

# WRONGFUL DISCHARGE FROM EMPLOYMENT

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NOTE: Dated Material --The statutes, rules, and court decisions discussed within are subject to amendment and interpretation. This publication is a general summary of the legal principles discussed. Questions concerning specific issues should be addressed to legal counsel.

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## **I. INTRODUCTION**

Regulation of the employment relationship continues to be one of the most dynamic and rapidly evolving areas of law. The sources of that regulation are federal and state legislation, and court decisions which interpret that legislation, or supplement it with decisions involving common law rights and remedies. In addition, the EEOC, the United States Department of Labor, the Montana Human Rights Bureau, and the Montana Department of Labor, among other enforcement agencies, publish administrative rules and policies which implement those laws.

The field of "traditional" labor law, involving union membership and collective bargaining agreements between employers and unions representing employees, is beyond the scope of this outline. The remaining employment laws which regulate the employment relationship can be divided into three general categories: One category involves the laws providing remedies for wrongful discharges from employment. A second category regulates safety and working conditions, wages, health and pension benefits, and other rights. The third category is best characterized as fair employment practices law, encompassing the many anti-discrimination rules which have been developed through legislation, court decisions, and enforcement agency guidelines. Those rules protect the rights of individuals to obtain and maintain employment and advance in employment, free from discrimination based on protected class status or personal characteristics, particularly those which are "immutable" (beyond the control of an individual) such as sex, race, national origin, and disabled status, or otherwise worthy

of protection such as those based on religion, veteran status, wages, benefits, and overtime laws, safety, or the right to marry and raise children.

When a legislative act includes a statute prohibiting discrimination against an employee because of a specified status (such as race, gender, etc.), or because of the exercise of a protected right (bankruptcy, wage complaint, safety complaint, etc.) that statute creates a "protected class status". Almost all federal acts include a standardized statute barring discrimination as a result of the exercise of the rights created by the act. This category of law requires employers to avoid employment decisions based upon stereotyped perceptions, or to make employment decisions based on individualized assessments of ability, or exclusive of the exercise of protected rights.

All fair employment practices laws prohibit retaliation against employees who initiate or participate in discrimination claim proceedings. Retaliation is actionable as a separate and distinct claim from the underlying discrimination complaint.

As a general principle, harassment on the basis of a protected class status is also prohibited.

The focus of this outline is the first category of wrongful discharge law. Although these areas of law are generally separate, it is critical that employers appreciate their scope, and understand the interrelationship between them. Remedies available to a plaintiff in an employment lawsuit are often mutually exclusive in theory, yet discharged plaintiffs commonly file claims alleging alternative theories of wrongful discharge and discrimination arising from a single event of employment termination.

## **II. OVERVIEW OF THE WRONGFUL DISCHARGE FROM EMPLOYMENT ACT**

Prior to 1987, the Montana Supreme Court developed a number of common law employment discharge remedies which provided greater protection for employee rights than available in many other states. Those remedies included actions for breach of the implied covenant of good faith and fair dealing, negligence, wrongful discharge based on violations of public policy, and breach of contract.

In 1987, in response to a series of large damage awards in favor of employees, the legislature enacted the "Wrongful Discharge From Employment Act," §3 9-2-901, et seq., MCA. The Act balances the interest of an employee in job security, and the employer's interests in efficiency, greater certainty, and limiting risk in making employment decisions.

Montana no longer recognizes the "employment-at-will" doctrine. Chapter 583, L. 2001. In a 1999 decision, the Montana Supreme Court held that the Act impliedly repealed the at will statute. *Whidden v. Nerison*, 981 P.2d 271. The legislature then amended the Act in 2001 (effective October 1, 2001) to eliminate all references to the at will doctrine with

the exception of its application to probationary employees. *See* Section 93-2-904(2), MCA (Appendix).

The Act abolished all common law forms of employment discharge remedies, replacing them with a single statutory action. The Act's "Remedies" clause substantially limited the scope and amount of damages available to a discharged employee. Section 39-2-905, MCA. The Act broadly defines the term "discharge" to include *any* termination of employment, constructive discharge, as well as failure to recall or rehire an employee. Section 39-2-903(2), MCA. It limited the types of claims allowed to "constructive discharge" authorizing an employee who *voluntarily* quits to sue for wrongful discharge, and claims for *involuntary* termination to circumstances where an employer discharges an employee if:

(1) the discharge is in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

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

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

Section 39-2-904, MCA.

The Act bars recovery of damages for pain and suffering, emotional distress, and any other compensatory damages other than lost wages and fringe benefits, and limits recovery of lost wages to a maximum of four years, with a mandatory reduction for amounts an employee could have earned with reasonable diligence. Section 39-2-905, MCA.

