PROTECTING WORKERS FROM WRONGFUL DISCHARGE: MONTANA'S EXPERIENCE WITH TORT AND STATUTORY REGIMES

BY
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I. INTRODUCTION

The default rule of "at will" employment has a long history in American labor law. In recent decades, as trade union protection for workers has waned, courts have created exceptions and limitations to the rule. One of the more significant departures from the rule has been the willingness of some state courts to allow employees to sue for wrongful discharge in tort.[1]

In addition to this common law development, some legal scholars have proposed statutory reform. The National Conference of Commissioners on Uniform State Laws has proposed a Model Employment Termination Act.[2] This model statute gives employees who believe they have been discharged without "good cause" the right to arbitration of their claims and to monetary damages. Bills with content similar to META were proposed in 42 legislatures between 1980 and 1992, but to date only Montana has adopted such a statute.[3]

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1. *See generally*, STEVEN WILLBORN, ET AL., EMPLOYMENT LAW 125-65 (2d ed. 1998).

2. MODEL EMPLOYMENT TERMINATION ACT (1991), *reprinted in* 9A Individual Employment Rts. Manual (BNA) 540:21 – 540:46 [hereinafter META].

3. Stuart Henry, *Legislating Just Cause*, 536 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 149, 159 (1994).

In fact, Montana has been the site of both common law and statutory innovation in the area of wrongful discharge. Between 1982 and 1987, Montana courts created a tort of wrongful discharge, which allowed employees fired without "good cause" to sue for damages.[4] Unhappy with the outcomes of this common law doctrine, the Montana legislature adopted the Wrongful Discharge From Employment Act on July 1, 1987.[5] This statute eliminated the common law right of action for wrongful discharge, replacing it with a statutory right. Under WDFEA, damages were limited relative to tort claims and arbitration became an option. As will be shown below, WDFEA has a family resemblance to META, but departs from the model statute significantly.

Given this history, Montana is an obvious place in which to compare the effects of common law and statutory wrongful discharge regimes. The duration of litigation, the size of awards received by successful plaintiffs, and the comparative outcomes for male and female plaintiffs are certainly of interest. So too, is the role of arbitration under WDFEA, and the extent to which it has supplanted litigation.

To investigate these matters, this paper analyzes data on wrongful discharge litigation and arbitration in Montana during the period 1983 to 1997. It will be shown that, compared to the pre-WDFEA wrongful discharge regime, WDFEA has reduced the expected value of jury awards to plaintiffs, and reduced the variance of awards. WDFEA has also reduced the average time it takes to litigate a wrongful discharge case. It will also be shown that recorded arbitration awards are significantly larger than jury awards under the statute.

II. WRONGFUL DISCHARGE IN MONTANA PRIOR TO WDFEA

Between 1982 and 1987, discharged employees in Montana could bring claims against their employers if the discharge violated an implied covenant of "good faith and fair dealing." This common law cause of action underwent a rapid and complex development in a five year period, which has been ably recorded and analyzed by LeRoy Schramm.[6] Throughout its development, however, breach of the

4. See, e.g., Stark v. Circle K Corp., 751 P.2d 162 (Mont. 1988); Gates v. Life of Montana Ins. Co., 668 P.2d 213 (Mont.1983).

5. MONT. CODE ANN. §§ 39-2-901 to 905 (1997) [hereinafter WDFEA].

6. *See* LeRoy H. Schramm, *Montana's Employment Law and the 1987 Wrongful Dis-*

covenant was treated as a tort. An employee subjected to a breach could seek tort damages such as emotional distress, and could seek punitive damages as well.

As will be discussed in detail in Section V below, employees did bring a number of claims for breach of the covenant of good faith. In some instances, individuals did receive substantial damage awards, occasionally many times greater than the salary they had been earning.

Looked at through the lens of tort law, large awards are not inexplicable or necessarily undesirable. A wrongfully discharged plaintiff may have injuries greater than a loss of income and benefits. A saleswoman discharged after her employer intentionally and falsely accused her of theft, may have sustained significant and irreversible personal damage well in excess of her lost salary.[7]

Assuming that employers are rational economic actors who try to maximize their expected net income, larger expected plaintiff awards will discourage wrongful discharge. The larger the expected award, the lower the net expected financial gain from a wrongful discharge. Moreover, if an employer is risk averse, the large tort awards which are possible when juries compensate plaintiffs for pain and suffering provide additional deterrent. Large awards, even if infrequent, increase the variance in the amount of awards. An increase in variance is, *ceteris paribus*, an increase in cost to a risk averse actor[8]

While discharged employees may have taken heart at the possibility of a large jury award, and while the court might have thought that an occasional large award would provide employers a useful incentive to reform employment practices, employers were unhappy with this common law scheme. According to Montana observers familiar with WDFEA and its origins, groups of employers and insurance companies decided to seek a legislative change in the law.[9] They formed the Montana Liability Coalition, and framed their desire to limit the number and value of wrongful discharge claims as an aspect of "tort reform." The WDFEA was amended before being enacted,

charge From Employment Act: A New Order Begins, 51 MONT. L. REV. 94 (1990).

