Wrongful Termination, Blacklisting & Defamation Claims Against Public Employers

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Private and public employers alike face increasing employment related claims under a variety of theories, but the most common claims stem from terminating or taking an adverse action against an employee. Public employers are subject to statutory and common law claims but also face constitutional claims from employees and former employees. While the statutory, common law and constitutional claims are distinct, the underlying elements overlap and good management should help prevent them all.

Wrongful Termination - Constitutional Claim – 42 U.S.C § 1983

Public employees often bring a civil rights claim under 42 U.S.C § 1983, alleging a property interest in continued employment that cannot be infringed without due process. The right to due process before termination of employment is required only where the employee has a clearly established property interest in continued employment for a certain term. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538 (1985). A "'property interest' is not created by the Constitution but exists in employment only if some written contract, state law, or regulation ... states or otherwise provides a specified term of employment.'" *Boreen v. Christensen*, 884 P.2d 761, 770 (Mont. 1994).

DOES THE EMPLOYEE HAVE A PROPERTY INTEREST?

- ✓ Is the employee covered by a contract or a collective bargaining agreement?
- ✓ Is the employee clearly within his or her probationary period?
- ✓ Does the Wrongful Discharge From Employment Act apply to the employee?
- ✓ What guarantees or procedures are set forth in your personnel policy manual?
- ✓ Are there applicable local ordinances?

If the employee has a written guarantee of employment, proceed as if he or she enjoys a property interest in continued employment and allow for due process prior to termination.

Public employees who can be dismissed only for cause are entitled to a very limited hearing prior to termination, followed by a more comprehensive post-termination hearing. *Gilbert v. Homar*, 520 U.S. 924 (1997). The employee should be given verbal or written notice of the charges or evidence against him and an opportunity to tell his side of the story.

HAS THE EMPLOYEE BEEN AFFORDED DUE PROCESS?

- ✓ Are there applicable personnel policies?
- ✓ Have the personnel policies been followed?
- ✓ Who is responsible for the termination decision (executive, supervisor, governing body)?
- ✓ If the governing body is responsible for the termination decision, has the employee been notified of the meeting?
- ✓ If the termination decision is made internally, has the employee been notified of the possible termination and provided an opportunity to answer charges or evidence of wrongdoing, poor performance, etc…?
- ✓ Is there a method to address the employee's privacy concerns if opportunity to be heard is at a public meeting?
- ✓ Are you prepared to balance the employee's right to privacy with the public's right to know?
- ✓ Is there a grievance procedure?
- ✓ Is there an appeal procedure to the mayor, executive, department head, governing body or police commission?
- ✓ Has the employee been properly notified of his grievance and appeal rights?
- ✓ Has the grievance committee, council or police commission followed the appropriate process during the grievance or appeal?

Wrongful Termination – Wrongful Discharge From Employment Act

The Wrongful Discharge From Employment Act ("WDEA"), MCA. §§ 39-2-901 through 39-2-915, preempts tort and express or implied contract claims arising from a discharge and provides the exclusive remedy for employees to whom the act applies.

The WDEA does not apply to probationary employees, employees covered by a collective bargaining agreement or those employed under a contract for a specific term. MCA § 392-904(2), MCA § 39-2-912, MCA § 7-32-4113.

Probationary police officers are specifically exempted from the WDEA because their employment is governed by § 7-32-4113, MCA, a specific statute, which allows the mayor to terminate a probationary police officer. *Ritchie v. Town of Ennis*, 2004 MT 43.

Prior to its *Ritchie* decision, the Montana Supreme Court addressed the intersection of the WDEA and Municipal Police Force statutes in a case where the City of Thompson Falls allowed an officer to complete his one-year probation but subsequently refused to confirm him as a permanent police officer without good cause for doing so. *Hobbs v. City of Thompson Falls*, 2000 MT 336. There, the Court held police officers must serve a probationary period not longer than one year, but during their probationary period, they may be terminated by the mayor without cause. However, the Court also held that following satisfactory completion of the probationary period of employment, the officer may not be terminated without "good cause" and the council may not withhold confirmation of the officer without "good cause."

