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I. AT-WILL EMPLOYMENT

A. Statute

Unlike most other states, the doctrine of at-will employment does not apply in Montana. Instead, the Montana Wrongful Discharge From Employment Act ("WDEA") applies. Mont. Code Ann. §§ 39-2-901 through 39-2-915. The WDEA was enacted by the Legislature in 1987 in response to several rather significant bad faith claims brought by discharged employees against their former employers. The WDEA purports to preempt all tort and express or implied contract claims arising from a discharge and provides the exclusive remedy for employees who believe they have been wrongfully discharged. Mont. Code Ann. § 39-2-913. It replaces the traditional concepts of at-will employment found in almost every other state. To date, the WDEA has survived all challenges to its constitutionality. See Meech v. Hillhaven W., Inc., 776 P.2d 488, 238 Mont. 21, (1989); Johnson v. State, 776 P.2d 1221, 238 Mont. 215 (1989); Allmaras v. Yellowstone Basin Props., 812 P.2d 770, 248 Mont. 477 (1991).

1. Who is Covered by the WDEA

The WDEA applies only to employees who are not covered by a contract for a specific term or a collective bargaining agreement. Mont. Code Ann. § 39-2-912(2). Additionally, the WEDA does not apply to a discharge subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute, for example, in cases of unlawful discrimination. The Montana Supreme Court has held, however, that an employee does not necessarily know if another statute applies until the finder of fact makes a decision in that regard. Tonack v. Montana Bank of Billings, 854 P.2d 326, 258 Mont. 247 (1993). In Tonack, the Montana Supreme Court held:

Whether a discharge will ultimately be 'subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute' is not immediately known when a claim is filed. This must be determined before it is known whether the Wrongful Discharge Act may be applied. It is established only when a finder of fact has made that determination or when judgment on the claim has otherwise been entered.

Id. at 331.

An employer may contest a WDEA claim on the basis that the WDEA is preempted by federal law. Fenno v. Mountain West Bank, ---P.3d---, 2008 WL 2971500, 345 Mont 161 (Aug. 4, 2008). In Fenno, a bank employee made a claim under the WDEA that he was discharged in retaliation for refusing to violate public policy, when he reported irregularities in a loan transaction that implicated wrongdoing by a bank executive. Id. at ¶¶ 5-7. The bank moved for dismissal on grounds the WDEA is preempted by the national "at pleasure" provision that allows national banks to discharge bank officers at their pleasure. Id. at ¶ 7. Although the district court dismissed the complaint based on the preemption argument, the

Montana Supreme Court reversed and held the WDEA comports with the federal law and does not stand as an obstacle to its accomplishment. Id. at ¶ 29. The Court noted that although the WDEA's provisions were more general than the applicable federal statutes, the two were not inconsistent and therefore the WDEA was not preempted. Id.

2. Elements

There are only a few circumstances under which a WDEA claim can arise.

A discharge is wrongful if it was in retaliation for the employee's refusal to violate public policy (defined 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" Mont. Code Ann. § 39-2-903(7), or for reporting a violation of public policy Mont. Code Ann. § 39-2-904(1)(a).

The discharge is wrongful if it was not for good cause and the employee had already completed the employer's probationary period of employment. Mont. Code Ann. § 39-2-904(1)(b). Good cause is defined as "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," Mont. Code Ann. § 39-2-903(5). Good cause may include a violation of the employer's policy manual, but the policy must be uniformly applied or the court may consider the termination arbitrary and not for good cause under the WDEA. See Johnson v. Costco Wholesale, 152 P.3d 727, ¶¶ 27-28, 336 Mont. 105, ¶¶ 27-28 (2007). Good cause does not include the use of "lawful products" (tobacco, food and beverages) while off the employer's premises and during non-working hours. Mont. Code Ann. § 39-2-313.

The discharge is wrongful if the employer violated the express provisions of its own written personnel policy. Mont. Code Ann. § 39-2-904(1)(c).

"Discharge" includes constructive discharge, 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 reduction in force. Mont. Code Ann. § 39-2-903(2). Constructive discharge occurs when the employer, by act or omission, creates a situation an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not occur if an employee quits solely because an employer refuses to promote the employee or improve wages, responsibilities or other terms or conditions of employment. Mont. Code Ann. § 39-2-903(1). Whether the employment situation is intolerable is generally a question of fact.

A "legitimate business reason" under the WDEA is:

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

Buck v. Billings Montana Chevrolet, Inc., 811 P.2d 537, 248 Mont. 276, 281-82 (Mont. 1991). Employers are afforded more discretion in discharging managerial employees than rank and file employees. McConkey v. Flathead Elec. Co-op., 125 P.3d 1121, 1127-28, 330 Mont 48 (2005). This is particularly true where the employment relationship is between a board of trustees and a general manager, and the board has determined the manager is not performing his duties to their satisfaction. Id. at 1127. The McConkey court clarified that such a managerial failure [as determined by the board], "constitutes a legitimate business reason to terminate employment." Id.

3. Damages

The WDEA limits wrongful discharge liability to employers. Mont. Code Ann. § 39-2-905.

Except when an employee is discharged for reporting a violation of, or refusing to violate public policy, damages under the WDEA are limited to four years lost wages and benefits less the amount the employee earned or reasonably could have earned. Mont. Code Ann. § 39-2-905(1). Punitive damages are available only to employees discharged for refusing to violate, or for reporting a violation of, public policy. Mont. Code Ann. § 39-2-904(1). Punitive damages are only allowed if an employer engages in actual fraud or actual malice in discharging an employee who reports or refuses to engage in violations of public policy. Buck v. Billings Montana Chevrolet, Inc., 811 P.2d 537, 541, 248 Mont. 276 (1991).

4. Arbitration

The WDEA also provides "[i]f 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." Mont. Code Ann. § 39-2-914(5).

Where arbitration is rejected and that same party loses in court, the prevailing party who offered arbitration "is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer." Mont. Code Ann. § 39-2-915.

An arbitration clause cannot, however, be agreed to in an employee handbook or policy manual that is not a separate contract agreement to arbitrate.

Hubner v. Cutthroat Communications, Inc., 80 P.3d 1256, 1261-62, 318 Mont. 421 (2003).

5. Employment-Related Torts that an Employee May Bring with a WDEA Claim

The WDEA was enacted to provide the exclusive remedy for the wrongful termination of employees covered by the Act. The Act has not, however, done away with all torts related to employment. An employee who files a wrongful discharge suit may also bring other claims, as long as those other claims do not arise from facts that are “inextricably intertwined” with the discharge. This leaves open the door for claims that may have arisen during the employment relationship, as well as any claims that arise after the discharge.