The Act is the exclusive remedy for a claim of wrongful discharge, but does *not* apply to discharges of employees who are: (1) covered by a collective bargaining agreement, (2) who have a written contract for a specific employment term, or (3) whose discharge is subject to a state or federal statute that provides a procedure or remedy for contesting the dispute. Exemptions clause, § 39-2-912, MCA.

The Act expressly preempts all tort and contract remedies for claims of discharge. Preemption clause, § 39-2-913, MCA. It sets forth a special, short one-year statute of limitations during which a claim must be filed. Section 39-2-911, MCA. The Act also established an employer defense based on internal appeal procedures. If an employer establishes an internal grievance or appeal procedure, and a discharged employee does not initiate or exhaust the available internal appeal procedure, his claim may be barred. Section 39-2-911(3), MCA.

Punitive damages are available only in narrow circumstances where the employee establishes that the discharge was in retaliation for a refusal to violate public policy, or for reporting a violation of public policy, and only if it is established to a high standard of

clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge. Section 39-2-905(2), MCA.

Finally, the Act encourages arbitration of claims by providing for recovery of attorneys' fees for a party who requests that the case be arbitrated, and the opposing party rejects that request, if the party requesting arbitration then prevails at trial. Section 39-2-915, MCA.

### **III. SPECIFIC FEATURES OF THE WRONGFUL DISCHARGE ACT**

#### **A. Definition of "Discharge"**

The Act specifically authorizes claims for "constructive discharge". That term is defined to mean 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". However, the Act limits this type of claim by expressly providing that a constructive discharge may not be based upon a voluntary termination "because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment". Section 39-2-903(1), MCA.

The term "discharge" is broadly defined to include not only a constructive discharge, but "any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason". Section 39-2-903(2), MCA.

Under this broad definition, discharged employees may theoretically challenge any employment discharge. The inclusion of "failure to recall or rehire" as an actionable discharge can result in claims where, for example, seasonal employees in outdoor occupations such as construction or mining are laid off with the expectation of returning the following spring. Often, those types of workers are reported as "job attached" by employers in the unemployment insurance process. Employees should take care to differentiate between temporary and permanent layoffs. *See Kneeland v. Luzenac*, \_\_\_ Mont. \_\_\_, 961 P.2d 725 (1998). In *Kneeland*, the Montana Supreme Court affirmed a jury verdict in favor of the employer in the plaintiff's reduction-in-force wrongful discharge claim because the layoff was a permanent separation and the employer had no duty to rehire the plaintiff.

#### **B. A Discharge is "Wrongful" Only If It Meets One or More of Three Criteria**

Under the Act, an employee who *voluntarily* quits may sue an employer and recover damages if the termination meets the definition of a "constructive discharge". Claims for wrongful discharge involving *involuntary* terminations are limited to three categories. An involuntary termination is wrongful only if:

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

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

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

**1. Retaliatory Discharge--Public Policy.** Under the former law, a discharged employee could bring a claim for wrongful discharge if a public policy had been violated in connection with the termination. *Keneally v. Orgain*, 186 Mont. 1, 606 P.2d 127 (1980).

The Act has retained this type of claim in theory, but limits its application to two narrow circumstances. Such a claim may only be brought if the discharge was "retaliatory", for either (1) refusing to do something which, if done, would violate "public policy" as defined in the Act, or (2) for reporting an employer's public policy violation (whistleblowing).

Further, the Act more narrowly defines the concept of "public policy" to mean a policy "concerning the public health, safety, or welfare" which is established by "Constitutional provision, statute, or administrative rule". Thus, unless the policy is formally established in published form, it cannot serve as the underlying basis for a retaliatory termination claim.

This type of wrongful discharge claim is particularly important because it is the only form of discharge which can support recovery of punitive damages. As a result, this type of allegation is often included in a complaint. The inclusion may be improper in many cases. This type of allegation is often used as the basis for a wrongful discharge claim when the factual circumstances underlying the claim are separately actionable under another state or federal statute providing a remedy for contesting the dispute. If so, the Act would not apply to such a discharge pursuant to the "Exemptions" clause of the Act. Section 39-2-912(1), MCA.

For example, an employee who alleges discharge in retaliation for reporting sexual harassment has a remedy available under both Title VII of the Civil Rights Act of 1964, and the Montana Human Rights Act. A miner who alleges retaliatory discharge for refusing to perform an unsafe act, or for reporting unsafe work practices, has a complete remedy available under the federal Mine Safety and Health Act (MSHA). 30 U.S.C. § 1815(c)(1); *Simpson v. Federal Mine Safety & Health Review Commission*, (D.C. Cir. 1988), 842 F.2d 453. Similarly, the federal Clean Air Act (42 U.S.C. § 7401, et seq.) and the Toxic Substances Control Act (15 U.S.C. § 2601, et seq.) provide comprehensive remedies for retaliatory discharge for work refusals or whistleblowing involving environmental matters. In most cases, the remedies authorized in most federal acts are as comprehensive as those provided under Title VII and the Montana Human Rights Act.

