONT. CODE ANN. § 39-2-904(a). Consequently, a retaliatory discharge is unlawful only when motivated.

210. MONT. CODE ANN. § 39-2-903(5).

supervisor's father-in-law) the case presents two motives for the discharge, and is thus considered a "dual motive" case.

4. Proof of Dual Motive Cases: The Same Decision Test

The United States Supreme Court has determined that, in a dual motive case, where the trier-of-fact has to choose between a permissible employer motive (e.g., poor work performance) and an impermissible motive (e.g., gender discrimination): (1) if the plaintiff demonstrates that "a motivating factor" for the adverse action was impermissible (e.g., gender discrimination), the plaintiff wins, unless (2) the defendant proves (the burden of proof shifts to the defendant) that it would have made the "same decision" (e.g., taken the adverse action based on the permissible motive).[211] The Montana Supreme Court has relied on this analysis.[212]

The "dual" or "mixed motive" proof mechanism applies in employment disputes where the law makes impermissible certain employer motives (e.g., gender, age, race, disability, union membership, etc.). The question becomes whether the employer's adverse action was impermissibly motivated or whether it was permissibly motivated (e.g., employee theft).[213]

Because a MWDA "good cause" claim does not involve an issue of employer "impermissible motive," the "dual" or "mixed motive" proof mechanism does not apply. Thus, the "burden of proof" is always on the plaintiff to demonstrate that the employer did not have "good cause" for the discharge. There is no issue regarding the presence or absence of an impermissible motive. Either the employer had "good cause" or did not.

Alternatively, if the plaintiff alleges that she was discharged in retaliation for refusal to violate public policy or for reporting a violation of public policy, the plaintiff alleges an

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211. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (42 U.S.C. 1983 free speech case); Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (Title VII gender discrimination case); NLRB v. Transportation Mgmt. Corp., 462 U.S. 393, 401-03 (1983) (mixed/dual motive cases under the National Labor Relations Act involving employer discrimination against employees for union activity or protected concerted activity; under the NLRA the employer escapes all liability by proving that it would have made the "same decision" even if the employee had not been involved in protected activities).

212. Bd. of Trs. v. State *ex. rel.* Bd. Pers. Appeals, 185 Mont. 89, 102, 604 P.2d 770, 777 (1979) (affirming Board of Personnel Appeals reliance on the *Mt. Healthy* dual motive test in a case of a discharged teacher where two motives were offered: (1) competence; and (2) protected union activity).

213. *See Mt. Healthy*, 429 U.S. 274.

impermissible motive.[214] If the plaintiff can prove that "a motivating" factor for her discharge was impermissible retaliation, the plaintiff should win unless the defendant can establish that it would have made the same decision in absence of the impermissible motive (e.g., discharged the plaintiff anyway because of some permissible motive, such as theft).

E. Evidence–Use of Experts, Hearsay, Service Letters and After-Acquired Evidence

1. Use of Expert Witnesses

Both plaintiffs and defendants in a wrongful discharge case often rely on expert testimony to demonstrate the discharge was or was not for "good cause," violated the defendant's "own written personnel policy," or was for unlawful retaliation. However, the Montana Supreme Court has directed that experts may not invade the province of the fact finders and give a conclusion on the ultimate question of law (e.g., whether the discharge was or was not for "good cause"). The court does allow an expert to testify whether the employer violated its own written personnel policy.[215]

Expert witnesses are allowed to testify to a broad array of matters. They can testify to matters such as a specific employer's employment guidelines and policies, common practices in different businesses and industries, the appropriate standards of conduct for a particular type of employer or employee, etc. In *Crenshaw v. Bozeman Deaconness Hospital*, the Montana Supreme Court held "Rule 702 [of the Montana Rules of Evidence] does not exclude expert testimony on all matters about which jury members have any knowledge . . . [and that] [t]he trier of facts' experience [did] not extend to Hospital disciplinary guidelines, much less the ability to evaluate the propriety of such guidelines."[216] The court went on to state that the expert's testimony "assisted the jury to understand the evidence and ultimately the [legal issue in question]."[217]

While the scope of an expert's testimony is broad, it is

214. MONT. CODE ANN. § 39-2-904(1)(a).

215. Jarvenpaa v. Glacier Elec. Coop., 1998 MT 306, ¶¶ 32-33, 292 Mont. 118, ¶¶ 32-33, 970 P.2d 84, ¶¶ 32-33 (an expert may testify as to whether the personnel policy was violated, but not to whether the policy existed).

216. 213 Mont. 488, 502-04, 693 P.2d 487, 494 (1984).

