

# The University of Montana Law School Football CLE—Employment Law Updates

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## Recent Montana Arbitration Cases

### A. Unenforceable Contracts of Adhesion

For a summary of Federal and Montana law regarding the enforceability of an arbitration provision in a commercial or labor contract, see Corbett, *Arbitrating Employment Law Disputes*, 68 Mont. L. Rev. 415 (2007). The Montana Supreme Court has previously announced that an arbitration provision contained in a contract is not enforceable if (1) the arbitration provision is adhesive, and (2) if adhesive, it is not enforceable if (a) the provision was not within the reasonable expectation of the weaker party, or (b) if within the reasonable expectation of the weaker party, the arbitration provision was “unduly oppressive, unconscionable or against public policy.” *Id.* at 435.

In *Woodruff v. Bretz, Inc.*, \_\_\_P.3d \_\_\_, 2009 MT 329, 2009 WL 3319927 (2009) the Montana Court repeats this test, and reverses the District Court’s order to compel arbitration in a commercial dispute involving the purchase of a motor home.

This commercial case is considered in the context of an Employment Law CLE program, because the Montana Court uses the above test in both commercial and non union-management employment contracts that contain an arbitration clause.

In *Bretz*, the Court held that the arbitration provision, which was prominently noted in a pre-sales agreement “memorandum of understanding” and thereafter in the sales agreement, was a contract of adhesion because it was included by the seller in a standardized form agreement, and the consumer’s choice was to either accept or to reject it without the opportunity to negotiate the preprinted terms. *Bretz*, p. 2-3. The Court characterized the only “negotiable terms” in standardized form agreements are those terms, often specific to the agreement, in which information is inserted into the blank provisions of the form (the only “truly negotiable terms” of the form), such as, in a loan agreement, the amount being borrowed, the interest rate, and the like. The Court states that Woodruff “might have haggled over price, but not over the preprinted terms” ... like the arbitration agreement.

After concluding that the arbitration provision was adhesive, the court concluded that it was beyond the consumer’s reasonable expectation. Here the Court’s “reasonable expectations” is determined “from all the circumstances surrounding the execution of the contract, such as the consumer’s business experience and sophistication, any routine practice between the parties established through prior dealings, whether the consumer studied the agreement and comprehended its terms, whether the consumer had the advice or representation of counsel, and whether the challenged provision and the consequences of the provision were fully and adequately explained to the consumer.” In addition, the waiver of fundamental constitutional rights (right to access the courts, jury trial due process, equal protection, etc.) must be voluntary, knowing and intelligent, a standard that “depends on the totality of circumstances.”

The post-*Bretz* question is how does an employer or commercial seller include an arbitration provision in a contract and not have it be deemed to be (1) adhesive, and (2a) not within the weaker party's (employee/consumer) reasonable expectation, or (2b) oppressive, unconscionable or a violation of public policy. Possibilities:

Adhesive:

Don't have a pre-printed dispute resolution provision. Give the provision a title and explain the purpose of the provision, (i.e. "Dispute Resolution.") This provision concerns the method the contracting parties are authorized to use in the event either alleges a breach of this agreement or any and all legal claims arising out of this sale and purchase." Provide the consumer/employee a writing that explains the options—arbitration or judicial. Have the consumer/employee read the writing, then discuss/negotiate which alternative to write in the blank. The written explanation, the tender of the explanation, that it was read, and the options discussed before the blank was filled-in are acknowledged in writing by the consumer/employee and the seller/employer.

Reasonable Expectation:

With the above, it seems extremely difficult for the weaker party to now effectively argue that the arbitration provision was beyond their reasonable expectation.

Oppressive, unconscionable or violation of public policy:

In *Kloss*,<sup>1</sup> the Montana Supreme Court provided criteria for determining substantive unconscionability<sup>2</sup> that can be reduced to the following five factors:

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<sup>1</sup> *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8-9 (Mont. 2002)

<sup>2</sup>The eight criteria are:

1. Are potential arbitrators disproportionately employed in one or the other party's field of business?
2. Do arbitrators tend to favor "repeat players" as opposed to workers or consumers who are unlikely to be involved in arbitration again? In other words, is there a tendency by arbitrators to avoid decisions which will result in the loss of future contracts for their services?
3. What are the filing fees for arbitration compared to the filing fees in Montana's district courts?
4. What are arbitrator's fees? Do they make small claims prohibitive? Do they discriminate against consumers or workers of modest means?
5. Are arbitration proceedings shrouded in secrecy so as to conceal illegal,

1. The arbitrator or potential arbitrator is biased or has a conflict of interest, e.g. the arbitrators are disproportionately employed in the employer's field of business, or tend to favor employer "repeat players."
2. The cost of arbitration is excessive when compared to judicial litigation, i.e. the total cost of arbitration is oppressive or it otherwise precludes the particular employee from availing herself of arbitration.
3. The arbitration proceeding is shrouded in secrecy so as to conceal illegal, oppressive or wrongful employer practices.
4. Arbitrators are not bound by the facts and law.
5. Employees do not have the right to discover the facts necessary to prove their claims.

Other courts have cited and relied upon these factors, as well as the following:

1. The arbitration agreement allows an employer access to the courts for its claims against the employee, but requires the employee to arbitrate.
2. The employer retains the unilateral right to modify the arbitration agreement.
3. Whether the employer provides separate consideration to an existing employee when the employer seeks to include a pre-arbitration clause in their existing contractual relationship.
4. The employer initiated arbitration agreement imposes a statute of limitations that is shorter than imposed by law.
5. The arbitration provision contains a venue provision for a designated forum unreasonably difficult for the employee.
6. The provision prohibits employment claims as class actions.
7. The pre-dispute clause limits the arbitrator's remedial authority in a manner inconsistent with the authority authorized by law.
9. The arbitration provision prevents the award of attorney fees to a prevailing employee, or authorizes the award of fees to the employer inconsistent with that provided by law.
10. Whether the arbitrator is competent to decide the case.
11. Whether a "union-management" pre-dispute arbitration agreement may require the arbitration of statutory or common law employment claims.