The *Hobbs* rule assumes the WDEA would apply to the town's police officers after completion of the probationary period. However, if the officer was employed under a collective bargaining agreement, the WDEA would not apply to the discharge, even after completion of the one-year probationary period. MCA § 39-2-912. In that situation, the "good cause" or "just cause" for a council's decision not to confirm would likely be defined by the collective bargaining agreement.

DOES THE WDEA APPLY?

- ✓ Is the employee in her probationary period?
  - o Is your probationary policy clear?
  - o Is the employee a probationary police officer?
  - o If a police officer, is he awaiting confirmation by the council?
  - o Is a performance review required before the end of the probationary period? (Consider revising the policy a performance review is mandatory before the end of the probationary period)
  - o If a performance review is required, does it have to be written?
  - o Was the employee a temporary employee prior to becoming a permanent employee? If so, do the policies make clear the temporary time does not count towards the probationary period?
- ✓ Is the employee covered by a collective bargaining agreement?
- ✓ Is the individual employed under a written contract for specific term?

- Is the employee an appointee and if so, does the appointment constitute a written contract for a specified term?

✓ Is the employee alleging discrimination, retaliation, or anything for which another statute provides a remedy for contesting the dispute?

If the WDEA applies, the discharge is wrongful 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." MCA § 39-2-904(1).

Retaliation for Employee's Refusal to Violate Public Policy or Reporting Violation of Public Policy

It can be hard to gauge what will be considered a "violation of public policy" for purposes of § 39-2-904(1)(a), MCA. The Act defines "public policy" as "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule." MCA § 39-2-903(7).

- The Montana Supreme Court recently upheld a jury's determination that an employee who quit and after **making an untimely and meritless wage claim** was constructively discharged for reporting a violation of public policy on grounds the wage statutes were enacted for the public's benefit. *Harrell v. Farmers Educ. Co-op Union of Am., Montana Div.*, 2013 MT 367.

- The Court has held an appraiser who was discharged by the state Department of Revenue for **violating its conflict-of-interest rule, which violated the Montana Constitutional "fundamental right to pursue life's basic necessities,"** was wrongfully discharged for his refusal to violate public policy. *Wadsworth v. State*, 275 Mont. 287 (1996).

- The Court has held the WDEA protects a good faith "whistle blower" and specifically one who **reported his co-workers illegal drug activity to state authorities**. *Krebs v. Ryan Oldsmobile*, 255 Mont. 291 (1992).

- The U.S. District Court recently held an employee who was discharged ostensibly for violation of a company policy shortly after he **filed a report of a workplace injury,** was not wrongfully discharged under § 39-2-904(1)(a). *Hendrichs v. Safeway, Inc.*, 2014 U.S.

Dist. LEXIS 162705. The court reasoned that while the employee reported a workplace injury, he did not file a workers compensation claim, and therefore the employer did not terminate him in violation of § 39-71-317, MCA, the statute prohibiting retaliation against an employee for filing a workers compensation claim.

Termination Without "Good Cause"

"Good cause" under the WDEA includes "reasonable job-related grounds for dismissal based on (1) a failure to satisfactorily perform job duties; (2) disruption of the employer's operation; or (3) other legitimate business reason[s]." MCA § 39-2-903(5).

- A "legitimate business reason" is "a reason that is neither false, whimsical, arbitrary or capricious," and logically related to the needs of the business.

- The court should balance the rights of the employer against the employee. *Vettel-Becker v. Deaconess Medical Center of Billings, Inc.*, 177 P.2d 1034, 1041 (Mont. 2008).