217. *Id.*, 213 Mont at 504, 693 P.2d at 494.

limited to ultimate factual issues of the case.[218] An expert is not allowed to testify to the ultimate legal issues of the case; those issues must be left to the jury to decide. In *Kizer v. Semitool*, the Montana Supreme Court discussed the distinction between legal and factual issues and points out that "[t]he admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case."[219]

The distinction between ultimate fact and ultimate legal conclusion was illustrated by the Montana Supreme Court in *Heltborg v. Modern Machinery*:

> To clarify, had Modern provided its employees with a handbook or policy requiring advance notice before termination, and requiring severance pay, an expert could testify to the factual issues of whether the employer followed its own policies. Nonetheless, the expert could not follow this testimony with a legal conclusion in whether the employer violated the covenant of good faith and fair dealing.[220]

2. *Hearsay Evidence*

A common situation involving the hearsay rule arises when the employer attempts to introduce records/documents of the plaintiff's rule violations or performance deficiencies. The typical plaintiff's objection is that the records are hearsay.[221] The employer often relies on these records because: (1) the supervisor who was involved in the alleged misconduct is no

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218. *Jarvenpaa*, ¶ 32. In *Jarvenpaa*, the court determined that the district court was correct in refusing to allow an expert to testify as to the existence of a written personnel policy. *Id.* The expert was allowed "to identify common management standards and discuss whether such standards were evident in the materials supplied by Glacier's management consultant." *Id.* He was also allowed to testify to whether Glacier violated a personnel policy, assuming one could be established. *Id.*

219. *Kizer*, 251 Mont. 199, 206, 824 P.2d 229, 233 (citing MCCORMICK ON EVIDENCE § 12 (Edward W. Cleary ed., West Publ'g 3d ed. 1984)). The court concluded that the expert's testimony as to whether Semitool had breached the covenant of good faith and fair dealing constituted a legal conclusion on the exact issue that was to be decided by the jury. *Kizer*, 251 Mont. at 207, 824 P.2d at 233.

220. Heltborg v. Modern Mach., 224 Mont. 24, 31, 795 P.2d 954, 958 (1990). *See also* Mahan v. Farmers Union Cent. Exch., 235 Mont. 410, 421, 768 P.2d 850, 857 (1989) (holding that a statistician may testify that his statistical tests show or do not show patterns of discrimination, but may not testify to the ultimate conclusion that discrimination was or was not exercised in the specific termination at issue).

221. "Hearsay is a 'statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Rule 801(c), M.R.Evid. Hearsay evidence is not admissible unless an exception applies. Rule 802, M.R.Evid." State v. Struble, 2004 MT 107, ¶ 96, 321 Mont. 89, ¶ 96, 90 P.3d 971, ¶ 96.

longer with the employer or is otherwise unavailable to testify; or (2) to bolster the testimony of the supervisor/s who testifies. The hearsay objection may be handled in either of two ways:

a. The Hearsay Objection–The Document is Admitted Only for the Reason, Not the Truth

First, if the defendant's proposed exhibit is introduced only for the purpose of demonstrating the "reason" for its adverse action against the plaintiff, and not for the "truth of the mater asserted," the document is not hearsay (i.e., the document is solely for the purpose of showing "why" the defendant discharged the plaintiff, not to demonstrate that it had "good cause" to do so).[222]

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222. If the evidence is not offered to prove the "truth of the matter asserted," the evidence is not subject to a hearsay objection. Often the employer documents the reason the plaintiff was discharged. Introduction of this document, if its only purpose is to establish the reason for the discharge, and not the truth of the alleged reason, is not hearsay.

In the age discrimination case of *Moore v. Sears, Roebuck & Co.*, 793 F.2d 1321 (1982), "Sears introduced a series of memoranda prepared by Moore's supervisors over a period of months." *Id.* at 1322. These memos contained "observations pertaining to Moore's performance, summaries of reports about his performance made by other Sears employees, and chronological accounts of events such as personnel investigations and meetings." *Id.* Several of the persons whose reports were reflected in the memos testified. *Id.* Moore's attorney contended that these documents constituted hearsay. *Id.* The trial court admitted the documents and Moore appealed. *Id.* The court of appeals held that the documents were properly admitted and did not constitute hearsay because they were not offered to establish the truth of the matter asserted. *Id.* The court stated that, "[t]he documents . . . were not tendered to prove the particulars of their contents, but to help establish that Sears was motivated, in good faith, to discharge Moore for reasons other than age." *Id.* at 1322-23.

In another age discrimination case, *Crimm v. Mo. Pac. R.R.*, 750 F.2d 703 (1984), Crimm argued on appeal that handwritten notes and an investigative report prepared by one of his supervisors, which was based on the supervisor's observations and conversations with Crimm and others, had been erroneously admitted into evidence under the business records exception. *Id.* at 709. The appellate court held that the argument was without merit because the documents were not hearsay. *Id.* The documents were offered simply to demonstrate that Missouri Pacific had conducted an investigation and to disclose the information Missouri Pacific relied on in making its decision. *Id.*

Similarly, in the Minnesota wrongful discharge case of *Hardie v. Cotter & Co.*, 849 F.2d 1097 (1988), Hardie objected to the admission of portions of his personnel file, "which included customer complaints regarding Hardie's work habits." *Id.* at 1101. He asserted that the documents were hearsay. *Id.* On appeal, the court held that the "objects were not offered to prove the truth of the material contained within them, but to demonstrate the state of mind of Cotter personnel who made the decision to discharge Hardie, a factor of crucial importance in wrongful discharge cases," and "[t]he challenged exhibits were properly admitted to establish Hardie's supervisors' understanding of the circumstances existing at the time of his discharge." *Id.*

b. Hearsay–The Business Records Exception

Second, if the purpose for the introduction of the exhibit is to establish that the plaintiff committed a rule violation or performance deficiency, the document may possibly be admitted under the exception for "business records/records of regularly conducted activity."

