SURVEY

MONTANA'S WRONGFUL DISCHARGE FROM EMPLOYMENT ACT: THE VIEWS OF THE MONTANA BAR

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I. INTRODUCTION

In 1987 the Montana Legislature enacted the pathbreaking "Wrongful Discharge From Employment Act" (WDFEA).[1] Montana thus became the first and, to date, the only state in the nation to provide statutory protection for "wrongful discharge." In an article last year in this Review, two of the authors of this Article traced the history and initial judicial interpretations of the WDFEA.[2] They suggested that the "Model Employment Termination Act" (META), recently drafted by the National Conference of Commissioners on Uniform State Laws, is based in significant measure on the Montana Act.[3] Since META serves as a model for possible reform throughout the nation, the operation and effectiveness of the WDFEA is important not only in Montana, but also in other jurisdictions where similar reforms are being considered.[4] To

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1. MONT. CODE ANN. §§ 39-2-901 to -914 (1991).

2. *See* Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge From Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53 (1992).

3. *Id.* at 53-54 & n.5.

4. *See generally* Leonard Bierman & Stuart A. Youngblood, *Employment-at-Will and*

gain a better understanding of the operational effectiveness of the WDFEA, the authors began a comprehensive, multi-phased, empirical study of the statute's effectiveness.[5] The first phase of this study involved a survey of all members of the State Bar of Montana designed to assess members' views regarding the WDFEA. What follows is a review and discussion of the survey methodology and the results of the survey. Special attention is given to the questions of whether attorneys in the state have adequate incentives to handle WDFEA cases and whether attorneys are making meaningful use of the arbitration provisions in the statute.

II. METHODOLOGY OF THE WDFEA SURVEY

On June 8, 1992, a survey regarding the WDFEA was sent by first class mail to all 2,063 current members of the Montana Bar. The State Bar of Montana provided mailing labels. A "previewing" notice regarding the survey appeared in the June issue of the Montana Bar newsletter, notifying Montana attorneys that this survey would be coming.[6] The mailing to Montana attorneys consisted of a cover letter providing a brief overview of the WDFEA and its importance,[7] a one-page questionnaire regarding the WDFEA,[8] and a pre-paid return envelope to Montana State University. The cover letter was sent on Montana State University stationery.

Survey responses were received from 636 members of the Montana Bar, just over 30.8 percent of those surveyed. This is a good response rate for a survey of this kind.[9] In addition, 179 of the 636 respondents provided their names, addresses, and phone numbers, thus facilitating possible follow-up interviews by the researchers. Finally, over half of the respondents provided various additional qualitative comments regarding the survey questions, comments that contributed immeasurably to the richness of the re-

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the South Carolina Experiment, 7 IND. REL. L.J. 28, 48-54 (1984) (discussing "wrongful discharge" reform proposals in California and Michigan); Jeremy B. Fox & Hugh D. Hindman, *The Model Employment Termination Act: Provisions and Discussion*, 6 EMP. RESP. & RTS. J. 33 (1993); Theodore J. St. Antoine, *The Model Employment Termination Act: Fairness for Employees and Employers Alike*, 43 LAB. L. J. 495 (1992).

5. The survey that is the subject of this article is part of an overall study that will analyze the WDFEA. Other phases of this study will include a survey of employers and interviews of arbitrators.

6. *See Wrongful-Discharge Survey Team Seeks Response*, MONT. LAW. (State Bar of Mont., Helena, MT) June 1992, at 14.

7. *See* Cover Letter, Appendix I *infra* p. 381.

8. *See* Survey, Appendix II *infra* p. 382.