The following discussion touches on claims that are not preempted by the WDEA because they are separate and independent from the discharge. See Beasley v. Semitool, Inc., 853 P.2d 84, 258 Mont. 258 (1993), Klein v. State, ex rel. Dept. of Corrections, 185 P.3d 986, ¶ 39, 343 Mont. 520, ¶ 39 (2008). For these claims to survive preemption of the WDEA, however, the facts giving rise to the claims must truly be independent of the discharge.

a. Blacklisting

Employers and their agents are prohibited from blacklisting discharged employees and from preventing or attempting to prevent any employee from obtaining employment with another. The statute applies to all former employees, whether they left employment voluntarily or involuntarily. Violations of the blacklisting statute may result in an award of compensatory and punitive damages to the former employee. Violation of the statute is also a misdemeanor offense. See Mont. Code Ann. §§ 39-2-802 through 39-2-804.

In the case of a discharged employee, the blacklisting statute does not prevent an employer from providing to a potential employer a truthful statement of the reason for discharge unless the former employee has demanded in writing a statement of the reasons for discharge. If the employer does not provide a written statement upon the employee’s request within a reasonable time after the demand, it is unlawful for the employer to furnish a statement of the reasons for the discharge to any person. See Mont. Code Ann. §§ 39-2-801 through 39-2-802.

b. Implied Covenant of Good Faith and Fair Dealing

Whether governed by a written contract for a specific term (and therefore not governed by the WDEA), by a written contract not for a specific term, or by an oral arrangement, employees often allege that the employment relationship is contractual in nature and that the employment relationship includes an implied covenant of good faith and fair dealing. In at least one instance, the Montana Supreme Court has

been receptive to this argument and has allowed employees to proceed with bad faith claims against employers. See Beasley v. Semitool, Inc., 853 P.2d 84, 258 Mont. 258 (1993).

The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. McCoy v. First Citizen's Bank, 148 P.3d 677, 681, 335 Mont. 1 (2006). Each party to a contract has a justified expectation that the other will act in a reasonable manner in its performance. Id. A breach of the implied covenant is a breach of contract, even where an express term of the contract is not breached. Id. Therefore, the damages for breach of the implied covenant is usually the same as damages for breach of contract i.e. the amount which will compensate the party aggrieved for all the detriment which was caused by the breach or, in the ordinary course of things, would be likely to result from the breach. Mont. Code Ann. § 27-1-311. In common contract actions, tort-type damages are not available for breach of the implied covenant of good faith and fair dealing.

The tort of bad faith arises in exceptional circumstances when the parties to a contract have a "special relationship." Such a relationship arises under the following circumstances:

- (1) The contract must be such that the parties are in inherently unequal bargaining positions; and
- (2) The motivation for entering the contract must be a non-profit motivation, i.e., to secure peace of mind, security, future protection; and
- (3) Ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole;" and
- (4) One party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and
- (5) The other party is aware of this vulnerability.

Story v. City of Bozeman, 791 P.2d 767, 776, 242 Mont. 436 (1990), citing Wallis v. Superior Court, 160 Cal. App. 3d 1109 (Cal. App. 4th Dist. 1984).

In special relationship contracts, the standard of conduct is the same as that for other contracts: honesty in fact and observance of reasonable commercial standards of fair dealing in the trade. If this standard is violated, and if the parties have a special relationship, the duty of good faith and fair dealing is breached and, in

addition to recovering damages for breach of contract, the aggrieved party is entitled to recover tort damages, such as emotional distress and punitive damages.

An employee covered by the WDEA may bring a claim for bad faith arising from the employment relationship provided the acts of bad faith occurred outside of the discharge. For example, in Beasley v. Semitool, an employee sued for breach of contract, bad faith, and wrongful discharge, claiming that the employer failed to keep compensation-related promises, *i.e.*, bonuses, stock options, and raises. 853 P.2d 84, 258 Mont. 258. The Montana Supreme Court held that the employee could bring his contract and bad faith claims, in addition to the wrongful discharge claim, because the promises on which these claims were based occurred prior to and independently of the resignation (alleged constructive discharge).

On the other hand, in Dagel v. City of Great Falls, 819 P.2d 186, 250 Mont. 224 (1991), and Mysse v. Martens, 926 P.2d 765, 279 Mont. 253(1996), the Montana Supreme Court held that the employees in those cases, both of whom were covered by the WDEA, could not bring a bad faith claim because they had not stated facts to support their claims which were separate and distinct from the discharge. In Solle v. Western States Ins. Agency, Inc., 2000 MT 96, 999 P.2d 328. The Montana Supreme Court noted that “claims for breach of the implied covenant of good faith and fair dealing are ‘inextricably intertwined with and based upon [an individual’s] termination from employment.’” *Id.* at ¶ 15, 999 P.3d at ¶ 15 (citation omitted).

c. Negligent Infliction of Emotional Distress

A claim for negligent and/or intentional infliction of emotional distress is available to employees, despite the exclusivity of the WDEA, so long as the employee can show that the infliction of emotional distress was separate from the conduct that led up to the discharge. Beasley v. Semitool, Inc., 853 P.2d 84, 86, 258 Mont. 258, 262 (1993), Klein v. State, ex rel. Dept. of Corrections, 185 P.3d 986, ¶¶12, 39, 343 Mont. 520, ¶¶ 12. 39 (2008).

d. Deceit

A claim for the tort of deceit is not barred by the exclusivity of the WDEA when the claim is independent from any rights or remedies related to the employee’s discharge. See Klein v. State, ex rel. Dept. of Corrections, 185 P.3d 986, ¶¶ 12, 39, 343 Mont. 520, ¶¶ 12, 39 (2008) (deceit claim not barred where it was based on employer’s alleged misrepresentation that its meeting with her was in regard to a personnel matter, when in fact it was a meeting intended to induce her to make statements that would be turned over the county attorney for the purpose of instituting criminal charges against her).

B. Case Law

See discussion above.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

Montana is not an at-will jurisdiction. See Wrongful Discharge From Employment Act, Mont. Code Ann. §§ 39-2-901 through 39-2-915; see generally discussion under Section I, above.

B. Public Policy Exceptions

See discussion above under Section I.

III. CONSTRUCTIVE DISCHARGE

See discussion of the Wrongful Discharge From Employment Act under Section I above.

IV. WRITTEN AGREEMENTS

The Wrongful Discharge from Employment Act does not apply to the discharge of an employee covered by a written collective bargaining agreement or by a written contract of employment for a specific term. Mont. Code Ann. § 39-2-912, Stowers v. Community Med. Center Inc., 172 P.3d 1252, ¶ 21, 340 Mont 116, ¶ 21 (2007). Collective bargaining agreements must be interpreted according to federal, not state law. Winslow v. Montana Rail Link, Inc., 16 P.3d 992, 2000 MT 292, ¶29. Other written employment contracts are governed by the general law of contracts as defined in state law. See, e.g., Avery v. Flathead County, 2005 MT 231.

