MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 24, 1987

The fifty-first meeting of the Senate Judiciary Committee was called to order at 7:00 p.m. on March 24, 1987 by Chairman Joe Mazurek in Room 402 of the Capitol Building.

ROLL CALL: All members were present.

ACTION ON HB 442: Valencia Lane explained the amendments that the committee asked her to prepare (see Exhibit 1). She stated amendments 2 through 7 discussed who will make the judgement and the amount entitled to the claimant. She commented the jury will return the verdict and the amount, which the judge is given to review and either accept or not accept. The judge must give his reasons for his decision on the claim amount, she said. Senator Mazurek commented there was a proposed amendment that allowed punitive damages to be put in front of the jury. Senator Pinsoneault agreed that the jury makes the decision on the determining amount, the judge reviews it. Senator Mazurek asked why on page 5, line 22, the amendments have the judge making the decision on punitive damage. Valencia explained on line 25, page 5, it refers to judge trials and the list of factors starts on page 3, line 1. Senator Brown asked isn't it the jury who gives the verdict in criminal cases and the judge gives the sentencing. He felt that system should be used here and have the judge give an amount of the claim and not the jury. Senator Pinsoneault said a judge does give a criminal sentencing, but with what the committee has done by making him just decide on whether the jury's amount is proper has taken some of the burden off his shoulders. Senator Mazurek asked the committee if they wanted every punitive damage award based on this criteria. Senator Mazurek explained there are two areas the committee must decide on: 1) who decides the amount, and 2) should there be punitive damage insurance. Senator Brown commented that he agreed with Representative Mercer that a punitive damage law suit should get at the person it is directed toward and not an insurance company, but it is hard to exclude it from all the other coverages. Valencia stated amendments 1, 8, and 9 strike the language prohibiting insurance coverage of punitive damages. Mr. Jim Robischon said if the committee strikes punitive damages, then his Liability Coalition would propose to allow insurance for punitive damages in some cases. He stated it would have to be an "express rider" clause, so it would not effect each policy. Senator Crippen moved amendments 1, 8, and 9 striking the provision against insurance coverage of punitivie damages. The motion carried.

Senator Crippen moved Jim Robischon's amendment (see Exhibit 2) for discussion. The committee asked why the bill needed this amendment, which allowed punitive damage insurance to continue in policies that

included it already, because it is protected in the law. Senator Crippen said the committee was talking about a Supreme Court case on this subject. Senator Mazurek said he was worried about the retroactive effectiveness since it is slated for October and the committee just deleted the insurance part. He asked what the effect of this amendment would be on policies which people thought punitive damages were covered. Valencia answered that on page 7, line 20 the language should be re-inserted because it will make it clear the effective date for the act without upsetting any insurance policy already in place. Senator Crippen added on to his motion on page 7, line 20, to re-insert: "AND policies of insurance issued". Senator Yellowtail felt the insurance companies already have the right to do this if they want and he didn't see why the bill needed it. Senator Mazurek inquired if he renewed an issue, would it still be an issue two years down the road. Valencia pointed out most bills related to insurance have effective dates referring to policies issued or renewed. Senator Mazurek asked if the amendment was adopted, would it apply after October 31, 1987. Jacqueline Terrell, American Insurance Association, said if the policy included the punitive damages, it would bring us into line with other coverages in other areas. They voted on the Robischon's amendment. The motion failed with Senators Yellowtail, Brown, Bishop, Pinsoneault, Halligan, and Blaylock voting no.

Valencia noted on page 2 of her prepared amendments that (9) is taken from the original statute on page four of the bill starting on line 19. She said the phrase on line 22, page four, after "rules":

", outside the presence of the jury,"

was left out of the amendments. Senator Halligan moved Valencia's 2 through 7 amendments, plus the additional wording found on line 22, page 4. He said this allows the judge to approve or disapprove the jury's decision. He said the judge has to tell the defendant the reasons for decreasing or increasing the claim the jury decided upon. Senator Galt asked what happens if the judge doesn't change it. Senator Bishop explained a judge can increase a jury award under existing law. Mr. Robischon said that was correct. Senator Bishop thought this will give the judge a new power. Mr. John Hoyt suggested it would give the court a very careful review. Senator Brown stated with or without the jury, the judge has always justified the decision anyway. Senator Bishop felt it would not be difficult to present an opinion on the amount if the judge has been there through the whole trial. Senator Beck felt it should be left the way it was presented to the committee. The motion to accept amendments 2 through 7, and the additional language passed with Senators Brown, Galt and Beck voting no.

Senator Halligan pointed out page 2, lines 9 through 14, totally eliminated product liability. Senator Halligan moved to delete page 2, lines 9

through 14, because it would allow punitive damages in bad faith cases, but it can't be in breach of contract cases. Senator Brown asked why this should be done. Senator Halligan expressed that was the way contracts were to be handled in this area. The motion carried with Senators Galt, Beck, Pinsoneault and Mazurek voting no.

Senator Halligan moved that on page 2, line 24 to re-insert "oppression". Senator Crippen felt the "oppression" motion was over-stepping it. Senator Halligan added to his motion the definition of oppression on page 4, lines 25, through page 5, line 4. Mr. Robischon said it could allow any person with any action taken against them to sue for punitive damages. Karl Englund told this definition was a Jack Ramirez and Tom Towe creation. The motion failed with only Senator Halligan voting yes.

Senator Pinsoneault moved the bill AS AMENDED BE CONCURRED IN. The motion carried with Senator Yellowtail and Senator Galt voting no.

ACTION ON HB 167: Mr. Robischon presented what the bill does in its present state. He explained the amendments, by the House, dealt with the prohibition against recovery for emotional or mental distress which applies only in cases arising from contract disputes, except in cases of actual physical injury to the plaintiff. He said, for example, in a recent case in Butte, the plaintiffs, who owned a Baskin Robbins franchise, sued Baskin Robbins for damages allegedly caused by Baskin Robbins' refusal to allow the franchise to be relocated to an allegedly more advantageous location in Butte. He said, the plaintiffs recovered not only for contractual damages but also a large sum for emotional distress. He said this bill, as amended, would have prevented the recovery for any emotional distress. Mr. Robischon went over his amendments, which he gave to the committee on March 12th (see Exhibit 3). He explained the new section 1 gives specific areas where no one can receive damages for emotional or mental distress (a through d). Karl Englund said the introduced bill would have emotional distress and mental distress cases in all contract problems. Mr. Englund pointed out the case Mr. Robischon brought in on March 12 about the 1,000 page transcript and a 1 page section on the mental distress involved, which the plaintiff received over 3 million for emotional distress. He felt there should be more proof to emotional distress than what was in that transcript. He explained his March 12 amendment (see Exhibit 4) that allows emotional and mental distress damages if the contract or the breach of contract would particularly cause distress. Jacqueline Terrell stated her group approves of the Robischon amendments because some damages are not associated with contract actions. Mr. Robischon opposed the Englund amendment. Senator Mazurek thought it was too broad. Randy Gray, Farmers Union Insurance, felt the Englund amendment puts it right back where they started. Senator Crippen asked Mr. Robischon if it would expand the bill by including contract cases and bad faith cases. Mr. Robischon answered it just shows more duties and obligations to this statute. He did feel what he had identified

as the duties and obligations were sufficient. Senator Galt moved the Robischon amendments. Senator Mazurek said one can get punitive damages, but not for emotional distress or bad faith cases. Valencia said that was correct. Mr. Robischon added that the House committee felt emotional distress should be kept in tort cases. Senator Yellowtail felt this was an expansion of the bill into the bad faith area and he did not think that it was right. Senator Crippen said he doesn't want to eliminate bad faith. Senator Yellowtail asked if the word "duty" doesn't imply "bad faith". Senator Mazurek stated that has been argued in front of the Supreme Court before. Mr. Englund believed if one has a breach of contract case, unless one has a physical injury, one should not get emotional distress compensation and he said his amendment doesn't deal with punitive damages. Senator Crippen asked Mr. Englund if he would ask the court in his cases for emotional distress. Mr. Englund answered not in contract cases. Senator Halligan moved a substitute motion to leave it the way it is. Senator Mazurek asked the committee if they could move on to HB 592 for the moment. The committee agreed. All motions were withdrawn.