7. These acts were alleged in Niles v. Big Sky Eyewear, Case No. 88-428 (Mont. 1986). Plaintiff, an optical store sales clerk, was awarded $470,000, because the jury determined that her employer had negligently inflicted emotional distress.

8. For a discussion of expected utility maximization and risk aversion, see EUGENE SILBERBERG, THE STRUCTURE OF ECONOMICS: A MATHEMATICAL ANALYSIS, 445-56 (2d ed. 1990).

9. Telephone interview with Jim Nys, Montana employer-side labor relations consultant, July 11, 1997.

in a manner detailed by Schramm.[10] The statute ultimately passed is discussed in the next section.

III. THE STRUCTURE OF WDFEA

WDFEA, like any statute, requires interpretation. A very thorough job of interpretation, along with a discussion of some as-yet-unresolved legal issues, can be found in excellent essays by LeRoy Schramm, and by Leonard Bierman and Stuart Youngblood.[11] Rather than repeat their analyses, this section merely summarizes some salient points of the statute, and notes some of their important implications for employers and employees.

A. Elements

WDFEA gives employees a cause of action for wrongful discharge if the discharge violates public policy; if it is not for "good cause," and the employee has completed the employer's probationary period; or if the employer violates an express provision of its own written personnel policy.[12] WDFEA exempts discharges subject to other state and federal statutes from coverage, nor do any of the statute's provisions apply to employees covered by individual employment contracts or collective bargaining agreements.[13] WDFEA preempts all other discharge claims arising from tort or express or implied contract.[14]

Note that employers can define the length of the probationary period, and hence indefinitely defer the date at which a cause of action might arise. Note also that employers can avoid a cause of action, while maintaining minimal commitment to employees, by signing short term employment contracts. An employer can discharge an employee for any reason, without creating a cause of action, by not renewing the contract. The Montana State University system, the largest employer in the state with approximately 6,000 employees, has

10. *See* Schramm, *supra* note 6, at 108.

11. Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge From Employment Act*, 53 MONT. L. REV. 53 (1992); Schram, *supra* note 6.

12. MONT. CODE ANN. §39-2-904 (1997).

13. *Id.* §39-2-912.

14. *Id.* §39-2-913.

adopted the strategy of hiring all non-faculty workers under one-year contracts.[15]

B. Remedies

WDFEA provides the exclusive remedies for claims which arise under it. A wrongfully discharged employee may recover up to four years in lost wages and fringe benefits. There is a duty to mitigate the loss of the discharge, and interim earnings between the discharge and the award are deductible from the award. Punitive damages may be recovered if the plaintiff can show, by clear and convincing evidence, that the employer engaged in fraud or malice in the discharge. No other compensatory or punitive damages are allowed.[16]

C. Arbitration

If there is a wrongful discharge dispute, either party may offer to arbitrate.[17] If the offer is not accepted and the offering party prevails in litigation, the offering party will be awarded reasonable attorney fees from the date of the offer.[18] Hence the only way either party can collect attorney fees under WDFEA is by offering to arbitrate. This is the only direct economic incentive for arbitration offered by the statute.

Under these arbitration provisions, an employer in a discharge dispute with a low-wage employee has good reason to refuse arbitration, if there was no fraud or malice in the discharge. It is unlikely that the low-wage employee can pay attorney fees, and the limits on damage awards make it unlikely that an attorney will take the case on a contingency fee. Hence, refusing arbitration will likely cause the employee to go away.

15. Telephone interview with LeRoy Schramm, Chief Legal Counsel of the Montana University System, July 11, 1997.

16. MONT. CODE ANN. §39-2-905 (1997).

17. *Id.* §39-2-914.

18. *Id.* §39-2-915.

IV. WDFEA AND META CONTRASTED

WDFEA differs from META in some significant ways. WDFEA allows the employer to determine the probationary period which must expire before an employee is covered by the statute. META prevents this abuse by setting a fixed probationary period, which expires when an employee has worked for an employer for a year, and has worked a minimum number of hours in the 26 weeks prior to termination.[19]

WDFEA, unlike META, does not provide strong incentives for arbitration. WDFEA makes arbitration an option which either party may propose, but neither must accept. META allows an employee to demand arbitration.[20]

WDFEA allows attorney fees to a prevailing party whose proposal for arbitration was declined. META allows an arbitrator to award attorney fees to a prevailing employee.[21] WDFEA does not provide for discovery in arbitration. META provides that the arbitrator may allow appropriate discovery.[22]

V. EMPIRICAL ANALYSIS OF TORT AND WDFEA OUTCOMES

A. Data Sources

In order to study the effects of WDFEA, it is necessary to understand how it has changed litigation outcomes, and to what extent arbitration has replaced litigation. *Montana Law Week* ("MLW"), a verdict reporting service operated by Frank Adams, is the only comprehensive source of data on litigation outcomes in Montana. MLW began publishing in August 1988, although it contains information on cases filed before that date. Mr. Adams estimated that his service reports about 75 percent of the cases decided in Montana courts.[23]