Even where a written contract appears to be in place, the WDEA's exclusive remedy may apply. Zier v. Hancock, 189 P.3d 1193, 345 Mont. 89 (2008). In Zier, the plaintiff entered into a written letter agreement with a new bank whereby he was to become the bank's president upon the happening of two conditions. Id. at ¶¶ 4-5. When the bank terminated Zier, he brought a contract claim alleging breach of a written contract. Id. at ¶ 6. The Supreme Court held the WDEA applied, that it was Zier's exclusive remedy, and that he had failed to make a claim within the one-year statute of limitations provided there. Id. at ¶ 17. The Court reasoned that Zier's letter agreement did not provide for a specific term of employment and that it contained conditions precedent that were not met. Id. at ¶¶ 14-18. Therefore, Zier's employment was governed by the WDEA and his contract claim was dismissed. Id.

A. Standard "For Cause" Termination

A written contract that permits termination only for cause is understood in its ordinary and popular meaning as good cause. The term "good cause" is "largely relative in [its] connotation, depending upon the particular circumstances of each

case." Cole v. Valley Ice Garden, L.L.C., 2005 MT 115, ¶29, 113 P.3d 275. It connotes "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." Id. The employer does not have a right to make an arbitrary or unreasonable decision about terminating an employee when there is an agreement to terminate only for good cause. Id. However, as a matter of law, it is not arbitrary or unreasonable for a minor league hockey team to fire a coach because of a losing record. Id.

Where there is a written collective bargaining or employment agreement, the employee may assert claims for breach of the written agreement or for common law torts such as wrongful discharge, breach of the covenant of good faith and fair dealing, or infliction of emotional distress. See, e.g., Firestone v. Oasis Telecomm., Data & Records, 2001 MT 297, 38 P.3d 796. A claim that does not depend on the terms of the agreement will not be pre-empted either by the Wrongful Discharge from Employment Act or by federal labor law. Winslow v. Montana Rail Link, Inc., 2000 MT 292, ¶¶ 30-36, 16 P.3d 992.

B. Status of Arbitration Clauses

Montana has adopted the Uniform Arbitration Act. Mont. Code Ann. §§ 27-5-101 et seq. Arbitration agreements between employers and employees or between their respective representatives are valid and enforceable and may be subject to arbitration if the agreement so specifies. Mont. Code Ann. § 27-5-113.

V. ORAL AGREEMENTS

A. Promissory Estoppel

While there are no Montana cases where a person attempted to establish employment through promissory estoppel, the doctrine has been recognized in Montana in other contexts. Keil v. Glacier Park, Inc., 614 P.2d 502, 188 Mont. 455 (Mont. 1980). The elements are: (1) a promise clear and unambiguous in its terms; (2) reliance on the promise by the party to whom the promise is made; (3) reasonableness and foreseeability of the reliance; and (4) the party asserting the reliance must be injured by the reliance.

If an employee is discharged from employment and seeks to establish a contract by way of promissory estoppel, such a claim, along with negligent misrepresentation and fraud, will be preempted by the Wrongful Discharge from Employment Act (WDEA) as long as they are inextricably intertwined with and based upon the employee's termination from employment. Kulm v. Montana State Univ. – Bozeman, 948 P.2d 243, 285 Mont. 328 (1997) (holding that these claims are inextricably intertwined with the employee's termination because the employee would have no conceivable cause of action if he were still employed).

B. Fraud

See discussion above under “Promissory Estoppel.”

C. Statute of Frauds

Montana’s Statute of Frauds requires any “agreement that by its terms is not to be performed within a year from the making thereof” be in writing. Mont. Code Ann. § 28-2-903(1)(a). Thus, any purported employment agreement of a term greater than one year must be in writing. It is also important to note that the WDEA does not apply to written contracts for employment. Mont. Code Ann. § 39-2-912(2).

VI. DEFAMATION

A. General Rule

In the employment context, defamation suits most commonly arise when an employer makes a written or spoken statement about an employee’s qualifications or performance, or gives a reason for some employment action, including discharge, which is false. There have recently been some large awards granted in Montana defamation claims, although the claims were not employment-related. See Blue Ridge Homes, Inc. v. Thein, 191 P.3d 374, 345 Mont 125 (2008) (upholding \$417,000 defamation jury award against homeowner that sent disparaging letters to various entities regarding construction contractor), Gardner v. Stokes, Z-600 Inc., and Skyline Broadcasters Inc., Flathead DV-07-729, (Sept. 17, 2008) (district court jury award of \$3.8 million for radio host’s disparaging comments about neighbors). A claim for defamation in Montana must be founded in either libel or slander. Mont. Code Ann. § 27-1-801.

1. Libel

Libel is:

[A] false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation.

Mont. Code Ann. § 27-1-802.

2. Slander

Slander is defined as:

[A] false and unprivileged publication other than libel which:

(1) Charges any person with crime or with having been indicted,

convicted or punished for crime;

- (2) Imputes in him the present existence of an infectious, contagious, or loathsome disease;
- (3) Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit;
- (4) Imputes to him impotence or want of chastity; or
- (5) By natural consequence causes actual damage.

Mont. Code Ann. § 27-1-803.

B. References

When giving references, employers need to be cognizant of Montana's blacklisting statutes, Mont. Code Ann. § 39-2-801 through § 39-2-804, as well as the defamation statutes noted here. See discussion under Section I.A.5. above. All statements made to or about an employee should be truthful. Information, other than dates of employment and perhaps positions held, should generally not be given to third parties absent a written authorization and release from the employee or former employee.

C. Privileges

Privileged communications are not defamatory. Mont. Code Ann. §§ 27-1-802 through 27-1-804; Wolf v. Williamson, 889 P.2d 1177, 1179, 269 Mont. 397 (1995); Mont. Bank of Circle, N.A. v. Ralph Meyers & Son, Inc., 769 P.2d 1208, 1213, 236 Mont. 236 (1989); Denny Driscoll Boys Home v. State, 737 P.2d 1150, 1152 227, Mont. 177 (1987); Storch v. Bd. of Dir. of E. Mont. Region Five Mental Health Ctr., 545 P.2d 644, 647, 169 Mont. 176 (1976). Privileged communications are defined by statute.

A privileged publication is one made:

- (1) In the proper discharge of an official duty;
- (2) In any legislative or judicial proceeding or in any other official proceeding authorized by law;
- (3) In a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the

person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information;

(4) by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

Mont. Code Ann. § 27-1-804.