ACTION ON HB 592: Mr. Robischon explained his substitute bill for HB 592 (see Exhibit 5). Mr. Robischon explained the House passed HB 167 and HB 442, which has the same concept as section 1 of his substitute bill, and because of the changes so far in HB 442 and HB 167 it should be put in this bill. He explained in the House's bill it attracts all claims. He stated his section 2 modifies the House's action, because it gets rid of non-negotiable contracts. He explained section 3 is the definition the committee requested. He said it is from the Uniform Commercial Code in the Sales part of the code. He felt it provides for the existence of the claim. Senate Mazurek expressed question on these suggestions because the committee only asked for a definition of "good faith". Mr. Robischon said that because of the action taken tonight, section 1 should be in there and section 2 is an attempt to convince the committee that a party might breach a contract because it was allowed in a statute of the contract. Senator Yellowtail stated the only reason the committee kept the bill is for a real definition and he did not see it. Senator Yellowtail moved BE NOT CONCURRED IN on the bill. Senator Galt made a substitute motion of passing the Robischon substitute bill. Senator Beck said he did not want to see it thrown out because he had received a lot of mail that wanted it passed out. He commented the banks are in a "Catch 22" position because the farmers can run on the bank, the bank can run on the farmer. He asked where does one draw the line on this. Senator Crippen expressed that Mr. Robischon had a definition but would not tell us. Mr. Robischon replied that he wouldn't have argued section 1, but the committee changed HB 442 and HB 167. He said he gave the only definition he had. He stated someone has to take responsibility of this issue before the jury does and section 3 is what the committee is looking for. Karl Englund stated section 1 is only for contract damages and section 2 is only limiting the amount of damages.

Karl Englund agreed with section 3 because it is in the sales code. Senator Mazurek asked when does a "convenant arise". Mr. Robischon said section 2 doesn't do what Mr. Englund said it does. He said it would be any contract that has failed to act, has no implied covenant. Senator Pinsoneault expressed that he doesn't know anyone who has dealt with a bank and has lost something that did not think they got a bad deal. He believed the committee was hearing one side of the story and he felt people will get lawyers to take them to court and use Rule 11, which doesn't work. He stated Robischon's amendment was the best deal. The substitute motion to except the substitute bill failed on a voice vote.

Senator Brown moved a substitute motion to accept just section 2 of the Robischon's bill. Senator Mazurek felt section 2, except for the last four words ("or of such contract") should be included with section 3. Senator Brown added section 2, except for the last four words, to his motion. Mr. Robischon reminded the committee section 2 is the action of the party and not the statute. Senator Brown said he will just go back to his original motion of section 3. Valencia wanted to make clear to the committee that the whole bill is just the definition of "good faith". The motion carried with Senator Galt voting no.

Senator Brown moved a substitute motion of AS AMENDED BE CONCURRED IN on HB 592. Senator Yellowtail felt it still did not do what it was suppose to. The motion carried with Senator Yellowtail voting no.

The committee continued action on HB 167. Senator Crippen moved to reconsider the action to put in an effective date in the bill. The motion to reconsider carried.

Senator Crippen moved the bill. The motion carried (see ROLL CALL Sheet).

ACTION ON HB 241: Senator Pinsoneault commented that the committee had three good meetings on HB 241. He gave the committee the rationales of the Ad Hoc's amendments presented on March 10 (see Exhibit 6) and Barry Hjort's revised amendments presented on March 20 to the subcommittee (see Exhibit 7). He also gave the committee copies of the minutes from the final subcommittee meeting on March 21 (see Exhibit 8). He explained that both sides agreed on amendments 1 through 6 from the Spaeth/Hjort amendments. Senator Pinsoneault moved the first six amendments. The motion carried.

Senator Mazurek asked what the "employer's discretion" meant. Senator Pinsoneault commented on the #3 amendment from the Ad Hoc rationale (see Exhibit 9 and 10, March 10th) about employer's decisions. Senator Bishop asked if they want to cut back on employers discretion or what. Barry Hjort replied there should be the assumption that the decision the

employer made was right or gives him the benefit of the doubt. He didn't like the proposal because it gives what kind of discretion is determined. Senator Pinsoneault said that deleting the employer's discretion is on:

Page 3, line 10.
Following: "DUTIES"
Strike: "OR"
Insert: ","

Page 3, line 11.
Following: "OPERATIONS"
Insert: ", or other legitimate business reason"

which changes the defintion of "good cause". Senator Pinsoneault moved these amendments. Barry Hjort said the Pinsoneault definition was fine. Senator Blaylock wonder what the difference was when saying "any good business reason". No comment. The motion carried with Senator Blaylock voting no.

Senator Pinsoneault open discussion on the eighth amendment of the Spaeth/Hjort amendments (Exhibit 8, page 3). LeRoy Schramm, from the University Systems, did not agree with the eighth amendment, which deleted the three year employment period. Senator Pinsoneault moved the eighth amendment. The motion carried unanimously.

Barry Hjort said the House put in (3) on page 4, line 4, which the Spaeth amendment deletes (#9 amendment). He said to either leave it the way it is or delete the subsection. Senator Pinsoneault stated the word "written" should be taken out because it is not needed. He said most contracts are written. Senator Galt moved to delete (3) on page 4, line 4 in its entirety. Senator Mazurek gave an example of a personnel policy which says a person gets 14 days vacation but the boss fires this person because he took a 14 day vacation and so the guy can use the written personnel policy. John Maynard, Department of Administration, Tort Claims Division, commented the State is sued for not following the progressive punishment policy because this policy has certain steps of discipline to follow. Senator Halligan said businesses will not have a written policy because they will be sued by having written policies to follow, so why have them. Senator Bishop questioned if you follow the policy, you will not get into trouble. Senator Crippen agreed with that. Senator Halligan stated people do not follow one, so why have it. Senator Halligan felt the Pinsoneault/Ad Hoc amendment would deter written policies because many businesses would tear written policies up so they are not sued with wrongful discharge. Senator Mazurek said if you have a huge company, you better have a written personnel policy, but he felt small businesses could go without one. Senator Beck asked which one would someone get sued for, the written policy that was not followed,

or the unwritten one. Senator Beck agreed with Halligan. Barry Hjort felt if it is left the way it is, it will encourage people to tear up a written policy. Senator Mazurek commented that on page 2, line 12, (2), with the Spaeth/Hjort amendments it does not mention a written personnel policy. Senator Crippen spoke out that any employer who doesn't have a written policy will be a damn fool because they have to prove they did not violate the spoken policy. He asked how one is going to do that if nothing is in writing. He felt it can be a defense for the employer. Senator Pinsoenault moved a substitute motion to retain (3) and include the word "written". Senator Beck asked if this still allows non-written policies. Senator Mazurek replied that you better follow the one you have and if you don't have one, you better write one. He pointed out if an employee states he was told a certain policy, that will not stand up in court. The motion carried with Senators Halligan, Yellowtail, Blaylock and Galt voting no.

Senator Galt withdrew his motion to delete all of (3). Senator Pinsoneault moved amendment #10 and #11 on the Spaeth/Hjort amendments. The motion carried unanimously.

Senator Pinsoneault discussed page 6, line 6, section 7. Karl Englund stated if a employer says you are hired for life, you should be able to bring suit against him. He felt if you have a written contract, you better deal with that contract. Mr. Schramm stated the University system has one year contracts and they are not covered under the act right now, but all the employees have to do is let the contract run out, and that will cause litigation. Senator Mazurek asked why do contracts only have specific terms. Mr. Hjort replied if you don't specify the terms, then why do it. Senator Pinsoneault moved amendment #13. The motion carried unanimously.

Barry Hjort explained amendments #14 and #15. He explained on amendment #15 by Gary Spaeth the concern would be other common cause actions would come about for deleting the laundry list. Senator Halligan moved the amendments. The motion carried unanimously.

Senator Pinsoneault moved on:

Page 9, line 3.
Strike: "accruing"
Insert: "arising"

The motion carried unanimously.

Senator Halligan inquired if the committee was going to leave the effective date. The committee agreed to. Senator Halligan questioned if Mike Meloy had thought of the point that an employer can not make an employee go into arbitration after the fact. Senator Pinsoneault said it should have been done before hand. Mr. Hjort told the committee they had

deleted the area of arbitration policy and he did not see any unfairness in this area. Mr. Englund commented arbitration dealt with the attorney fees being paid by the one who would not go into arbitration. Senator Mazurek thought maybe they would not use lawyers at all if they know they have to pay the fees. Barry Hjort thought the process was even. Karl England told stories of arbitrators. Valencia commented that the House took out the word "COLOR" on page 6, line 1, and it is in the Human Rights statute, so it should be put back in there. Senator Halligan moved the amendment. The motion carried.

