

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2014-005

**TO:** Mayor John Engen, Bruce Bender, Ginny Merriam, Dept. Human Resources

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** January 29, 2014

**RE:** The Montana Supreme Court indicated Montana's 1987 "Wrongful Discharge from Employment Act" effectively eliminated, superseded, and impliedly repealed Montana's former "Termination at Will" statute which statute was then subsequently repealed in 2001

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### **FACTS:**

The mayor's office received a citizen email inquiry concerning at-will employment which it requested information about.

### **ISSUE(S):**

Pursuant to Montana law, generally, after an employee has successfully completed their probationary employment period, does at will employment continue to exist?

### **CONCLUSION(S):**

No. Pursuant to Montana law, after an employee has successfully completed their probationary employment period the employee generally may not be discharged from employment without good cause.

### **LEGAL DISCUSSION:**

Montana's former "Termination at Will" law was repealed in 2001. There is no definition of "At Will Employment" in Montana state law. In fact many argue that generally "At Will Employment" no longer exists in Montana after an employee has successfully completed their employer's employment probationary time period.

Generally employment at will or "At-Will-Employment" is an employment relationship that is undertaken without an employment contract applicable to the employment relationship, that may

be terminated at any time by either the employer or employee without cause. See Black's Law Dictionary, Eighth Edition, page 566. For example, collective bargaining agreements are a type of contract for employment.

However, in Montana, the 1987 Montana State Legislature enacted the "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT" that is set forth in title 39, chapter 2, part 9 Montana Code Annotated (MCA). Title 39, chapter 2, part 9 MCA is entitled "WRONGFUL DISCHARGE FROM EMPLOYMENT". Montana's "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT", pursuant to sections 39-2-901 MCA, et. seq. established some employment rights for employees who do not have an employment contract and who have successfully completed their employer's probationary period of employment.

Generally, pursuant to Montana's "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT", if the employee has completed the employer's probationary period of employment, the employer must have good cause in order to terminate the employee. See section 39-2-904 MCA. Section 39-2-904 MCA states:

**39-2-904. Elements of wrongful discharge -- presumptive probationary period.** (1) A discharge is wrongful only if:

- (a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
- (b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or
- (c) the employer violated the express provisions of its own written personnel policy.

(2) (a) During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason.

(b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire. (emphasis added)

Pursuant to Montana's "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT", the term "good cause" is defined in subsection 39-2-903(5) MCA as meaning:

"(5) 'Good cause' means reasonable job related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4)"." (emphasis added)

Statutory exemptions are set forth pursuant to section 39-2-912, MCA which states:

**39-2-912. Exemptions.** This part does not apply to a discharge:

- (1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful

discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.

(2) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

Remedies and limitations on actions are set forth in sections 39-2-905 and 39-2-911, MCA which state:

**39-2-905. Remedies.** (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest on the lost wages and fringe benefits. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of [39-2-904\(1\)\(a\)](#).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in subsections (1) and (2).

**39-2-911. Limitation of actions.** (1) An action under this part must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures, other than those specified in [39-2-912](#), under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).

For many decades in Montana state labor law there was a state law, most recently cited as section 39-2-503 MCA and previously cited as section 41-304 Revised Codes of Montana (RCM) 1947 that was entitled "TERMINATION AT WILL", that basically recognized at will employment in

Montana by statute. However, after the Montana State Legislature's 1987 enactment of Montana's "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT", the 1999 Montana Supreme Court in *WHIDDEN v. JOHN S. NERISON, INC.*, 1999 Mt. 110, 294 M 346, 981 P 2d 271 (1999) held that because the plain meaning of the statutory language in Montana's "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT", section 39-2-904 MCA provided that a non-probationary employee (one who had successfully completed the employer's probationary employment period) may not be discharged without good cause, the provisions of the "TERMINATION AT WILL" state law, Section 39-2-503 MCA (formerly 41-304 Revised Codes of Montana (RCM)) were effectively eliminated and were superseded and impliedly repealed by the Montana "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT" adopted by the Montana State Legislature.

The Montana Supreme Court in *Whidden*, *supra*, paragraph 21 stated in pertinent part that: "...we conclude that the WDFEA has effectively eliminated the at-will act. The plain meaning of §§39-2-904(2), MCA again is that outside of the probationary period of employment, an employer may not discharge an employee without good cause. We overrule *Medicine Horse* to the extent that it is inconsistent with this holding. However, we recognize that under §39-2-904(2) MCA, the good cause requirement applies to an employee upon completion of a probationary period. The employer must define the probationary period at the outset of an employment relationship and the employer has the burden of showing the period was in effect at the time of the discharge." (emphasis added)

The 2001 Montana State Legislature then officially through Montana State Legislative action repealed Montana's "TERMINATION AT WILL" state law, section 39-2-503 MCA (formerly 41-304 RCM).

The 2001 Montana State Legislature also amended the "WRONGFUL DISCHARGE FROM EMPLOYMENT ACT", section 39-2-904 MCA entitled 'ELEMENTS OF WRONGFUL DISCHARGE-PRESUMPTIVE PROBATIONARY PERIOD" to insert and establish a six (6) month employee employment probationary period from the date of employment hire if the employer has not established a specific employment probationary time period for their employee(s).

Employees of course retain a right to terminate their employment at any time at their discretion.

It should also be noted that employer personnel policy manuals and/or employer employee handbooks may establish process and procedure and employee rights as well that might apply to certain factual circumstances.

### **CONCLUSION(S):**

No. Pursuant to Montana law, after an employee has successfully completed their probationary employment period the employee generally may not be discharged without good cause.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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