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oppressive or wrongful business practices?

6. To what extent are arbitrators bound by the law?
7. To what extent are arbitrators bound by the facts?
8. What opportunity do claimants have to discover the facts necessary to prove a claim such as a company's business practices  
*Kloss v. Edward D. Jones*, supra Note 104, at 133-34 (indicating that the list provides only examples).

12. Whether the weaker party made a voluntary, knowing and intelligent waiver of their constitutional and appropriate right to a jury trial and substantive and procedural process.<sup>3</sup>

**B. Who, the Court or the Arbitrator, Decides the Scope of the Arbitration Provision**

*Thompson v. Lithia of Great Falls*, 343 Mont. 392, 185 P.3d 332, (2008), held that when a contract containing an arbitration clause is challenged on the basis of the failure of a condition precedent to contract formation, the court, not the arbitrator, is the appropriate decider whether the condition precedent was satisfied.

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<sup>3</sup> In *Kloss*, a plurality of the Montana Court also determined that even if a pre-dispute arbitration provision is not procedurally or substantively unconscionable, it may nevertheless be struck if it is not clear that the employee waived his right to a judicial forum. The plurality, speaking through Justice Nelson, stated:

A waiver of a fundamental right (jury trial and judicial forum) must be proved to have been made voluntarily, knowingly and intelligently – typically by the party seeking the waiver. For a fundamental right to be effectively waived, the individual must be informed of the consequences before personally consenting.

And the waiver will be narrowly construed.

The plurality then stated that in applying these principles, a court must consider a totality of overlapping and non-exclusive factors. Similarly, The United States Supreme Court requires that courts be vigilant against compelling arbitration of legal rights unless the individual who seeks to avoid the pre-dispute arbitration provision clearly has waived her right to the forum provided by law. This is the case even in union-management disputes. The Ninth Circuit Court of Appeals and other courts also require that a waiver of the judicial forum must be “knowing and voluntary.”

Justice Nelson, now speaking for the majority, in *Bretz* repeated this standard concluding that an ordinary consumer like plaintiff Woodruff would reasonably not expect that she is giving up her right to a judicial forum and a jury by knowing the presence of the arbitration provision.

The Montana Act<sup>4</sup> provides that if one party to an arbitration clause refuses to arbitrate, the other party may sue in Montana District Court to compel arbitration.<sup>5</sup> Alternatively, if a party believes that it is not required to arbitrate, it may bring an action to stay the arbitration proceeding.<sup>6</sup> Similarly, the FAA<sup>7</sup> provides that a Federal District Court may enter an order to

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<sup>4</sup>The Montana Arbitration Act does not generally apply to arbitration agreements “between employers and employees or between their respective representatives,” unless the parties’ agreement “so specifies,” but that certain provisions are applicable to all such agreements. §27-5-113 MCA. One provision that is applicable to all arbitration agreements provides that a Montana District Court may compel arbitration when a party, pursuant to an agreement to arbitrate, refuses to do so. §§27-5-115 MCA. In addition to enforcing agreements to arbitrate, the other provisions of the act that are applicable to employee and employer arbitration agreements are (1) the authority to stay an arbitration proceeding where there is no arbitration agreement, (27-5-115 (2)), (2) to confirm the award of an arbitrator, (27-5-311), (3) the authority to vacate an arbitration award, (27-5-312(1), (3) through (5)), and (4) the authority to modify or correct an award, (27-5-313).

<sup>5</sup>Montana Code Annotated §27-5-115 (1).

<sup>6</sup>Montana Code Annotated §27-5-115 states:

1. On the application of a party showing an agreement described in 27-5-114 and the opposing party's refusal to arbitrate, the District Court shall order the parties to proceed with arbitration; but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of that issue raised and shall order arbitration if it finds for the applying party or deny the application if it finds for the opposing party.
2. On application, the District Court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the stay ordered if the court finds for the applying party. If the court finds for the opposing party, it shall order the parties to proceed to arbitration.
3. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (1), the application must be made in that court. Otherwise, and subject to 27-5-323, the application may be made in any court of competent jurisdiction.
4. An action or proceeding involving an issue subject to arbitration must be stayed if an order or application for arbitration has been made under this section. If an issue is severable, the stay may be made with respect to the severable issue only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.
5. An order for arbitration may not be refused on the ground that the claim in issue lacks merit or good faith or because no fault or grounds for the claim sought to be arbitrated have been shown. See *Ratchye v. Lucas*, 288 Mont. 345, 957 P.2d 1128(1998); *IBEW, Local 1638 v. Montana Power Co.*, 53 St. Rep. 1296 (1996).

<sup>7</sup>9 U.S.C. §1 through 16 (19 ).

compel or stay arbitration.<sup>8</sup> The court, however, may not use the proceeding to address the merits of the controversy. The function of the court is solely to determine whether the dispute comes within the arbitration clause, and if so, the merits of the dispute are referred to arbitration.<sup>9</sup>

As discussed previously, the Supreme Court, in construing the FAA, has stated that the question of “who,” the court or the arbitrator, is to decide the issue of “substantive arbitrability” (whether a particular dispute or claim falls within the arbitration agreement) depends on the language of the arbitration agreement.<sup>10</sup> If the agreement directs that the arbitrator is to decide the issue, then a court cannot make that decision.<sup>11</sup> The Court stated that when looking at the language of an agreement:

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<sup>8</sup>Section 4 of the FAA provides, in part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of such a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . .

Section 3 of the FAA provides that if a dispute “is referable to arbitration, under such an agreement, ...[the court] shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement....”