Senator Pinsoneault moved the bill AS AMENDED BE CONCURRED IN. The motion carried with Halligan voting no.

The committee adjourned at 10:20 p.m.

Chairman

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date March 24 7:00pm

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

SENATE JUDICIARY
EXHIBIT NO. 1
DATE March 24, 1987
BILL NO. HB 442 7:00pm

PROPOSED AMENDMENTS TO HOUSE BILL 442
(Third reading, blue copy)

1. Title, lines 7 and 8.
Following: "CASES;" on line 7
Strike: the remainder of line 7 through "DAMAGES;" on line 8

2. Page 5, line 18.
Following: "(a)"
Strike: "If"
Insert: "When"
Following: "the"
Strike: "trier of fact"
Insert: "jury"

3. Page 5, line 20.
Following: "the"
Strike: "judge"
Insert: "jury"

4. Page 5, line 21.
Following: line 20
Strike: line 21 through "time"
Insert: "be submitted to the judge for review as provided in subsection (8)(c)"

5. Page 5, line 22.
Following: "made"
Insert: "by the judge"

6. Page 5, lines 22 and 23.
Following: "," on line 22
Strike: the remainder of line 22 through "judge" on line 23
Insert: "he"

7. Page 6, lines 17 through 24.
Following: line 16
Strike: subsection (9) in its entirety
Insert: "(c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (8)(b). If, after review, the judge determines that the jury award of punitive damages should be increased or decreased, he may do so. The judge shall clearly state his reasons for increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (8)(b).

(9) The plaintiff may not present, with respect to the issue of exemplary or punitive damages, any evidence to the jury regarding the defendant's financial affairs or net worth unless the judge first rules that the plaintiff has presented a prima facie claim for exemplary or punitive damages."

8. Page 6, line 25 through page 7, line 8.
Strike: sections 3 and 4 in their entirety
Renumber: subsequent sections

9. Page 7, line 20.
Following: "ARISING"
Strike: "AND policies of insurance issued"

7077b/C:JEANNE\WP:jj

SENATE JUDICIARY
EXHIBIT NO. 1
DATE 3-24-87
BILL NO. H.B 442

HOUSE BILL NO. 442

INTRODUCED BY MERCER, MANUEL

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW RELATING TO PUNITIVE DAMAGES; LIMITING THE RIGHT TO RECOVER PUNITIVE DAMAGES; RESTRICTING THE AWARD OF PUNITIVE DAMAGES IN CONTRACT-RELATED CASES; ~~PROHIBITING INSURANCE COVERAGE OF PUNITIVE DAMAGES;~~ AMENDING SECTIONS 27-1-220 AND 27-1-221, MCA; AND PROVIDING APPLICABILITY DATES AND ~~AN IMMEDIATE EFFECTIVE DATE~~."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-1-220, MCA, is amended to read:

"27-1-220. ~~Purpose------factual--basis-for-punitive-or exemplary-damages~~ Punitive damages -- when allowed. ~~The purpose--of--27-1-221--is--to--deter--claims-for-punitive-or exemplary-damages-that-are-not-clearly-based-in-fact,-and-to that-end,-the-legislature-intends-for-27-1-221-to-be-used-in combination-with-early-and-ready-application-and-granting-of motions-for-summary-judgment-pursuant--to--Rule--56--of--the Montana--Rules--of-Civil-Procedure-where-such-claims-are-not based-in-fact,-and-the-application-of-the-sanctions-provided for-in-Rule-11-of--the--Montana--Rules--of--Civil--Procedure against--those--parties--responsible-for-making-such-claims.~~ (1) Except as otherwise expressly provided by statute, a judge or jury may award, in addition to compensatory damages, punitive damages for the sake of example and for the purpose of punishing a defendant.

(2) (A) Unless otherwise expressly provided by statute, punitive damages may not be recovered in any action arising from:

~~(a)~~(I) contract;

~~(b)~~(II) breach of contract;

~~(c)~~(III) breach of any express or implied covenant included within or arising out of a contract; or

~~(d)(IV) a--tort-that-is-interrelated-with-and-dependent upon-a-claim-for-breach-of-contract.~~ TORTIOUS VIOLATION OF ANY EXPRESS OR IMPLIED COVENANT INCLUDED WITHIN OR ARISING OUT OF A CONTRACT.

(B) SUBSECTION (2)(A) DOES NOT PROHIBIT RECOVERY OF PUNITIVE DAMAGES IN A PRODUCTS LIABILITY ACTION OR AN ACTION ARISING UNDER 33-18-201."

Section 2. Section 27-1-221, MCA, is amended to read:

"27-1-221. ~~When-exemplary~~ Punitive damages allowed -- liability -- proof -- award. (1) Subject to subsection (2), ~~in-any-action-for-a-breach-of-an-obligation-not-arising-from contract~~ and the provisions of 27-1-220, reasonable punitive damages may be awarded where the defendant has been guilty of oppression, actual fraud, or actual malice, ~~actual-or presumed,-the-jury,-in-addition-to-the-actual--damages,--may~~

SENATE JUDICIARY
EXHIBIT NO. 1
DATE 3-24-87
BILL NO. H.B. 442

Montana Legislative Council

intentionally-causes-cruel-and-unjust-hardship-by:

(a)--misuse-or-abuse-of-authority-or-power;-or

(b)--taking--advantage-of-some-weakness,-disability,-or misfortune-of-another-person;

(6)--(a)-In-cases-of-actual-fraud-or-actual-malice,-the jury-may-award-reasonable-punitive-damages-after-considering the-circumstances-of-the-case;

(b)--In-all-other--cases--where--punitive--damages--are awarded,--punitive--damages-may-be-in-an-amount-up-to-but-no greater-than-$25,000-or-1%-of--the--defendant's--net--worth, whichever-is-greater;

(7)--In--cases--where--punitive-damages-may-be-awarded, the-jury-shall-not-be-instructed,-informed,--or--advised--in any--manner-as-to-the-limitations-on-the-amount-of-exemplary or-punitive-damages-as-set-forth-in-subsection-(6)(b);

(6)(7) Liability for punitive damages must be determined by the trier of fact, whether judge or jury.

(7)(8) (a) ~~If~~ When the ~~trier of fact~~ jury returns a verdict or finding of liability for punitive damages, the amount thereof must be determined exclusively by the ~~judge~~ jury and ~~judgment entered within a reasonable time~~ be submitted to the judge for review as provided in subsection (8)(c).

(b) When an award of punitive damages is made, ~~the judge~~ he shall clearly state his reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:

SENATE JUDICIARY
EXHIBIT NO. 1
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H.B. 442

(i) the nature and reprehensibility of the defendant's wrongdoing;

(ii) the extent of the defendant's wrongdoing;

(iii) the intent of the defendant in committing the wrong;

(iv) the profitability of the defendant's wrongdoing, if applicable;

(v) the amount of actual damages awarded by the jury;

(vi) the defendant's net worth;

(vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;

(viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and

(ix) any other circumstances which may operate to INCREASE OR reduce, without wholly defeating, punitive damages.

~~(8)(9) Evidence regarding the defendant's financial affairs, financial condition, and net worth may not be admissible in a trial to determine whether a defendant is liable for punitive damages, except that evidence of the defendant's net worth must be considered by the judge in determining the amount of punitive damages to be awarded in those cases where liability for such an award has been determined.~~

~~NEW SECTION. Section 3. Insurance coverage of~~

(c) The judge shall review a jury award---

(9) The plaintiff may not present, ---

HB 442

SENATE JUDICIARY
EXHIBIT NO. 2
DATE March 24, 1987
BILL NO. HB 442 7:00pm.

Page 6, line 25

Following: Section 3

Strike line 25 through page 7, line 4

Insert: "Insurance coverage does not extend to punitive or exemplary damages unless the insurance contract specifically includes such coverage."

SENATE JUDICIARY
EXHIBIT NO. 3
DATE March 24, 1987
BILL NO. HB 167 7:40 pm.