A computer search of the MLW database, covering entries made between August 1988 and July 26, 1997, produced 89 jury verdicts and

19. META, *supra* note 2, §3.
20. *Id*, §6.
21. *Id*, §7.
22. *Id*, §6.
23. Telephone interview with Frank Adams, publisher of Montana Law Week, July 9, 1997.

nine arbitration awards related to wrongful discharge. Although MLW includes verdicts from both levels of Montana's civil court system—the District Courts and Supreme Court—all cases were followed through the LEXIS database to determine if a lower court verdict had been appealed. In some cases this modified the outcome reported in MLW.

After deleting reports where the date of the plaintiff's discharge could not be determined, where LEXIS research indicated that a case had been remanded and there was no subsequent information, or where the issue in a case was only procedural, there remain 66 jury verdicts in the sample. The verdicts cover discharges taking place in the period 1983 to 1995.

The date of discharge was not reported in any of the arbitration awards. Nonetheless, the arbitration results are included and discussed separately.

The data are summarized in Table A.1 The table is organized by the year of discharge. For each case, the table indicates the verdict, the size of the jury award, the sex of the plaintiff, and the year in which the case was finally resolved.

B. Descriptive Statistics on Wrongful Discharge Litigation, Before and After WDFEA[24]

WDFEA has had significant effects on wrongful discharge litigation. Among those effects has been a reduction in the time it takes to litigate a claim. Table 1 presents descriptive statistics on the duration of wrongful discharge cases under the tort system and under WDFEA. The time it takes to litigate a wrongful discharge claim under WDFEA is measurably smaller than under the prior tort regime. The mean duration was reduced from 4.23 years to 2.5. This difference is statistically significant at the .005 level.[25] The median time has

24. Because MLW began collecting data in 1988, the reports for earlier years may not be as comprehensive as those for 1988 and after. While it takes time for a claim to be decided, it is possible that MLW data for, say, 1983 omit cases which were concluded in a year or two. Inspection of the data for 1983-1986 suggests this. The data for recent discharge claims also may be incomplete, because MLW reports used in this study cease in mid-1997, thereby excluding cases of long duration. There is no obvious way to remedy this problem.

25. The test is the null hypothesis H_0: $\mu_{pre} - \mu_{post} = 0$ against the alternate hypothesis H_A: $\mu_{pre} > \mu_{post}$, where μ is a mean and the subscript "pre" refers to the period before WDFEA, and "post" refers to the period after.

In this case the appropriate test statistic is $t = 3.84$, assuming unequal variances for "pre" and

likewise fallen, from 4 to 2 years.

Table 1
Duration of Wrongful Discharge Cases, in Years, Before and After WDFEA[26]

	1/83 to 7/1/87	7/1/87 to 12/95
Mean duration	4.23	2.5
Duration variance	3.71	1.47
Median duration	4.0	2.0
Maximum duration	10.0	5.0
Minimum duration	2.0	1.0
Number of cases in sample	22	44

The reduced duration may be merely the outcome of reform. By simplifying the law and reducing the grounds for suit, issues may be resolved more easily. Alternatively, the change may be a result of altered economic incentives under WDFEA. As will be shown below, successful plaintiffs receive significantly lower awards under WDFEA. When expected rewards are lower, there is less reason to pursue more time-consuming and expensive discovery and litigation strategies. The data available do not allow us to choose between these possibilities.

Descriptive statistics on verdict awards for the pre-WDFEA period are given in Table 2. It is notable that the mean and median awards for female plaintiffs are higher than those for males. Women received an average award of $200,500 in constant 1992 dollars, while men received an average award of $132,900. The difference in mean values for men and women, however, is not statistically significant at

"post," and the critical value of t for a one-tailed test at the .005 level of significance with 64 degrees of freedom is 2.66. Hence the null hypothesis of equal means can be rejected.

It is reasonable to assume unequal variances in the two time periods. Their ratio F = 3.71/1.47 = 2.52. The .01 critical value for an F statistic with 21 and 43 degrees of freedom is 2.24. Hence a null hypothesis of equal variances can be rejected. The "t" and "F" tests used throughout this essay are described in PAUL HOEL, AN INTRODUCTION TO MATHEMATICAL STATISTICS, 261-73 (1971).

26. The duration of each case was calculated by subtracting the year in which a final verdict was reached from the year the claim was filed.

the .05 level. The variances for men and women are also different, but the difference is not significant at the .05 level.[27]

Assuming that the MLW sample correctly represents overall outcomes, equal average awards for men and women need explaining. Women on average earn less than men, within and across occupations. To explain equal average awards, there must be factors other than compensation for lost income which are important to jury awards. Obvious possibilities include a disproportionate share of lawsuits by higher income women; awards for pain and suffering; or punitive damages. The MLW data do not consistently report the salary of the plaintiff, or break the award into components. More data are needed to understand these outcomes.