9. *See* GRAHAM KALTON, INTRODUCTION TO SURVEY SAMPLING 66 (4th prtg. 1987); NEAL W. SCHMITT & RICHARD J. KLIMOSKI, RESEARCH METHODS IN HUMAN RESOURCES MANAGEMENT 355-56 (1991).

sponses received.[10]

III. Results of the WDFEA Survey

A. *Types of Respondents and Involvement with Wrongful Termination Disputes*

The first half of the survey questionnaire consisted of a variety of questions regarding the type of legal practice of the respondents.[11] Of those responding, the vast majority, 83 percent, were in private practice.[12] Approximately 12 percent of the respondents were involved in government service, just over three percent were employed by corporations, and less than two percent were members of the judiciary or fell into "other" categories.[13] Of the attorney respondents who were in private practice, over 30 percent were solo practitioners, with 66 percent of the remaining respondents practicing law in firms with between two and twenty-five attorneys.[14] Approximately four percent of the respondents practiced in firms with twenty-five attorneys or more.[15]

Of those Montana attorneys responding to the question as to whether they regarded themselves as "primarily a plaintiff's attorney," "primarily a defense attorney," or a combination of both, approximately 30 percent regarded themselves as plaintiff's attorneys, 26 percent regarded themselves as defense attorneys, and just over 44 percent saw themselves as a combination of both.[16] Moreover, about 43 percent of the respondents indicated that they devoted more than half of their time to plaintiff's work, while about 42 percent reported that they devoted more than half of their time to defense work.[17]

Of the 636 respondents 558, or about 89 percent, said that they were exposed to "employment-related matters" in their legal practice.[18] This percentage of exposure to employment matters is

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10. *See* Qualitative Comments to Survey Questions (on file with Montana Law Review).

11. *See* Survey, questions 1-9, Appendix II *infra* p. 382.

12. *See* Statistical Survey Results, question 2 (on file with College of Business, Montana State University).

13. *Id.* (question 1) (While the survey did not provide an "other" category, some survey respondents wrote in "other.").

14. *Id.* (question 3).

15. *Id.* Thus Montana seems to have escaped the trend toward mega-size law firms. *See generally* Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Firms*, 76 Va. L. Rev. 747 (1990).

16. *See* Statistical Survey Results, *supra* note 12 (question 4).

17. *Id.* (question 5).

18. *Id.* (question 6a).

likely higher than that of the average member of the Montana Bar, since attorneys exposed to matters of this kind would probably be more inclined to respond to a survey on the WDFEA.[19] Nevertheless, while 89 percent of the respondents were exposed to employment-related matters in their legal practice, approximately 90 percent of the respondents spent one-third or less of their time working in this area of the law.[20] Indeed, only about seven percent of the respondents spent 50 percent or more of their time dealing with employment-related issues, with the majority of respondents devoting ten percent or less of their time to employment-related matters in the context of a general legal practice.[21]

Respondents to the survey had a general familiarity with the issue of "wrongful termination" with 86 percent stating that they had been involved in a "wrongful termination" dispute.[22] Additionally, 437 or almost 70 percent of the respondents had been involved in a dispute involving the WDFEA since its enactment in 1987.[23] In fact, 234 of the respondent attorneys, or about 37 percent, were currently involved in a dispute involving the WDFEA at the time they responded to the survey.[24] Thus, the survey respondents were quite familiar with the WDFEA and its operation.[25]

B. Incentives For Employees to Pursue and Attorneys to Handle Cases Under the WDFEA

The primary impetus for the Montana Legislature's enactment of the WDFEA[26] and for the active consideration of "wrongful termination" legislation in other jurisdictions[27] has probably been state judicial rulings awarding large sums of money to plaintiffs in some cases challenging the traditional rule of "employment-at-will." Under the current general system of plaintiff challenges to "at will" rules in state judicial systems, employers have been exposed to something of a game of "Russian roulette," with disgruntled employees often winning little or no damages but occasionally

19. *See generally* Schmitt & Klimoski, *supra* note 9, at 374-75.
20. *See* Statistical Survey Results, *supra* note 12 (question 6b).
21. *See id.*
22. *Id.* (question 7).
23. *Id.* (question 8a).
24. *Id.* (question 9).
25. *Id.* (questions 8a & 9).
26. *See* Bierman & Youngblood, *supra* note 2, at 55.
27. *See* William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 905 (1986).

garnering from juries lottery-sized, million-dollar plus judgments.[28] In addition, substantial legal costs are typically involved in defending wrongful discharge cases in court.[29]