HOUSE BILL NO. 167

Third Reading Copy

1. Strike: Everything after the enacting clause

2. Insert: NEW SECTION. Section 1. Damages for emotional or mental distress prohibited in contract actions or actions arising out of contract. (1) Except in those actions involving actual physical injury to the plaintiff, damages for emotional or mental distress may not be recovered in any action arising from:

(a) contract

(b) breach of contract;

(c) breach of any express or implied duty of good faith and fair dealing; or

(d) tortious breach of any express or implied covenant including but not limited to those arising out of a contract.

(2) As used in subsection (1) or this section, emotional or mental distress includes but is not limited to mental anguish or suffering, sorrow, grief, fright, shame, embarrassment, humiliation, anger, chagrin, disappointment, or worry."

SENATE JUDICIARY
EXHIBIT NO. 4
DATE March 24, 1984
BILL NO. HB 167 7:00pm

PROPOSED AMENDMENT TO HOUSE BILL 167 - THIRD READING COPY

Page 1, Line 18

Following: "plaintiff"

Insert: "or the contract or the breach is of such a kind that emotional disturbance was a particularly likely result"

SENATE JUDICIARY
EXHIBIT NO. 5
DATE March 24, 1987
BILL NO. HB 592 7:00pm

SUBSTITUTE HB 592

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT, UNLESS OTHERWISE PROVIDED IN STATUTE, DAMAGES FOR BAD FAITH AND BREACH OR TORTIOUS VIOLATION OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ARE LIMITED TO THE MEASURE OF CONTRACT DAMAGES; PROVIDING THAT A PARTY MAY NOT BE FOUND TO HAVE BREACHED THE COVENANT IF ITS ACTION WAS BASED UPON A STATUTORY OR CONTRACTUAL RIGHT; DEFINING GOOD FAITH CONDUCT; AND PROVIDING AN APPLICABILITY DATE AND AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA.

Section 1. Damages. Unless otherwise expressly provided by statute, damages for breach or tortious violation of an implied covenant of good faith and fair dealing shall be limited to the measure of damages for breach of contract.

Section 2. When covenant applicable. An action for breach or tortious violation of an implied covenant of good faith and fair dealing included within or arising out of a contract may not be maintained against a party whose act or failure to act is permitted by any provision of statute or of such contract.

Section 3. Definition. The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Section 4. Applicability. This act applies to causes of action arising after the effective date of this act.

Section 5. Effective date. This act is effective July 1, 1987.

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SENATE JUDICIARY
EXHIBIT NO. 6
DATE March 24, 1987
BILL NO. HB 241 7:00pm.

March 19, 1987

Mr. Richard Pinsoneault
Chairman-H.B. 241
State Capitol
Helena, Montana

Re: Amendments Proposed By Barry Hjort

Dear Mr. Pinsoneault:

You requested that I comment concerning the amendments proposed by Barry Hjort on March 18, 1987, at the subcommittee hearing.

Amendments 1 - 6 The ad-hoc committee would have no objection.

Amendment 7 The ad-hoc committee opposes reinserting language which was deleted through prior amendments in the House of Representatives. Proponents of this amendment seek to place the bill back in its original form. The definition of "good cause" in its present form along with the amendments suggested by the ad-hoc committee fairly and reasonably inform employers what "good cause" means -- a goal sought by this legislation. No further changes should be made.

Amendment 8 I believe that the amendments suggested by the ad-hoc committee on damage limitations are more appropriate. Moreover, it would seem to be inconsistent to allow recovery of punitive damages when the bill in its present form does not even allow for recovery of general or compensatory damages which the employee could prove. The ad-hoc committee once again opposes the limitations as to proof of an employee's damages.

Amendment 9 See above.

Amendment 10 This refers to Section 7, Exemptions, found at page 5 of the bill. Mr. Hjort seeks to delete the entire section. This section of the original bill exempts from the law discharges that relate to unlawful discrimination based on race, national origin, sex, handi-

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cap, creed, religion, political belief, marital status, or other similar grounds. This provision lists the obvious public policy exceptions. Simply put, an employee should not be discharged for filing complaints, charges or claims on the basis of unlawful discrimination. If such a discharge took place, an employee should be allowed to recover without limitation his provable damages. My suggestion is not to delete this section but to have as a prerequisite to filing a wrongful discharge case a determination made by an administrative body which finds that there has been, in fact, unlawful discrimination for one of the enumerated bases. Therefore, I oppose the deletion of the exemption but would recommend that a procedure be added to require the employee first have a determinative finding of unlawful discrimination. Otherwise, deletion of the provision would be an attempt to try and prevent even an administrative remedy for such unlawful discharges.

Amendment 11 No objection

Amendment 12 The ad-hoc committee strongly opposes removing sub-section (2) on page 7 of the original bill. This subsection was inserted after much debate in the House of Representatives and reflects a compromise provision. The committee here is seeking to limit wrongful discharge cases; it has nothing to do with independent causes of action or independent claims which the committee cannot foresee at the present time. There are times that a cause of action arises separate from a discharge but which occurs within the employment setting. That wrong, independent of wrongful discharge, should have a remedy. For example, an employer should not be able to defame, libel, or slander any person whether or not an employee. This sub-section should not be altered.

Finally, I wish to thank the members of the committee for allowing the opportunity for the ad-hoc committee's input. The ad-hoc committee, consisting of employer representatives, employee representatives and personnel experts worked long and hard to create amendments which were compromises from all viewpoints. I personally am not satisfied with the original bill or all of its amendments. However, in the spirit of cooperation and compromise, I endorse the amendment proposals of the ad-hoc committee as written. Because this bill has such serious implications for so many people in the state of Montana, I hope that this

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legislative committee will seriously consider the amendments proposed by the ad-hoc committee.

Respectfully submitted,

Monte D. Beck

cc: Don Robinson
Karl Englund
Tom L. Lewis
Donald W. Molloy
Alan D. Brown
Joan M. Jonkel
Mary E. Van Buskirk
Kim L. Ritter
Peter M. Meloy

Enclosure

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RATIONALE FOR PROPOSED AMENDMENTS

TO HB 241

* * * * *

Pursuant to a request by Senator R.J. "Dick" Pinsoneault, this memorandum is being submitted to explain the rationale of the proposed amendments to HB 241 which are attached.

1. Proposed amendments 1-6 are intended to insure that the bill applies to all forms of termination of employment which an employee might claim to be a "wrongful discharge" within the meaning of the bill.

2. Amendment 7 deals with one of the most critical aspects of the bill: the definition of what constitutes "good cause."

As introduced, the bill defined good cause as "a legitimate business reason." In place of this definition the House substituted the following: " 'Good cause' means reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties or disruption of the employer's operation."

The problem with the House amendment is that it is too narrow, because it would not allow employers to discharge employees for legitimate economic reasons such as lack of work, elimination of the job, etc.

The original definition of good cause -- a legitimate business reason -- would be broad enough to cover all of the various kinds of termination of employment. Under the original definition, the employee's interest in job security would be protected by requiring that the employer in fact have a legitimate reason for discharge. At the same time, the employer's interest in management discretion would be protected by allowing businesses to make employment decisions for

business reasons.

3. Proposed amendment 8 is in fact an amendment recommended by the Ad Hoc Committee. This amendment would allow employers to set probationary periods of employment, and would require that a discharge be "for good cause" once the employee has satisfied the probationary period.

4. Proposed amendment 9 would delete subsection (3) of Section 4 of the bill, which was added by a subcommittee of the House Judiciary Committee, and which provides a separate and independent basis for finding a discharge to be wrongful if the employer is found to have violated the express provisions of its own written personnel policy. The Ad Hoc Committee has suggested that this provision may encourage employers to discard their written personnel policies and resort to unwritten policies "simply to avoid discharge suits." In order to avoid this problem, it is submitted that subsection (3) should be deleted in its entirety, with the issue of violation of personnel policies being dealt with under the "good cause" standard. In this regard, a violation of an employer's personnel policy would certainly be strong evidence that the termination was not for a legitimate business reason.

5. Proposed amendments 10 and 11 would allow an employee to recover punitive damages if there is clear and convincing evidence of actual fraud or actual malice in connection with a public policy discharge.

6. In a recent decision in the Drinkwalter case the Montana Supreme Court has suggested that it may be possible to bring a discrimination claim directly in district court, without first having to proceed before the Montana Human Rights Commission. If this proves

to be the law, discrimination claims filed directly in district court should be made subject to the provisions of HB 241. Proposed amendment 12 covers this situation by removing from the bill the exclusion for discrimination claims.

