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

October 31, 2009

Bill Corbett

I. Recent Montana Arbitration Cases

II. Recent Montana Human Rights Act Cases

III. Recent Montana Wrongful Discharge Cases

IV. Recent Montana Union-Management Cases

V. Federal Court Review of Montana State Administrative Agency Decisions

VI. Mixed Motive Proof as Applied to a Federal Age Discrimination Case

TOPIC I.

Recent Montana Arbitration Cases

A. Unenforceable Contracts of Adhesion

- In Montana an arbitration provision contained in a consumer or nonunion-management employment contract is not enforceable if:
- (1) the arbitration provision is adhesive (form contract & take-it-or-leave-it), and (2) if adhesive, it is not enforceable if:

Procedural - (a) the provision was not within the reasonable expectation (based on totality of circumstances with voluntary, knowing and intelligent waiver of right to jury trial and all included process) of the weaker party, or

Substantive - (b) if within the reasonable expectation of the weaker party, the arbitration provision was "unduly oppressive, unconscionable or against public policy."

- In *Woodruff v. Bretz, Inc.*, ___P.3d ___, 2009 MT 329, 2009 WL 3319927 (2009) reverses the District Court's order to compel arbitration in a commercial dispute involving the purchase of a used motor home (dog/cat pee (DCP) motor home). The **Court determined the arbitration provision was adhesive and not within the purchaser's reasonable expectation**. Thus, it did not need to address substantive unfairness.

- **The post-*Bretz* question:** 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:

1. Adhesive:

Don't have a pre-printed dispute resolution provision.

1) 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 and any and all legal claims arising out of this sale and purchase."

2) 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.

2. 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.

3. Oppressive, unconscionable or violation of public policy:

- See pp. 4-5 of materials.

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).*

- The United States Supreme Court and the Montana Supreme Court has said: **“Who”** the **arbitrator or the court** should **decide substantive arbitrability** (whether a particular dispute or claim falls with the arbitration agreement), **depends** on the language of the arbitration agreement. **If the agreement directs that the arbitrator is to decide the issue, the court cannot make that decision**.

- Alternatively, the law treats contract silence or ambiguity to mean that the court should decide the question. **Courts should not assume the parties agreed that the arbitrator was to decide the issue absent “clear and unmistakable” that they intended to do so**.

- In *Lithia,* the sales agreement contained an arbitration clause and specified that the **entire contract** was **contingent** on the seller obtaining appropriate financing. Seller argued that the condition precedent 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.

- **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), (**another "who" case**) the parties were subject to a construction contract that contained an arbitration clause. 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. **Only after nearly a year, despite filing several answers, and only two week before trial, did Blackhawk file a motion to compel arbitration.** The Supreme Court affirmed the district court's order refusing to compel arbitration. The Court, citing a previous case, 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.

TOPIC II.
RECENT MONTANA HUMAN RIGHTS ACT CASES
A. Disability Discrimination Under the Montana Human Rights Act

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

- The duty of **reasonable accommodation to accommodate disability and religion.**

- For the disabled the employer must **make existing facilities accessible and usable, and restructure positions to enable the disabled to successfully perform the job.**

- This employer duty to accommodate is required up to the point of **"undue hardship." Finally, employer need not adopt the accommodation suggested by the worker.**

- **Janelle McDonald & Her Dog. She suffers from mental and physical disability.**

- **Requested Accommodation. Carpet the hallways,** so that her dog's feet/paws would not slip on the existing tiled surface. On several occasions the dog fell. These falls caused injury to the dog and made it even more fearful of the slick floors.

- **The Department refused;** the problem could be corrected by having the dog's nails cut, wear non-slip boots, 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, but the Department had sufficient money to make the changes.

- The Court stated the issues on appeal as:
- 1. Whether the plaintiff needed an accommodation (it was undisputed that plaintiff could 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 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 HRC 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 -- Accommodation may be necessary even if plaintiff can work successfully 50% of the time without the accommodation.

- Held: Plaintiff was entitled to enjoy "equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities."

- Issue # 2 – Modifying a floor surface is within the employer's duty MHRA.

- **The accommodation went to plaintiff, not her dog, and the problem was not the "care, control[1] or behavior" of the dog.** The Court analogized to disabled users of **wheelchairs**, and concluded that the problem was not with the assistive device (the dog).
- 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.

B. Sexual Harassment or Tort

- *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, and sometime after the commencement of her employment, **she commenced a sexual relationship with her supervisor Keeton.. Ultimately, Keeton ended the relationship.**

- Plaintiff filed **gender and disability claims against McDonalds and Keeton with the Montana Human Rights Commission**. An administrative investigation concluded that the allegations were not supported by the evidence. The Complaint was dismissed and plaintiff filed her discrimination claims along with a number of tort claims in District Court.