The official duty privilege, Mont. Code Ann. § 27-1-804(1), is an absolute privilege. An absolutely privileged communication cannot form the basis of a defamation claim. Wolf, 889 P.2d at 1179; Small v. McRae, 651 P.2d 982, 994, 200 Mont. 497 (1982). Internal communications made as part of a supervisor's official duty regarding personnel issues generally are afforded an absolute privilege. See Small, 651 P.2d at 994; Nye v. Dep't of Livestock, 639 P.2d 498, 501 1196 Mont. 222 (1982); Storch, 545 P.2d at 648. Although Small, Nye and Storch all involved public officials, the reasoning behind the absolute privilege is arguably applicable to non-public officials who make internal communications within the proper discharge of their official duties.

A qualified privilege can form the basis of a defamation claim only if the employee proves such communications were made with malice. Rasmussen v. Bennett, 741 P.2d 755, 758, 228 Mont. 106 (1987) (citation omitted). To prove malice, the employee must show the communications were made "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." Id. at 758 (citations omitted).

In Sacco v. High Country Independent Press, Inc., 896 P.2d 411, 271 Mont. 209 (1995), the plaintiff claimed her former employer reported to police that she had stolen photographs and proof sheets and that the report was false. The employer argued that reports to law enforcement were privileged communications. The Montana Supreme Court disagreed, holding that unsolicited complaints to the police are not privileged under section 27-1-804 of the Montana Code Annotated.

D. Other Defenses

1. Truth

Slander and libel both require that the statements are false. Thus, statements that are true, or believed to be true by the speaker are not actionable. Rasmussen v. Bennett, 741 P.2d 755, 758, 228 Mont. 106 (1987).

2. No Publication

One of the elements of a defamation claim is that the defamatory statement has to be "published." In the employment context, publication or public disclosure of defamatory remarks may occur in investigations, performance evaluations, references,

or letters of recommendation. Generally speaking, however, statements made directly to the employee cannot form the basis of a defamation claim.

3. Self-Publication

As with all general rules, however, there are exceptions. For example, if an employer makes a false statement to an employee, and that employee is forced to repeat or “self-publish” the statement, the communication may give rise to a defamation claim. Likewise, if an employer falsely accuses an employee of theft, or some other crime, and the employee is asked to disclose the reasons given for discharge to a third party, the employee’s truthful publication of the false statements may be defamatory. Sacco v. High Country Indep. Press, Inc., 896 P.2d 411, 271 Mont. 209 (1995).

4. Invited Libel

There are no Montana cases or statutes discussing “invited libel.”

5. Opinion

Statements of opinion cannot reasonably be defamatory. McConkey v. Flathead Electric Cooperative, 125 P.3d 1121, ¶ 49, 330 Mont. 48, ¶ 49 (2005), Frigon v. Morrison-Maierle, Inc., 760 P.2d 57, 62, 233 Mont. 113 (1988) (citations omitted), overruled on other grounds by Sacco v. High Country Indep. Press, Inc., 896 P.2d 411, 271 Mont. 209 (1995).

E. Blacklisting Statutes

See discussion under Section I.A.5. above

F. Non-Disparagement Clauses

There are no Montana cases or statutes discussing “non-disparagement clauses.”

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

See discussion on “Negligent Infliction of Emotional Distress” below.

B. Negligent Infliction of Emotional Distress

A claim for negligent and/or intentional infliction of emotional distress is available to employees, despite the exclusivity of the WDEA, so long as the employee can show that the infliction of emotional distress was separate from the conduct that led up to the discharge. Klein v. State, ex rel. Dept. of Corrections, 185 P.3d 986, ¶¶12, 39, 343 Mont. 520, ¶¶ 12. 39 (2008), Beasley v. Semitool, Inc., 853 P.2d 84, 86, 258 Mont. 258, 262 (1993). Employees may also bring emotional distress claims in connection with

discrimination claims under the Montana Human Rights Act and federal anti-discrimination laws. Stringer-Altmaier v. Haffner, 138 P.3d 419, 332 Mont 293 (2006); Benjamin v. Anderson, 2005 MT 123, ¶ 70 112 P.3d 1039, ¶ 70, citing Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, ¶ 33 38, P.3d 836, ¶ 33.

A cause of action for negligent infliction of emotional distress may arise in the employment context when serious or severe emotional distress to the employee was the reasonably foreseeable consequence of an employer's negligent act or omission. Intentional infliction of emotional distress may arise when serious or severe emotional distress to the employee was the reasonably foreseeable consequence of the employer's intentional act or omission.

To be actionable, the emotional distress suffered must be serious or severe. Serious emotional distress is defined as follows:

Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved.

...

The distress must be reasonable and justified under the circumstances, and there is no liability 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.

RESTATEMENT (SECOND) OF TORTS § 46, cmt. j at 77-78; Sacco v. High Country Indep. Press, Inc., 896 P.2d at 426.

VIII. PRIVACY RIGHTS

A. Generally

There are many different scenarios in which an employee may allege a violation of his common law right to privacy. Generally, invasion of privacy is an umbrella term for four common causes of action: intrusion upon seclusion; appropriation of name or likeness; public disclosure of private facts; and publicity placing a person in false light.

With regard to public employees, the Montana Constitution requires a balancing test between the public's right to know and the individual's right to privacy. Great Falls Tribune v. Sheriff, 775 P.2d 1267, 1269, 238 Mont. 103, 107 (1989). In Great Falls Tribune, the court held the release of disciplinary information regarding three police officers did not violate their individual rights of privacy because they held positions of public trust and the public's right to know outweighed their individual privacy rights. Id.

1. Intrusion upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. Liability often turns on whether the employer had legitimate business interests for inquiring into the employee's private concerns. Most jurisdictions require some form of physical intrusion.

One area for employers to be particularly concerned about is surveillance. Permissible surveillance varies from state to state and government employees have more protection than do private employees. See discussion of "Electronic Monitoring" below.

2. Appropriation of Name or Likeness

When an employer uses an employee's name or likeness to advertise the employer's business or products or for some other commercial purpose the employee may have an action for invasion of privacy. Employers should get a written authorization and release before using the name or likeness of any individual.

3. Public Disclosure of Private Facts

Generally, employers should not disclose any personnel information (including performance evaluations, salary, medical records, psychological information, references and employment evaluations), or any personal information learned as a result of the employment relationship, to a third party without a written (and specific) authorization and release from the employee. Medical records should be kept in a separate file.

Employees have a reasonable expectation of privacy in their employment files and these files should remain confidential. State v. Burns, 830 P.2d 1318, 253 Mont. 37 (1992), Missouliau v. Board of Regents, 675 P.2d 962, 207 Mont. 513 (1984). Employers must take care that they do not invade the privacy of other employees when they release information about an employee who has sued them. Mont. Human Rights Div. v. City of Billings, 649 P.2d 1283, 1288, 199 Mont. 434 (1982).