By enacting the WDFEA the Montana Legislature directly addressed this issue by expressly limiting the monetary awards employees could obtain under the new Act.[30] Section 39-2-905(1) of the WDFEA states that "if an employer has committed a wrongful discharge" an "employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon."[31] This provision also provides for "mitigation of damages" stating that "[i]nterim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages."[32] Recovery for punitive damages by an employee is not permitted unless the employee was discharged "in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy"[33] and it can be proven only "by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge."[34] The Act also expressly preempts common law remedies for wrongful discharge, stating that "no claim for discharge may arise from tort or express or implied contract,"[35] and specifically prohibits recoveries by employees for emotional distress or pain and suffering.[36]

In sum, in return for broad statutory protection against wrongful discharge, wrongfully discharged employees' remedies are sharply limited by the WDFEA. While such a "tradeoff" (of the kind similarly inherent in worker compensation laws, for example) is probably necessary for legislation like the WDFEA to achieve "political acceptability" and be enacted, the issue remains whether the statute's sharp limits on monetary relief "chills" parties from pursuing remedies under the Act.[37] Furthermore, Harvard Law Professor Paul Weiler has raised the question of whether the Montana statute's cap on recoveries makes it difficult for aggrieved par-

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28. *See* Bierman & Youngblood, *supra* note 2, at 56.

29. *See* JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY, 35-36, 62-63 (1992); Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644, 646-50 (1991).

30. MONT. CODE ANN. § 39-2-905(1) (1991).

31. MONT. CODE ANN. § 39-2-905(1) (1991).

32. MONT. CODE ANN. § 39-2-905(1) (1991).

33. MONT. CODE ANN. § 39-2-904(1) (1991).

34. MONT. CODE ANN. § 39-2-905(2) (1991).

35. MONT. CODE ANN. § 39-2-913 (1991).

36. MONT. CODE ANN. § 39-2-905(3) (1991).

37. *See* Bierman & Youngblood, *supra* note 2, at 73.

ties to find lawyers willing to take their cases.[38] One of the most important goals of this survey was to attempt to obtain empirical answers to these significant questions.

Question 10 of the survey directly asked all Montana Bar members whether they believed that adequate incentives existed for workers to pursue cases under the Act. Space was also provided on the questionnaire for those who felt that adequate incentives did not exist to provide some qualitative comments.[39] Overall, 52.3 percent of the respondents felt that adequate incentives exist for workers to pursue cases under the Act.[40] However, only 20.5 percent of the respondents who identified themselves as primarily a plaintiff's attorney felt that adequate incentives exist, compared to 86.7 percent of the respondents who identified themselves as primarily a defense attorney.[41] A very sizeable minority of all the respondents, 48.1 percent, felt that adequate incentives do not exist for workers to bring cases under the WDFEA.[42] Of those in this latter group who provided qualitative comments, the vast majority pointed to the statute's "restricted damages" as a reason why workers do not have adequate incentives to pursue WDFEA cases.[43] Survey respondents also noted that workers often found "proof almost impossible," and that potential plaintiffs often experienced difficulty in finding attorneys to take their cases (and that the statute was "too complex" to pursue cases without an attorney).[44] Overall, a significant number of those responding to this question felt that adequate incentives for employees to pursue cases under the Act do not exist.[45]

Questions 11 and 12 of the survey directly addressed Professor Paul Weiler's concern regarding whether adequate incentives exist for attorneys to take cases under the WDFEA. Question 11 asked attorney respondents whether they felt that adequate incentives existed for attorneys "to handle plaintiff's causes of action" under the WDFEA, with those who felt that adequate incentives do not exist being given the opportunity for additional qualitative comments.[46] Of the bar members responding, a majority of 56.5 per-

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38. *See* PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAWS 98-99 (1990).

39. *See* Survey, Appendix II, question 10 *infra* pp. 382-83.

40. *See* Statistical Survey Results, *supra* note 12 (question 10).

41. *Id.*

42. *Id.*

43. *See* Qualitative Comments to Survey Questions, *supra* note 10 (question 10).

44. *Id.*.