7. Proposed amendment 13 is an amendment suggested by the Ad Hoc Committee. The purpose of the amendment is to prevent employers from attempting to avoid litigation by creating arbitration policies after a discharge has occurred.

8. Proposed amendment 14 changes the term "wrongful discharge" in Section 8 to "discharge." The reason for the amendment is to conform to the definition section of the bill, which defines the word "discharge," and not "wrongful discharge."

9. Proposed amendment 15 is intended to clarify the pre-emptive effect of the bill, to insure that this bill provides the sole and exclusive remedy for claims arising from a discharge from employment.

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CATEST

Friday 20th

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BILL NO. H.B. 241

AMENDMENTS - HB 241
(Third Reading Copy)

1. Page 1, line 23. After the word "employment." delete the following sentence. (Spaeth)

2. Page 2, line 13. After the word "and" delete "means the" and insert "any other". (Spaeth)

3. Page 2, line 14. After the word "employment" delete "through an action other than retirement," and insert "including resignation,". (Spaeth)

4. Page 2, line 15. After the word "work," insert "failure to recall or rehire and". (Spaeth)

5. Page 2, line 17. After the word "reason," insert "." and strike "or resignation." (Spaeth)

6. Page 2, line 22. Delete subsection (4), and renumber the following subsections accordingly. (Spaeth)

7. Page 3, line 9. Delete lines 9, 10 and 11 and insert "a legitimate business reason." (Spaeth)

8. Page 3, line 25. Delete subsection (2) and insert "(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment." (Ad Hoc Committee)

adopt

9. Page 4, line 4. Delete subsection (3). (Spaeth)

10. Page 4, line 14. Add a new subsection (2) as follows: "(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 Section 4(1)." (Spaeth as suggested by Ad Hoc Committee)

11. Page 4, line 19. After the word "(1)." insert "and (2)." (Spaeth as suggested by Ad Hoc Committee)

12. Page 5, line 20. Delete subsection (1) in its entirety and renumber following sections accordingly. (Spaeth)

13. Page 6, line 6. Delete subsection (3) in its entirety. (Ad Hoc Committee) ?

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14. Page 6, line 15. After the word "for" delete "wrongful". (Spaeth)

15. Page 6, line 17. After the word "contract" insert "." and delete the remainder of subsection (1) and all of subsection (2). (Spaeth)

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MINUTES OF SUBCOMMITTEE ON
WRONGFUL DISCHARGE (Judiciary)

March 21, 1987

The Senate Judiciary subcommittee on Wrongful Discharge met on Saturday morning, the 21st of March, 1987, at 7:00 a.m. in Room No. 325. Present at the meeting were all subcommittee members: Senators Galt, Beck, Halligan and Pinsoneault.

Carl England, who represents the Montana Trial Lawyers, was present and acted as secretary for the committee during its deliberations. The following action was taken by the subcommittee relating to HB 241. (1) The committee had been presented by the Coalition, certain amendments to HB 241, which are referred to in these minutes as the Spaeth amendments. There was no objection voiced by the ad hoc committee on wrongful discharge to the proposed amendments 1 through 6 of the Spaeth amendments. On motion of Senator Halligan, the committee agreed concerning the proposed Spaeth amendment #7, that the language in the 3rd Reading bill be kept in tact and that from the proposed amendment of the ad hoc committee, that there be added the following sentence. "Employer discretions must be taken into consideration by the trier of fact in applying the "good cause" standard." The vote on the amendment was 3 voting yes and Senator Galt voting no.

(2) Senator Halligan moved that the subcommittee adopt Spaeth amendment #8. All committee members moved in favor of the motion.

(3) Senator Galt moved that the committee adopt the Spaeth amendment #9, with Sen. Galt voting yes and Senators Beck and Halligan voting no. Motion failed.

Senator Halligan then moved that at line 4, page 4, that (3) be retained and modified as follows: "The employer violated the

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express provisions of its own personnel policies." On the voting, Senator Galt voted no and Senators Beck and Halligan voted yes.

(4) Spaeth amendments #10 and #11 were moved to be adopted by Senator Halligan, the subcommittee voted unanimously in favor of the motion. In addition, on page 4, line 19, following "(1) close friends" add ":" and "and (2)".

(5) Senator Galt moved Spaeth amendment #12. Motion failed with Sen. Galt voting yes and Senators Pinsoneault, Beck and Halligan voting no.

(6) Senator Galt moved Spaeth amendment #13. The committee voted unanimously to accept Spaeth amendment #13.

(7) Senator Beck moved Spaeth amendment #14. The subcommittee voted unanimously for the motion.

(8) Senator Galt moved Spaeth amendment #15. Senators Beck, Pinsoneault and Galt voted yes and Senator Halligan voted no. The motion carried.

(9) Motion was made by Senator Halligan that on page 9, line 3, that the word "accruing" be stricken and that inserted in its place, the word "arising".

The meeting adjourned at 7:55 a.m.

Senator R. J. "Dick" Pinsoneault

CATEST

Friday 20th

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AMENDMENTS - HB 241
(Third Reading Copy)

1. Page 1, line 23. After the word "employment." delete the following sentence. (Spaeth)

2. Page 2, line 13. After the word "and" delete "means the" and insert "any other". (Spaeth)

3. Page 2, line 14. After the word "employment" delete "through an action other than retirement," and insert "including resignation,". (Spaeth)

4. Page 2, line 15. After the word "work," insert "failure to recall or rehire and". (Spaeth)

5. Page 2, line 17. After the word "reason," insert "." and strike "or resignation." (Spaeth)

6. Page 2, line 22. Delete subsection (4), and renumber the following subsections accordingly. (Spaeth)

7. Page 3, line 9. Delete lines 9, 10 and 11 and insert "a legitimate business reason." (Spaeth)

8. Page 3, line 25. Delete subsection (2) and insert "(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment." (Ad Hoc Committee)

adopted

9. Page 4, line 4. Delete subsection (3). (Spaeth)

10. Page 4, line 14. Add a new subsection (2) as follows: "(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 Section 4(1)." (Spaeth as suggested by Ad Hoc Committee)

11. Page 4, line 19. After the word "(1)." insert "and (2)." (Spaeth as suggested by Ad Hoc Committee)

12. Page 5, line 20. Delete subsection (1) in its entirety and renumber following sections accordingly. (Spaeth)

13. Page 6, line 6. Delete subsection (3) in its entirety. (Ad Hoc Committee) ?

14. Page 6, line 15. After the word "for" delete "wrongful". (Spaeth)

15. Page 6, line 17. After the word "contract" insert "." and delete the remainder of subsection (1) and all of subsection (2). (Spaeth)

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HOUSE BILL NO. 241

INTRODUCED BY SPAETH, THAYER, HOLLIDAY, POULSEN, COBB, BOYLAN, RASMUSSEN, HARP, DONALDSON, THOMAS, MERCER, MAZUREK, MANUEL

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A PROCEDURE AND REMEDIES FOR WRONGFUL DISCHARGE; AUTHORIZING ARBITRATION AS AN ALTERNATIVE; ELIMINATING COMMON-LAW REMEDIES; REPEALING SECTIONS 39-2-504 AND 39-2-505, MCA; AND PROVIDING AN APPLICABILITY CLAUSE AND AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 9] may be cited as the "Wrongful Discharge From Employment Act".

Section 2. Purpose. [Sections 1 through 9] set forth certain rights and remedies with respect to wrongful discharge. Except as limited in [sections 1 through 9], employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party. Except as provided in [section 7], [sections 1 through 9] provide the exclusive remedy for a wrongful discharge from employment. [~~Sections 1 through 9] do not apply to any employment-related personnel action other than wrongful discharge.~~

Section 3. Definitions. In [sections 1 through 9], the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" INCLUDES A CONSTRUCTIVE DISCHARGE AS DEFINED IN SUBSECTION (1) AND ~~means the~~ any other termination of employment ~~through an action other than retirement~~ including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire and any other cutback in the number of employees for a legitimate business reason. ~~or resignation not constituting a constructive discharge. Discharge includes constructive discharge.~~

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

~~(4) "Employment-related personnel action" means an employer's action or failure to act involving discharge or other termination of employment, suspension, removal, failure to recall or rehire, demotion, discipline,~~

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~~promotion, transfer, assignment, pay, or change in pay or benefits.~~

(4) (5) "FRINGE BENEFITS" MEANS THE VALUE OF ANY EMPLOYER-PAID VACATION LEAVE, SICK LEAVE, MEDICAL INSURANCE PLAN, DISABILITY INSURANCE PLAN, LIFE INSURANCE PLAN, AND PENSION BENEFIT PLAN IN FORCE ON THE DATE OF THE TERMINATION.

