

## LAW SUITS

# Avoiding Wrongful Discharge Law Suits in Montana

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**A**cross the country each year thousands of employees sue their employers for wrongful discharge, and the stakes can be quite high. In a recent settlement in Montana, for example, the state Supreme Court [Flanigan v. Prudential Savings & Loan] upheld a jury award of almost \$1.5 million to a bank teller discharged without "good cause" following twenty-eight years of service. This article will outline relevant aspects of current law and present a practical guide for Montana business owners and managers hoping to avoid such costly wrongful discharge lawsuits. Our comments apply only to those not under contract or covered by a labor agreement.

## Background

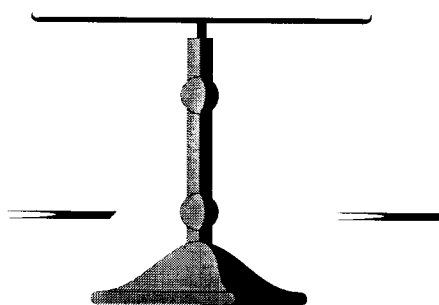
### *History of At-will Employment*

Starting in the early 1980s, many state courts began to re-examine at-will doctrines. These doctrines, which had their origin in English common law, held that an employee could withdraw services and could likewise be fired by an employer at will—that is, without any justification or explanation needed. States began to establish limitations or exceptions based, in many instances, on the premise that constitutional rules of law and due process applying to civil affairs should also apply to private industry.

This application, however, has become particularly problematic because private industry must balance changing legal expectations with other business pressures—such as a competitive pressure to "downsize" personnel rolls, or improve workforce quality.

### *Montana Eliminates At-will*

Montana's Supreme Court began to weaken the state's at-will employment doctrines in the mid-1970s. It developed a novel legal remedy known as the tort of bad faith for wrongful discharge. Briefly, the court's actions opened the door for



emotional distress claims and punitive damages in employee dismissals.

In early 1982 the court held, without a dissenting opinion, that Montana employers could be sued for wrongful discharge based on the nebulous concept of bad faith and be held liable for compensatory damages, punitive damages, and emotional distress. Employee termination issues suddenly ranked among the most hazardous problems facing

Montana employers. Although the court couldn't repeal the state's at-will statute, it did routinely either ignore that statute or simply create exceptions it deemed in the public interest.

### *Confusion in the Montana Supreme Court*

Early bad faith/wrongful discharge cases were greeted enthusiastically by the plaintiffs' bar, but defense attorneys and the business community, not surprisingly, reacted in a negative fashion. Montana's revolutionary employee discharge rules became a fashionable topic of discussion at legal meetings around the country and even attracted attention from the national media.

Court decisions, however, remained unpredictable through the mid-1980s. The reasoning used to rule in favor of an employee in one case would be used in a later case to support a ruling in favor of an employer.

### *The Legislature Intervenes*

During this period, Montana's state legislature faced continued pressure from employers and insurance companies who lobbied hard to reduce the cost of wrongful discharge settlements. Accordingly, the state legislature drafted what was to become the Wrongful Discharge from Employment Act (WDFEA) of 1987.

Though it did not affirm a return to strict at-will standards, the bill definitely moved in that direction. It restored much of the previous latitude employers had in the termination process, while also reflecting recent judicial concern for grossly unfair treatment of employees.

### Provisions of WDFEA

Basically, WDFEA specified the conditions that constitute wrongful discharge, and tightly limited cases that might qualify for punitive damage awards.

A discharge is wrongful only if based on one of three conditions:

- 1 Public policy violation: Public policy dictates, for instance, that employees not be terminated for exercising protected rights like "whistle blowing," or for refusing to commit a wrong such as falsifying financial records.
- 2 Discharge not for "good cause": After a suitable probationary period, a dismissal must be based on reasonable job-related grounds, such as failure to perform job duties, disruption of employer operations, or another "legitimate business reason." Note that this is not a restatement of the implied covenant or good faith.
- 3 Employer violates express provisions of its own personnel policy: Employers' actual personnel practices must conform to their written policies, because personnel manuals can be construed as implied contracts.

Other important features of the WDFEA are that it:

- Eliminates punitive damages except where "actual fraud or malice" can be proved.
- Sets limits for lost wage awards at four years plus accrued interest.
- Establishes one-year statute of limitations for filing a wrongful discharge action.
- Specifies that an employee must first exhaust written internal procedures before appealing a discharge through courts.
- Provides for arbitration.
- Excludes discharges covered under other statutes such as the Human Rights or Equal Employment Opportunity Acts; and excludes those covered by union or other written employment contracts.