45. *Id.*

46. *See* Survey, Appendix II, question 11 *infra* p. 383.

cent indicated that adequate incentives do not exist for attorneys to handle plaintiff's causes of action under the WDFEA.[47] Moreover, in responding to question 12 of the survey, nearly half (49.7 percent) of the attorney respondents stated that they had personally declined a case involving the WDFEA; of those who gave reasons for personally declining a case, 75 percent stated it "did not offer the possibility of 'adequate' remuneration."[48]

In qualitative comments accompanying these survey responses, attorney respondents frequently noted that attorney fees are not routinely allowed as damages under the Act (although they are permitted in some instances).[49] A number of respondents also noted that the compensation currently available in wrongful discharge cases did not adequately reflect the time and complexity of the work involved.[50] Some respondents noted that cases under the WDFEA were not worth taking unless some sort of "malicious action" could be proven.[51] The Act, as noted above, permits the awarding of punitive damages in cases involving malicious discharges of employees for reasons contravening public policy.[52]

The fact that large numbers of attorneys in the state who practice employment law have turned down cases involving the WDFEA because these cases did not offer the possibility of adequate remuneration seems to call into question the efficacy of the entire Act. The Act, as some respondents noted, is probably "too complex" for an aggrieved employee to proceed under without an attorney.[53] But if attorneys in the state are unwilling to take cases, how many aggrieved employees are being left without a meaningful remedy? The issue seems ripe for consideration by both the Montana Legislature and other legislatures considering proposals similar to the WDFEA.

C. Resolving WDFEA Cases Through Arbitration Versus Litigation

The WDFEA contains a provision specifically designed to encourage aggrieved employees, even those with limited financial resources,[54] to settle disputes through arbitration rather than litiga-

47. *See* Statistical Survey Results, *supra* note 12 (question 11).
48. *Id.*
49. *See* Qualitative Comments to Survey Questions, *supra* note 10 (questions 11 & 12).
50. *Id.*
51. *Id.*
52. *See supra* note 33 and accompanying text.
53. *See supra* text accompanying note 43.
54. *See* LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 111, 118-19

tion.[55] By specifically encouraging the use of arbitration to resolve WDFEA disputes, the Montana Legislature appeared to be heeding the evaluation of leading employment law scholars that arbitration is a particularly effective method for resolving "wrongful discharge" disputes.[56] Despite the clear statutory encouragement of arbitration as a way to resolve these disputes, however, anecdotal evidence has suggested that aggrieved parties have been largely avoiding arbitration and instead taking WDFEA disputes to court.[57] Questions 13 through 16 of the survey were designed to gain an understanding as to whether this is indeed the case and, if so, why this phenomenon exists.

Question 14 of the survey directly asked attorneys whether they would ever skirt the arbitration provision of the Act and advise their client to take a WDFEA case directly to court without first offering to go to arbitration.[58] This question was asked in tandem with survey question 13, which inquires about the effectiveness of the WDFEA arbitration provision and its cost-shifting mandates.[59] Under section 39-2-914 of the Act, if either party makes a valid offer to arbitrate its case and that offer is not accepted by the other party, the refusing party must pay the offering party's "reasonable attorney fees" should the offering party later prevail in court.[60] Moreover, the section provides that a discharged employee whose offer to arbitrate is accepted by the employer is entitled to have all fees and costs of arbitration paid by the employer if the employee prevails.[61] Finally, question 16 of the survey asks attorney respondents who have been personally involved in WDFEA cases to identify how the given cases have been resolved

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(1990).

55. MONT. CODE ANN. § 39-2-914 (1991).

56. The definitive article on this issue is perhaps Professor Clyde W. Summers' 1976 piece. *See* Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

57. Discussions by the authors and others with various workers, employers, lawyers, and arbitrators in Montana seemed to point in this direction. *See generally* Bierman & Youngblood, *supra* note 2, at 73-74.

58. *See* Survey, Appendix II, question 14 *infra* p. 383.

59. Survey, Appendix II, question 13 *infra* p. 383.

60. In *Hoffman v. Town Pump, Inc.*, ___ Mont. ___, 843 P.2d 756 (1992), the Montana Supreme Court apparently assumed the necessity of a pre-existing written arbitration agreement as a prerequisite for awarding attorney fees under section 914(4) of the WDFEA. *Hoffman*, at ___, 843 P.2d at 759 (construing MONT. CODE ANN. § 39-2-914 (1991)). More recently, however, the Montana Legislature's 1993 amendments to section 914 clarify that a pre-existing written arbitration agreement is not a prerequisite for either (1) a party's offer to arbitrate, or (2) awarding attorney fees to a party whose offer to arbitrate is rejected, where the offering party later prevails in court. *See* H.B. 258, 53d Mont. Leg. (1993) (codified at MONT. CODE ANN. § 39-2-914 (1993)).