Table 2
Verdict Awards
Sample Period: 1/83 to 7/1/87
(Money Values in Thousands of 1992 Dollars)[28]

	All Plaintiffs	**Male Plaintiffs**	**Female Plaintiffs**
Mean award	166.7	132.9	200.5
Award variance	54629.6	3801.57	74193.3
Median award	37.8	47.3	28.3
Maximum award	780.2	610.9	780.2
Minimum award	0	0	0
Number of cases in sample	22	11	11

27. In this case, to test H_0: $\mu_f - \mu_m = 0$ against the alternate hypothesis H_A: $\mu_f > \mu_m$, where the subscripts m and f stand for male and female, the test statistic is t = .67, and the critical value of t for a one-tailed test with 20 degrees of freedom is 1.725. Hence the null hypothesis of equal means cannot be rejected.

It is reasonable to hypothesize equal variances for men and women in this period because the ratio of the sample variances is F = 74193.3/38015.7 = 1.95. The .05 critical value for an F statistic with 10 and 10 degrees of freedom is 2.97. Hence a null hypothesis of equal variances cannot be rejected.

28. All money values have been converted to constant 1992 dollars, using a chain-type GDP price index. The price index is from U.S. Deparment of Commerce, SURVEY OF CURRENT BUSINESS, August 1998 at 159.

Descriptive statistics for verdict awards in the post-WDFEA period are given in Table 3. A comparison of this data with that in Table 2 shows striking quantitative effects from WDFEA. For all plaintiffs, the average award has been reduced from $166,700 to $36,800 in constant 1992 dollars. This difference is significant at the .05 level.[29] The median award for all plaintiffs was reduced from $37,800 to zero.

The variance in awards for all plaintiffs was also reduced by WDFEA. Before enactment, the variance was 54629.6. After, it was 4350.9. These variances are statistically different at the .05 level.[30]

Enactment of the statute clearly shifted the distribution of awards leftward, and reduced dispersion. The award mean, median and variance each declined. In addition, the variance in awards was reduced relative to the mean award. The coefficient of variation, which is the ratio of the standard deviation to the mean, reflects this. Before WDFEA, the coefficient of variation was .71; after, it was .55.

There is more than one potential explanation for these changes. The limitation on jury awards may simply prevent plaintiffs from being made whole. WDFEA ties recovery to a plaintiff's income. A low income plaintiff with a valid claim, who would have a large and deserved recovery for pain and suffering under tort law, could easily recover an inadequate amount under WDFEA.

However, if plaintiffs with marginal claims were winning the large awards in tort, the changes may only reflect the elimination of perverse economic incentives. With smaller expected net recoveries and a reduction in the maximum award possible, risk-loving litigants and attorneys may have been induced to abandon weak claims.

The data on central tendency and dispersion are insufficient to allow discrimination between these hypotheses. That would require finer information about individual verdicts than is presently available.

The average male award was reduced from $132,900 to $45,000. The average female award was reduced from $200,500 to $19,200. Observationally, both genders are affected by WDFEA, women pro-

29. In this case, the test is the null hypothesis H_0: $\mu_{pre} - \mu_{post} = 0$ against the alternate hypothesis H_A: $\mu_{pre} > \mu_{post}$. In this case the test statistic $t = 2.56$, under the hypothesis that population variances are unequal. The critical value for t with 23 degrees of freedom is 1.714. Hence the null hypothesis can be rejected.

It is reasonable to hypothesize unequal variances because the ratio of the two sample variances $F = 12.56$, and the critical value for an F statistic with 21 and 43 degrees of freedom is 1.82. Hence a null hypothesis of equal variances can be rejected.

30. The ratio of the variances is $F = 54629.6/4350.9 = 12.56$. The .05 critical value for an F statistic with 21 and 13 degrees of freedom is 2.42. Hence a null hypothesis of equal variances can be rejected.

portionally more.

To test for significant reductions in male and female awards separately, the post-WDFEA outcomes should be compared to the pre-WDFEA outcomes for the entire pre-WDFEA sample. This is because pre-WDFEA means and variances for men and women were not statistically different. Compared to the pre-WDFEA mean for all plaintiffs, the reduced post-WDFEA mean for males is statistically smaller at the .05 level.[31] The post-WDFEA mean for females is also significantly smaller than the pre-WDFEA mean for all plaintiffs at the .05 level.[32]

The median male award was reduced from $47,300 to zero. The median female award was reduced from $28,300 to zero.