<sup>9</sup>See *Buckeye Check Cashing, Inc v. Cardegna*, 546 U.S. \_\_\_, 126 S. Ct 1204 (2006). The Court stated that “[c]hallenges to the validity of arbitration agreements ‘upon such grounds as exist at law or in equity for the revocation of any contract,’ can be divided in two types. One type challenges specifically the validity of the agreement to arbitrate.” “The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g. the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.” *Id.* at 1208. For example, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the court may proceed to adjudicate it. But a court may not consider claims of fraud in the inducement of the contract generally. *Id.* at 1208. See also *Martz v. Beneficial Montana, Inc.* 332 Mont. 93, 98-99, 135 P.3d 790 (2006) (adopting the language and reasoning of *Buckeye*). See also, *Ratchye v. Lucas*, *supra note* \_\_\_\_, 288 Mont at 353 (the Court citing subparagraph 5 of § 27-5-115 MCA, *supra note* \_\_\_\_, held that the lower court did not have jurisdiction to enter summary judgment on certain aspects of the underlying dispute once it was determined that the arbitration of those disputes fell within the arbitration clause).

<sup>10</sup>*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

<sup>11</sup>*Id.* at 943.

Courts should not assume that the parties agreed to arbitrate arbitrability unless there is “clear and unmistakable” evidence that they did so.... In this manner the law treats silence or ambiguity about the question of “*who* (primarily) should decide arbitrability” differently from the way it treats silence or ambiguity about the question of “*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement”----- in respect to this latter question, the law reverses the presumption....The latter question arises when the parties have a contract that provides for arbitration of some issues.<sup>12</sup>

The FAA is generally applicable to Montana employment contracts<sup>13</sup> for two reasons: (1) because the Montana Act on its face is inapplicable in the employment context;<sup>14</sup> and (2) because

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<sup>12</sup>*Id.* at 944-45. Indeed, the Court said that if the issue of substantive arbitrability arises in state court, as opposed to federal court, in deciding the question of “who,” (the arbitrator or the court), is to decide arbitrability, the state court “should apply ordinary state-law principles that govern the formation of contracts...” to determine whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. *Id.* at 944. In the context of making this determination, the state court “should not assume that the parties agreed to arbitrate arbitrability unless there is “clear and unmistakable” evidence that they did so. *Id.* at 944.

<sup>13</sup>The United States Supreme Court has determined that the FAA is applicable to state courts, (See *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and J. O’Connor concurring in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) where she expresses concern about the Court’s determination), and secondly, the Federal Act preempts contrary state law. *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (the Court determined that the venue provision of the Montana Act was inconsistent with the FAA and thus preempted). Consequently, if there is anything in the Montana Act, some other Montana statute, or Montana common law that is inconsistent with the FAA, that Montana law would be preempted.

Alternatively, if the parties include the arbitration agreement a “choice-of-law provision” stating that state law is to apply to their agreement, then state law is applicable. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed 488 (1989) (no FAA preemption of the state arbitration law when the parties agree to abide by state rules on arbitration). The *Volt* decision was limited in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed. 2d 76 (1995) (when there is a conflict between state law under the choice-of-law provision; and the arbitration clause, state law covers the rights and duties of the parties, while the arbitration clause covers the arbitration—here the arbitration provision provided that the arbitrator could issue punitive damages, whereas state law did not authorize punitives).

<sup>14</sup>The Montana Act provides: “Arbitration agreements between employers and employees or between their respective representatives are valid and enforceable and may be subject to all or portions of this chapter *if the agreement so specifies*, except 27-5-115 [providing for, subpoenas, and depositions of witnesses], 27-5-311 [providing for court modification or correction of an

generally the FAA preempts the Montana Act. As discussed above,<sup>15</sup> the FAA is applicable to all employees whose employment contracts evidence interstate commerce, except employees actually engaged in the movement of goods in commerce.<sup>16</sup> Alternatively, because the FAA is inapplicable to public sector (governmental) employment agreements, the Montana Act is applicable to Montana Statute and subdivision employees are subject to arbitration agreements.<sup>17</sup>

In *Lithia*, plaintiff purchased a vehicle from Lithia. The sales agreement contained an arbitration clause and specified that the entire contract was contingent on the seller obtaining financing. Thus, there was a condition precedent to the agreement. Seller argued that the condition allowed only it, and not the buyer, out of the agreement. Ultimately, the buyer sought to revoke the agreement, avoid arbitration, and brought a tort suit in State District Court. The Seller sought an order to compel arbitration. The District Court issued an order to compel.

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arbitrator award], 27-5-312 (1) and (3) through (5) [court vacating an award, limitations period for seeking vacation, if the award is vacated, provision for rehearing before arbitrators, court order confirming an award], 27-5-313 [modification or correction of an award], and 27-5-322 [providing for state district court jurisdiction] apply in each case.” (Emphasis added). 27-5-113 M.C.A..

<sup>15</sup>See *Circuit City Stores v. Adams*, supra note 47.

<sup>16</sup>For some period of time, there was confusion whether the FAA was applicable to employment arbitration. However, this issue was put to rest by the United States Supreme Court in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 211 S.Ct 1302, 149 L.Ed.2d 234 (2001). The Court adopted the position of the majority of U.S. Courts of Appeals that the FAA exempts only the classification of employees specified---seamen, railroad employees, or others who work directly in interstate commerce. See supra Note 47.

<sup>17</sup>I have not found any cases where this issue has been raised, but I believe that in 1925 at the time the FAA was enacted, Congress did not intend to regulate the relationship between a state and its employees. Second, because the FAA was enacted under the Commerce Clause,” at the time the statute was enacted, the Commerce Clause would not have reached states vis-a-vis their own employees. See gen., Chemerinsky, *Constitutional Law*, 3<sup>rd</sup>, § 3.3 (2006) (discussing the interpretation of the Commerce Clause Before 1937). Third, Commerce Clause jurisprudence, especially in recent years with the Court’s concern for the Tenth Amendment and federalism, (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”) arguably results in the conclusion that States, as employers, are not regulated by the FFA. See *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (a Missouri state law that set a mandatory retirement age for state judges was not invalidated by the Federal Age Discrimination in Employment Act). In *Gregory*, the Court determined that a federal law will be applied to important state government activities only if there is a clear statement from Congress that the law was meant to apply. *Id.* at 464. Thereafter, in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Court held that state governments cannot be sued for violating the Age Discrimination in Employment Act.