61. MONT. CODE ANN. § 39-2-914(5) (1991).

(i.e., through litigation, arbitration, or settled informally), while question 15 asks respondents whether "enough skilled arbitrators exist in the state to properly handle WDFEA arbitration cases."[62]

Survey results appear to generally support the anecdotal evidence regarding the use of arbitration under the WDFEA. Attorneys responding said that they had settled 1,076 cases under the WDFEA informally, 640 cases by way of litigation, 157 cases by legal action pursuant to another statute or other means, and only 67 cases through arbitration.[63] Thus, of the 1,942 reported cases only about 3.5 percent were resolved through arbitration. Additionally, the number of cases resolved through arbitration was only about 10.5 percent of the number of cases resolved under the WDFEA pursuant to litigation. Consistent with this result is that over 60 percent of the responding attorneys stated that they might advise clients to take their case directly to court without first offering to go to arbitration, despite that if such an offer were turned down, the refusing party would be statutorily required to pay the other side's attorney fees if the plaintiff-employee won in court.[64] Thus, although 62 percent of those responding felt that the WDFEA's arbitration provision and its fee-shifting mandates were "effective,"[65] a very small number of these attorneys actually were willing to take cases to arbitration. Finally, almost 52 percent of those responding felt that there were not enough skilled arbitrators in the state to handle WDFEA cases.[66]

Qualitative comments to these questions helped elucidate some of the survey results. A number of respondents, for example, commented that they wanted to try their case before a jury, and that they were more familiar with and had more confidence in court procedure than arbitration.[67] Respondents also commented that they felt discovery is better in a lawsuit, that the possibility of success was higher in litigation than in arbitration, that some arbitrators were biased, and that Montana lacked arbitrators.[68] In contrast, a handful of respondents did state that they felt arbitration cases were shorter, cheaper, and less burdensome—although this was clearly the minority view.[69]

Overall, it seems that the arbitration provision of the WDFEA

62. *See* Survey, Appendix II, questions 15 & 16 *infra* p. 383.
63. *See* Statistical Survey Results, *supra* note 12 (question 16).
64. *Id.* (question 14).
65. *Id.* (question 13).
66. *Id.* (question 15).
67. *See* Qualitative Comments to Survey questions, *supra* note 10 (question 14).
68. *Id.*
69. *Id.*

is not being fully utilized, and that many attorneys are recommending that clients take WDFEA cases to court despite clear statutory encouragement to offer at least initially to take the case to arbitration. What can be done to ameliorate this situation is somewhat unclear, although one positive step would be to facilitate the training of more arbitrators in the State of Montana. Some legislative action may also be in order.[70] The extent to which the problem of failure to fully utilize the relevant statutory arbitration procedure that exists under the Montana WDFEA would be replicated in other states were they to enact similar statutes is also somewhat unclear.[71] The issue is clearly one worthy of careful consideration by legislative drafters in other jurisdictions.

D. Impact of WDFEA on Employment Practices

The WDFEA has had a clear impact on employer personnel practices in Montana. Section 39-2-904(3) of the Act, for example, directly states that a discharge is "wrongful" if an employer violates the "express provisions" of the employer's own written personnel policies.[72] Thus, Montana became the first state in the nation to hold that the promises made in employer personnel handbooks, for example, are legally binding.[73] The WDFEA also gives enhanced legal status to employer internal grievance procedures, mandating that discharged employees must first exhaust internal employer grievance procedures before bringing a case under the WDFEA, and potentially shortening the statutory statute of limitations for employees who do not avail themselves of such internal grievance mechanisms.[74] Consequently, it was not surprising that a clear majority of respondents (about 65 percent) stated that they felt "employer personnel practices have changed due to the

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70. A proposal to amend section 39-2-912(2) of the WDFEA was rejected by the 1993 Montana Legislature. The proposed amendment would have provided that employees covered by a written collective bargaining agreement are not exempted from the Act's coverage unless that agreement contains a "just cause" provision and provides for final and binding arbitration of grievances. *See* S.B. 19, 53d Mont. Leg. (1993) (introduced by Sen. Blaylock). Thus, there is awareness in the Legislature of the importance of arbitration as an employment dispute resolution method.