- Deference is afforded to the employer where the employee occupies a sensitive or managerial position. In such a case, the appropriate inquiry is whether it is reasonable to believe the employer had legitimate business concerns that the employee would jeopardize its operations. *Sullivan v. Contl. Const. of Montana, LLC*, 299 P.3d 832 (Mont. 2013).

Even if you have "good cause," is it the REAL cause for the discharge?

Even where an employer demonstrates it had a "legitimate business reason" for the discharge, a claim may still succeed under § 39-2-904(1)(b), if the employee demonstrates the reason was a pretext for something else. *Hendrichs v. Safeway, Inc.*, 2014 U.S. Dist. LEXIS 162705. In *Hendrichs,* the employee managed the Safeway store but accepted employment from two beverage distributors to stock shelves in the Safeway and in Safeway's competitor store. Hendrichs had his young children performing the work for the beverage distributors, but he accepted and reported the income as his own. The court held Hendrich's actions were sufficient to establish a "legitimate business reason," but denied Safeway's motion for summary judgment on grounds Hendrich presented some evidence to suggest Safeway fired him a reason other than his employment with the beverage distributors.

Employee Handbooks/Personnel Materials

Where an employee alleges wrongful termination under § 39-2-904(c), MCA, for the employer's violation of its own personnel policies, courts will carefully evaluate the policies to determine if a violation occurred or if the policies allow leeway for the action taken. *Sullivan v. Contl. Const. of Montana, LLC*, 299 P.3d 832 (Mont. 2013).

- ✓ To whom do the policies apply?
  - o Do the policies apply to elected officials?
  - o Do the policies apply to the mayor's appointees?
  - o Do the policies apply to the municipal court or city judge?
  - o Do the policies apply to those employed under contracts?
- ✓ Make sure you understand whether all or parts of the manual apply to the employee.
- ✓ Implement policies without rigid time line requirements for evaluations or responses to complaints, grievances or appeals.
- ✓ Implement policies that allow leeway in progressive discipline, including the ability to immediately terminate employees for very serious matters.
- ✓ Know what the policies mean. If you don't, revise them to make them clear.
- ✓ Make sure there are no inconsistent provisions.
  - o For example, compare:
    - ***Date of Hire.*** *Date of hire shall mean the effective date of the individual's employment with the Town. Anniversary date shall mean the date of hire. There will be no change in an employee's anniversary date in the following instances: Reallocation of an employee's position to a new classification title when there have been no recent, abrupt and/or significant changes in assigned tasks and responsibilities.*
    - ***Probationary Period****. New Employees (except temporary employees and short-term workers), in full-time or part-time permanent positions must serve a one-year period of probation and may be terminated without cause. Short-term workers and temporary employees are continually on probation. [….] Transferred or promoted employees shall not serve a period of probation at the new position and may not be terminated without cause.*

Affirmative Defense – Failure to Grieve

If the employer maintains written internal procedures under which the discharged employee may grieve the discharge, the employee must exhaust those procedures prior to filing a claim under the WDEA. If the employee does not do so, his WDEA claim is barred. However, the employer **MUST** provide the discharged employee with a written copy of the procedures within 7 days of the date of the discharge.

- ✓ Send a copy of the grievance procedure by certified mail to the employee within 7 days of the discharge;
- ✓ If the employee is a police officer, provide the grievance policy AND notify of the right to appeal to the police commission.

Wrongful Discharge – Contract or Collective Bargaining Agreement Claims

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. *Firestone v. Oasis Telecomm., Data & Records,* 38 P.3d 796 (Mont. 2001). 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. Mont. Rail Link, Inc.,* 16 P.3d 992 (Mont. 2000).

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.,* 113 P.3d 275 (Mont. 2005).

On the other hand, if the contract allows the employer to terminate the employee at-will and without cause, it is not a "written contract for a specific term" under WDEA and a discharged employee's claim is not excluded by from the WDEA under § 39-2-912, MCA. *Brown v. Yellowstone Club Operations, LLC*, 2011 MT 155.