4. Publicly Placing a Person in a False Light

The Montana Supreme Court has recognized the elements of false light invasion of privacy as: (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. Lence v. Hagadone Inv. Co., 853 P.2d 1230, 1237 (Mont. 1993), overruled on other grounds by Sacco v. High Country Indep. Press, Inc., 896 P.2d 411, 258 Mont. 433, 444 (1995). The “highly offensive” standard has been narrowly construed. Machleder v. Diaz, 801 F.2d 46, 48 (2d Cir. 1986).

To be actionable, the statement must not merely be published to a third person, as in defamation, but “publicized.” The RESTATEMENT (SECOND) OF TORTS has defined publicity as making the matter public “by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” Polin v. Dun & Bradstreet, Inc., 768 F.2d 1204, 1206 (10th Cir. 1985) (citations omitted); see also Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F. Supp. 1359, 1372 (N.D. Ill. 1990); RESTATEMENT (SECOND) OF TORTS § 652D cmt. a, and § 652E.

The pivotal issue, therefore, is not whether an offending statement was made, but whether the statement is likely to become known to the public at large. It is not an invasion of the right of privacy to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons. RESTATEMENT (SECOND) OF TORTS, § 652D cmt. a. The Restatement strongly distinguishes between “private” and “public” communications, noting that false light invasion of privacy arises exclusively from public communications.

B. Specific Issues

1. Workplace Searches

There are no Montana cases or statutes covering employer searches of employees in the workplace.

2. Electronic Monitoring

Whether an employee has a right to expect that his or her electronic mail messages (voice mail and e-mail) are private is a topic of concern. The Ninth Circuit recently affirmed a decision from a United States District Court for the District of Montana, that held an employee does not have a reasonable expectation of privacy in his workplace computer where the employer had a known policy of monitoring the computer. U.S. v. Ziegler, 474 F.3d 1184 (9th Cir. 2007). In Ziegler, the employer contacted the FBI when it discovered an employee had received child pornography on his workplace computer. Id. Although no search warrant was issued, the employer made a copy of the hard drive and turned it over to the FBI, who used it to prosecute the employee. Id. In an en banc re-hearing on the matter, the Ninth Circuit held that

although the employee had a reasonable expectation of privacy in his office space, he did not have the same reasonable expectation of privacy in his workplace computer because the employer had a known practice of monitoring employee computers. Id.

Employers should implement a policy and inform employees that they do not have an expectation of privacy when using the e-mail and voice mail systems. If employers do monitor voice and electronic communications, they should make sure they are in compliance with section 45-8-213 of the Montana Code Annotated, which makes it illegal to “purposely intercept an electronic communication.” An employer also violates section 45-8-213 if it knowingly or purposely “records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation.” But the latter prohibition does not apply to (1) elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty; (2) persons speaking at public meetings; (3) persons given warning of the transcription or recording; or (4) a health care facility recording a health care emergency call.

3. Taping of Employees

See discussion above under “Electronic Monitoring.”

4. Medical Information

Generally, medical records are private and “deserve the utmost constitutional protection.” State v. Nelson, 941 P.2d 441, 448, 283 Mont. 231, 242 (1997). Article II, Section 10, of the Montana Constitution guarantees informational privacy in the sanctity of one’s medical records. Nelson, 941 P.2d at 448, 283 Mont. at 242.

Within the context of litigation, a plaintiff also enjoys statutory privileges including the doctor-patient privilege and the psychologist-client privilege. Rules 805 and 807, M.R. Evid. An exception to these rules is that when a party claims damages for physical or mental injury, he or she places the extent of that physical or mental injury at issue and waives his or her statutory right to confidentiality to the extent that it is necessary for a defendant to discover whether the plaintiff’s current medical or physical condition is the result of some other cause. State ex rel. Mapes v. District Court, 822 P.2d 91, 94, 250 Mont. 524, 530 (1991). But the waiver is limited – a defendant may only discover records related to prior physical or mental conditions if they relate to currently claimed damages. Id. at 94-95. A plaintiff’s right to confidentiality is balanced against the defendant’s right to defend itself in an informed manner. Id. A defendant “is not entitled to unnecessarily invade plaintiff’s privacy by exploring totally unrelated or irrelevant matters.” Id.

See also discussion of “Public Disclosure of Private Facts” above.

IX. OTHER TORTS

A. Negligent Hiring/Supervision

Although the Montana Supreme Court has discussed the tort of negligent hiring, retention and supervision, it has never explicitly recognized it or specified the elements a party would have to prove. See Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc., 179 P.3d 481, ¶ 64, 342 Mont 29, ¶ 64 (2008). Hoffman v. Austin, 147 P.3d 177, ¶¶ 27-31, 334 Mont. 357, ¶¶ 27-31 (2006). Stafford v. State, 2004 MT 96N, ¶¶ 21 & 22 (Mont. 2004) (non-cite opinion), citing Pablo v. Moore, 2000 MT 48, 995 P.2d 460 (Mont. 2000).

B. Tortious Interference with Business/Contractual Relations

To prove a claim for tortious interference, whether with business or contractual relations or prospective economic advantage, the plaintiff must show the defendant committed acts that: (1) were intentional and willful; (2) were calculated to cause damage to the pleader in his or her business; (3) were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and (4) resulted in actual damages and loss. Hughes v. Lynch, 164 P.3d 913, ¶ 25, 338 Mont. 214 ¶ 25 (2007), Pospisil v. First Nat'l Bank, 2001 MT 286, ¶ 14, 37 P.3d 704; Farrington v. Buttrey Food & Drug Stores Co., 900 P.2d 277, 272 Mont. 140 (1995).

The factors to be considered in determining whether an actor's conduct is improper include: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relation between the parties. Farrington, 900 P.2d at 279; Pospisil, 2001 MT at ¶ 13.

X. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Section 28-2-703 of the Montana Code Annotated provides: "Any contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided for by 28-2-704 or 28-2-705, is to that extent void." Id. The exceptions deal with the sale of the goodwill of a business and the dissolution of a partnership.

In spite of the broad statutory language, the Montana Supreme Court has held that a covenant not to compete is reasonable and enforceable if it: (1) is limited in operation as to time or place; (2) is based on some good consideration; and (3) affords a reasonable protection for and does not impose an unreasonable burden upon the employer, employee, or public. Dobbins Dequire & Tucker, P.C. v. Rutherford,

McDonald & Olson, 708 P.2d 577, 580, 218 Mont. 392 (1985).