The Supreme Court reversed, concluding that the condition precedent applied to both buyer and seller, and because of the condition precedent, the court rather than the arbitrator, was to determine whether the condition precedent was satisfied and there was an actual contract.

In *Higgins Development Partners v. Skanska*, 352 Mont. 243, 216 P.3d 199 (2009), the parties had a contract that contained an arbitration. A construction contract dispute arose between the parties.<sup>18</sup> The issue was whether the dispute was subject to the contract arbitration clause. Montana Supreme Court held that the plain language of the parties' contract was ambiguous regarding whether it was subject to the arbitration clause, and because the parties did not "clearly and unmistakably" provide that an arbitrator was to decide the "scope of the arbitration clause" issue, the District Court was the appropriate forum for doing so.

### C. Waiver of the Contract Arbitration Clause

In *Signal Perfection Ltd. v. Blackhawk, Inc.*, 344 Mont. 552, (unpublished decision, 2008), the parties were subject to a contract containing an arbitration clause. Signal sued Blackhawk in State District Court. For nearly a year, despite filing several answers, and only two week before trial, Blackhawk filed a motion to compel arbitration. The Supreme Court affirmed the District Court's order refusing to compel arbitration. The Court, citing a previous case,<sup>19</sup> said a party waives the right to arbitrate when: "(1) that party now asserting its right to arbitration had knowledge of the existing right to compel arbitration; (2) that the party acted inconsistently with the right to arbitrate the dispute; and (3) that the party resisting arbitration has suffered prejudice. The Court discussed its' earlier decision to the effect that answering the claim on the merits, asserting a counterclaim, and participating in discovery, without more, is insufficient to constitute waiver. However, it noted that participating in discovery which sought more information than necessary to determine the existence of the right to arbitrate was excessive and inconsistent with the right to arbitrate.

## RECENT MONTANA HUMAN RIGHTS ACT CASES

*McDonald v. Department of Environmental Quality*, 351 Mont. 243, 214 P.3d 749 (June 2009)

### Summary of the Case

In Montana, it is unlawful for an employer to discriminate against an employee or applicant for employment based on the employee's race, gender, color, national origin, religion, age, or disability. Generally, an employer meets this legal obligation by refraining from engaging in discriminatory conduct based on race, gender, color, national origin, religion, age or disability.

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<sup>18</sup> The contract claim was for approximately \$50,000.

<sup>19</sup> *Downey v. Christensen*, 251 Mont 386, 389, 825 P.2d 557, 559 (1992).

However, with regard to religion and disability, the law requires that not only must the employer not discriminate, but that it must take affirmative action to accommodate the religion or disability of the employee or applicant. The duty to accommodate a disabled employee or applicant may require the employer to make existing facilities accessible and usable by the disabled individual and potentially to restructure the actual job to enable the disabled individual to successfully perform the job. This duty to accommodate is required up to the point that the duty places an “undue” burden on the employer. The employer need not suffer such “undue” burdens to accommodate. Second, while the employer must make efforts to accommodate the disabled worker, it need not adopt the accommodation suggested by the worker.

In this case, Janelle McDonald was employed by the Montana State Department of Environmental Quality. Ms. McDonald suffers from mental and physical disability. Her mental depression causes her to lose focus and concentration at work, and her physical disability makes it difficult for her to walk on hard surfaces. While employees of the State are not normally allowed to bring dogs to work, the Department made an exception for Ms. McDonald. It allowed her to bring her specially trained dog to work because the presence of the dog allowed her to function without loss of focus and concentration, and to walk and ascend/descend stairs. This sort of accommodation is not unusual for employees who suffer the type of disability that Ms. McDonald suffered.

There is no dispute regarding the right of Ms. McDonald to bring the dog to work. The dispute centers on any potential additional duty the Department had to make the workplace better suited for Ms. McDonald and her dog. To understand this issue requires a closer look at the physical aspects of the workplace.

Ms. McDonald worked in a large carpeted room on the ground floor of a department building. Outside of her office area was a tiled hallway leading to restrooms, the elevator, and several meeting rooms she used in her work. The problem was that when she walked on the tile floors accompanied by her dog, the dog’s feet/paws slipped on the tiled surface, and on several occasions, it fell. These falls caused injury to the dog and made it even more fearful of the slick floors. Ms. McDonald asked the Department to accommodate her disability by placing carpet runners in the hallway or by carpeting the hallway. The carpeting would keep the dog from slipping. The Department refused her request. The Department recognized the problem but suggested that the problem could be corrected by having the dog’s nails cut, placing non-slip boots on the dog, and better handling of the animal by Ms. McDonald. The Department also believed that the cost of installing carpet runners or carpeting the hallway was too expensive.

Thus, the dispute centers on whether the Department was required to carpet the hallway, or at least install carpet runners to properly accommodate Ms. McDonald, or whether its suggested accommodation of having the dog’s nails trimmed, having the dog wear non-slip boots, and having Ms. McDonald better handle her dog were sufficient methods of accommodation.

Ms. McDonald brought a legal suit against the Department alleging that it had failed in its duty to properly accommodate her disability by its refusal to carpet the hallway or provide a carpet runner in the hallway.

Initially, the suit was heard before a Hearings Examiner for the Montana Human Rights Commission. The Hearings Examiner decided in favor of Ms. McDonald. That decision was then appealed to the Human Rights Commission. The Commission, with four members voting, split two to two. The tie vote resulted in affirming the decision of the Hearings Examiner. That decision was then appealed to Montana District Court. The Court overturned the decision of the Commission. The District Court decision was then appealed to the Montana Supreme Court, and the Court reversed the District Court and remanded for further proceedings.