Table 3
Verdict Awards
Sample Period: 7/1/87 to 12/95
(Money Values in Thousands of 1992 Dollars)

	All Plaintiffs	**Male Plaintiffs**	**Female Plaintiffs**
Mean award	36.8	45.0	19.2
Award variance	4350.9	5866.0	816.6
Median award	0	0	0
Maximum award	270.1	270.1	79.1
Minimum award	0	0	0
Number of cases in sample	44	30	14

31. In this case, the test is H_0: $\mu - \mu_m = 0$ against the alternate hypothesis H_A: $\mu > \mu_m$, where μ is the pre-WDFEA mean award for all plaintiffs and μ_m is the mean award for males post-WDFEA. The test statistic is t = 2.32, and the critical value of t for a one-tailed test with 42 degrees of freedom is 1.68. Hence the null hypothesis of equal means can be rejected.

It is reasonable to hypothesize unequal variances in the two time periods because the ratio of the variances is F = 54629.6/5866.6 = 9.31. The .05 critical value for an F statistic with 21 and 29 degrees of freedom is 1.90. Hence a null hypothesis of equal variances can be rejected.

32. In this case, the test is H_0: $\mu - \mu_f = 0$ against the alternate hypothesis H_A: $\mu > \mu_f$, where μ is the pre-WDFEA mean award for all plaintiffs and μ_f is the mean award for females post-WDFEA. The test statistic is t = 2.94, and the critical value of t for a one-tailed test with 25 degrees of freedom is 1.708. Hence the null hypothesis of equal means can be rejected.

It is reasonable to hypothesize unequal variances in the two time periods because the ratio of the variances is F = 54629.6/816.6 = 66.9. The .05 critical value for an F statistic with 21 and 13 degrees of freedom is 2.42. Hence a null hypothesis of equal variances can be rejected.

After WDFEA, the mean value of female awards is below the mean value of male awards, which reverses the observed ordering in the pre-WDFEA sample. However, the difference between male and female awards remains statistically insignificant at the .05 level.[33]

An observed difference in the mean awards to men and women after WDFEA was to have been expected. Award size is limited by plaintiff's income, and incomes of women are generally lower than those of men. The fact that average awards to men and women post-WDFEA are statistically indistinguishable is somewhat anomalous.

The data for all arbitration awards in the MLW database are summarized in Table 4. It is not possible to identify the date of discharge for any of the awards, so it is not possible to follow the usage rate of the WDFEA arbitration provision since its passage. Moreover, a former judge and experienced arbitrator has indicated that employers often insist that arbitration outcomes not be disclosed.[34] Therefore, arbitration results, even more than verdict results, are likely to be incompletely recorded. According to Mike Lamb, head of the Montana Bar Association ADR Section, there is no other systematic source of information on WDFEA arbitrations.[35]

33. In this case, to test H_0: $\mu_m - \mu_f = 0$ against the alternate hypothesis H_A: $\mu_m > \mu_f$, where the subscripts m and f stand for male and female, the test statistic is t = 1.62, and the critical value of t for a one-tailed test with 42 degrees of freedom is 1.68. Hence the null hypothesis of equal means cannot be rejected.

It is reasonable to hypothesize unequal variances in the two time periods because the ratio of the variances is F = 5866.6/816.6 = 7.18. The .05 critical value for an F statistic with 21 and 43 degrees of freedom is 1.82. Hence a null hypothesis of equal variances can be rejected.

34. Telephone interview with Gordon Bennett, retired Montana District Court Judge, currently in private practice and a sometime arbitrator, July 14, 1997.

35. Telephone interview with Mike Lamb, July 10, 1997.

Table 4
Arbitration Awards Under WDFEA
Sample period: 7/1/87 - 12/95
(Money Values in Thousands of 1992 Dollars)

	All Plaintiffs	Male Plaintiffs	Female Plaintiffs
Mean award	121.5	121.0	126.0
Award variance	6597.3	7536.5	n/a
Median award	126.0	148.4	n/a
Maximum award	210.5	210.5	126.0
Minimum award	0	0	126.0
Number of cases in sample	9	8	1

The average arbitration award is large by WDFEA jury award standards. The arbitration average is $121,500, while the jury average is $36,800. This difference is statistically significant at the .05 level.[36] The median arbitration award is $126,000, while the jury median is zero.

C. Comparing MLW Data to Attorney Survey Results

The MLW data are a sample of litigated and arbitrated cases, by definition incomplete. Moreover, not every case filed is litigated or arbitrated. Therefore it would be useful to estimate the total number of wrongful discharge claims brought, and the number settled outside the courtroom.

Fortunately, data from a survey of Montana attorneys can be

36. In this case, to test H_0: $\mu_{Arb} - \mu_l = 0$ against the alternate hypothesis H_A: $\mu A_{rb} > \mu l$, where the subscripts Arb and l stand for arbitration and litigation, the test statistic is t = 3.3, and the critical value of t for a one-tailed test with 10 degrees of freedom is 1.812. Hence the null hypothesis of equal means can be rejected.
It is reasonable to hypothesize equal variances in the two time periods because the ratio of the variances is F = 6597.3/4350.9 = 1.52. The .05 critical value for an F statistic with 8 and 43 degrees of freedom is 2.18. Hence a null hypothesis of equal variances cannot be rejected.

used to check and to extrapolate the MLW data.[37] The authors attempted to survey all practicing attorneys in Montana, inquiring about, among other things, the number of discharge cases they had settled, litigated and arbitrated. The response rate to the survey was 30.8 percent.[38] Since only a fraction of attorneys practice labor law, the response rate among the relevant population of attorneys is probably higher than 30.8 percent. Relevant survey data are summarized in Table 5.