In Dobbins, an accounting firm sued three accountants who had left the firm and formed their own competing firm. The firm sought to enforce covenants the accountants had signed that required them to pay the firm an amount equal to the gross fees billed in the prior year to all clients that followed the accountants after they left the plaintiff firm. The district court dismissed the firm's claim, holding as a matter of law that the covenant was an unreasonable restraint on trade. On appeal, the Montana Supreme Court reversed and remanded because the covenant did not directly restrain the defendants from engaging in the business of public accounting, but merely required them to pay one year's fees (in monthly installments over three years at eight percent interest), which "does not appear unreasonable on its face." 708 P.2d at 579. Based on "a balancing of the competing interests of the public as well as the employer and the employee," the court held that the covenant did not constitute a restraint prohibited by section 28-2-703 of the Montana Code Annotated. Id. at 579.

Just a few years later, the court applied the Dobbins three-part test but struck down a contract that would have prevented employees of an oxygen supply company who left the firm from disclosing or using customer lists and trade secrets for an unlimited time and in an unlimited geographical area. State Med. Oxygen & Supply, Inc. v. Am. Med. Oxygen Co., 782 P.2d 1272, 1275, 240 Mont. 70, 74 (Mont. 1989). The contract failed the first part of the Dobbins test, so "on its face" violated the statute and the law regarding restrictive covenants. State Med. Oxygen, 782 Mont. at 1275.

The Montana Supreme Court's recent decision regarding restrictive covenants, Montana Mountain Products v. Curl, 2005 MT 102, 112 P.3d 979, struck down a restrictive covenant for failing to meet the third part of the Dobbins test, which the Court revised slightly to read: the covenant "should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public." 112 P.3d at ¶16. Plaintiff MMP was a jewelry finishing business with only one customer, Montana Silversmiths. MMP required Curl to sign a covenant barring her from competing with MMP for three years within 250 miles of MMP or doing subcontract labor for Montana Silversmiths. Noting that the covenant barred Curl from practicing her trade within 250 miles of MMP, so her only option to practice her trade in the vicinity where she resided was to work as a subcontractor of Montana Silversmiths, the court held the covenant unreasonable and unenforceable. Id. at ¶17.

It now appears the court will refuse to enforce any covenant that bars an employee from engaging in his or her chosen trade or profession in the area where the employee resides. However, the court still may enforce covenants that require an employee to pay reasonable compensation to the employer for customers that take their business to the employee.

This year, the Montana Supreme Court again addressed a non-compete covenant in an employment contract in Access Organics, Inc. v. Andy Hernandez, 175

P.3d 899, 341 Mont. 73 (2008). There, the Court addressed whether the non-compete was supported with good consideration. The Court held that continued employment might be sufficient consideration for a non-compete if the employee is an at-will employee who is specifically guaranteed employment for a definite term in exchange for signing the non-compete or where the non-compete was signed in advance of employment. Id. at ¶¶ 20, 26. In Access Organics though, the employee had already been hired and promoted when he was asked to sign the non-compete. Id. at ¶ 23. Therefore, the Court held the non-compete was invalid because his continued employment was not consideration. Id. at ¶ 28.

B. Blue Penciling

The Montana Supreme Court has upheld use of the blue pencil approach to revise overbroad restrictive covenants in two contracts for the sale of businesses and one dissolution of a partnership. Dumont v. Tucker, 822 P.2d 96, 250 Mont. 417 (1991); Western Media, Inc. v. Merrick, 727 P.2d 547, 224 Mont. 28 (1980); Treasure Chem., Inc. v. Team Lab. Chem. Corp., 609 P.2d 285, 187 Mont. 200 (Mont. 1980). The court has never applied the blue pencil approach to a restrictive covenant in an employment agreement.

C. Confidentiality Agreements

The enforceability of contracts not to disclose trade secrets or customer lists is assessed just as for any other employment contract, using the three-part Dobbins test to determine whether the contract is an unreasonable restraint on trade. See State Med. Oxygen & Supply, Inc. v. Am. Med. Oxygen Co., 782 P.2d 1272, 1275, 240 Mont. 70, 74 (1989); First Am. Ins. Agency v. Gould, 661 P.2d 451, 454, 203 Mont. 217, 223 (1983). The burden of establishing that the covenant not to disclose does not violate Mont. Code Ann. § 28-2-703, falls on the party seeking to enforce the covenant. State Med. Oxygen, 782 P.2d at 1275; First Am. Ins. Agency, 661 P.2d at 454.

Generally, an employee, having left her employment, is free to make use of her experience as long as she does not violate her employer's confidence. First Am. Ins. Agency, 661 P.2d at 454. In First Am. Ins. Agency, an insurance agent who had signed a covenant not to compete or disclose, left and started her own insurance agency. The court held both covenants void. It said a covenant not to disclose customer information can be valid if the information is "confidential and not readily accessible to competitors," but affirmed the trial court's finding that the agent took no property from the agency and violated no confidences.

Similarly, in State Med. Oxygen, an oxygen service company brought an action against three former employees who left to work for a competitor and also against the competitor. The court held that the employees' agreement not to divulge trade secrets or customer lists was not reasonable because it was not restricted as to either time or place. 782 P.2d at 1275.

D. Trade Secret Statute

Montana adopted the Uniform Trade Secrets Act in 1985. Mont. Code Ann. §§ 30-14-401 et seq. The Montana Supreme Court has addressed the Act only in dicta. See Great Falls Tribune v. Mont. Public Serv. Comm'n, 2003 MT 359, ¶61, 82 P.3d 876. However, the Ninth Circuit has held exemplary damages and attorney's fees are allowable under Montana's Uniform Trade Secrets Act. Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101 (9th Cir. 2001).

E. Other Considerations

A Montana statute prohibits a court from entering an injunction "to prevent the breach of a contract the performance of which would not be specifically enforced." Mont. Code Ann. § 27-19-103(5). Another statute lists the contracts that cannot be specifically enforced, the first of which is "an obligation to render personal service or to employ another therein." Mont. Code Ann. § 27-1-412. Applying those statutes, the Montana Supreme Court has held that a court may not use injunctive relief to prevent a party to a personal services contract from performing services elsewhere during the life of the contract because that would have the effect of forcing the employee to perform the contract, thereby accomplishing indirectly a result the court could not accomplish directly. Reier Broadcasting Co., Inc., v. Kramer, 2003 MT 165, ¶19, 72 P.3d 944.