71. There would probably be the same sorts of incentives for attorneys in other jurisdictions to pursue cases via litigation, although employees in other jurisdictions might have greater familiarity with the use of labor arbitration, and more qualified labor arbitrators might be available.

72. MONT. CODE ANN. § 39-2-904(3) (1991).

73. *See* Bierman & Youngblood, *supra* note 2, at 71-73 (citing Buck v. Billings Mont. Chevrolet, Inc., 248 Mont. 276, 811 P.2d 537 (1991)).

74. MONT. CODE ANN. §§ 39-2-911(2), (3) (1991). *See* Schramm, *supra* note 54, at 117-18. *See also Hoffman*, ___ Mont. at ___, 843 P.2d at 758-59.

WDFEA."[75]

While survey question 17 did not solicit any qualitative response, respondents independently added 91 qualitative responses to this question.[76] A number of respondents noted that more dramatic changes in employer personnel policies occurred when Montana state courts were making significant judicial incursions into the traditional doctrine of "employment of will" than under the WDFEA.[77] Further, a number of respondents asserted that the changes wrought by the WDFEA have not necessarily "been for the better," alleging that employers appear more "callous" and less worried about "wrongful discharge" claims since the enactment of the statute.[78] Nevertheless, some respondents did note positive changes with respect to employer written personnel policies and handbooks and greater efforts by employers to document personnel actions.[79]

Question 18 of the survey focused on one specific aspect of employer personnel policy and the statute's impact on it: the nature and length of an employee's "probationary period." The WDFEA's general protections against wrongful discharge[80] do not apply to "probationary" employees.[81] More specifically, the Act states that employees are required to have completed the employer's period of probationary employment.[82] Unlike the META, however, which establishes a one-year probationary period,[83] the WDFEA does not define or mandate a specific probationary term.[84] Instead, the statute appears to leave the length of the employee's probationary period solely to the discretion of the employer. Indeed, when the Montana Legislature was holding hearings with respect to the initial enactment of the WDFEA, some individuals testified that employers had, in some instances, implemented probationary periods up to seven years.[85] The legislative history makes clear that the legislature intended to leave these probationary periods unaffected

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75. *See* Statistical Survey Results, *supra* note 12 (question 17).

76. *See* Qualitative Comments to Survey Questions, *supra* note 10 (question 17).

77. *Id.*

78. *Id.*

79. *Id.*

80. However, the statute's specific protections against discharges in violation of "public policy or for reporting a violation of public policy" and in contravention of written employer personnel policies apply even to probationary employees. *See* MONT. CODE ANN. §§ 39-2-904(1), (3) (1991). *See also* Schramm, *supra* note 54, at 117.

81. *See* MONT. CODE ANN. § 39-2-904(2) (1991).

82. MONT. CODE ANN. § 39-2-904(2) (1991).

83. *See* Bierman & Youngblood, *supra* note 2, at 53-54 n.5.

84. *Id. See also* Schramm, *supra* note 54, at 116.

85. *See* Schramm, *supra* note 54, at 116 n.134.

by the new legislation.[86]

Question 18 of the survey directly addressed the issue concerning the efficacy of this provision of the WDFEA as compared to provisions in various other legislative proposals that prescribe one-year probationary periods, and asked respondents which approach they thought was better and why.[87] Of those individuals responding, 58.7 percent felt that it was better to leave the definition of probationary period to the employer's discretion, while 41.3 percent preferred a set one year period.[88]

In their qualitative comments, respondents arguing for employer discretion with respect to the probationary period frequently stated that such an approach allows for a tailoring of the probationary period to the complexity, sensitivity, and overall nature of the job.[89] Some respondents also noted that under the WDFEA the issue is properly a "negotiable matter" between the employer and employee, and that an employee can decline a job if unsatisfied with the probationary period.[90]