(5) ~~(5)~~ (6) "Good cause" means ~~a legitimate business reason~~ REASONABLE, JOB-RELATED GROUNDS FOR DISMISSAL BASED ON A FAILURE TO SATISFACTORILY PERFORM JOB DUTIES OR DISRUPTION OF THE EMPLOYER'S OPERATION. Employer discretion must be taken into consideration by the trier of fact in applying the "good cause" standard.

(6) ~~(6)~~ (7) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) ~~(7)~~ (8) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

Section 4. Elements of wrongful discharge. A discharge is wrongful ONLY if:

(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; or

~~(2) the employee was employed by the employer for at~~ (2) the discharge was not for good cause and

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the employee had completed the employer's probationary period of employment.

~~least 1,000 hours a year for 5 3 consecutive years immediately preceding the discharge and the discharge was not for good cause; OR~~

(3) THE EMPLOYER VIOLATED THE EXPRESS PROVISIONS OF ITS OWN ~~WRITTEN~~ PERSONNEL ~~POLICY.~~ Policies.

Section 5. 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 ~~2~~ 3 years from the date of discharge, TOGETHER WITH INTEREST THEREON. Interim earnings, including unemployment--compensation benefits and amounts earnable with reasonable--diligence--by the--employee THE EMPLOYEE COULD HAVE EARNED WITH REASONABLE DILIGENCE, must be deducted from the amount awarded for lost wages. (2) *

(3) (2) There is no right under any legal theory to damages for wrongful discharge under [sections 1 through 9] for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages not, EXCEPT AS provided for in subsection (1) and (2).

Section 6. Limitation of actions. (1) An action under [sections 1 through 9] must be filed within 1 year after the date of discharge.

(2) If an employer maintains WRITTEN internal procedures, other than those specified in [section 7], under which an employee may appeal a discharge within the

* (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 and actual malice in the discharge of the employee in violation of section 4(1)

organization structure of the employer, no-suit-for-wrongful discharge-may-be-brought,-and-the-time-for-bringing-the-suit under-subsection-(1)--does--not--begin--to--run,--until--the employee--has-exhausted-those-procedures. THE EMPLOYEE SHALL FIRST EXHAUST THOSE PROCEDURES PRIOR TO FILING AN ACTION UNDER [SECTIONS 1 THROUGH 9]. THE EMPLOYEE'S FAILURE TO INITIATE OR EXHAUST AVAILABLE INTERNAL PROCEDURES IS A DEFENSE TO AN ACTION BROUGHT UNDER [SECTIONS 1 THROUGH 9]. 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 [SECTIONS 1 THROUGH 9] 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.

Section 7. Exemptions. [Sections 1 through 9] do 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. Such 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,

handicap, 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; or

~~(3) of an employee who is covered by an employment policy that provides for final and binding arbitration before a neutral third-party.~~

Section 8. Preemption of common-law remedies. ~~[Sections--1-through-9]-preempt-all-other-rights-relating-to and-claims-seeking--redress--for--wrongful--discharge.--This preemption--includes-but-is-not-limited-to-rights-and-claims at-common-law-or-in-equity-that-arise-from-tort--or--express or-implied-contract,-including-claims-that-are~~ (1) EXCEPT AS PROVIDED IN [SECTIONS 1 THROUGH 9], NO CLAIM FOR ~~WRONGFUL~~ DISCHARGE MAY ARISE FROM TORT OR EXPRESS OR IMPLIED CONTRACT, NOR MAY IT BE based on:

~~(1)~~(A) public policy;

~~(2)~~(B) an implied covenant of good faith and fair dealing;

~~(3)~~(C) intentional or negligent interference with contractual rights, prospective or otherwise;

~~(4)~~(D) intentional or negligent infliction of emotional distress;

~~(5)--fraud;~~

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~~(6)--defamation;~~

~~(7)~~(E) breach of fiduciary duty;

~~(8)~~(F) negligent or intentional misrepresentation; OR

~~(9)--loss-of-consortium;--or~~

~~(10)~~(G) negligence.

(2) THIS SECTION DOES NOT PREEMPT INDEPENDENT CAUSES OF ACTION OR INDEPENDENT CLAIMS, OTHER THAN FOR WRONGFUL DISCHARGE, UNDER SUBSECTIONS (1)(A) THROUGH (1)(G) SIMPLY BECAUSE THEY ARISE IN THE EMPLOYMENT SETTING.

Section 9. Arbitration. (1) Under a written agreement of the parties, a dispute that otherwise could be adjudicated under [sections 1 through 9] may be resolved by final and binding arbitration as provided in this section.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) A neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

(b) In the absence of a written agreement to allocate the arbitrator's fees and the arbitration costs, the employer and the employee shall each pay one-half of those fees and costs.

(c) The arbitration must be governed by the Uniform Arbitration Act, Title 27, chapter 5. If there is a conflict between the Uniform Arbitration Act and [sections 1 through

9], [sections 1 through 9] apply.

(d) The arbitrator is bound by [sections 1 through 9].

(3) If a complaint is filed under [sections 1 through 9], the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

(4) A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under [sections 1 through 9] is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.

(5) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under [sections 1 through 8]. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.

Section 10. Repealer. Sections 39-2-504 and 39-2-505, MCA, are repealed.

Section 11. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the

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1 invalid applications.

2 Section 12. Applicability. This act applies to claims

3 ~~accruing~~ arising after the effective date of this act ~~and-to-claims~~

4 ~~accruing-prior-to-the-effective-date-of-this-act--that--have~~

5 ~~not-been-filed.~~

6 SECTION 13. EFFECTIVE DATE. THIS ACT IS EFFECTIVE

7 JULY 1, 1987.

-End-

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RATIONALE OF PROPOSED AMENDMENTS TO HB 241

The Ad Hoc Committee's proposed amendments have attempted to address both employee and employer concerns. The overall rationale of the amendments was to limit wrongful discharge suits to legitimate cases in which employees have been illegally discharged, but for which there would not be adequate or fair redress under the bill as written. The amendments also attempt to establish more specific definitions and standards that are in conformity with present law and/or personnel practices. The proposed amendments are discussed as follows:

Proposed Amendment No.	Subject	Rationale
1	Constructive Discharge	Since the legislation eliminates any actions arising out of layoffs, etc. (which is not proposed to be changed), nevertheless employers should not be allowed to engage in short-term layoffs, then fail or refuse to recall employees for illegal reasons or in violation of their personnel policy. Example: A mill engages in a layoff of several hundred employees for a short time, then fails or refuses to recall older employees with good work records simply because of their age or pension benefits, etc., and in violation of the employer's personnel policy assuring recall rights to laid off employees, before hiring new employees. The bill as presently written would not allow a remedy for an employee who is subject to this type of unfair and illegal conduct.
2	Constructive Discharge	Deletion of the words "failure to recall or rehire" is consistent with Proposed Amendment No. 1. While the original layoff is not subject to wrongful discharge suit, an employer should not be allowed to ignore the rights of laid off employees with impunity.
3	Good Cause	The proposed amendment would provide the courts with a strict definition of "good cause." The proposed definition has been recognized by both courts and arbitrators for many years. Also, it makes it clear that the trier of fact (jury or arbitrator) should not be allowed to "second guess" the employer's decision to terminate for good cause, if the decision met the standard proposed.