Most statutory remedies of that type have short (90-day or 180-day) statutes of limitations. Employers and their attorneys should carefully review retaliation allegations to determine whether the Exemptions clause bars the claim, and whether the plaintiff has failed to file a claim with an appropriate administrative agency within the required time frame. The Wrongful Discharge Act does not serve as a "remedy by default" due to a plaintiff's failure to invoke a specific federal or state statutory remedy.

**2. Terminations Without "Good Cause".** An employer will be liable for wrongful discharge under the Act if an employee is terminated without "good cause". The only exception to this principle is when the discharged employee is still within an applicable probationary period.

The requirement that all discharges be based upon "good cause" is the fundamental concept of the Act. It was the primary benefit granted to employees when the legislature balanced their interests with those of employers, essentially repealing the concept of "at-will" employment under Montana law.

"Good cause" is expressly defined in the Act to mean "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason". Section 39-2-903(5), MCA.<sup>[1]</sup> The requirement within the definition that a discharge be based upon "reasonable job-related ground for dismissal" incorporates the most salient and fundamental concept underlying all employment law: *reasonableness*. If there is one concept in employment decisionmaking which if adhered to will insulate employer's from liability it is that the grounds for a discharge be "reasonable".

The balance of the definition establishes three categories of good cause which will justify a termination:

- (1) failure to satisfactorily perform job duties;
- (2) disruption of the employer's operation; and
- (3) other legitimate business reason(s).

Section 39-2-903(5), MCA.

Although many wrongful discharge complaints include allegations of retaliation and/or personnel policy violation claims, virtually all complaints allege lack of good cause for the discharge.

The three categories are not necessarily mutually exclusive, although some circumstances clearly fall within specific categories. A secretary who can master neither typing nor spelling clearly will not be able to satisfactorily perform required job duties. An employee who harasses and demoralizes co-workers, is insubordinate to management, or misses work on a regular basis without calling to report an absence will clearly disrupt an

employer's operation. An employer which loses a major customer or otherwise experiences substantial economic hardship may be required to reduce its workforce to survive, and the reduction in force will clearly fall within the category of a legitimate business reason for terminating one or more employees. However, the secretary's poor performance may also disrupt the production requirements of the office, and the duties of the employee who harasses and demoralizes co-workers, or fails to report to work may jeopardize important performance criteria, and his insubordination may be a "legitimate business reason" for discharge as well as a disruption to the workplace. Employers confronted by personnel issues which may justify a discharge should consider whether the problems arising from an employee's conduct or performance fall under more than one of the justifications for discharge recognized under the Act.

**3. Violation of Personnel Policy.** Under the Act, a discharge is wrongful if an employer violates the express provisions of its own written personnel policy. Section 39-2-904(3), MCA. This type of claim is frequently joined with a claim that the employee was discharged without good cause. It is often more difficult for an employer to defend against this type of claim than a claim of lack of good cause. This is because most jurors are employees, and can readily understand concepts of poor performance and disruptiveness among their own co-workers. However, personnel policies are similar to either contract provisions or statutes. They are often drafted in general terms, and usually contain procedural guidelines, resulting in the need for interpretation.

Personnel policies can have multiple purposes, describing everything from company history and sweeping generalizations about the company's commitment to fair and equal treatment of all employees, explanations of benefits and leave policies, and finally, the company's basic rules concerning attendance, reporting off, standards of conduct, and disciplinary and termination procedures.

The policies which create the greatest risk of wrongful discharge claims are those which either make general, unnecessary promises about commitments to fair and equal treatment of all employees, or those which establish complicated progressive discipline procedures, and promise employees extensive due process rights during an investigation.

An employer's most effective strategy for avoiding liability under the former type of policies which make sweeping promises of commitments to fair and equal treatment of all employees, or longevity of employment if the employee performs satisfactorily, is to avoid using those types of policies. It is very difficult to dispose of a case on summary judgment without going to trial when the issue is whether the employer has afforded the discharged employee "fair and equal treatment", or is entitled to long-term employment based on satisfactory performance.

Progressive discipline policies can also be troublesome. Some employers publish complicated discipline procedures whereby disciplinary violations will be cleared from a file in six months or one year, etc., and promise that cleared violations will no longer be held against the employee if subsequent violations occur. If the employee persistently engages in the same types of troublesome conduct, but his or her prior violations "clear"

between events, it is easy for the employee to allege that the employer, despite having technically "purged" the record of past offenses from the file, is still holding them against the employee.

A third problem area is where personnel policies place onerous obligations on management in the investigation and handling of a co-worker's complaint or an employee disciplinary matter. If complicated procedures are established, they *must* be followed. Otherwise, the discharged plaintiff can argue his personnel policy discharge claim as a de facto "negligent investigation" case.