Respondents arguing against the WDFEA's approach and in favor of a one-year probationary period stated that they felt there was a need for a "uniform interpretation" of the Act, and that such an approach would make the law more effective and better protect employees.[91] A number of respondents also echoed the theme raised by one commentator[92] that the Act's current approach to probationary periods encourages abuse by giving employers the opportunity to avoid statutory protections for employees by adopting indefinite employee probationary periods.[93] A legislatively set probationary period would obviously thwart these tactics.[94]

E. Summary Qualitative Assessments

Question 19 of the survey was open-ended and provided respondents with the opportunity to set forth any additional comments or questions they might have regarding the survey instrument.[95] A number of individuals took advantage of this opportunity, with the most common themes being expressed that

86. *Id.*
87. *See* Survey, Appendix II, question 18 *infra* p. 383.
88. *See* Statistical Survey Results, *supra* note 12 (question 18).
89. *See* Qualitative Comments to Survey Questions, *supra* note 10 (question 18).
90. *Id.*
91. *Id.*
92. *See, e.g.*, Schramm, *supra* note 54, at 117.
93. *See* Qualitative Comments to Survey Questions, *supra* note 10 (question 18).
94. *See id.*
95. *See* Survey, Appendix II, question 19 *infra* p. 383.

the WDFEA was "enacted to protect employers, not employees" and that the limits on damages under the statute give employees a diminished chance for a "reasonable recovery" than under prior common law.[96] Similarly, various respondents pointed out that they felt the number of wrongful discharge cases in the state had decreased since the enactment of the WDFEA, and that damages under the Act need to be expanded. On the other hand, some respondents asserted that the WDFEA has slowed the stream of employers leaving Montana, and introduced a more "rational" approach to settling disputes of this kind.[97] Overall, however, the most common response to this question was that the statute had done a disservice to employees in the state.

IV. CONCLUSION

The survey of the Montana Bar with respect to the WDFEA answered many questions, but also created many new ones, and left many unanswered. In general, however, the survey results seem to show that the Act has not been living up to its full potential, at least from the perspective of the attorneys surveyed. Attorney respondents evidenced considerable familiarity with the WDFEA, with 70 percent having personally handled a case under the statute. Consequently, the fact that a majority of these individuals felt that adequate incentives did not exist for attorneys to take plaintiff's cases under the Act, and that a large percentage had personally declined a case involving the WDFEA because of inadequate compensation, are distressing and raise the question of the adequacy of the Act. If aggrieved individuals cannot find attorneys to represent them, how effective are the statutory protections? Moreover, while the Act clearly encourages the use of arbitration, the survey results reveal that attorneys have not generally been utilizing this forum. This is clearly an issue worthy of attention by the Montana Legislature.

Finally, the survey indicates that the WDFEA has changed employer personnel practices in Montana, although perhaps not all for the better. Because the statute sharply limits employee damages, the evidence suggests that some employers now are less concerned about wrongful discharge claims than before the law was enacted.

In summary, it appears that the full potential of the WDFEA is not being realized. The problems that have developed under the

96. *See* Qualitative Comments To Survey Questions, *supra* note 10 (question 19).
97. *Id.*

WDFEA merit careful attention not only in Montana, but also in other states considering legislation of this kind.

APPENDIX I

June 8, 1992

Dear Colleague:

As you likely know, the Montana Legislature in 1987 enacted the path breaking *Wrongful Discharge From Employment Act* (WDFEA). With this legislation, Montana became the first, and to date, only state in the union to statutorily protect all workers in the state from unjust dismissal. Because of its unique nature, the WDFEA has commanded considerable attention from practitioners and scholars throughout the country. For example, the Uniform Law Commissioners' *Model Employment Termination Act* is patterned on the Montana statute and is currently being proposed in other states. Consequently, there is considerable interest in evaluating how effective the WDFEA has been.

Toward this end, would you please take a few minutes to answer the enclosed one page questionnaire? This questionnaire is targeted to those in legal practice that may have had some interaction with the WDFEA in their current or past legal practice. A stamped, self addressed envelope is enclosed for your convenience. Please be assured that the questionnaire may be completed anonymously or if you choose to identify yourself, your responses will be treated confidentially. Please call me at 406-994-6187 or write me, if you have any questions or comments. Thank you very much for your cooperation.