Considerations When Terminating a Contract Employee

- ✓ Does the contract allow for termination "for cause?"
- ✓ "Cause" under a contract still requires "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." *Cole v. Valley Ice Garden, LLC.*
- ✓ Is the contract a "contract for a specific term?"
- ✓ Does the contract automatically renew?
- ✓ If the employee is subject to a collective bargaining agreement, has he followed the internal grievance process established under the CBA?
- ✓ Do the personnel policies and CBA policies overlap or conflict?
- ✓ Have you notified the employee of his rights under the CBA, contract and personnel policies?

Defamation & Blacklisting – Is Talking About An Employee Illegal?

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.

Recently, there have been some large awards granted in Montana defamation claims, although the claims were not employment-related.

- ➢ *Blue Ridge Homes, Inc. v. Thein*, 191 P.3d 374 (Mont. 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., & 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).

On the other hand, the Montana Supreme Court recently upheld the imposition of sanctions requiring the plaintiff to pay the defendant's attorneys' fees where the case was found to have been brought for improper purposes and without any basis in fact or law. *Hilten v. Bragg*, 248 P.3d 282 (Mont. 2010). And while there have been numerous defamation claims against employers based both upon statements made by co-workers to co-workers and upon statements made and information released by a supervisor, they are hard claims to win and most are dismissed.

- Terminated State Tourism Director brought defamation and invasion of privacy claim after State terminated her and released documents associated with her internal grievance to the media. State's motion for summary judgment denied. *Baumgart v. State*, 2014 MT 194

- Plaintiff alleged co-worker defamed him by telling another employee his discrimination complaint against a female officer was "bullshit." Plaintiff's claims against the female officer and the City were dismissed on summary judgment and Plaintiff voluntarily dismissed his defamation claim before a ruling. *Shermer v. City of Missoula, et al.*, DV-13-285, MT Fourth Judicial Dist. Court.

- Former police officer sued police chief for written reference the chief provided to another police department. The claim was dismissed as a privileged communication made in the course of chief's public duty. *Wolf v. Williamson*, 269 Mont. 397 (1995).

- Where false statements made about an employee are inextricably intertwined with the employee's termination, the defamation claim is barred by the exclusivity of the WDEA. *Daniels v. YRC, Inc.*, 2013 U.S. Dist. LEXIS 15732, 9 (D. Mont. Feb. 5, 2013)

- False statements made to the Unemployment Insurance Division are privileged as statements made in an official proceeding. *Daniels v. YRC, Inc*.

- Statements made about employee were privileged as official duty communications when made internally and in the course of evaluating performance. *Nye v. Dept. of Livestock*, 196 Mont. 222.

- Statements made by a councilman about an employee at a council meeting were privileged. *Skinner v. Pistoria*, 194 Mont. 257 (1981).

- Statements of opinion on matters of public concern are constitutionally protected free speech. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

- Statements that do not contain a provable false factual connotation or a statement that cannot reasonably be interpreted as stating actual facts about an individual are protected by the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

- Accusing executive of "mismanagement" and stating the cooperative paid "$30 million too much" for another company were not defamatory because the accusations were statements of opinion and not capable of being proven true or false. *McConkey v. Flathead Electric Co-op.*, 2005 MT 334.

Blacklisting & References

The other way employers face liability for talking about employees or former is employees is under Montana's Blacklisting statutes. MCA § 39-2-801 – MCA § 39-2-804. 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 statutes apply 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.

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. Nor do the statutes require the employer to provide the statement. If the employer does not provide a written statement upon the employee's request within a reasonable time after the demand, the employer may not furnish a statement of the reasons for the discharge to any person (except to defend itself in subsequent litigation). MCA §§ 39-2-801 through 39-2-802.