It is conceivable that an employer may have abundant good cause to discharge an employee, yet be held liable for wrongful discharge because the termination violates promises made to an employee through its personnel policies.

Finally, employers must realize that a policy does not have to be contained within a published manual to be considered a "personnel policy". Any general memorandum, evaluation forms which contain statements of company policy, or other postings, may also constitute personnel policies which, if violated, may result in wrongful discharge liability.

Although the Act expressly preempts claims for breach of an express or implied contract as allowed under the former law, the Act's authorization of a claim for violation of an express provision of a written personnel policy in effect reinstates a limited form of an action for breach of contract.

### **C. Limitation on Recoverable Damages**

One of the most important tradeoffs for employers confronted by the Act's requirement of good cause for all discharges is the stringent limits placed upon damages which may be recovered by a prevailing plaintiff. Under the former law, plaintiffs routinely recovered past and future lost wages, awards for emotional distress, and in many cases punitive damages. The Act expressly bars damages for pain and suffering, emotional distress, or any form of compensatory damages other than limited lost wages and fringe benefits. Section 39-2-905, MCA, entitled "Remedies". The Act specifically provides that a prevailing plaintiff may be awarded lost wages and fringe benefits:

. . . for a period not to exceed four years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment. Section 39-2-905, MCA.

This limitation on damages is profoundly important to employers. Unless the narrow circumstances authorizing recovery of punitive damages are present, most employers can

generally calculate their risk of loss before discharging an employee, and in most cases can avoid the catastrophic results which sometimes occurred under the former law.

The mitigation requirement is mandatory. The Act states that interim earnings "must" be deducted from the amounts awarded for lost wages. The Act also specifies that interim earnings include amounts an employee "could have earned with reasonable diligence". Although minimum wage replacement jobs are not particularly desirable to many workers, it is reasonable to assume that most discharged employees could obtain such a position, and significant aggregate earnings could be imputed to an employee who fails to reasonably obtain even minimum wage replacement employment.

#### **D. Interim Appeal Procedure Defense**

The Act allows employers the benefit of an important defense to liability if the employer maintains "written internal procedures . . . under which an employee may appeal a discharge within the organizational structure of the employer". The availability of this defense has important procedural requirements. The employer must establish a written appeal procedure which applies to discharges. It is critical that the employer "within seven days of the date of the discharge" notify the discharged employee of the existence of the procedure and supply the discharged employee with a copy of it. If that is not done, the discharged employee is excused from compliance with the procedure and the defense is lost. Section 39-2-911, MCA.

The defense is only available if the employee, having properly been notified of the defense, fails to initiate or exhaust his rights under the internal procedure. If the employee invokes the appeal procedure, and the employer sustains the discharge, the defense is not applicable. It is only available if the employee fails to initiate or exhaust the procedure. Section 39-2-911, MCA.

If the employee invokes the appeal procedure, but the employer fails to complete its review within 90 days from the date the employee initiated the appeal, the employee is free to file an action under the Wrongful Discharge Act, and the appeal procedure is deemed exhausted. Section 39-2-911, MCA.

If the employee invokes the procedure, the one-year statute of limitations for bringing a claim is "tolled" (extended) until such time as the procedure is exhausted. However, the statute caps any tolling at a maximum of 120 days. Section 39-2-911, MCA.

#### **E. Arbitration**

The Act allows the parties to a wrongful discharge claim to voluntarily arbitrate the dispute. Section 39-2-914, MCA. Arbitration is a binding substitute for litigation in the court system. If an arbitrator rules on a case, one party "wins" and the other party "loses" just as if a jury rendered a verdict. Other than in cases of a procedural defect or other impropriety, there is no realistic basis for appeal from an arbitrator's decision.

Either party may request arbitration. The significance of the availability of arbitration under the Act is largely due to the fact that a party demanding arbitration may recover "reasonable" attorneys' fees incurred after the offer is made if the opposing party rejects the demand and the party demanding arbitration prevails at trial. Section 39-2-915, MCA.

Under the Act, offers to arbitrate must be made in writing, and must contain provisions concerning selection of the arbitrator, submission to the requirements of the Uniform Arbitration Act, and must bind the arbitrator to the law as established in the Act. If a complaint has been filed under the Act, the offer 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. 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 the Act. The arbitrator's award is final and binding, subject to limited grounds for review. Section 39-2-914, MCA.

If the discharged employee offers to arbitrate, and the offer is accepted by the employer, and then the *employee* prevails in the arbitration proceeding, the employer will be obligated to pay the arbitrator's fee and all costs of arbitration.

Although no statistics are available, arbitration of wrongful discharge claims is likely the exception, rather than the rule. It is often difficult for the parties to agree upon an arbitrator acceptable to both sides. If they can't agree, the court will select the arbitrator. Wrongful discharge claims are combined with tort claims, and there is uncertainty concerning what claims are subject to arbitration if the parties cannot agree in advance.