- **The District Court** granted **summary judgment in favor of both defendants on the tort claims** finding they were barred by the Montana Human Rights Act. The Court also entered summary judgment in favor of McDonalds on the gender and disability claims, but 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 on her tort theories in District Court. The Court concluded that plaintiff may not pursue both tort and Human Rights Act actions based on the same underlying conduct.

- **J. Nelson concurred** in the result but argued 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**.

- **Nelson**: I look "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.

C. HRC's INVESTIGATIVE REPORT IS HEARSAY

Stevenson v. Felco Industries, 209 MT 299 (2009)

- The Montana Court also held, consistent with *Crockett 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.

TOPIC III
RECENT MONTANA WRONGFUL DISCHARGE CASES
A. Effect of Employer Offer of Reinstatement with Full Pay & Benefits

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

- Prior to discharge, plaintiff was employed by defendant Paws Up Ranch. The defendant had a written internal grievance procedure, and plaintiff filed a grievance pursuant to the policy. Ultimately, 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 Supreme Court affirmed.

B. Employer's Pressure on Employee to Quit to Avoid Employee's Health Insurance Costs

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.

- 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 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 concluded that the defendant had discharged plaintiff in retaliation for her refusal to violate public policy.**
- The **jury awarded** $20,000 in compensatory damages, and the District Court awarded Harding $47,000 in attorney fees and costs.
- **Montana Supreme Court affirmed.**

- **The question not addressed:**

  (1) What was the constitutional, statutory, or administrative rule that provided that an employee may not be discriminated against for filing health insurance claims.

  (2) What is that policy and in what constitutional, statutory or administrative rule is the policy stated?

  (3) How can a discharge be in violation of a public policy and yet be for good cause?

TOPIC IV.

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."

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.**

- 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 collective bargaining agreement provided "the [union] 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."**

- 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.

- **Question:** Does the employer now have an obligation to bargain to impasse before it can take unilateral action on transfers and assignments.

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).*

TOPIC V.
Federal Court Review of Montana State Administrative Agency Decisions

- In *BNSF Railway Co. v. O'Dea,* 572 F.3d 785 (9th Cir. July 16, 2009), the **9th Circuit Court of Appeals held that Federal District Courts have diversity jurisdiction over appeals from state administrative agency decisions when state law places such appeals in state trial courts.**

- Plaintiff O’Dea brought an disability discrimination (obesity) against BNSF Railway. The MHRC awarded O’Dea approximately $366,000. Montana law places judicial review in state district court. Both the plaintiff and defendant appealed the HRC ruling to state district court. At some point, defendant sought judicial review in Montana Federal District Court, and asked the state district court to stay its proceedings. the Federal District Court dismissed for lack of jurisdiction. The 9th Circuit reversed concluding that the lower federal court had jurisdiction, and case back for further proceedings.

- The state district court denied defendant’s motion to stay, and entered an order in favor of plaintiff. The state district court’s refusal to enter the stay was then appealed to the Montana Supreme Court.

The Rationale of the 9th Circuit

- The 9th Circuit reluctantly agreed that its previous holding that federal district court's lack jurisdiction to review state agency decision had effectively overturned by the U.S Supreme Court. Thus, it concluded that the Montana federal district court had jurisdiction to review the decision of the Montana HRC. However, the 9th Circuit **appeared to encourage state courts 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."**

The Rationale of the Montana Supreme Court

- The Montana Supreme Court affirmed the state district court's refusal to enter a stay, and its' affirmation of the Montana HRC decision. *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 9th 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 9th Circuit based on the res judicata holding. I do not believe the 9th Circuit's decision will be granted certiori by the United States Supreme Court.

- **Other that 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.

- **There are two or possibly three types of abstention.**

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

- 3. **Unsettled questions of state law**—Issue may be resolved by the interpretation of a state constitution that is of particular importance to the state, or by certifying the issue to the state supreme.

- However, the U.S. Supreme Court has noted that except in exceptionally rare circumstances federal courts are not justified in issuing a stay or dismissal simply because of a concurrent state proceeding.

TOPIC IV.

The Mixed Motive Case as Applied to a Federal Age Discrimination in Employment (ADEA) Case

- In *Gross v. FBL Financial Services, Inc.* 129 S. Ct. 2343, 106 FEPC (BNA) 833 (June 2009) the **U.S. Supreme Court held a mixed motive (same decision) proof is not available in a Federal Age Discrimination in Employment (ADEA) case.** Plaintiff, in an ADEA case, must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action (the single motive case).

- **Expect Congressional action** to reverse the holding. 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.

- 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. Felco Industries, Inc.,* 209 MT 299, 107 Fair Empl. Prac. Cas. (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.**