4	Public Policy, definition	The present language is too restrictive and fails to encompass situations where employees may be unfairly discharged. Presently the bill does not allow for situations in which an employee is discharged for insisting upon compliance with established and accepted industry safety practices which are recognized by the employer himself. Further, it does not allow for situations where an employee is discharged for engaging in a civic duty (e.g., jury service, voting, etc.). The proposed expansion of the definition of "public policy" is consistent with case law not only in Montana but throughout the United States recognizing this type of public policy definition.
5	Public Policy, Cause of Action	This proposed amendment is consistent with Proposed Amendment No. 4. Furthermore, it makes it clear that an employee cannot bootstrap an violation of a statute for which there is a specific remedy (e.g., discrimination statutes) into a wrongful discharge suit.
6	Part-time Employees, Probationary Employees, and Good Cause	The proposed amendment reflects both employee and employer concerns of the present bill, which limits wrongful discharge suits to employees with three (3) or more years of service and to employees who work more than 1,000 hours per year. Example: Employees with good records who have faithfully worked part-time for 20 years would have no remedy to an otherwise clearly unlawful discharge. Further, the law would encourage employers to reduce the hours of employees (usually the lower-paid and most vulnerable employees) to 990 hours per year just to be in a position to claim this exemption. The 3-year provision, while obviously designed to prevent suits by employees with short tenure, also has a double-edged effect of creating an implication of "tenure" for employees who have been employed for more than 3 years. Further, if the employee has satisfied the employer's probationary period (which the proposed amendment would allow the employer to decide), then such an employee should have the same protection as other employees. Establishing artificial tenure requirements lends itself to manipulation of employee rights merely for the sake of positioning an employer to avoid an otherwise legitimate wrongful discharge suit.

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The amendment would thus simplify the situation and allow suits for employees who were discharged not for good cause and have otherwise satisfied the employer's probationary period, and would allow suits by part-time employees as well.

7 Personnel Policy

The bill as presently written would allow a suit only when the discharge was in violation of an "express" provision of a "written" personnel policy.

It is felt that this provision would provide a great temptation for employers who have written policies to tear them up and use unwritten, sub rosa policies, simply to avoid discharge suits. This would do a disservice both to employees and employers who have established written policies. Furthermore, an employee should not be discharged in violation of an established unwritten policy of employment. Again, the legislation as written would promote subterfuge and destroy the incentive for employers to clearly define their policies. The legislation should encourage, not discourage, employers to avoid wrongful discharge suits by establishing clear policies and guidelines for employment and discharge.

8 Damages Limitations, Wages

This amendment, while recognizing the 3-year limitation on back-pay for younger employees who have better ability to become re-employed following a wrongful discharge, allows for recognition of employees who are 40 years or more of age and who have been employed for more than 10 years. The example situation is an employee 57 years of age who has worked for the employer for 30 years. An employee who has reached that age, and has limited his employment skills to the specialized needs of his employer, should be allowed to show that it is unlikely that he can become re-employed at age 57 in a similar job, if that is the evidence presented. The amendment would still allow the jury to consider whether that is a legitimate claim, and to offset for other earnings. However, the legislation as written is patently unfair to older and more vulnerable employees who frequently are unable to re-enter the job force on the pay levels previously earned. They should at least have the opportunity to present a legitimate claim for economic losses that extend beyond the 3-year period.

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9	Damages Limitations, General and Punitive Damages	The proposed amendment would allow for punitive damages for those limited cases where the discharge is outrageous and motivated by actual fraud or actual malice. The unjustified and malicious taking of a citizen's livelihood should be as subject to punitive damages as are allowed for other outrageous conduct which takes away life or property. The punitive damages standard is strictly established, however, to cases where the evidence is "clear and convincing." The proposed amendment is intended to weed out spurious punitive damages claims, but to allow them where they are truly justified. With respect to general, non-economic damages, the amendment would allow them to be recovered as "otherwise allowed by law." Other legislation is pending (e.g., HB 167) which would limit the recovery of these kinds of damages in all types of lawsuits. It is felt that however the law is eventually applied, it should apply to discharge suits in the same manner as allowed in other types of litigation.
10	Statute of Limitations	The proposed amendment would allow for a two-year statute of limitations, consistent with the limitations periods for other property damage claims. The one-year period is too short, and again it was felt that suits involving loss of livelihood should not be given a "second class" status under the law.
11	Arbitration	The bill as presently written allows an employer to avoid the court system by creating a final and binding arbitration policy for wrongfully discharged employees, even though the arbitration was not agreed to by the employee and even though the policy was unwritten. The proposed amendment would delete this provision for the following reasons: (1) The arbitration "policy" would not have to be in writing. Thus an employer who was sued could suddenly develop an arbitration "policy" that had not previously existed. (2) The arbitration provision repeals the historically established notion that arbitration should always be a mutual and consensual procedure, not one unilaterally imposed by one party. (3) It is an unfair (if not unconstitutional) deprivation of access to the courts.

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(4) A wrongful discharge case that involves the loss of a job should not be relegated to a "second class" legal status. An employee should be entitled to the protection of the established legal system under established legal rules and procedures.

12	Arbitration, Penalty for Refusing	The proposed amendment would delete this provision, which would penalize a party who refuses to go to arbitration. It is unfair for the reasons set forth in Proposed Amendment No. 11. This provision is also double-edged in that it might promote more unmeritorious claims than it would avoid (demand by a discharged employee to go to arbitration on his claim, which he might not be willing to pursue if he had to undergo judicial scrutiny of it).
13	Effective Date	The proposed amendment is simply a change in semantics to make the meaning of the effective date more clear. It is not clear what is meant by a claim "accruing" and needless litigation may occur to define or decide what is meant by it. The word "arising" will avoid any such confusion.

SUMMARY

The foregoing proposed amendments were suggested and drafted by a group of personnel experts and attorneys who attempted to reflect a balanced concern for both employee and employer rights. The group was composed of the following:

1. Alan Brown, a personnel expert from Missoula who represents and/or testifies on behalf of both employees and employers.

2. Kim L. Ritter, an attorney with Milodragovich, Dale & Dye, Missoula. Her firm defends wrongful discharge suits on behalf of employers, but does have some experience in representing discharged employees as well.

3. Joan Jonkel, an attorney in Missoula, who represents primarily discharged employees, but also counsels employer clients on this subject.

4. Monte Beck, an attorney in Bozeman, who represents primarily discharged employees.

5. Mike Meloy, an attorney in Helena, who represents discharged employees, but also counsels employer clients on this subject.

6. Donald Robinson, an attorney in Butte, who represents primarily employers in discharge suits and counsels management, but also has represented discharged employees.

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SENATE JUDICIARY
EXHIBIT NO. 10
DATE March 24, 1987
BILL NO. HB 241 7:00pm

PROPOSED AMENDMENTS TO HB 241

(An act providing a procedure and remedies for wrongful discharge)

An Ad Hoc Committee of personnel experts and attorneys who deal with wrongful termination issues in Montana, both from the perspective of discharged employees and employers, met to review HB 241, which is pending before the Senate Judiciary Committee. A hearing before the Senate committee is scheduled for March 10, 1987, at 10:00 a.m. The following amendments were proposed by the Ad Hoc Committee for consideration by the Senate Judiciary Committee:

Proposed Amendment No.	Page	Lines	Section, Paragraph & Subject	Text of Amendment
1	2	8	3.(1) Constructive Discharge	Add the following after the word "alternative": "Constructive discharge shall also mean the failure to recall or rehire a laid off employee in a fair and non-discriminatory manner, or in violation of the employer's personnel policy."
2	2	25	3.(4) Constructive Discharge	Delete the words "failure to recall or rehire"
3	3	11	3.(6) Good Cause Discharge	Add the following to the definition of "good cause": "'Good cause' means a fair and honest cause or reason regulated by good faith on the part of the employer in his decision to terminate an employee. Managerial discretion must be taken in to consideration by the trier of fact in applying the 'good cause' standard."
4	3	19	3.(8) Public Policy Definition	Add the following at line 19, following the word "rule": ". . . or established custom, practice, or law which recognizes the performance of an act that public policy would encourage or the refusal to perform an act that public policy would condemn."

5	3	22-23	4.(1) Public Policy	Delete the words "retaliation for the employee's refusal to violate public policy or for reporting a" and add on line 24, following the word "policy" the following: ". . for which there is no other statutory remedy." The paragraph would thus read: "(1) it was in violation of public policy for which there is no other statutory remedy."
6	3-4	25; 1-3	4.(2) Part-time Employees, Probationary Employees, And Good Cause	Delete as presently written and insert the following: "(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment."
7	4	4-5	4.(3) Personnel Policy	Delete the word "express" on line 4 and the word "written" on line 5
8	4	14	5.(1) Damages Limitation, Wages	Add the following sentence to this paragraph, beginning at line 14: "This limitation shall not apply to a discharge in violation of public policy or where the employee is in the protected age class of employees under federal or state anti-discrimination laws and has been employed for ten (10) or more years of service."
9	4	15-19	5.(2) Damages Limitations, General and Punitive	Delete the present paragraph and insert the following: "The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer has engaged in actual fraud or actual malice in the discharge. General damages shall be as otherwise allowed by law."
10	4	21	6. Statute of Limitation	Delete the number "1" and insert the number "2."