It must be recognized that "arbitration" and "mediation" are very different procedures. Mediation is a mutual, voluntary submission of the dispute to a neutral third party, usually a retired judge or an attorney experienced in the field, who is not empowered to make a binding decision concerning the case, and who attempts to facilitate a settlement of the dispute. Arbitration is a binding, final substitute for a court proceeding where the purpose of the arbitrator is to review the evidence, apply the law, and decide the case.

#### **IV. ALTERNATIVE AND RELATED CLAIMS**

The Act is the "exclusive remedy for a wrongful discharge from employment". Section 39-2-902, MCA. The Act provides that there is "no right under any legal theory to damages for wrongful discharge" except as provided under the Act. Section 39-2-905(3), MCA.

The Act specifically preempts all other claims "for discharge" which may arise from tort or express or implied contract. Section 39-2-913, MCA.

However, despite the clear language of the Act, it is common for discharged employees to combine alternative or related claims with their wrongful discharge claim in their

complaint, or to pursue alternative claims in other forums, such as enforcement agencies like the EEOC, Montana Human Rights Bureau, United States Department of Labor, etc.

Part of the reason for that practice is uncertainty whether a discharge is more properly a claim for wrongful discharge under the Act, or whether it is actionable under one of a number of anti-discrimination statutes. Further, employment relationships are sometimes complex, involving ancillary agreements and obligations which may exist independent of an actual event of "discharge". In some cases, discharged employees allege that employers engaged in conduct well before the actual event of discharge, or after it, such as invasion of privacy, defamation, blacklisting, or intentional or negligent infliction of emotional distress, that they contend is separately actionable from the discharge itself.

As noted above, the Act exempts certain types of claims from coverage. Section 39-2-912, MCA, (Exemptions). In particular, claims which may be brought under state or federal statutes that prohibit discrimination based on race, sex, age, disability, etc., are exempt from coverage under the Wrongful Discharge Act. Under Montana law, the Human Rights Act is expressly deemed the "exclusive remedy" for discrimination of that type. Section 49-2-509(7), MCA. The legislature clearly intended that the two statutes be mutually exclusive, and that a discharged employee may not recover under both for the same event of discharge. *Tonack v. Montana Bank of Billings*, 258 Mont. 247, 854 P.2d 326 (1993).

Although the Preemption clause of the Act bars tort and contract claims "for discharge", it does not bar all claims merely because they arise in the employment context. *Beasley v. Semitool*, 258 Mont. 258, 853 P.2d 84 (1993); *Ruzicka v. First Health Care Corporation*, 45 F.Supp. 2d 809 (Nov 1997); *Kulm v. Mont. St. U., Bozeman*, 285 MT 328, 948 P.2d 243 (1997). The Montana Supreme Court has stated that whether or not an employee's discharge "is subject to any other state or federal statute that provides a procedure for contesting the claim" may not be known when the claims are filed. *Schultz v. Stillwater Mining, Co.*, 227 Mont. 154, 920 P.2d 486 (1996).

The Court has held that the only proper defendant in a claim under the Wrongful Discharge Act is the actual "employer", and not managers or co-workers. *Buck v. Billings, Montana, Chevrolet, Inc.*, 248 Mont 27, 811 P.2d 537 (1991). However, discharged employees sometimes sue both the company and also a co-worker or supervisor alleging interference with contract, defamation, infliction of emotional distress, or blacklisting.

#### A. Defamation

Written (libel) and verbal (slander) false statements damaging the reputation of an employee may constitute a basis for a claim of defamation. *Frigon v. Morrison-Maierle, Inc.*, 233 Mont. 113, 760 P.2d 57 (1988). Defamation claims are sometimes combined with wrongful discharge claims. *Ruzicka*. Insurance is at times a factor. Most employers do not purchase insurance for coverage of employment claims. Generally, employer liability policies contain employee practices exclusions from coverage. However, some

general liability policies will provide coverage, and pay for the cost of defense of a claim, when defamation is alleged in the complaint.

Montana has a special statute prohibiting blacklisting which may apply in post-termination communications. Section 39-2-801, MCA. Blacklisting is related to, but distinct from, defamation. The entire act reads as follows:

**TITLE 39. LABOR**  
**CHAPTER 2. THE EMPLOYMENT RELATIONSHIP**  
**PART 8. BLACKLISTING AND PROTECTION OF DISCHARGED**  
**EMPLOYEES**

**39-2-801. Employee to be furnished on demand with reason for discharge.** (1) It 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. Except as provided in subsection (3), if the person refuses to do so within a reasonable time after the demand, it is unlawful for the person to furnish any statement of the reasons for the discharge to any person or in any way to blacklist or to prevent the discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed in this part.

(2) 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.

(3) 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.