- The Court recently upheld the dismissal of a blacklisting claim made by a former employee and his sons, claiming that after their involvement in an environmental claim against PPL Montana, they've never been able to find work in the electricity field again. The Court upheld the dismissal because the plaintiff had no evidence, other than his own deposition, that PPL Montana engaged in blacklisting. *Burnett et al v. PPL Montana, Western Energy, Rosebud Operating Services, and Westmoreland Resources*, 2013 MT 362N

Best Practices To Avoid Statutory, Constitutional and Common Law Wrongful Discharge Claims and Claims for Defamation or Blacklisting.

- ✓ ALWAYS send a copy of your grievance policy to a terminated employee or any employee who claims they're resigning under duress. This must be done within 7 days of the discharge. It should be sent certified mail;
- ✓ Establish clear policies;
- ✓ Train department heads and supervisors on the policies;
- ✓ Document the training;
- ✓ Change policies that require you to adhere to strict timelines or formats for performance evaluations, complaints and grievances;
- ✓ Follow the policies in place until new policies are adopted;
- ✓ Terminate questionable employees during the probationary period;
- ✓ If you must keep a questionable probationary employee beyond the initial probationary period, consider extending the probation, but do so very carefully and seek advice before doing it;
- ✓ Give non-probationary employees the opportunity and tools to improve;
- ✓ Communicate with the employee and generally do not go forward with a termination if the employee will be surprised by it – there should be no surprises;
- ✓ But communicate carefully – do not send rash e-mails or memos;
- ✓ Consider seeking legal advice before formal discipline;
- ✓ Document, document, document;
- ✓ If you've failed to document past internal complaints or verbal reprimands, refer back to those during the next written reprimand if only to remind the employee he has been given prior warnings and opportunities to improve;
- ✓ Timing – consider your options and whether or not you have documentation to support the decision;
- ✓ When you make a termination decision, make it for the real reason. Terminating under a pretext never works.

2014 Wrongful Discharge Trial Results

Adkins v. BioLife Plasma - Defense Verdict

A Great Falls jury found that BioLife Plasma did not wrongfully discharge Rhonda Adkins, its assistant manager. Adkins was terminated after BioLife discovered a noncompliant practice at the Center involving employees directing certain donors not to scan out at the end of the donation, which resulted in manipulation of data that is reported to the company and factors into evaluations and bonuses. Adkins alleged she wasn't aware of the practice, that BioLife lacked "good cause," and that she was entitled to progressive discipline. BioLife argued Adkins was responsible for overseeing operations and that its personnel policies gave it discretion to immediately terminate without progressive discipline based on severity of the offense.

Pritchard-Sleath v. DPHHS – Plaintiff Verdict - $244,239

A Helena jury found that Elizabeth Pritchard-Sleath was wrongfully discharged her from her position as a psychology specialist at Montana Developmental Center in Boulder. Pritchard-Sleath alleged her employer wrongfully accused her of trying to get a client to move in with her for romantic reasons after she filed a claim with Disability Rights Montana. As a result of her complaint to DRM she was placed on administrative leave multiple times and on 3/10/11 was required to return her keys and prohibited from returning to the campus until 5/27 when she was fired. The letter proposing her termination stated that the reason was her interactions with two clients. She showed that these purported reasons were invalid. Her information was ignored as DPHHS had already decided to terminate her. Her discipline and ultimate discharge were motivated by her contacts with DRM and therefore violated the WDEA in that she was terminated reporting a violation of public policy.

Kenley v. Johnson – Plaintiff Verdict - $70,000

A 9-3 Hamilton jury found that Phyllis Kenley was wrongfully terminated by dentist Eli Johnson when she was fired from the job she had held for 19 years for allegedly being rude to a prospective patient during her lunch hour. Kenley never received the annual performance evaluation required in the personnel manual. Johnson denied he had a personnel manual, even though he alleged Kenley violated one of the policies as justification for her discharge. Johnson did no investigation and waited six days after hearing about the alleged rude comment to fire Kenley.