This exception to the hearsay rule states:

> Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.[223]

Business records "are presumed reliable for two general reasons: 1) employees generating these records are motivated to accurately prepare these records because their employer's business depends on the records to conduct its business affairs; and 2) the routine and habit of creating these records also lends reliability."[224] To be admissible, a business record must "report information concerning a primary business activity of the business for which there is a duty and a motive to report truthfully."[225] When a document is prepared for use outside normal business operations, especially for use in litigation, it does not support the presumption of reliability.[226]

In *Bean v. Montana Board of Labor Appeals*, the hearings referee, in an unemployment compensation hearing, admitted, over objection, a report prepared by the social services director for a nursing home regarding the performance of one of its licensed practical nurses.[227] The report was based, not on the

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There is also a Washington Court of Appeals case, *Subia v. Redmond*, 15 P.3d 658 (Wash. 2001), which cites *Hardie* in a footnote. *Subia*, 15 P.3d at 116, n.11. The court held that the results of a polygraph test taken by Subia were relevant and admissible to prove the Department of Correction's state of mind when it dismissed Subia to establish a non-discriminatory reason for the discharge. *Id.* at 116.

223. MONT. R. EVID. 803(6) (2004).

224. Bean v. Mont. Bd. of Labor Appeals, 1998 MT 222, ¶ 20, 290 Mont. 496, ¶ 20, 965 P.2d 256, ¶ 20.

225. *Id.* ¶ 27.

226. *Id.* ¶ 23.

227. *Id.* ¶ 9.

personal knowledge of the social services director, but on information she received from the daughter of a "resident" concerning alleged misconduct of the nursing home's employees.[228] It was undisputed that the report was hearsay evidence: the issue was whether the report was properly admitted as a business record.[229] The Montana Supreme Court determined that the report was not a "business record," and was not exempt from the hearsay rule because: (1) the report was not prepared as part of the employer's routine business activity, rather, it was prepared as part of disciplining employees, an activity incidental to its main business activity; and (2) the report itself contained a hearsay statement of the daughter, a third party, who was not charged with accurately collecting or documenting information for the employer.[230]

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228. *Id.* ¶ 8.

229. *Id.* ¶ 16.

230. *Bean*, ¶¶ 23-24. But see Chief Justice Grey's dissent which states:

> [T]he Court's suggestion that the Incident Report is not a "business record" ignores the actual working of the rule and also ignores the reality that personnel records—including complaints about employees—are regularly kept and serve legitimate business purposes which have noting to do with anticipated litigation. The Incident Report at issue clearly was kept in the course of a regularly conducted business activity and it was the regular practice of the business to make the report. No more need be said about that portion of Rule 803(6), M.R. Evid. Indeed, in my opinion, it is neither necessary nor wise to engage in the unproductive exercise of trying to determine how closely related a purported business record is to the main business activity of the enterprise in discussing and applying this Rule.
>
> . . . Businesses operate through their employees. Moreover, a business like [the nursing home], which is—in the Court's words—in the 'routine business activity of administering nursing services to elderly residents,' can hardly remain in business without competent and courteous employees who discharge the services in manner acceptable to both the elderly residents and their visiting loved ones. A complaint about an employee, written up into an Incident Report, is an integral part of the business activity as it enables the business to better provide the services for which it is engaged by training and counseling its employees and, where necessary, disciplining them for conduct which does not measure up to expectations.

Id. ¶¶ 46-47.

On this point, the Chief Justice may have the better position. As a normal business activity, employers compile and keep such "incident" reports for the purpose of training, counseling, and potentially disciplining employees. An employer cannot be expected to deliver a product or service, or to even remain in business, with employees who exhibit poor performance or violate legitimate employment rules. To that extent, these records, when otherwise trustworthy, should be admitted under the business records exception, and the parties left to argue to its weight. Ultimately, the question is whether the record is of the type that is trustworthy, or whether it is just a document prepared to support employer conduct.

The Chief Justice concurred with the majority and said that, in this case, the

Thereafter, in *State v. Struble*, the Montana Supreme Court, in a criminal case regarding a State prison employee charged with falsifying payroll records, determined that the prosecution's introduction of the prison's official logbooks for the purpose of demonstrating that the defendant submitted false time records was proper as a business record.[231] The court held that the logbooks were trustworthy given that they are prepared by Montana State Prison (MSP) employees as part of their routine duties, and "[u]nlike the Incident Report used in *Bean*, the MSP logbook records are prepared by MSP employees whose duties are to report accurately the variety of people who enter and exit the prison."[232] "[D]ocumentation of who was on shift (when an employee arrived for and left from duty), and what occurred during the shift was essential to the continued safety of the MSP employees and inmates."[233] These safety concerns also prompted the logging in and logging out procedures.[234]

3. Service Letters and After-Acquired Evidence

a. Service Letters

Montana statutory law provides that, upon request, a discharged employee is entitled a "written statement of reasons for the discharge."[235] The employer's response, containing the discharge reasons, is referred to as a "service letter."[236] In 1978, the Montana Supreme Court held that, once an employer provides an employee with a service letter, it cannot thereafter rely on reasons other than those stated in the letter.[237] In 1995, the Montana Supreme Court reaffirmed this holding stating that "in a wrongful discharge action the only reason for

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incident report should not have been admitted because it "lack[ed] sufficient guarantees of trustworthiness" as it was based on the hearsay statement of the daughter. *Id.* ¶ 48. The statement certainly was not trustworthy and consequently, was properly excluded.