Table 5
Wrongful Discharge Claims Handled by Montana Attorneys[39]

Period: 7/1/87 to 12/31/92

Litigated cases, WDFEA	640
Claims arbitrated, WDFEA	67
Litigated cases, not WDFEA	157
Total discharge claims	1,942

Only a fraction of civil cases filed actually are resolved by a trial verdict. One estimate is that .05 of cases filed go to trial.[40] Given this estimate, and an MLW reporting rate of approximately .75 for jury verdicts, then the 54 jury verdicts reported by MLW for the period July 1, 1987 – December 1992 represent (54*4/3*20) = 1440 cases filed. Given an incomplete response to the attorney survey, this point estimate is in the ballpark of the 640 cases reported in the survey of Montana attorneys for the same period. Hence there is reason to believe that MLW and the attorney survey are measuring the same activity, and producing similar quantitative results.

The survey data show that (WDFEA arbitration)/(WDFEA litigation) = 67/640 = .11 If the actual number of WDFEA cases filed is 1440 as estimated, then we would expect about 158 cases arbitrated during the 87-95 period. This would mean than the MLW data include about .06 of all arbitration cases, a lower reporting rate than MLW's estimated .75 reporting rate for jury verdicts.

37. Leonard Bierman, et al., *Montana's Wrongful Discharge From Employment Act: The Views of the Montana Bar*, 54 MONT. L. REV. 367 (1993).

38. *Id.* at 368.

39. Given the form of questions in the survey, a discharge issue resolved through "litigation" need not have gone to trial.

40. J. DERTOUZOUS, ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION vii (1988).

Both the survey and MLW data indicate that arbitration is used in only a minority of WDFEA cases. This outcome is explained by several factors. One experienced Montana labor attorney suggested that most discharged employees do not opt for arbitration because they see juries, made up mostly by employees like themselves, as "their shot at getting something." [41]

It is also apparent that attorneys do not favor arbitration under WDFEA. Attorneys responding the WDFEA survey appear to favor litigation over arbitration, though their preference is not well-explained in the report of survey results.[42] An employer-side labor consultant suggested that few attorneys suggest arbitration to plaintiffs as an option.[43] Attorneys may disfavor arbitration because WDFEA does not allow discovery, which is available in litigation. Also, potential fees may be low relative to jury trials. Finally, employers have very good strategic reasons, discussed in Section IIIA, to refuse arbitration offers from lower-income employees.

D. Estimated Employer Costs of Wrongful Discharge Claims

The threat of common law wrongful discharge claims was sufficient to provoke an employer response and a statutory change. Hence it is reasonable to ask how much the "good faith and fair dealing"regime cost employers, and whether WDFEA reduced these costs. To answer these questions, an upper bound for the per-employee cost of wrongful discharge claims will be estimated.

When an employer litigates a wrongful discharge case, the costs include attorney fees as well as the jury award. Attorney fees can be substantial. Some estimate that a wrongful discharge case can cost $150,000 to litigate.[44] By adding this estimate of fees to the average verdict award, we have a generous estimate of the cost of each case brought. It is likely to be generous, since MLW is more likely to learn of large awards than smaller ones.

An estimated upper bound to the cost of all cases tried in a particular year can be calculated as [average annual jury award +

41. Telephone interview with LeRoy Schramm, July 11, 1997.

42. Bierman et al., *supra* note 37, at 375.

43. Telephone interview with Jim Nys, July 11, 1997.

44. Theodore St. Antoine, *Employment-At-Will – Is the Model Act the Answer?*, 23 STETSON L. REV. 179, 186 (1993).

150,000]*[number of cases reported]*4/3. The factor 4/3 is used to scale up results to account for the possible 25% under-reporting by MLW. These annual estimates are then divided by the number of employees in Montana for each year, to obtain a per-employee cost for wrongful-discharge cases.[45] The results of these calculations are reported in Table 6. For the period January 1983 – July 1, 1987, the estimated average annual cost per employee of wrongful discharge verdicts was $3.78 in 1992 dollars. For the period July 1, 1987 – December 1995, this average cost was reduced to $2.36.