### Trends and Ambiguities since WDFEA

The Wrongful Discharge From Employment Act became

effective July 1, 1987. Although many observers assumed the Montana Supreme Court would declare WDFEA unconstitutional, that did not happen. Court decisions since 1987 have continued to pay lip service to the tort of bad faith, while reducing its effective application. (See article on "Bad Faith" in *MBQ*, Autumn 1991, for more on related court decisions.)

Several grey areas still exist, however. For one thing, WDFEA applies only to discharges; other employment decisions regarding, say, advancement or salary matters, could lead to disputes still governed by the old bad faith rules. Recent court decisions suggest that employers who comply with their own personnel manuals and who have "legitimate business reasons" for decisions will likely avoid liability.

It also appears likely that the court will not allow businesses to use indefinite or artificially long probationary periods as justification for dismissal without "good cause." The WDFEA does not name specific probationary time periods, although recent court actions have suggested they must be "reasonable" and inversely related to the amount of broad discretionary powers an employee exercises. That is, a managerial employee paid to exercise personal judgement may reasonably be expected to have a much longer probationary period than a blue collar worker who does not have broad discretionary responsibilities.

Finally, WDFEA specifically excludes employee terminations otherwise covered under collective bargaining agreements. But a recent case suggests that union and other employees may have access to litigation under the bad faith tort rules if the dispute involves interpretation (rather than the terms themselves) of a collective bargaining agreement.

### Practical Guide for Montana Employers

Given that complex and often ambiguous legal background, what can Montana employers do now to avoid wrongful discharge litigation in the future? There are no guarantees, but the following checklist of hiring, termination, and other personnel practices should help reduce the risk.

#### Recruitment and Selection Practices

Your organization *should*:

- Carefully evaluate each applicant to reduce the probability of making an incorrect selection decision, using only job-related hiring factors.
- Include in all employment offers a statement that the employee may voluntarily terminate his or her employment with proper notice, and that the employee may be terminated by the employer at any time for any reason.

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- Monitor recruitment and selection processes to ensure that all disclaimers and procedures are being used as intended.

Your organization *should not*:

- Include in recruitment brochures or applicant correspondence any promise of permanent employment.
- Tell any prospective applicant that his or her employment will be terminated only for "just cause" or after a careful investigation and review of all relevant facts.

### **Personnel Manuals**

Personnel manuals *should*:

- Inform employees that handbook can be changed at the employer's discretion.
- Include a disclaimer stating that employee handbook is not a contract and that any employee may be terminated at any time for any reason.
- Specify all work rules and the consequences for violating such rules before the company makes any attempt to enforce them.
- Ensure that all work rules and managerial orders are related to the orderly, efficient and safe operation of the business and to the performance an employer might reasonably expect of an employee.
- Provide a list of specific offenses that could result in termination or other disciplinary action with a provision that the list is not meant to be all inclusive—only illustrative.

Personnel manuals *should avoid*:

- Statements indicating that termination will occur only for "just" or "proper" cause.
- Detailed procedures outlining levels of employee discipline that must occur before termination.
- Any statement that an employee will be placed on "permanent" status after a probationary period.

### **The Termination Process**

In the termination process, a company *should*:

- Conduct an independent review of any proposed termination by someone other than the employee's immediate supervisor, before any final determination is made.
- Use written guidelines to identify possible errors or omissions in the process, including:
  - unlawful (statutory) discrimination
  - inconsistency with similar cases
  - inappropriate penalty for the nature of the offense and circumstances of the case
  - availability of appropriate alternatives other than termination
  - the use of progressive discipline when required by the nature of the alleged offense
  - the presence of any mitigating circumstances
- Grant authority to the reviewer to reverse a termination decision if there are no defensible grounds for it
- Provide employee with a statement of the reason for the discharge.
- Have employees who resign voluntarily sign a separation agreement (a legal contract) whereby in exchange for some benefit such as a letter of reference or severance pay, the employee agrees not to sue and releases the company from all future liability arising from employee's resignation.

While the WDFEA of 1987 has brought some order to the early 1980s' judicial chaos, it remains to be seen how the state Supreme Court will interpret this law in the future. For the time being, however, some predictability has been restored to Montana employment law. ■

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