231. 2004 MT 107, ¶¶ 18, 39, 321 Mont. 89, ¶¶ 18, 39, 90 P.3d 971, ¶¶ 18, 39.

232. *Id.* ¶¶ 37-38 (citing *Bean*, 1998 MT 222, 290 Mont. 496, 965 P.2d 256.).

233. *Id.* ¶ 36.

234. *Id.*

235. MONT. CODE ANN. § 39-2-801(1) (2003). The statute states "[i]t is the duty of any person after having discharged any employee from service, upon demand by the discharged employee, to furnish the discharged employee in writing a statement of reasons for the discharge." *Id.*

236. Swanson v. St. John's Lutheran Hosp., 182 Mont. 414, 422, 597 P.2d 702, 706 (1979) (stating that such letters are known as "service letters").

237. *Id.*

discharge the district court could consider was the reason set for in the discharge letter."[238]

The effect of these holdings was that plaintiff's counsel was advised to always seek a service letter shortly after the discharge to "lock-in" the employer's reasons for discharge. If this was accomplished, the employer could not thereafter rely on other reasons in defending the discharge.

However, in 1999, the Montana Legislature amended the statute that served as the basis for the service letter rule in three critical aspects: (1) to allow the former employer to, at any time, modify the reasons stated in the service letter; (2) to allow the employer to deviate from the reasons stated in the service letter in presenting a defense in any legal action brought by the discharged employee;[239] and (3) that the former employee's "written demand" for a service letter must advise the former employer of the "possibility that the employer's statements may be used in litigation."[240] The affect of this amended language permits the former employer to, at any time, modify the reasons asserted in the service letter, and it provides that the former employer is not bound in litigation only to the reasons asserted in any service letters.[241] The statute continues to provide that the former employer may not attempt to "blacklist" or prevent

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238. Galbreath v. Golden Sunlight Mines, 270 Mont. 19, 23, 890 P.2d 382, 385 (1995) (citing *Swanson*, 182 Mont. at 417-18, 597 P.2d at 704). *See also Bean*, ¶ 18 (stating "in a wrongful discharge action, any reasons for discharge other than those set forth in the discharge letter are irrelevant, and, thus, inadmissible") (citing *Galbreath*, 270 Mont. at 23, 890 P.2d at 385).

239. The amended language states:

> A response to the demand may be modified at any time and may not limit a person's ability to present a full defense in any action brought by the discharged employee. Failure to provide a response as required under subsection (1) may not limit a person's ability to present a full defense in any action brought by the discharged employee.

MONT. CODE ANN. § 39-2-801(3).

240. The amended language states: "A written demand under this part must advise the person who discharged the employee of the possibility that the statements may be used in litigation." *Id.* § 39-2-801(2).

The amended language requires that an employee's "written demand" for the reasons for discharge must contain a statement that the reason(s) asserted may be used in litigation. However, there is nothing in the statute that requires a former employee to make the initial demand for the discharge reason(s) in "writing." The statute states "[i]t is the duty of any person after having discharged any employee from service, upon demand by the discharged employee, to furnish . . . in a writing a statement of the reasons for the discharge." *Id.* § 39-2-801(1). Thus, while the employer's statement must be in writing, there is no requirement that the former employee's initial request/demand for the employer's written statement be in writing.

241. *Id.* § 39-2-801(3).

the former employee from obtaining employment elsewhere, but the evidentiary effect of the service letter has been negated.[242]

b. After-Acquired Evidence

The "after-acquired evidence" rule may have a similar consequence as the service letter rule. In its narrowest application, it states that an employer's defense in a discharge/discipline case must rise or fall on the reasons the employer proffered at the time of the decision.[243] The purpose of the rule is to encourage employers not to discharge/discipline an employee without first investigating to determine whether there is "cause" for the adverse action and to discourage employers from, after taking adverse action, scouring the earth to find justifications for actions already taken.[244]

The principal difference between the service letter rule and the after-acquired evidence rule is that the service letter rule had its basis in statutory law, whereas the after-acquired evidence standards have been developed by the courts.

Courts have taken three approaches to after-acquired evidence: (1) to completely exclude it;[245] (2) to allow it to establish an employer defense, at least in some cases;[246] and (3) to prohibit it from being used as a defense to liability, but allowing it in determining the extent of a plaintiff's remedy.

The United States Supreme Court has adopted the latter rational. In *McKennon v. Nashville Banner Publishing Co.*, an age discrimination case, the Court held that, if at the time of

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242. *Id.* § 39-2-801(1). The statute continues to provide that if upon the former employee's demand the employer refuses to issue a service letter within a reasonable time, it may not hereafter do so or in any way "blacklist or to prevent the discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed . . . ." *Id.* The penalty for violating the statute is a misdemeanor. *Id.* § 39-2-804 (2003). An employer is also liable for punitive damages recovered via a civil action. *Id.* § 39-2-802 (2003). The Act does not prohibit any person from truthfully advising of the reason(s) for discharge to any entity to whom the discharged employee is seeking employment. *Id.*

243. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362 (1995).