The Court stated the issues on appeal as:

1. Whether the plaintiff needed an accommodation (it was undisputed that plaintiff work 50% of the time without her dog and managed to perform her job to the employer's satisfaction).
2. Whether modifying a floor surface so that an employee with a disability can use her service dog effectively within the workplace is beyond the scope of an employer's duties under the Montana Human Rights Act.
3. Whether plaintiff's requested accommodation was reasonable.
4. Whether the employer's delay in providing a reasonable accommodation amounted to an adverse employment action.
5. Whether the hearing examiner's award of damages (\$10,000 for emotional distress, \$18,000 for a replacement service animal, \$1,536 for travel expenses to procure the replacement service animal, and \$333.84 for veterinary bills) is clearly erroneous.

The Court spoke to only the first two issues and remanded the other three issues to the District Court.

Issue #1 -- whether the plaintiff needed an accommodation, the Court answered in the affirmative. It held the fact that plaintiff did not need the accommodation 100% of the time is not the standard. It said the law does not require an "all-or-nothing showing," the reasonable accommodation requirement "is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated." Employers have a duty to accommodate even when the employee is able to perform the essential function of the job without accommodation; the duty "includes making modifications or adjustments which enable an employee with a disability to enjoy "equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities." Plaintiff was entitled to a reasonable accommodation if such accommodation could have assisted her in performing her job duties or alleviated barriers to her ability to enjoy equal benefits, privileges and opportunities of employment. Here plaintiff was forced to perform under limitations to

which similarly situated persons were not subjected, such as recurring dissociative episodes, difficulty walking, and the risk of falling without her dog's assistance to get up.

Issue # 2 – is modifying a floor surface so that an employee with a disability can use her service dog effectively within the workplace beyond the scope of an employer's duties under the MHRA.

The Court determined that the accommodation went to plaintiff, not her dog, and that the problem was not the “care, control<sup>20</sup> or behavior” of the dog. The Court analogized plaintiff's reliance on her dog as similar to disabled users of wheelchairs. For wheelchair users, the employer has a duty of removing the hazard of slippery tile floors so that a person with a disability may use her assistive device effectively within the work facility.

Finally, the Court determined that the problem was not that the assistive device (the dog) performed poorly. Here the dog was trained to assist plaintiff, the fact that the animal had problems on the slick floors was not solely the fault of the animal.

Justice Cotter concurred with the majority on the first two issues but dissented on the majority's failure to find for the plaintiff on the remaining issues. Her discussion of those issues is extremely helpful in fleshing out those topics as guidance to the lower court and other future litigants.

*Mallory v. McDonald's Restaurants of Montana & Alex Keeton*, 342 Mont. 29, 179 P.3d 481, 102 FEP Cases 1584 (2008).

Plaintiff Mallory was the Guardian of her niece, Patricia Saucier. Saucier suffers from spinal meningitis, which significantly and permanently impaired her brain function. Her reasoning ability is not unlike that of an child of approximately 9 to 12 years old.

Ms. Saucier was employed at a Billings McDonald's restaurant. Her supervisor was Alex Keeton. Sometime after the commencement of her employment, Saucier and Keeton commenced a sexual relationship. Ultimately, Keeton ended the relationship.

After learning of the relationship, Plaintiff filed gender and disability claims against McDonalds and Keeton with the Montana Human Rights Commission. The Montana Human Rights Bureau investigated the claims and concluded that the allegations of discrimination were not supported by the evidence. The Complaint was dismissed and plaintiff was free to pursue her discrimination claims in District Court. Then plaintiff filed a number of tort claims along with gender and discrimination claims in State District Court. Ultimately, the District Court granted summary judgment in favor of both defendants on the tort claims because they were

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<sup>20</sup> The court defined care and control of the dog as the responsibility of plaintiff, but stated the plaintiff met that obligation, the problem was the slick floor surface.

barred by the Montana Human Rights Act. The Court also entered summary judgment on the gender and disability claims against McDonalds, and refused to grant summary judgment on those claims against Keeton.

The Supreme Court reversed the summary judgment on the tort claims. It concluded that while normally sexual harassment claims are only allowable under the Montana Human Rights Act, in this case the “gravamen” allegation against the defendants was beyond sexual harassment and constituted non-consensual sex and she was not barred from proceeding in District Court. At 497.

Regarding the gender and sex discrimination claims, the Court concluded that Plaintiff may not pursue both tort and Human Rights Act actions based on the same underlying conduct.

J. Nelson concurs in the result but argues that Montana law, *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200 (1990) (forceful kissing), *Arthur v. Pierre Ltd.*, 323 Mont. 453, 100 P.3d 987 (2004) (slapping plaintiff on the buttocks that categorized tortuous battery as “sexual harassment” should be overruled. He does not like the “gravamen” test as used by the majority and would recognize all sexual assaults or batteries as torts. He states that he looks “forward to the case when that issue is raised, briefed and argued on appeal.” Watch out employers, I’m sure he will get his wish. Moreover, the majority may agree that the gravamen test is no longer appropriate.

## **RECENT MONTANA WRONGFUL DISCHARGE CASES**

*Kibbee v. ACP Sales West, LLC and Paws Up Ranch*, not reported in F. Supp 2d, 2008 WL 5395741, (Mt. Fed. Dist. Ct., 2008).

Plaintiff was employed by defendant Paws Up Ranch as the human resource manager. Ultimately she was discharged. The defendant has a written internal grievance procedure. Montana law requires the satisfaction of such a procedure as a prerequisite to filing a Montana Wrongful Discharge suit. Plaintiff filed a grievance pursuant to the policy and the defendant agreed with her claim and offered her full reinstatement with all lost salary and benefits. The District Court granted defendant’s motion for summary judgment, holding that the offer made the suit moot unless the plaintiff could demonstrate “special circumstances justifying a rejection of the offer,” that her “rejection of the offer was objectively reasonable” (“whether a reasonable person would have refused the offer...”).

The Court dismissed plaintiff’s other claims (misrepresentation and breach of the Covenant of Good Faith and Fair Dealing), because they arise out of the discharge action and are not separate.

Finally, the Court dismissed plaintiff’s claims for punitive damages based on the allegation that the defendant acted with “actual fraud and actual malice” when it discharged her.

The Court ruled that because summary judgment was awarded to all of the substantive claims, her claim for punitives is “moot.”