**39-2-802. Protection of discharged employees.** If any person, after having discharged an employee from his service, prevents or attempts to prevent by word or writing of any kind such discharged employee from obtaining employment with any other person, such person is punishable as provided in 39-2-804 and is liable in punitive damages to such discharged person, to be recovered by civil action. No person is prohibited from informing by word or writing any person to whom such discharged person or employee has applied for employment a truthful statement of the reason for such discharge.

**39-2-803. Blacklisting prohibited.** If any company or corporation in this state authorizes or allows any of its agents to blacklist or any person does blacklist any discharged employee or attempts by word or writing or any other means whatever to prevent any discharged employee or any employee who may have voluntarily left the company's service from obtaining employment with another person, except as provided for in 39-2-802, such company or corporation or person is liable in punitive damages to such employee so prevented from obtaining employment, to be recovered by him in a civil action, and is also punishable as provided in 39-2-804.

**39-2-804. Violation of part a misdemeanor.** Every person who violates any of the provisions of this part relating to the protection of discharged employees and the prevention of blacklisting is guilty of a misdemeanor.

Under the statute, an employer has a "duty" to furnish upon demand of a discharged employee a written statement setting forth a "full, succinct, and complete statement" of the reasons for the employee's discharge. If the employer refuses to do so within a "reasonable time", it is unlawful for the employer to later "furnish any statement of the reason for the discharge . . ." Subsection (1). "Truthful statements are not prohibited". Subsection (2). It is difficult to reconcile these two subsections. An employer who violates the statute is liable for punitive damages and potentially guilty of a criminal misdemeanor. Section 39-2-803, MCA.

### **B. Infliction of Emotional Distress**

There had been long standing controversy over whether a claim for infliction of emotional distress could be asserted as a separate claim, as opposed to being an element of damages for some other tort claim. In *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995), the Montana Supreme Court clarified the law, and held that a plaintiff may state "an independent cause of action for intentional infliction of emotional distress . . . under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission. *Sacco*, 896 P.2d at 428.

### **C. Invasion of Privacy**

Many commentators suggest that claims for invasion of employee privacy will become one of the largest areas of employer tort exposure in the coming years. The law is not yet well established in Montana on this issue, and the anticipated groundswell has not yet materialized. However, employers should be exceedingly cautious about releasing information about their (current or former) employees to co-workers or third parties. This type of tort claim can have potentially dire consequences in the proper circumstances.

### **D. Intentional Interference with Contractual Relations**

The most common circumstance where this claim is combined with a claim of wrongful discharge is when the plaintiff sues both his own employer, and another party who or which he contends wrongfully "interfered" with his employment relationship. For example, if a general contractor is displeased with the attitude or safety performance of the employee of a subcontractor, and complains to the employer/subcontractor, and the offending employee is thereafter discharged, the discharged employee may sue his own employer for wrongful discharge, and join the "interfering" general contractor as a co-defendant based on an interference claim. These types of claims are difficult, and can result in polarizing a relationship between the defendants.

## **E. Fair Employment Practices (Discrimination) Claims**

It is a common practice for plaintiffs to allege claims of both wrongful discharge and discrimination and/or retaliation. The Montana Supreme Court nominally approved of this practice in the *Tonack* decision. Two completely distinct bodies of law apply to these distinct types of claims. Discrimination claims under federal law are particularly appealing for plaintiffs. Generally, anti-discrimination statutes allow a prevailing plaintiff to recover his or her attorneys' fee, and in cases subject to the Civil Rights Act of 1991, a prevailing plaintiff may recover general and compensatory damages well in excess of the limited damages recoverable under the Wrongful Discharge Act, including punitive damages in cases of intentional discrimination. In most cases, an employer is in a much less threatening situation if its exposure is only to a claim of wrongful discharge under the Act.

Whether or not an employer is subject to the much more stringent and threatening provisions of many federal employment laws is generally dependent upon how many employees it has. Once an employer crosses the varying size thresholds for coverage by various federal acts, its potential risk of large damage exposure increases dramatically. Among the federal laws which are frequently implicated in employment discharge claims are the Americans With Disabilities Act, the Family Medical Leave Act, the Age Discrimination In Employment Act, the Worker Adjustment and Retraining Notification Act (WARN), Title VII, the Rehabilitation Act, and the Civil Rights Act of 1991.

## **F. Workers' Compensation Retaliation/Wrongful Discharge/ Disability Discrimination: The "Bermuda Triangle" of Employment Law**

It is difficult to conceive of a more threatening and less certain combination of potential claims which can arise from an injury to an employee. The importance and complexity of the issues arising from this set of circumstances is of such magnitude and complexity that it warrants a separate seminar in its own right.