244. *Id.*

245. *See, e.g.*, Tricat Indus. v. Harper, 748 A.2d 48, 64 (Md. 2000) (stating that the jury was to disregard employee's alleged wrongful conduct after termination because conduct following discharge is not relevant to whether cause existed for termination).

246. *See* Gassmann v. Evangelical Lutheran Good Samaritan Soc'y, Inc., 933 P.2d 743, 744 (Kan. 1997) (holding that after-acquired evidence is admissible in a case not involving a violation of public policy); Mitchell v. John Wiesner, Inc., 923 S.W.2d 262, 264 (Tex. Ct. App. 1996) (refusing to allow after-acquired evidence in a retaliatory discharge action).

discharge, the employer was motivated solely by illegal considerations (e.g., age), it could not avoid a finding of liability, but it could avoid a portion of the normal remedy—the employer was liable for back pay and damages only from the date of the adverse employee action up to the time it discovered the legitimate grounds for such action.[247] Thus, in a discharge case, if the employer is found to be liable on the basis of the originally asserted reason(s) (e.g., unsustainable allegations of plaintiff's poor work performance), but that the after-acquired evidence (e.g., sustainable allegations of plaintiff's theft) justified the adverse action, the employer is liable for monetary relief only up to the time that it discovered the evidence of theft.[248]

In the context of an age discrimination case or other protected class discrimination (e.g., gender, race, disability, religion, national origin, etc.), the United States Supreme Court's treatment in *McKennon* of after-acquired evidence (i.e., a finding of employer liability, but a limitation on monetary relief) has an important positive affect for a plaintiff because if there is a determination of employer liability, the successful plaintiff is entitled to attorney fees regardless of how modest the amount of damages (monetary relief) awarded.[249] In the context of a MWDA case, the *McKennon* rationale would have little or no positive affect for plaintiffs because successful plaintiffs are not normally entitled to attorney fees.[250] Moreover, because the MWDA entitles plaintiffs to such a narrow band of remedies, primarily lost wages and benefits,[251] and the amount of such relief (between the date of discharge and the employer's discovery of the evidence that justifies the action) will be meager, *McKennon* relief is of little value to plaintiffs.

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247. 513 U.S. 352, 362 (1995).

248. *Id. See also* Wallace v. Dunn Constr., 62 F.3d 374 (11th Cir. 1995); Garrett v. Langley Fed. Credit Union, 121 F. Supp. 2d 887 (E.D. Va. 2000). The employer could also avoid a "reinstatement" order requiring the employee to be reinstated to her former position, a remedy provided for in an Age Act case, but not provided under the MWDA.

249. Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act provide that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." 42 U.S.C. 2000e-5(k) (2000).

250. The MWDA authorizes attorney fees in only two instances. *See* MONT. CODE ANN. § 39-2-914(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."); *Id.* § 39-2-915 ("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.").

251. MONT. CODE ANN. § 39-2-905.

The Montana Supreme Court has consistently excluded employer after-acquired evidence. This rationale has been based on the Montana Blacklisting statute that required a service letter.[252] With the 1999 amendments to that statute, a defendant may argue that the service letter basis for excluding after-acquired evidence (or any evidence not asserted in the service letter) is gone. However, the amended language does not require that all after-acquired evidence is admissible in a wrongful discharge case.

The amended language only allows an employer to modify a service letter response and to "present a full defense in any action brought by the discharged employee."[253] Consistent with that language, a Montana court may determine that after-acquired evidence is not relevant in cases where the plaintiff alleges "unlawful retaliation."[254] The fact that the employer may have discovered after-the-fact evidence to support a "good cause" for discharge is irrelevant where the plaintiff's claim is based on the employer's prior violation of public policy arising from the Montana or United States Constitution, a statute, or an administrative rule.[255]

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252. *Id.* § 39-2-801. In *Jarvenpaa*, the court states the rule, but it determines that the defendant "did not offer [objected to] evidence to present collateral reasons for [the] discharge." *Jarvenpaa*, ¶ 41. The evidence was offered to "substantiate the reason it had already given [in the discharge] letter." *Id. See also Galbreath*, 270 Mont. 19, 890 P.2d 382.

253. MONT. CODE ANN. ¶ 39-2-801(3).

254. MONT. CODE ANN. § 39-2-904(1)(6) (employer retaliation for the employees refusal to violate public policy or for reporting violation of public policy).

255. *See* section "D. Proving & Defending: The Role of Motive & Causation" *supra* pp. 382-86. A retaliatory discharge is unlawful if it was motivated by the employee's refusal to violate public policy or for reporting such a violation. MONT. CODE ANN. § 39-2-904(1)(a). The fact that the employer may have after-the-fact discovered a "good cause" for discharge is irrelevant. If the initial discharge was motivated by unlawful retaliation, "after-acquired" evidence that there existed a "good cause" for discharge does not lessen the employer's initial culpability, nor the damages that flow from the public policy violation. *See* Gassmann v. Evangelical Lutheran Good Samaritan Soc'y, Inc., 933 P.2d 743, 744 (Kan. 1997) (holding that after-acquired evidence is admissible in a case not involving a violation of public policy); *Mitchell*, 923 S.W. 2d 262, 264 (refusing to allow after-acquired evidence in a retaliatory discharge action).