In *Harding v. Garcia*, 342 Mont. 550 (unpublished, 2008), plaintiff was discharged by defendant, and brought a Montana wrongful discharge suit. The Wrongful Discharge Act provides three claims for relief: (1) lack of good cause, (2) violation of the employer’s own written personal procedures, and (3) retaliating against an employee for refusing to violate a public policy or for reporting a violation of public policy. A public policy is one that is recognized by constitutional provision, statute or administrative rule.

In *Harding*, plaintiff claimed that the discharge was for lack of good cause, and because defendant had discharged plaintiff for refusing to violate a public policy. The jury found that the discharge was for good cause, but that the defendant had discharged plaintiff in retaliation for her refusal to violate public policy. Plaintiff offered evidence that she had been pressured to quit so that the defendant would not have to pay for reconstructive breast surgery resulting from a mastectomy. When she refused to quit, she was discharged.

The jury awarded \$20,000 in compensatory damages, and the District Court awarded Harding \$47,000 in attorney fees and costs.

The question not addressed was what was the constitutional, statutory, or administrative rule that provided that an employee may not be discriminated against for filing health insurance claims. What is that policy and in what constitutional, statutory or administrative rule is the policy stated?

## **Recent Montana Union-Management Cases**

### **A. Union-Management Arbitration**

In *Klein v. Mt. Dept. of Corrections*, 343 Mont. 520, 185 P.3d 986, (2008), the Montana Supreme Court held that a labor-management arbitration clause did not require a discharged employee to litigate her tort claims against her former employer under the specific language of the contract arbitration clause. The Court recognized that arbitration clauses may use broad language, i.e. “a claim arising from or related to this agreement,” “any problem or dispute arising under this Agreement and/or concerning the terms of this Agreement,” or narrow language, i.e. “relating to disputes arising only under the terms of the agreement.”

Here the arbitration language required arbitration of all disputes arising between them involving the question of interpretation or application of the terms and provisions of this Agreement. The Court held that its narrow language did not compel the arbitration of tort claims that were separate and apart from the Collective Bargaining Agreement.

Former Chief Justice Grey concurred in the result, but did not offer contract language that provides “[e]mployees desiring to contest an employment action through alternative

statutory or civil procedures may not contest the same employment action under the provisions of this agreement's grievance procedure.”

## **B. Mandatory Subjects of Bargaining**

In *Bonner School District v. Bonner Education Assn.*, 341 Mont. 97, 176 P.3d 262, 183 L.R.R.M. 2673 (2008), the Montana Supreme Court held that the employer, Bonner School District, had the duty to bargain with the bargaining representative of its teachers, the Bonner Education Association, regarding teacher transfers and reassignments. This, despite the fact that the Montana Public Sector Collective Bargaining Act provides that a Montana public sector employer has the management right to “hire, promote, transfer, assign, and retain employees .....” 39-31-303(2), MCA. (Emphasis added).

The parties' collective bargaining contract provided “the BEA recognizes the prerogatives of the [district] to operate and manage the school district and retain, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by law, except as limited by explicit terms of this agreement.” It was undisputed that there was no specific or explicit term in the agreement that addressed transfers and assignments. However, the Court noted that the contract contained a “professional advantages” clause which provided that teachers shall not be deprived of professional advantages heretofore enjoyed. The Court concluded that not being reassigned or transferred is such a professional advantage.

Next, the Court concluded that the contract zipper clause, which provided that the Union had waived its right to bargain on matters not included in the contract, matters discussed at negotiations, or matters that could have been discussed were ambiguous, and did not waive the Union's right to insist on bargaining transfers and assignments.

Ultimately, the Court concluded that the bargaining obligation did not require the employer to agree, but only bargain with the Union.

## **C. The Amount of Court Discretion Given a Union-Management Arbitrator/Arbitration**

For an excellent case on the discretion a court gives a union-management arbitrator/arbitration, See *Teamsters Union Local 2 v. C.N.H. Acquisitions, Inc.* 204 P.3d 733 (2008).

## Federal Court Review of Montana State Administrative Agency Decisions

In *BNSF Railway Co. v. O’Dea*, 572 F.3d 785 ( 9<sup>th</sup> Cir. July 16, 2009), the 9<sup>th</sup> Circuit Court of Appeals held that Federal District Courts have diversity jurisdiction<sup>21</sup> over appeals from state administrative agency decisions when state law places such appeals in state trial courts. In this case, BNSF Railway, a Delaware corporation with its principal place of business in Texas, sought judicial review of a Montana Human Rights Commission decision in favor of employee applicant O’Dea, a Montana citizen, based on disability discrimination (obesity). The MHRC awarded O’Dea approximately \$366,000. The Montana Human Rights Act places judicial review in State District Court. Thus, the 9<sup>th</sup> Circuit Court of Appeals determined that Montana Federal District Court, in addition to Montana State District Court, had jurisdiction on judicial review.

The 9th Circuit remanded the case to the Montana District Court for further proceedings. Both BNSF and O’Dea had previously filed for judicial review in Montana District Court. BNSF had sought the district to stay its judicial review pending a resolution of its appeal to the 9<sup>th</sup> Circuit. The District Court refused the stay, and ultimately affirmed the decision of the MHRC.

BNSF then appealed the refusal of the District Court’s refusal to grant a stay to the Montana Supreme Court. The Montana Supreme Court affirmed the District Court. *BNSF Railway Co. v. O’Dea*, 2009 WL 2399953, 2009 MT 262N (unpublished disposition, Aug. 5, 2009).

The Montana Supreme Court’s disposition of this case will effectively end the litigation of this matter. It is anticipated that if they return to the Montana District Court on remand from the 9<sup>th</sup> Circuit, the District Court will accept jurisdiction but then dismiss the action based on res judicata. Any appeal of the Federal District Court’s dismissal will be affirmed by the 9<sup>th</sup> Circuit based on the res judicata holding. I do not believe the 9<sup>th</sup> Circuit’s decision will be granted certiorari by the United States Supreme Court.