Table 6
Estimated Cost of Jury Awards and Attorney Fees
(Money Values in 1992 Dollars)

Year Complaint filed	Verdict + Estimated Legal Fees, Per Employee
1983	3.03
1984	2.82
1985	4.50
1986	5.40
1987 (to 7/1/87)	2.99
1987 (from 7/1/87)	3.17
1988	1.84
1989	2.36
1990	1.73
1991	3.82
1992	1.53
1993	3.96
1994	2.54
1995	.36

If we make the extremely generous assumption that employers experience the same costs for every case filed, and as before that only .05 of cases filed are litigated to completion, then the cost of jury

45. Data on employment were obtained from the web site of the Research & Analysis Bureau, Montana Department of Labor and Industry: jsd.dli.mt.gov/lmi/stat_lf.htm. (last visited Dec. 1997).

awards per employee becomes $3.78*20 = $75.60 for January 1983 – July 1, 1987, and $47.20 for the July 1, 1987 – December 1995 period.

Of course, these estimates of verdict cost do not tell the entire story. Many cases are settled informally before any court papers are filed, and some are settled informally after filing but before trial. If we make another generous assumption, that the cost of informal settlement is equal to the cost of a litigated case, then the survey data can be used to estimate the value of informal settlements. The ratio of non-arbitrated settlements to litigated cases is 1078/640 = 1.68. Thus the per employee cost of litigation and informal settlements can be estimated as 2.68*$75.60 = $202.61 for January 1983 – July 1, 1987, and as 2.68*$47.20 = $126.49 for July 1, 1987 – December 1995.

These estimates of the per employee cost of wrongful termination are biased upward. Even so, they are not large. With complete and smoothly functioning insurance markets, employers could insure against the cost of a wrongful discharge claim at an annual premium per employee approximately equal to the average cost per employee.

The cost of WDFEA per employee may be compared to the cost of unemployment insurance. For fiscal years 1994 through 1997, the average unemployment insurance tax per employee in Montana was $133.89 in 1992 dollars.[46] Hence before WDFEA, the estimated upper bound to the cost of wrongful discharge per employee is slightly above the cost of unemployment insurance per employee. After WDFEA it is slightly less.[47]

VI. DISCUSSION OF RESULTS

Compared to the period when wrongful discharge claims could be brought under the common law "good faith and fair dealing" stan-

46. To estimate the cost of unemployment insurance per employee, aggregate unemployment insurance taxes paid by Montana employers for fiscal years 1994 through 1997 were deflated using the chain-type U.S. GDP price index. The resulting real insurance cost for each fiscal year was divided by the number of employed persons for the corresponding calendar year. The four resulting numbers were then averaged, to produce the number given in the text.
Data on employment were obtained from the web site of the Research & Analysis Bureau, Montana Department of Labor and Industry, *supra* note. Data on unemployment insurance tax was taken from MONTANA DEPARTMENT OF REVENUE, BIENNIAL REPORT OF THE MONTANA DEPARTMENT OF REVENUE, 32 (1998). The price index used is from U.S. Department of Commerce, *supra* note 28.

47. A discussion of the indirect costs to wrongful discharge liability may be found in J. DERTOUZOUS, ET AL., *supra* note 40.

dard, Montana's WDFEA has dramatically altered the legal landscape. The list of cognizable damages is limited, remedies are restricted, and arbitration is now an option.

The effect on litigation outcomes has been remarkable. The time it takes to litigate a case has been reduced significantly. The average size of jury awards has been significantly reduced, as has the variance in the size of awards. The median award is now zero.

One plausible explanation for these changes is that WDFEA's major effect has been to limit recovery of wrongfully discharged employees. If this is so, a change in employer behavior is likely to have occurred. By reducing the expected cost of a plaintiff's verdict, the statute has raised the expected net gain to a wrongful discharge. Rational and risk neutral employers, maximizing expected income, now have less financial incentive to avoid wrongful discharge when it is in their economic interest to violate the law. By reducing the probability of a large plaintiff's verdict, risk averse employers are also more likely to violate the law when doing so is in their economic interest.

Alternatively, WDFEA may have reformed a malfunctioning area of tort law. By limiting recovery, the statute may have kept employees with weak claims from filing suit or winning large awards. WDFEA also may have clarified employer responsibilities and reduced instances of wrongful discharge.

The data on arbitration also raise provocative questions. In the MLW sample, post-WDFEA plaintiff verdicts are significantly smaller than arbitration awards. Why should this be so? It is possible that the observed difference results from a deficient sample. The reports on arbitration are few, relative to the number of arbitrations reported in the survey of Montana attorneys. The MLW system may have picked up only the largest awards. If this is so, we simply do not know if many lower income employees use arbitration.

Alternatively, the data may reflect disproportionate use of WDFEA's arbitration provisions by higher income employees. Employers may be refusing to arbitrate the claims of lower income employees, knowing that it is unlikely that they can bring a lawsuit. They may agree to arbitration with higher income employees to save litigation costs.

If WDFEA arbitration is the province of upper income employees, META's approach could remedy this defect. META requires arbitration when requested by employees, permits discovery by employees, and allows winning employees to collect attorney fees.

These features would make lower income employees more likely to use arbitration, and it would be easier for them to obtain an award for a valid claim.

To discriminate among competing hypotheses about litigation and arbitration under WDFEA, a more extensive empirical study is needed. The effort required to collect and analyze data would be substantial. However, given the interest of courts and legislatures in wrongful discharge law, such an effort could be very useful.