The Montana Supreme Court has not been faced with challenges to covenants not to compete based on principles such as unconscionability, failure of consideration, bad faith, or unreasonable liquidated damages, but those principles have been recognized in other contexts and could be applied to agreements containing such covenants. See e.g., Arrowhead Sch. Dist. No. 75 v. Klyap, 2003 MT 294, 79 P.3d 250 (liquidated damages clause in teacher contract not an unenforceable penalty); Kloss v. Edward D. Jones & Co., 2002 MT 129, 54 P.3d 1, modified on rehearing, 2002 MT 129A (arbitration clause in securities broker agreement unconscionable); Marias Healthcare Services, Inc. v. Turenne, 2001 MT 127, 28 P.3d 491 (employment contract supported by sufficient consideration).

XI. DRUG TESTING LAWS

A. Public Employers

See discussion below of the Workforce Drug and Alcohol Testing Act of 1997.

B. Private Employers

Montana enacted the Workforce Drug and Alcohol Testing Act in 1997. See Mont. Code Ann. §§ 39-2-205 through 39-2-211. According to this Act, only the following employees may be subjected to drug and alcohol testing:

[A]n individual engaged in the performance, supervision, or management of

work in a hazardous work environment, security position, position affecting public safety, or fiduciary position for an employer and does not include independent contractor. The term includes an elected official.

Mont. Code Ann. § 39-2-206(4). A hazardous work environment is further defined in the statute. § 39-2-206(6).

Employers may only test these categories of employees in accordance with a “qualified testing program.” Mont. Code Ann. § 39-2-207. This entails adopting and implementing testing pursuant to written policies and procedures which must be in place for at least 60 days prior to testing. The testing procedures must conform to the procedures set forth in the federal Department of Transportation regulations governing drug and alcohol testing procedures (49 C.F.R. Part 40). Mont. Code Ann. § 39-2-207(1). These are very specific and detailed regulations.

The Act sets forth other specific provisions that must be contained in the policies and procedures, including confidentiality provisions, medical review requirements, employee explanation and second test procedures, and description of programs about which employees must be informed. Only five types of tests are permitted under the Act – prospective employee tests, random, reasonable suspicion, follow-up tests and post-accident tests. Mont. Code Ann. § 39-2-208. Any employer considering drug or alcohol testing should carefully review this Act to ensure full compliance.

The Montana Supreme Court has not addressed the issue of employee drug testing under the Workforce Drug and Alcohol Testing Act.

XII. STATE ANTI-DISCRIMINATION STATUTES

Title 49, Chapter 2 of the Montana Code Annotated, contains the anti-discrimination statutes in Montana. These statutes prohibit all types of employment discrimination based upon race, creed, religion, color, national origin, age, disability, marital status and sex and afford additional protections for pregnancy. Montana anti-discrimination statutes closely mirror federal law, with the exception that the age discrimination statute covers all ages, Montana law prohibits discrimination on the basis of marital status, and the Montana pregnancy discrimination provisions afford greater protection than the FMLA or the federal Pregnancy Discrimination Act.

A. Employers/Employees Covered

“Employee’ means an individual employed by an employer.” Mont. Code Ann. § 49-2-101(10).

“Employer’ means an employer of one or more persons or an agent of the employer but does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a non-membership basis.”

Mont. Code Ann. § 49-2-101(11).

B. Types of Conduct Prohibited

As noted above, Montana's anti-discrimination statutes prohibit several types of conduct, including:

1. Retaliation against a person supporting the anti-discrimination laws. Mont. Code Ann. § 49-2-301.
2. Aiding or coercing in or attempting to do an act forbidden under the chapter. Mont. Code Ann. § 49-2-302.
3. Discrimination in employment based on race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex. Mont. Code Ann. § 49-2-303.
4. Discrimination by state or political subdivisions. Mont. Code Ann. § 49-2-308.
5. Discrimination in insurance and retirement plans. Mont. Code Ann. § 49-2-309.
6. Discrimination against pregnant women. Mont. Code Ann. § 49-2-310 and 311.

Because the MHRA is modeled after Title VII of the Civil Rights Act, the Montana Supreme Court refers to federal case law in construing it. Williams v. Lowther Ins. Agency Inc., 177 P.3d 1018, ¶¶ 21, 27, 341 Mont. 394, ¶¶ 21, 27 (2008). In Williams, the employer argued for application of a test that placed more requirements on an employee to make a prima facie case of quid pro quo sexual harassment when the sexual relationship was consensual. Id. at ¶ 24. The Court declined to adopt the proposed test, and instead held it would follow EEOC guidelines and more recognized federal case law in determining whether illegal sexual discrimination had occurred. Id. at ¶ 27. The Court held the employer had illegally discriminated against the employee in Williams where he specifically conditioned her continued employment on her resuming a sexual relationship with him. Id. at ¶ 28.

C. Administrative Requirements

Title 49, Chapter 2, Part 2 establishes the Montana Human Rights Commission to enact rules to handle complaints and enforce the anti-discrimination laws.

D. Remedies Available

An aggrieved party may file a complaint within 180 days of any alleged discrimination or within 180 days after exhausting any internal employer procedures.

Mont. Code Ann. § 49-2-501. A complainant or the commissioner may seek a preliminary injunction through the district court. Mont. Code Ann. § 49-2-503.

After the complaint is filed, the Human Rights Commission first tries to resolve the complaint through conference or conciliation, Mont. Code Ann. § 49-2-504, and if that does not work, the Commission holds a contested case hearing. Mont. Code Ann. § 49-2-505. A party may appeal the decision of the hearings officer to the Commission. Id.

The Department's order may: (a) prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found; (b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against; (c) require a report on the manner of compliance. Mont. Code Ann. § 49-2-506. If the order or conciliation agreement is not obeyed, a party may apply to the district court to obtain an order to enforce it. Mont. Code Ann. § 49-2-508. If the department dismisses a complaint for one of the various reasons outlined in Mont. Code Ann. §§ 49-2-507 and -509, a complainant may file a complaint in district court within 90 days of receipt of the dismissal document.

This procedure is the exclusive remedy for discrimination. Mont. Code Ann. § 49-2-509(7). However, the Montana Supreme Court recently held that a claim arising from sexual intercourse between a supervisor and a mentally-disabled employee was not barred by the exclusivity of the MHRA. Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc., 179 P.3d 481, ¶ 76, 342 Mont 29, ¶ 76 (2008). The Saucier Court held that sexual intercourse without consent (which was presumed because the employee had a disability that would likely make her incapable of consent under the criminal statutes) goes far beyond what is contemplated in the state's anti-discrimination statutes and thus sounds in tort claims not barred by the MHRA. Id. at ¶¶ 70-71. Similarly, the Court held that a WDEA claim is not barred by the exclusivity of the MHRA where the underlying facts of the complaint are not based on allegations of discrimination. See Vettel-Becker v. Deaconess Med. Center of Billings, Inc., 177 P.3d 1034, ¶ 37, 341 Mont. 435, ¶ 37 (2008) (holding hospital deacon's WDEA claim was not barred even though he previously brought a discrimination claim based on the MRHA).