In *BNSF v. O’Dea*, 572 F.2d, 785, the 9<sup>th</sup> Circuit reluctantly agreed that its previous holding to the contrary<sup>22</sup> was effectively overturned by the U.S Supreme Court.<sup>23</sup> However, the

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<sup>21</sup> Diversity jurisdiction requires complete diversity of citizenship between the parties (citizenship of corporations is based on state where incorporated and where the corporation has its principle place of business, here Delaware and Texas) and amount in controversy (in excess of \$50,000) The MHRC awarded O’Dea approximately \$366,000 in lost wages, lost benefits, pre-judgment interest, lost future earnings and emotional distress).

<sup>22</sup> *Shamrock Motors, Inc. v. Ford Motor Co.*, 120 F3d 196 (9th Cir. 1997)

<sup>23</sup> *City of Chicago v. Int’l. Coll. of Surgeons*, 522 U.S. 156, 118 S. Ct. 523 (1997).

9<sup>th</sup> Circuit appeared to encourage state court to expedite any judicial review of administrative decision so that “ordinary principles of res judicata might dictate whether the (Federal) District Court can or should decide the cross-system appeal.”<sup>24</sup>

Other than res judicata, there are additional principles of federalism that may be relied upon by a Federal District Court to, after it determines that it has diversity jurisdiction, to avoid ruling on the merits of state administrative action on judicial review.

When a dispute is pending both in federal and state court, the federal court, even though the federal court has jurisdiction, may abstain from proceeding—and thus allowing the state court to act. There are two or possibly three types of abstention.<sup>25</sup>

1. Pullman (A federal Constitutional issue is pending in fed. ct.; the fed. ct. agrees to stay ruling on the Constitutional issue.)

The stay allows the federal court to avoid deciding federal constitutional issue and allow the state court to determine the controversy by using a non-federal Constitutional alternative (state constitution, statute or common law), except where the federal court determines that state action is unconstitutional on its face or state non-constitutional law is clear and can not form the basis for ending the dispute without ruling on the federal constitutional issue.

2. Burford (state law public statutory issue is pending before a trial court federal court and a state trial court, the federal court dismisses its proceeding).

The federal court will dismiss the state action pending before it, to avoid a needless conflict with state administration of its own affairs (specialized aspects of complicated regulatory system), and allow the state court to decide the matter. The *Burford* type of abstention appears to be a ready-made type of abstention for use in these state “administrative” matters.

3. Unsettled questions of state law—Kaiser Steel & W. S. Ranch. Simultaneous actions were pending in both federal and state court.

The federal court action was *Ranch (N.M.) v. Kaiser (Pa)*. The dispute involved a New Mexico trespass law in action in federal court based § 1332 diversity jurisdiction. The Ranch claimed that Kaiser was trespassing on Ranch

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<sup>24</sup> See Circuit Judge Fisher’s concurring opinion, at 794. See also the majority opinion, note 15, p. 791.

<sup>25</sup> See gen. Wright & Kane, *Law of Federal Courts* (West Hornbook series), § 52, pp. 324-41, 6<sup>th</sup> Ed. (West, 2002).

property. The trespass claim would ultimately turn on a construction of the N.M. Constitution concerning a private parties right to use eminent domain.

In state court, Kaiser & W .S. Ranch, Kaiser sought a declaratory judgment that it was not trespassing on the land of the Ranch (that is could use eminent domain to cross the Ranch's land.

Kaiser asks the federal court to stay its proceeding . The district court granted the stay. The Supreme court affirmed.

4. Consideration of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of the litigation— Moses H. Cone Memorial Hospital v. Mercury Const. Corp.

In *Moses H. Cone*, a declaratory judgment action was pending in state court. The suit asked the court to declare that the Hospital owes nothing to Mercury and that Mercury has waived it's contract right to arbitrate.

In federal court, Mercury asked to court to compel arbitration. The federal district court ordered a stay in its proceeding to allow the state court to decide the matter. The circuit court reversed and the Supreme Court affirmed the circuit court. "After cone there will be rare cases in which "exceptional circumstances" will exist justifying a stay or dismissal because of a concurrent state proceeding, but I most cases neither stay nor dismissal will be proper and the federal court will be obliged to exercise its jurisdiction."<sup>26</sup>

## **Mixed Motive Proof as Applied to a Federal Age Discrimination Case**

### **Proving Causation--The Mixed Motive Case**

In most protected class discrimination cases (gender, race, color, etc.) the critical element of causation is proven by circumstantial evidence via the disparate treatment formula. Here the treatment of the plaintiff is compared to the treatment of the favored person, e.g. comparing the treatment of women versus men, blacks versus whites, older workers versus younger workers. Again, most of these cases involve an allegations of an employer from a single motive—either lawful, e.g.qualifications, or unlawful, e.g. protected class status.

proof proceeds on both sides on the premise that one motive only on the part of the employer--either an illegitimate one (e.g., race) or a legitimate one (e.g., ability to do the job)--has caused the adverse action of which the plaintiff

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<sup>26</sup> Wright & Kane, *The Law of Federal Courts*, p. 341.

complains. It is this type of case for which . . . McDonnell Douglas<sup>27</sup> . . . is designed. . . . Typically, the plaintiff will contend that one reason--race--was operative, the defendant will contend that another single reason--ability to do the job--motivated it, and the trier of fact will find one reason or the other (but not a combination) to be the true one. In such a case, the issues of motivation and causation are not distinctly separated, nor do they need to be. If the plaintiff shows the defendant's proffered reason to be a pretext for race, the case is over. Liability is established, and reinstatement is ordered (in a discharge case) absent extraordinary circumstances. The very showing that the defendant's asserted reason was a pretext for race is also a demonstration that, but for his race, plaintiff would have gotten the job.<sup>28</sup>

In the mixed motive case, the trier of fact accepts both the credibility of evidence supporting the defendant's asserted legitimate nondiscriminatory reason, and the plaintiff's evidence that protected class status had a role in the employment decision. For instance, the plaintiff may not have been the best applicant for the position, but race played a role in his non-selection. The trier of fact accepts the evidence of both the defendant and the plaintiff. In such a case, there must be a test that accounts for both reasons and allows the trier of fact to also reach a decision. That is the purpose of the mixed motive test. Mixed motive cases are not unique to protected class employment discrimination cases. Federal courts<sup>29</sup> and administrative agencies<sup>30</sup> have grappled with mixed motive cases in other contexts.