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11	6	6-8	7.(3) Arbitration	Delete this paragraph in its entirety.
12	8	7-11	9.(4) Penalty for Declining Arbitration	Delete this paragraph in its entirety.
13	9	3	12. Effective Date	On line 3, delete the word "accruing and insert the word "arising," so that the section would read: "This act applies to claims arising after the effective date of this act."

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SENATE JUDICIARY
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DATE 3-24-87
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ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date March 24, 1987 Bill No. HB 167 Time 8:20 p.m.

NAME	YES	NO
Senator Joe Mazurek, Chairman		X
Senator Bruce Crippen, Vice Chairman		X
*Senator Tom Beck		X
Senator Al Bishop	X	
Senator Chet Blaylock	X	
Senator Bob Brown	X	
Senator Jack Galt	X	
Senator Mike Halligan	X	
Senator Dick Pinsoneault	X	
Senator Bill Yellowtail	X	

Mary T. Huber
Secretary

Senator Joe Mazurek
Chairman

Motion: AND AS AMENDED, BE CONCURRED IN. The motion carries.

STANDING COMMITTEE REPORT

March 26 19 87

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration HOUSE BILL No. 442

Third reading copy (blue color)

Limit Puntive damages.
Mercer (Halligan)

Respectfully report as follows: That HOUSE BILL No. 442

1. Title, lines 7 and 8.
Following: "CASES;" on line 7
Strike: the remainder of line 7 through "DAMAGES;" on line 8

2. Page 2, line 7.
Following: ";"
Insert: "or"

3. Page 2, line 8.
Following: "contract"
Strike: ";"
Insert: "."

4. Page 2, lines 9 through 14.
Strike: subsections (III) and (IV) in their entirety

5. Page 5, line 18.
Following: "(a)"
Strike: "If"
Insert: "When"
Following: "the"
Strike: "trier of fact"
Insert: "jury"

~~XXXXXX~~

~~XXXXXXXXXX~~ CONTINUED

Chairman.

Senator Mazurek

6. Page 5, line 20.
Following: "the"
Strike: "judge"
Insert: "jury"

7. Page 5, line 21.
Following: line 20
Strike: line 21 through "time"
Insert: "be submitted to the judge for review as provided in subsection (8)(c)"

8. Page 5, line 22.
Following: "made"
Insert: "by the judge"

9. Page 5, lines 22 and 23.
Following: "," on line 22
Strike: the remainder of line 22 through "judge" on line 23
Insert: "he"

10. Page 6, lines 17 through 24.
Following: line 16
Strike: subsection (9) in its entirety
Insert: "(c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (8)(b). If after review the judge determines that the jury award of punitive damages should be increased or decreased, he may do so. The judge shall clearly state his reasons for increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (8)(b).

(9) The plaintiff may not present, with respect to the issue of exemplary or punitive damages, any evidence to the jury regarding the defendant's financial affairs or net worth unless the judge first rules, outside the presence of the jury, that the plaintiff has presented a prima facie claim for exemplary or punitive damages."

11. Page 6, line 25 through page 7, line 8.
Strike: sections 3 and 4 in their entirety
Renumber: subsequent sections

CONTINUED

March 26 19 87

12. Page 7, line 20.
Following: "ARISING"
Strike: "AND policies of insurance issued"

Amendments, HB 442
7077b/C:JEANNE\WP:jj

AND AS AMENDED
BE CONCURRED IN

Senator Mazurek

STANDING COMMITTEE REPORT

March 25, 19 37

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration HOUSE BILL No. 167

Third THIRD reading copy (blue color)

Limiting right to recover damages for emotional or mental distress.
Gilbert (
(Mazurek)

Respectfully report as follows: That HOUSE BILL No. 167

be amended as follows:

1. Title, line 8.
Following: "PLAINTIFF"
Insert: "; AND PROVIDING AN APPLICABILITY DATE"

2. Page 1, line 21.
Following: line 20
Insert: "Section 2. Applicability. This act applies to claims arising after the effective date of this act."

XXXXXX DO PASS

XXXXXXXXX DO NOT PASS

AND AS AMENDED
BE CONCURRED IN

Senator Mazurek
Chairman.

STANDING COMMITTEE REPORT

SCRB2592

March 26, 19 87

MR. PRESIDENT

We, your committee on Judiciary

having had under consideration House Bill No. 592

third reading copy (blue color)

ABOLISH BAD FAITH & BREACH OF COVENANT OF GOOD FAITH & FAIR DEALING ACTIONS

Harp (Brown)

Respectfully report as follows: That House Bill No. 592

BE AMENDED AS FOLLOWS:

1. Title, lines 4 and 5.
Following: " "AN ACT" on line 4
Strike: remainder of line 4 through "BREACH OF" on line 5
Insert: "ESTABLISHING THE CONDUCT REQUIRED BY"

2. Title, lines 6 and 7.
Following: "DEALING" on line 6
Strike: remainder of line 6 through "STATUTE" on line 7

3. Page 1, line 10 through page 2, line 23.
Strike: lines 10, page 1 through line 23, page 2 in their entirety

4. Page 3, lines 1 through 3.
Following: "1." on line 1
Strike: remainder of section 1 in its entirety
Insert: "Implied covenant of good faith and fair dealing. The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

~~DO PASS~~ and as amended

~~DO NOT PASS~~ Be Concurred In

Chairman.

Senator Mazurek

STANDING COMMITTEE REPORT

SCRHB241

March 26, 19 87

MR. PRESIDENT

We, your committee on Judiciary

having had under consideration House Bill 241 No.

third blue reading copy (color)

REGULATE WRONGFUL DISCHARGE DISPUTES

Spaeth (Pinsoneault)

Respectfully report as follows: That House Bill No. 241

BE AMENDED AS FOLLOWS:

1. Page 1, lines 23 through 25.
Following: "employment." on line 23
Strike: remainder of line 23 through line 25

2. Page 2, line 13.
Following: "AND"
Strike: "means the"
Insert: "any other"

3. Page 2, line 14.
Following: "employment"
Strike: remainder of line 14 through "retirement"
Insert: ", including resignation"

4. Page 2, line 15.
Following: "work,"
Insert: "failure to recall or rehire, and"

5. Page 2, line 17.
Following: "reason"
Strike: ", or resignation"

6. Page 2, line 22 through page 3, line 2.
Strike: subsection (4) in its entirety
Renumber: subsequent subsections

~~DO PASS~~

~~DO NOT PASS~~ CONTINUED

CONTINUED

Chairman.

SENATE JUDICIARY
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Page 2

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7. Page 3, line 10.
Following: "DUTIES"
Strike: "OR"
Insert: ","

8. Page 3, line 11.
Following: "OPERATION"
Insert: ", or other legitimate business reason"

9. Page 3, line 25 through page 4, line 3.
Following: "(2)" on line 25
Strike: remainder of line 25 through "cause" on line 3, page 4
Insert: "the discharge was not for good cause and the employee had completed the employer's probationary period of employment"

10. Page 4, line 15.
Following: line 14
Insert: "(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 [section 4 (1)].
Renumber: subsequent subsection

11. Page 4, line 19.
Strike: "subsection"
Insert: "subsections"
Following: "(1)"
Insert: "and (2)"

12. Page 5, line 1.
Following: "COLOR,"
Insert: "color,"

13. Page 6, lines 5 through 8.
Following: "term" on line 5
Strike: remainder of line 5 through "party" on line 6

14. Page 6, line 15.
Following: "FOR"
Strike: "WRONGFUL"

15. Page 6, line 17 through page 7, line 9.
Following: "CONTRACT" on line 17
Insert: "."
Strike: remainder of line 17 through line 9, page 7

16. Page 9, line 3.
Strike: "accruing"
Insert: "arising"

~~[illegible]~~ AND AS AMENDED
BE CONCURRED IN

SENATOR SAZUREK