XIII. STATE LEAVE LAWS

A. Jury/Witness Duty

Private employers are not obligated by Montana law to provide any special leave for jurors or witnesses. However, terminating an employee for complying with a subpoena or summons could give rise to liability under the Wrongful Discharge from Employment Act. Section 2-18-619 of the Montana Code Annotated governs jury duty for state employees.

B. Voting

Montana law does not require private employers to provide time off or leave for employees to vote.

C. Family/Medical Leave

No Montana statute addresses family or medical leave generally, but it is unlawful discrimination for an employer to: (1) terminate a woman's employment because of her pregnancy; (2) refuse to grant a reasonable leave of absence for a pregnancy; (3) deny to an employee who is disabled as a result of pregnancy any compensation to which she is entitled under disability or leave plans; or (4) require an employee to take mandatory maternity leave for an unreasonable length of time. Mont. Code Ann. § 49-2-310.

D. Day of Rest Statutes

Montana has no statute imposing a day of rest. Each Sunday is a legal holiday. Mont. Code Ann. § 1-1-216.

E. Military Leave

The 2005 Montana legislature enacted the Montana Military Service Employment Rights Act. Mont. Code Ann. §§ 10-1-1001 et seq. The Act prohibits discrimination based on membership in the state militia, authorizes leaves of absence for militia members, and defines the right of militia members to return to employment without loss of specified benefits. It provides for enforcement, including administrative remedies and a private right of action for equitable relief, damages, liquidated damages, and attorney's fees. Mont. Code Ann. § 10-1-1021.

XIV. STATE WAGE AND HOUR LAWS

The Montana minimum wage equals the greater of the minimum hourly wage rate established by the federal Fair Labor Standards Act or the rate set by Montana statute (currently \$6.55 per hour). The minimum wage is \$4.00 per hour for businesses with gross annual sales of \$110,000 or less. There are exclusions from minimum wage requirements for the value of tips received by the employee, and special provisions for training wages. Mont. Code Ann. § 39-3-409.

Employees other than farm workers and seasonal recreation workers may not be employed for a workweek longer than 40 hours unless paid time and a half for the overtime. Mont. Code Ann. § 39-3-405. Employees in a number of occupations, such as hoisting engineers, drivers, miners, and telephone operators are subject to particular overtime restrictions. Mont. Code Ann. §§ 39-4-101, et seq.

Employees must be paid in lawful money of the United States, by check, or by

electronic funds transfer. Mont. Code Ann. § 39-3-204. An employer who fails to pay the full amount due an employee is guilty of a misdemeanor, and also is liable for the unpaid wages plus a penalty not to exceed 110% of the wages due and unpaid. Mont. Code Ann. § 39-3-206.

An employee who separates from employment must receive all unpaid wages on the earlier of the next regular payday or fifteen days from the date of separation. There are two exceptions. One, an employee who is laid off or separated for cause must be paid immediately -- unless the employer has a written personnel policy extending the time for final payment. Two, an employer who discharges an employee based on an allegation of theft may withhold from an employee's final paycheck an amount sufficient to cover the theft so long as either the employee agrees in writing to the withholding, or the employer files a report of theft with law enforcement within seven days and other conditions are met. Mont. Code Ann. § 39-3-205.

XV. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Deception as to Character of Employment, Conditions of Work or Existence of Labor Dispute

Montana law provides that "no one doing business in this state shall induce, influence, persuade, or engage workmen to change from one place to another in this state through or by means of deception, misrepresentation, or false advertising concerning the kind or character of the work, the sanitary or other conditions of employment, or as to the existence of a strike or other trouble pending between the employer and the employees at the time of or immediately proper to such engagement." Mont. Code Ann. § 39-3-303.

If an employee is influenced, induced, engaged, or persuaded to come to work for an employer by any of the above means, the employer is liable for all damages caused by its conduct, including attorney's fees and costs.

B. Medical Tests

An employer may not require an employee or an applicant to pay the cost of a medical examination or the cost of furnishing any records of such examination as a condition of employment. Mont. Code Ann. § 39-2-301.

C. Lie Detector Tests

An employer may not require a person to take a polygraph test or any form of a mechanical lie detector test as a condition for employment or continuation of employment. Mont. Code Ann. § 39-2-304.

D. Use of Lawful Substances During Non-Working Hours

An employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during nonworking hours. Mont. Code Ann. § 39-2-313. There are three exceptions. One exception is for use of lawful products that: (i) affect an individual's ability to perform job-related employment responsibilities or the safety of other employees; or (ii) conflict with a bona fide occupational qualification that is reasonably related to the individual's employment. Id. Another exception is for individuals who, on a personal basis, have a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products. Id. A third is for nonprofit organizations that discourage the use of one or more lawful products by the general public. Id. Also, an employer does not violate the prohibition if the employer believes its actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement. Id.

An employer may offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type or price of coverage based on the employees' use of a product if: (a) differential rates assessed against employees reflect actuarially justified differences in providing employee benefits; (b) the employer provides an employee with written notice delineating the differential rates used by the employer's insurance carriers; and (c) the distinctions in the type or price of coverage are not used to expand, limit, or curtail the rights or liabilities of a party in a civil cause of action. Mont. Code Ann. § 39-2-313.

A person who is discharged, discriminated against, or denied employment in violation of the above prohibition may file a civil action and the court may take any reasonable measure to correct the practice and rectify the resulting harm. Mont. Code Ann. § 39-2-314.

XVI. OTHER DEVELOPMENTS

The 2007 Montana legislature passed the following measures that substantially affect employment and labor issues in Montana:

1. House Bill 58, a measure which amends Mont. Code Ann. § 39-51-2201 and Mont. Code Ann. § 39-51-2302, to allow for increased unemployment benefits if the employee leaves their job because of their spouse's military transfer. The Act became effective October 1, 2007.

2. Senate Bill 89, a measure requiring public employers, including school districts, municipalities, state and county governments, state government and the university system to allow for break time and reasonable accommodations for breastfeeding mothers to express breast milk. The bill also prohibits discrimination by

any public employer against an employee or potential employee on the basis that she expresses breast milk. The law became effective July 1, 2007 and is codified at MCA §§ 39-2-215 – 39-2-217.

3. House Bill 76, a measure amending portions of Montana Code Annotated Title 42 Chapter 2. The bill purports to clarify the process of filing discrimination claims with the Human Rights Commission, adds the Department of Labor as a party of interest in temporary injunctions and enforcement orders, and revises various other procedures involved in filing a discrimination claim in Montana. The law became effective July 1, 2007.