Alternatively, if the trier-of-fact determines that the discharge was caused because of the employer's violation of its own written personnel policies (e.g., failure of the employer to perform mandated evaluations and inform the employee of deficiencies), but, based on after-acquired evidence, it is determined that the employee would have otherwise been legitimately discharged (e.g., for employee theft), the *McKennon* rationale appears applicable. A claim for relief based on an employer's violation if its own personnel policies is different in type and degree from a violation of public policy. Indeed, a violation of its own personnel policies is closely similar in degree to absence of "good cause." In both cases, the employer's failure is based on misfeasance of a lesser

Finally, a Montana court could adopt the most restrictive approach to after-acquired evidence by excluding it entirely.[256] Such an approach is not inconsistent with the 1999 Legislature's modification of the "Service Letter" statute.

The effect of the 1999 Legislative modification was to assure that employers may modify the reasons stated in a service letter in presenting a defense to any employee suit.[257] Thus, an employer is not solely bound by the reason(s) asserted for discharge in a service letter, but that does not necessarily mean that the employer may, based on after-acquired evidence, assert wholly unrelated reasons for discharge. For example, the employer may have evidence of employee poor work performance, rules violations, and economic necessity as justifications for a discharge. However, in a service letter, the employer cites only economic necessity as the reason for the discharge. In such a case, the employer is not precluded from thereafter relying on poor work performance and rule violations in presenting a defense to a wrongful discharge suit. All of the evidence existed at the time of the discharge and the employer was aware of the evidence, but chose to cite and rely only on economic necessity to justify the discharge. However, the Black Listing statute, its requirements for a service letter, and the 1999 Legislature's amendments do not support the proposition that the employer may, after the discharge, scour the earth to find justifications for actions already taken.

Consistent with the 1999 amendments, an employer may defend on reasons asserted in the service letter and with justifications and evidence that exist at the time of discharge, but, consistent with the "narrowest application" of the after-acquired evidence rule, not defend on justifications and evidence unknown at the time of discharge.

F. Separation and Release Agreements

The federal Age Discrimination in Employment Act of 1967[258] (ADEA) provides that a "separation and release" agreement is invalid unless it meets certain conditions.[259] While the conditions are codified in the ADEA, they are based on many

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type than that of a public policy violation.

256. *See, e.g.*, *Tricat*, 748 A.2d 48.

257. *See also* "Service Letter" discussion *supra* pp. 391-93.

258. 29 U.S.C. §§ 621-634 (2000).

259. *Id.* § 626(f).

federal court decisions regarding employee "waiver of legal rights" cases. Consequently, the ADEA standards have become the criteria that employers' counsel consults in drafting employee separation and release agreements, regardless of the potential basis of the employee's subsequent suit.[260] Defense counsel is advised to consult these standards in drafting any employee release.

The ADEA states that, for an employee to waive any right or claim under ADEA, the waiver must be knowing and voluntary and will not be considered as such unless at a minimum:

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual waives rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled:
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement:
>
> (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or
>
> (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
>
> (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;
>
> (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—
>
> > (i) class, unit or group of individuals covered by such program, any eligibility factors for such program, and any

260. *See, e.g.*, Old Elk v. Healthy Mothers, Healthy Babies, Inc., 2003 MT 167, ¶ 6, 316 Mont. 320, ¶ 6, 73 P.3d 795, ¶ 6.

time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

. . . .

(3) In any dispute that may arise over . . . the validity of a waiver . . . [the employer has] the burden of proving [compliance with this part].[261]

G. Pre-discharge Hearing

With regard to Montana "public employees," it is critical that an employee be provided with a "due process" hearing prior to the discharge. The United States Supreme Court has determined that a non-probationary governmental employee has a "property right" to her job, and that job cannot be "taken" absent affording the employee a "due process" hearing prior to the taking.[262] The employer has to inform the employee of the alleged wrongdoing or performance failure and offer an opportunity to address the charges. This requirement may be satisfied by giving the employee "oral or written notice of the charges . . . and explanation of the employer's evidence and an opportunity to present his side of the story."[263]

H. Employer Preventive Law Standards: Bases from Which Plaintiff May Argue Violation of the "Good Cause" Provision of MWDA

1. Employer Preventive Law

A union-management contract typically includes a provision that the employer may discharge and discipline employees only upon a showing of "just cause." Union-management contracts also typically provide that contract interpretation/application disputes are to be resolved through arbitration. Union-management arbitrators have long developed criteria for assessing whether a discharge or discipline was for just cause.

The Montana Legislature, in enacting the MWDA, specifically chose the term "good cause," not the union-

261. 29 U.S.C. § 626(f)(1)-(3).

262. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

263. *Id.* at 546.

management term "just cause," and it intended that the term "good cause" was not to be construed in the same manner as union-management arbitrators construe "just cause."[264] Accordingly, the following discussion is not intended as a legal construction of the MWDA term "good cause." However, if an employer complies with arbitrator-developed criteria used in construing "just cause" in determining whether to discharge an employee, it is suggested that any subsequent contest of that discharge based on lack of "good cause" will be resolved in the employer's favor. Accordingly, the discussion of "just cause" standards is offered to provide employers with more definite standards in making discharge decisions.

Union management arbitrators demand that for an employer to demonstrate just cause, the employer needs to prove based on a preponderance of the evidence: (1) that the employee committed the rule violation or performance failure; and (2) that the employee was accorded appropriate process.[265] Certainly, the first criteria—"did the employee do what the employer charged"—is consistent with "good cause" under the MWDA. It is only the second criteria involving "appropriate process" that is potentially different.

The concept of "appropriate process" is not complicated and involves familiar concepts. If a Montana employer uses these elements as guidelines in assessing whether to discharge an employee, the employer should be able to sustain the discharge if it is contested. These guidelines are:[266]

1. EMPLOYEES HAVE A RIGHT TO KNOW WHAT IS EXPECTED OF THEM AND WHAT THE CONSEQUENCES OF NOT FULFILLING THOSE EXPECTATIONS WILL BE

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264. The determination of legislative intent is based on the author's discussions with those who participated in drafting the bill that ultimately became the MWDA.

265. In the union-management context, this concept is referred to as "industrial due process." The industrial due process term has historical significance in the union-management context because it arose at a time of industrial unionization. In the current world, the use of the term "due process" is somewhat confusing if it equates the process accorded employees with concepts of constitutional due process. However, as noted at *supra* p. 398, in the context of discharging "public employees," the process that must be accorded to meet constitutional requirements are very similar to the requirements addressed here.

266. These guidelines represent the author's statement of universally accepted standards used by labor-management arbitrators. *See, e.g.*, DISCIPLINE AND DISCHARGE IN ARBITRATION (Norman Brand, BNA Books 1992 & Supp. 2001); James R. Redeker, EMPLOYEE DISCIPLINE: POLICIES AND PRACTICES (BNA Books 1989); Adolph M. Koven & Susan N. Smith, JUST CAUSE: THE SEVEN TESTS (BNA Books 1992).

If an employer expects that employees will comply with work rules and perform consistent with expectations, the employer must inform employees of the work rules and the performance expectations. The employer should also inform employees that rule violations and non-performance may serve as a basis for dismissal.

While the latter matter, consequences, may be implicit, it is better for the employer to make what appears implicit, explicit. Doing so is not time consuming and imposes little or no costs on the employer. If done, it avoids the employee's argument that he/she did not realize the importance of the matter.

As to the former matter, informing employees of the work rules and performance expectations, again, the employer may believe that rules and expectations are implicit. This is an issue in which employees often take shelter in wrongful discharge cases. Employees argue that the work rules and/or expectations were not made explicit and they did not know the standards on which their conduct would be judged. Again, employers are wise to make sure that work rules and performance standards are appropriately communicated.[267]

2. THE EMPLOYEE HAS A RIGHT TO CONSISTENT AND PREDICTABLE EMPLOYER RESPONSES TO VIOLATIONS OF RULES

This element merely requires an employer react similarly to similar violations of rules or performance standards. In doing so, the employer demonstrates to its employees that it is following its defined policy and that employees can expect to be treated like their fellow workers. This improves the effectiveness of discipline as a deterrent to unacceptable behavior because employees will see that discipline will be consistently used when their conduct, or the conduct of fellow workers, does not measure up to the employer's legitimate expectations.

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267. The communication should be a form that can be understood by reasonable persons who work a particular position. This may necessitate that work rules and performance standards be written or otherwise communicated in a manner which can be understood by employees who have the least education and work experience in the enterprise. An employer who fails to do so may encounter the argument that the plaintiff did not know the standards because they were communicated in a manner that the plaintiff could not understand.

3. THE EMPLOYER HAS A RIGHT TO FAIR DISCIPLINE BASED ON FACT

Supervisors must be trained to accurately gather facts before discipline can follow. In this regard, record-keeping is crucial. Prior to discharge or discipline, the employer should make sure, through appropriate investigation, that discipline is warranted. Failure to properly investigate often leads to the plaintiff's argument that she was targeted for discharge for reasons unrelated to those that the employer ultimately asserts.

4. THE EMPLOYEE HAS A RIGHT TO QUESTION THE FACTS AND TO PRESENT A DEFENSE

This element suggests that employers should give an employee accused of wrongdoing an opportunity to address those accusations. The point of this exercise is to determine if the accused employee has anything that will assist in evaluating the merits of the accusation(s). This process may be very informal and take very little time. The important thing is for the employer not to make a conclusion on the merits of the alleged wrongdoing before allowing the employee to address the allegation(s).

5. THE EMPLOYEE HAS THE RIGHT TO APPEAL THE DISCIPLINARY DECISION

A problem that often occurs when an employee is discharged by his or her line supervisor is that the employee will claim that the supervisor had a vendetta or unrelated illegitimate employer issues. To avoid this situation, an employer should allow a supervisor's initial decision to be reviewed by a more senior management official, a person that is somewhat removed from the focal point (e.g., passion/heat of the personalities and moment) of the alleged employee misconduct, someone who may be more capable of assessing the strength and weaknesses of the case for discharge.