Sincerely,

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Enclosures

APPENDIX II

MONTANA WRONGFUL DISCHARGE FROM EMPLOYMENT ACT (WDFEA) SURVEY

DIRECTIONS: This questionnaire only requires a few minutes to complete and your participation is anonymous. Please be sure to answer *front* and *back* sides of this sheet. Most questions may be answered by circling a response choice, checking a blank, or filling in a blank space. A stamped, self-addressed envelope is enclosed for your convenience in returning this questionnaire. Thank you for your input!

1. Which of the following best describes your legal practice (please circle):

a. private law practice
b. corporate legal staff
c. government attorney
d. member of judiciary

2. If you are in a private practice, how many attorneys are in your firm? _____

3. If you work on a corporate legal staff or for a government agency, please estimate the number of attorneys on your staff or in your agency. _____

4. Do you consider yourself (check one):

___ Primarily a plaintiff's attorney.
___ Primarily a defense attorney.
___ Combination of plaintiff and defense.

5. What percent of your time do you spend on:

___ % plaintiff's work
___ % defense work

6a. In your legal employment are you exposed to employment-related matters?

___ Yes (go to 6b) ___ No (go to 7)

6b. If yes, what percentage of your work involves employment-related matters? _____%

7. Have you, in your legal practice, ever been involved with a "wrongful termination" dispute?

___ No ___ Yes

8. Have you, in your legal practice, ever been involved with a dispute arising under the WDFEA since its enactment in 1987? ___ No ___ Yes, (how many cases and who did you represent: plaintiff or defendant?): _____

_____

9. Are you currently involved in a dispute(s) involving the WDFEA?

___ No ___ Yes

10. Do you believe adequate incentives exist for *workers* to pursue

cases under the Act?
___ Yes ___ No, why not? _____
11. Do you believe that adequate incentives exist for *attorneys* to handle plaintiff's causes of action under this Act?
___ Yes ___ No, why not? _____
12. Have you ever declined a case involving the WDFEA because it did not offer the possibility of "adequate" remuneration? ___ No ___ Yes, why? _____
13. The WDFEA permits either party to offer to take their case to arbitration. If party A refuses the offer and party B prevails in court, then party A must pay for the subsequent attorney fees. If an employee makes an offer to arbitrate which is accepted and the employee prevails, the employer must pay for arbitration. Do you feel this provision is effective? ___ Yes ___ No, why not: _____

_____

_____

14. Would you ever advise a client to take their case directly to court as opposed to first offering to go to arbitration?
___ No ___ Yes, why? _____
15. Do you believe enough skilled arbitrators exist in the state to properly handle WDFEA arbitration cases? ___ Yes ___ No
16. We are trying to identify WDFEA cases, especially those that have gone to arbitration. If you have personally been involved in *any* WDFEA cases, how many have you helped resolve via:
___ litigation
___ settled informally
___ arbitration (Would you give us the arbitrator's name and your name and telephone number to follow up on?) _____
___ other:explain _____
17. Do you believe employer personnel practices have changed due to the WDFEA?
___ No ___ Yes
18. Under the WDFEA, the employer determines the employee's "probationary period" (during which the Act's protections do *not* apply), while under various legislative proposals in other jurisdictions the probationary period is simply set at *one year*. Which do you think is a better approach and why?

_____

_____

19. If this questionnaire has prompted any further comments or questions, please use the space below to provide your comments:

_____

_____

OPTIONAL: If you have had any experience litigating, conciliating, or in any other capacity attempting to resolve an unjust dismissal dispute under the WDFEA and would be willing to discuss in a separate telephone interview, fill in the information below or send your name, address and telephone number under separate cover to Dr. Karen Vinton, College of Business, Montana State University, Bozeman, Montana 59717-0306. If you choose to identify yourself for the purposes of a follow-up interview, please be assured that your responses will be treated confidentially. NO ONE EXCEPT THE RESEARCHERS WILL SEE YOUR INDIVIDUAL QUESTIONNAIRE.

Name _____

Address _____

Telephone No. _____