Claims of this nature usually arise after a worker reports a debilitating injury. These cases frequently involve claims of back injury, and usually in industrial employment. The employee claims temporary total disability, and aggressively pursues a Workers' Compensation claim. Often, the claim is disputed. The plaintiff may claim permanent limitations, and request "reasonable accommodation" under the Americans With Disabilities Act. Issues of job transfers, light duty work, work hardening, and rehabilitation arise. Most larger employers have long term disability insurance, and the plaintiff will often apply for it, claiming total disability under the plan definition.

Ultimately, the plaintiff settles the Workers' Compensation case, and is laid off when he can't return to the duties of his original position. The employer dutifully informs the discharged plaintiff that he will be granted the preference available to him under the Workers' Compensation Act to obtain reemployment for a "comparable position" that becomes vacant if that position is consistent with his physical condition and vocational

abilities within two years from the date of his injury, provided he has received a medical release to return to work. Section 39-71-317, MCA.

Thereafter, the plaintiff files suit alleging wrongful discharge without good cause, in violation of various personnel policies, and in retaliation for having filed a Workers' Compensation claim. He joins with that claim a distinct statutory tort claim arising from the reemployment preference statute, which provides that "an employer may not use as grounds for terminating a worker the filing of a [Workers' Compensation] claim . . . ." Section 39-71-317(1), MCA; *Lueck v. U.P.S.*, 258 Mont. 2, 851 P.2d 1041 (1993). He also files claims alleging disability discrimination with the EEOC and the Montana Human Rights Bureau. When he receives his "right to sue" letters from those agencies, he joins those claims in the district court lawsuit, as well. 42 U.S.C. § 12111, et seq.; Section 49-2-101, et seq., MCA.

A claim of this type gives rise to multiple issues of law and fact, and triggers issues which remain unresolved under both state and federal law, and which are presently the subject of controversy as a result of the publication of recent EEOC regulations.

One issue is clear under Montana law. If the case is ultimately determined to be one of disability discrimination, the plaintiff's exclusive remedy lies with the Montana Human Rights Act. It is also clear that the remedies under the Montana Human Rights Act and the Wrongful Discharge Act are mutually exclusive. One of the uncertainties is whether § 39-71-317, MCA, actually creates a statutory "tort" claim, independent of the Wrongful Discharge Act. In 1993, the Montana Supreme Court in *Lueck* hinted, but did not expressly rule, that the statute creates an independent claim, and set forth the following elements necessary to prove a retaliatory discharge claim under the statute:

1. That the employee was discharged and
2. That the employer's motive in discharging the employee was to retaliate for his filing a claim under the Workers' Compensation Act. *Lueck*, 851 P.2d at 1045.

Pursuit of a claim of this type presents a dilemma for the injured worker. To maximize his Workers' Compensation recovery, and potentially obtain long term disability benefits, an injured worker will often contend he is significantly disabled and unable to return to work. By doing so, he takes the risk that he will forfeit the ability to return to work with reasonable accommodation to perform the essential functions of his position.

The employer also faces a dilemma. If the Workers' Compensation claim is disputed, the employer risks developing a record of skepticism and hostility toward the injury claim which may be used against the employer as evidence of retaliatory intent and malice in the later lawsuit. Although the employer, and the Workers' Compensation insurer, will both be motivated financially to return the employer to work, many employers are reluctant to engage in the practice of creating special, light duty positions for injured workers.

Finally, benevolent employers who retain injured employees unable to return to work for extended periods of time may end up establishing a de facto policy of continuing expensive health insurance benefits through ad hoc decision making. The employer may end up carrying one injured worker as a nominal employee for an extended period of time, hoping the employee will recover and return, and may lay off another employee because it is apparent fairly soon that he or she will never be able to return.

These cases are problematical, and any circumstances of this type should be carefully reviewed with an attorney.

## **G. Miscellaneous**

Most federal employment-related acts contain remedial, anti-discrimination statutes. Employers should recognize the potential interrelationship of the remedies under the Wrongful Discharge Act, and those provided through anti-discrimination statutes. The following is a non-exclusive list of federal acts which contain employment remedies:

- Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq. See § 510
- Mine Safety and Health Act (MSHA), 30 U.S.C. § 801, et seq. See § 815
- Occupational Safety and Health (OSHA), 29 U.S.C. § 651, et seq. See § 660(c)
- National Labor Relations Act (NLRA), 29 U.S.C. § 141, et seq. See 29 U.S.C. § 157, and Section 7, guaranteeing non-union employees the right to freely organize and assist labor organizations, and the right to engage in "concerted activities" for mutual aid or protection. Section 8 of the Act makes it an unfair labor practice for an employer to interfere with, or restrain, or coerce employees in the exercise of their rights.
- Fair Labor Standards Act, 29 U.S.C. § 201, et seq. See § 215.
- Immigration Reform and Control Act, 8 U.S.C. § 1324b. See 8 U.S.C. § 1324b(a)(g)(h).
- Bankruptcy, 11 U.S.C. § 525(b)
- Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 4321(b)(3); 4324(d) [formerly 2021(b)(3); 2024(d)]
- Family and Medical Leave Act (FMLA), 29 U.S.C. § 2611, et seq.