TABLE A.1: CASE DATA FROM *MONTANA LAW WEEK*

Case	Verdict	Award	P's Gender	P's Salary	Year resolved
Discharge in 1983:					
Sewell v Blue Cross of Montana	P	571, 996	M	48,000	1989
Brink v First Bank System	P	175,000	M		1989
Discharge in 1984:					
Barnett v ASARCO	P	230,000	M		1990
Martinell v MPC	P	467,364	F		1994
Discharge in 1985:					
Seteren v Farmers Union Trading	P	19,940	F		1989
Smith v Kwik Way	P	273,984	F	19,000	1989
Price v Montgomery Ward	P	700,000	F	29,000	1989
Mannix v Butte Water	D		M		1993

Discharge in 1986:

Barodi v Cogswell	D		F	1989
Niles v Big Sky Eyewear	P	470,000	F	1989
Lenhart v Tractor and Equipment	D(SJ)		M	1989
Majerus v Skaggs Alpha Beta	D(SJ)		M	1990
Guay v State	D(SJ)		F	1989
Neyrinck v State	D		F	1989
Farnes v Meadowgold	P	42, 465	M	1990
Hemmenway v Red Lion	P	26,523	F	1990
Anderson v ANR	P	105,000	F	1990

Discharge in 1987, before 7/1/87:

Cundall v Western Oil	P	293,250	M	1990
Fortman v Decker Coal and Cobre Tire	D(SJ)		M	1989
Jackson v Plum Creek Timber	D		M	1989
Kizer v Semitool	P	51,000	M	1990

Foster v Albertsons	D(JML)		F		1991
Discharge in 1987, after 7/1/87:					
Stoddard v Big Horn Communications	P	48,800	F		1989
Rose v Selway	D		M		1992
Erickson v MSE	P	270,143	M		1992
Beardsley v MSE	P	260,017	M		1992
Discharge in 1988:					
Dill v Arnlund Automotive	P	10,000	F		1990
Weber v State	p	33,230	M		1992
Stacey v Wang	P	5,000	M		1991
Arnold v Boise Cascade	P	41,920	M		1993
Discharge in 1989:					
Muller v Lincoln Lincoln Electric	D		M	50,000	1990
Hoffman v Town Pump	D(SJ)		M		1990
Allmaras v Yellowstone Basin	D		M		1990

Rios v Yellowstone Basin	D		M	1990
Vance v ANR Freight	D		M	1991
Hanson v Colonial Life	D		M	1991
Discharge in 1990:				
Turner v MT Bank of Billings	D		F	1993
Kestell v Heritage Health	P	123,600	M	1992
Wadsworth v Dept of Revenue	P	85,000	F	1995
Discharge in 1991:				
Miller v Citizen State Bank	D		F	1992
Chrisman v Abbott	D		F	1993
Shuland v Trucker's Express	P	43,906	M	1993
Rogers v Howell	P	41,600	M	1995
Shelley v Stillwater Mining	D		M	1993
Guertin v Moody's Markets	P	65,000	F	1994

Reynolds v Pacific Telecom	P	52,023	F	1994
Rogers v Howell	P	41,600	M	1995
Discharge in 1992:				
Soraich v Smoot	D		F	1994
Wilson v Dimich Sons (Pepsi)	D		M	1994
Tyner v County	P	0	M	1995
Titchbourn v Lone Pine	D		F	1995
Discharge in 1993:				
Baxter v Archie Cochrane Motors	P	120,000	M	1995
Barry Wall v Corrall Ranchwear	P	75,000	M	1994
Renee Wall v Corrall Ranchwear	P	1	F	1994
Boyer v Navajo	D		M	1994
Dennis v Coca Cola	P	202,982	M	1995
Molder v MT Deaconess Hospital	D		M	1995
Walker v MPC	D		M	1996

Hanson v Ferron and Sons	P	14,560	F	1996
Discharge in 1994:				
Linda Moore v Imperial Hotels	D		F	1996
Gary Moore v Imperial Hotels	D		M	1996
Wagner v MT Coyote	P	6,000	M	1996
Smith v Job Line	D		M	1996
Timmerman v H&H Lumber	P	130,000	M	1996
Grubb v Tillerman	D		M	1997
Discharge in 1995:				
All v Glacier Eye Clinics	D		F	1997
Discharge Arbitrations:				
Pugh v Dain Bosworth	D		M	1993
Gresen v UPS	P	214,819	M	1993
Mays v First Natl Pawnbrokers	P	132,432	M	1994

Mays v First Natl Pawnbrokers	P	132,432	F	1994
Maki v BN	P	185,229	M	1994
Rudd v Universal Under-writers	D		M	1994
Stokan v Education Logistics	P	187,113	M	1996
Fairhurst and Fairhust v Reimer Express	P	179,078 30,724 100,000 punitives 3,000 costs	M	1996