The Supreme Court has examined actions motivated by both lawful and unlawful considerations in administrative and legislative decision-making. In an equal protection challenge to a municipal zoning plan, the Court adopted the "same-decision" test.<sup>31</sup> Later, in *Mt.*

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<sup>27</sup> 411 U.S. 792 (1973).

<sup>28</sup> See *Bibb v. Block*, 778 F.2d 1318, 1320-21 (8<sup>th</sup> Cir. 1985).

<sup>29</sup> See, e.g., *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (a first amendment retaliatory discharge).

<sup>30</sup> See, e.g., *NLRB v. Wright Line*, 251 N.L.R.B. 150, 105 L.R.R.M. 1169 (1980); *enforce*, 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The NLRB adopted the *Mt. Healthy* test to determine liability under § 8(a)(3) of the National Labor Relations Act. See also *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

<sup>31</sup> The Supreme Court stated:

Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

*Healthy City School District Board of Education v. Doyle*,<sup>32</sup> the Court used the 'same-decision' test for first amendment retaliatory-discharge cases. The Court stated:

“Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'--or, to put it in other words, that it was a “motivating factor” in the Board's decision not to rehire him. Respondent, having carried that burden, however, the District Court should have gone on to determine whether the Board had shown, by a preponderance of the evidence, that it would have reached the same decision as to respondent's employment, even in the absence of the protected conduct.”<sup>33</sup>

The test requires that, first the plaintiff prove that unlawful motive was a motivating factor in the decision. The second aspect is that the defendant prove that it would have reached the “same decision” even absent the plaintiff's protected status. Thus, plaintiff proves that protected class status was a motivating factor in the discriminatory action. If so, then the defendant proves that it would have reached the same decision on the action regardless of plaintiff's protective class status.

In *Price Waterhouse v. Hopkins*,<sup>34</sup> the Supreme Court applied the mixed motive “same-decision” test in a sex discrimination case. The Court determined that once a plaintiff ...shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.” In the case a woman argued successfully that she had been subjected to discriminatory action, but the employer successfully argued that even absent gender based discrimination, it would not have promoted her. The Court held that the employer may *escape liability* if it carries its “burden of proof” that it would have made<sup>35</sup> the same decision absent the discrimination.

The effect of the court's decision was that the employer may escape all liability by proving it would have reached the “same-decision.” In the 1991 amendments to Title VII, Congress modified the Act to provide that in a mixed-motive case, *liability is established* when the complaining party demonstrates protected class discrimination was a motivating factor, even though other factors also motivated the practice.<sup>36</sup> Congress amended the remedial portions of

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<sup>32</sup> 429 U.S. 274.

<sup>33</sup> *Id.* at 287.

<sup>34</sup> 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1989).

<sup>35</sup> The Court specifically stated that proving that the same decision would have been justified...is not the same as proving that the same decision would have been made. *Id.* at \_\_\_\_.

<sup>36</sup>

Title VII to provide that in a mixed-motive case, if the defendant demonstrates it would have taken the same action in the absence of the impermissible motivating factor, the court may grant injunctive and declaratory relief, but shall not award damages or issue an order requiring any make whole remedy (admission, reinstatement, hiring, promotion, or payment). The effect of the amendment is that plaintiff is the prevailing party, and thus entitled to injunctive and declaratory relief (e.g. a cease and desist order and the current finding of unlawful discrimination may be used as evidence in any subsequent case), but more importantly, because the prevailing party is entitled to attorney fees, plaintiff may collect her attorneys fees.<sup>37</sup> However, no other monetary award or make whole remedy is appropriate.

For a time, some lower courts, in a mixed motive case, required plaintiff to prove “motivating” factors by direct evidence.<sup>38</sup> This has since been rejected by the Supreme Court, and the Court has held that there is no distinction between direct and circumstantial evidence in the mixed motive case.<sup>39</sup>

Recently, in *Gross v. FAL Financial Services, Inc.* 129 S. Ct. 2343, 106 FEPC (BNA) 833 (June 2009) the Supreme Court held a mixed motive (same decision) proof is not available in a Federal Age Discrimination in Employment (AREA) case. Plaintiff, in an AREA case, must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have “made the same decision” even when a plaintiff produces evidence that age was one motivating factor in the decision.

It is likely that Congress will legislatively reverse the holding in *Gross* by amending the AREA. Until Congressional action, *Gross* governs Federal Age Discrimination cases. However, Montana Courts and the Montana Human Rights Commission have long relied on the mixed motive case, and it is not clear whether the *Gross* case will have any impact in Montana Age Discrimination cases brought under the Montana Human Rights Act.

Interestingly, about three months after *Gross* was decided, the Montana Supreme Court addressed the applicability of the mixed motive case in a Montana Human Rights Act age discrimination case. The Court considered whether plaintiff had presented “direct” evidence of discrimination and consequently whether plaintiff was entitled to a mixed-motive instruction. *Stevenson v. Falco Industries, Inc.*, 209 MT 299, 107 Fair Emil. Pac. Caves. (BNA) 324 (2009). Ultimately the Court concluded that the alleged direct evidence of discrimination was not direct evidence, and therefore there was no need to give a mixed motive instruction.

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<sup>39</sup>*Desert Place, Inc. v. Costa*, 539 U.S. 90 (2003).

The Court also held, consistent with *Cricket v. City of Billings*, 234 Mont. 87, 761 P.2d 813, that a Human Rights Commission final investigative report was hearsay evidence and should not have been admitted into evidence, even though no motion in limine, as required by the court's scheduling order, was filed to exclude it.