6. THE EMPLOYEE HAS A RIGHT TO CORRECTIVE DISCIPLINE

The purpose of employment work rules and performance

standards are to establish acceptable levels of employee conduct. Employee conduct violations fall along a continuum from a minor violation to very/extremely serious violations. Gross misconduct involves matters that are essential to the survival of the organization, such as rules against theft, destruction of the employer's property, assaulting a supervisor, failing to follow safety procedures, or continued performance failures. Other violations involve matters that are important to the smooth operation of the organization, and generally only after a number of violations will they affect the stability or profitability of the organization. These include reporting to work on time, maintaining the work schedule, conducting personal business during work hours, failure to call in when absent, and minor performance failures.

Discipline has a rehabilitative as well as deterrent effect. When disciplinary action is required for minor offenses, it is initially usually for the purpose of correction and an employer uses a lesser form of discipline (e.g., counseling, warnings, or even a suspension). Corrective discipline suggests that, unless an employee has committed a major offense, he/she should not be discharged until he/she has been given the opportunity to modify his/her behavior through the imposition of lesser penalties. By first imposing lesser (through increasingly severe) penalties, the employer places the employee on notice that his/her behavior is not acceptable, and he/she is given an opportunity to change it before discharge action is taken. Corrective discipline is, therefore, a problem-solving, training approach up to the point where an employee demonstrates by his/her continued infractions that they will not correct their unacceptable conduct.

7. THE EMPLOYEE HAS A RIGHT TO BE CONSIDERED AS AN INDIVIDUAL

Under this topic, there are two subtopics: (1) whether the discipline was appropriate in relation to the offense and the individual; and (2) whether the alleged wrongdoing (e.g., rule violation/performance failure) was the result of a "disability" for which the employer had an obligation to make "reasonable accommodation."

(i) Discipline in Relation to the Offense and the Individual

In the above discussion of corrective discipline, it is suggested that, because the employer has hierarchy of disciplinary measures to choose from, such as counseling, warning, and suspension, the employer should deal with minor employee conduct problems initially with a corrective approach. Additionally, the employer should consider the employee's work record in choosing the appropriate form of discipline. Long-time employees with good work records will normally receive lesser forms of discipline than relatively new workers—particularly new workers with poor work records. Thus, appropriate discipline requires not only a consideration of the offense, but also the status of the offender.

(ii) Employee Misconduct and the Americans with Disability Act

While the focus of this article is wrongful discharge, any employer analysis regarding whether the employer should discharge an employee must consider the Americans with Disability Act (ADA) protections.[268] The ADA requires an employer to accommodate "qualified employees" with a "disability."[269] Thus, if an employee's unacceptable conduct is the consequence of a disability, the correct employer response is to attempt to accommodate the employee's disability, not to discipline or discharge him or her. While it is not the intent of this article to analyze the ADA, employers must be aware that employee rule violations or performance problems may be the consequence of a disability, which require accommodations, not punishment.

2. Bases from Which Plaintiff May Argue Violation of the "Good Cause" Provision of MWDA

The above standards for assessing "just cause" for discharge may be used for attacking a discharge under the MWDA "good cause" standard.

The MWDA defines "good cause" as "reasonable job-related grounds for dismissal." Thus, the employer is subjected to a reasonableness standard and the jury will be so instructed. The above standards, if complied with, suggest an employer who has

268. 42 U.S.C. §§ 12101-213 (2000).
269. *Id.* § 12112(b)(5)(A).

"reasonably" responded to employee misconduct. As stated in the discussion of "good cause,"[270] the fact that the employer is able to demonstrate employee wrongdoing may not be sufficient to demonstrate "good cause." Where the employee's failures were in part the fault of the employer, wrongdoing does not equate to "good cause." Secondly, it is difficult to imagine a jury finding for an employer who: (1) discharges a long-time employee based on a rule violation or performance deficiency that itself is a minor violation; (2) has not established and communicated rules or performances standards; (3) has not discharged other similarly situated employees; (4) has not carefully investigated the alleged wrongdoing; and (5) has not given the discharged employee an opportunity to address the allegations prior to discharge. The employer satisfaction of the above standards are not a required matter of law, but, if complied with, the defendant will have a stronger factual case; alternatively, the plaintiff will have a much more difficult factual case.

V. CONCLUSION

The basis for Montana wrongful discharge lawsuits is the MWDA. Since its inception in 1987, it has been sparingly amended. The significant developments in the law have occurred as the Montana courts have interpreted the Act's language and applied it to fact. While this development will continue, many, if not most of the Act's provisions have been construed and applied, and consequently the law has become fairly settled.

Also settled is the fact that plaintiffs have a claim based on wrongful employer conduct apart from discharge. Where available, plaintiffs prefer these suits because the limitations found in the MWDA are not present. Because of the advantage that these suits provide plaintiffs, it is anticipated that this will be a growth area of the law.

Finally, it is anticipated that the practice in this area of law will become more sophisticated as counsel become better versed on how this subject of state practice is entwined with the broader practice of employment law.

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270. *See supra* pp. 336-39.