## **H. Reducing the Risk of a Discharge Lawsuit**

1. Appreciate the magnitude and significance of an employment discharge. Employment problems, and in particular discharges, give rise to strong emotions. Pride, honor, self-worth, and self-esteem are usually on the line for the employee. The employee may have caused the problems himself or herself, but those considerations are present nonetheless. Depression, fear, extreme anger, vindictiveness, threats, and often violence, and occasionally suicide and homicide, can result from employment disputes. Recognize the risk, and try to prevent tensions from escalating.

2. Maintain privacy and confidentiality to the greatest extent possible.

3. Make effective use of evaluation procedures, and honestly and carefully document problems with performance and conduct.
4. Probationary periods are important. Evaluate a new employee's capabilities and demeanor carefully during the probationary period. Don't wait until it has expired to take action.
5. Avoid the perception that a personality dispute exists between a single manager and a problem employee. Involve more than one supervisor in the review of an employee's performance, or investigation of the complaints that arise concerning the employee.

Failure to distribute this burden may result in a contention that a single supervisor was "out to get" the employee.

6. Supervisors should avoid excessive familiarity with the personal lives of their employees. This is one of the "burdens of management".
7. Avoid unnecessary and unduly complex personnel policies. The best personnel policies are the ones which place an employee on notice of company rules and standards of conduct.
8. Be candid with employees who have a "slim chance" of success. Circumstances may vary, but honesty and compassion can preserve a relationship and perhaps motivate a poor employee to voluntarily look for replacement employment before it is necessary to terminate.
9. Avoid a policy of "immediate termination". There is almost never a justification for discharging an employee "on the spot," regardless of their conduct or the circumstances. It is always a better practice to send an employee home (this does not have to be "disciplinary" in nature), investigate, and allow for an objective evaluation. A termination is not "discipline." It is a decision that the situation is beyond discipline.
10. Consider a formal "last chance" agreement to correct performance or conduct problems.
11. Last, but not least, be humane and reasonable at all times through the evaluation of a personnel issue. If a termination is required, a lawsuit may follow.

12. After the discharge:

- a) Promptly provide the final paycheck and comply with COBRA requirements, etc. *See* § 39-3-205, MCA.
- b) Don't withhold pay to leverage the return of company property or other assets.

c) Watch for a request for a statement of the reasons for termination under the Blacklisting statute. Direct the letter to the appropriate person for response. Review the request and proposed response with a knowledgeable attorney.

d) Carefully adhere to the company reference policy.

e) Unemployment claims are inevitable. Discuss the proposed response with a knowledgeable attorney. UI benefits are a form of social insurance paid by a common fund. The benefits paid are not the employer's funds. The fact that good cause existed to justify a discharge does not mean that the employee is ineligible to receive UI benefits. An employee who is involuntarily discharged is entitled to receive UI benefits unless the employee engaged in "misconduct" connected with or affecting the employee's work. Section 39-51-2304, MCA. The test for whether an employer had "good cause" to discharge an employee is significantly different than the test for whether an employee engaged in "misconduct" under the UI statute. For example, an economic downturn, or poor performance, may constitute "good cause" to discharge an employee who did not engage in "misconduct".

## **A P P E N D I X**

### **MONTANA CODE ANNOTATED**

#### **TITLE 39. LABOR**

#### **CHAPTER 2. THE EMPLOYMENT RELATIONSHIP**

#### **PART 9. WRONGFUL DISCHARGE FROM EMPLOYMENT**

**39-2-901.** Short title. This part may be cited as the "Wrongful Discharge From Employment Act".

**39-2-902. Purpose.** This part sets forth certain rights and remedies with respect to wrongful discharge. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

**39-2-903. Definitions.** In this part, the following definitions apply:

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

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for

lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

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

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

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

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

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

**39-2-904. Elements of wrongful discharge** -- presumptive probationary period. (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.

(2) (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.

(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.

**39-2-905. Remedies.** (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest on the lost wages and fringe

benefits. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

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

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

**39-2-906 through 39-2-910 reserved.**

**39-2-911. Limitation of actions.** (1) An action under this part must be filed within 1 year after the date of discharge.

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

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

**39-2-912. Exemptions.** This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. 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.

**39-2-913. Preemption of common-law remedies.** Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.

**39-2-14. Arbitration.** (1) A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated under this part.

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

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

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

(c) The arbitrator is bound by this part.

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

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

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

**39-2-915. Effect of rejection of offer to arbitrate.** A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.

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<sup>[1]</sup>The definition was amended in 1993 to further provide that "legal use of a lawful product by a individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of § 39-2-313(3) or (4)." *See* §§ 39-2-313, 314, MCA.