

Max A. Hansen & Associates, P.C.

ATTORNEYS AND COUNSELORS

Max A. Hansen*
*Admitted in Montana, California & Utah
max@irc1031x.com

Bryan J. Wheat*
*Admitted in Montana
bryan@irc1031x.com

Post Office Box 1301
8 South Idaho, Suite A
Dillon, Montana 59725-1301
Office: (406) 683-4301
Fax: (406) 683-4304
Cell: (406) 660-1031
www.maxattorney.com

March 7, 2013

Re: SB 148

Dear Chair Berry, Vice Chairs Salomon and Boland and Members of this Committee:

As I grew up, I was taught that everyone was entitled to a fair shake. For that reason, I was very concerned when I learned of the introduction of SB 148. I expressed my displeasure to members of the Senate regarding the bill and now the bill is before you for consideration. This is a bad bill and it needs to be tabled by this Committee.

It appears this bill was introduced in the context of the "Legal Reform" being promoted by the Montana Chamber of Commerce since last Fall. I had grave concerns then about the Chamber's editorials and other comments about Montana's wrongful discharge laws and the purported role those laws play in creating an adverse environment for Montana businesses. I have concerns for the same reasons about SB 148. "Legal Reform" means different things to different people but is universally unfair to lay the blame for a bad business environment on people who are wrongfully terminated from their job and decide to stand up for their rights.

Let me preface my remarks with the following facts: I am a lifelong Montana resident; I am a long-time member of the Montana Chamber of Commerce; I derive from a long line of staunch Republicans; I am an attorney representing numerous large businesses throughout the Rocky Mountain region; I am the owner of multiple businesses; I have employed countless employees during my business career of 36+ years; I have terminated numerous employees during my career or they left my employ for their own reasons. I have never been sued for wrongful termination. I believe I am like the majority of Montana employers in that regard who I believe are generally kind and compassionate people.

I have seen another side of the issue too. I have had to stand on the sidelines when a close family member was the subject of a wrongful termination. In witnessing that event and the repercussions that can last years after the event, it is clear that the wrongful actions of an employer have a terrible impact on not only the employee, but their family and close friends. The effects of wrongful termination are devastating to the employee's financial condition, their sense of dignity and their position in the community.

March 7, 2013

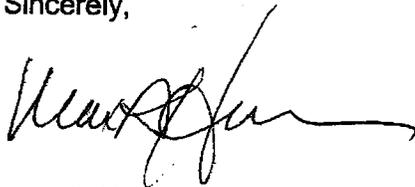
Page 2

In spite of all the good business people in this state, there are also bad employers. Those bad employers do not deserve to be cast under the same protective umbrella as the thousands of entrepreneurs and businesses who provide safe and dignified workplaces. Those bad employers should be made to answer for the grievous acts they commit.

Unfortunately due to the structure of the current wrongful termination law, the wrongfully terminated employee will never obtain full compensation for their loss no matter the merits of their case or the skills of their attorney. There is no compensation in Montana for emotional distress. The "caps" in the current statute limit the employee to no more than 4 years of lost wages and benefits. The income received by the employee or which is imputed to the employee is used to offset the amount of recovery. Many people cannot afford an attorney due to the small size of any potential recovery. In fact when Montana's current wrongful termination law was enacted, it was touted around the country as being one of the best laws on the books for business and a model for other states.

Thank goodness that when my family member was wrongfully terminated from her job, there was still a way she could try to regain some of her monetary losses and her sense of dignity. I felt completely helpless to assist her because of the complexities of the law and my inability to be objective about the case but I was able to find someone who could help. Still there is no way she will be fully compensated for her loss under the current statute. SB 148 drives the nail in the coffin for employees who are not treated fairly. If this bill is passed there is no way a wrongfully terminated employee can get any reasonable relief. I urge you to kill this bill in Committee because it doesn't give anyone a fair shake. It does not comport with what we Montanans believe in and it will make it even more difficult to attract skilled and competent workers to our state.

Sincerely,

A handwritten signature in black ink, appearing to read "Max A. Hansen", with a long horizontal flourish extending to the right.

Max A. Hansen

BEST LAW OFFICES, P.C.
ATTORNEYS AT LAW

MICHAEL JOSEPH BEST
ELIZABETH ALLAIRE BEST

P.O. BOX 2114
425 THIRD AVENUE NORTH
GREAT FALLS, MT 59403-2114
PHONE: (406) 452-2933
FAX: (406) 452-9920

March 6, 2013

Montana House Business
and Labor Committee

Re: SB 148, Montana Wrongful Discharge from Employment Act

Dear Members of the Committee:

I write this letter as a lawyer who represents Montanans in employment cases. I represent employers and employees. I have been doing this work since 1985, after serving in the U.S. Army and clerking for a Federal Judge.

Montanans define themselves by working hard for a living—earning their keep and doing their best to make Montana what it is—a great place to live and raise a family. We spend most of the time we are awake at work, and we have a sense of pride in our jobs. We are taught early: an honest day's work for an honest day's pay. Work is a big part of who we are.

Sometimes, employers and employees have to part ways because the job and the employee are just not the right fit. We all understand that. That's fair. But sometimes, not that often, employers fire people for bad reasons. Maybe it is because the employee reported unsafe working conditions. Maybe it is because the employee wanted to be paid overtime. Maybe it is because the boss wanted to make room for a friend who is less qualified. Whatever it was, firing for bad reasons cause the employee serious harms. Suddenly, she can't pay her bills. She can't buy groceries. She can't buy gas. She can't make payments on her house and her car. That's not right.

The law used to allow employees to try to prove that they were treated unfairly, and to be compensated for harms like these, by convincing a jury of their neighbors...people like you...who could decide what was fair. And juries were tough. Many cases were lost. And some were won. In 1987 that all changed.

In 1987, the Montana Wrongful Discharge from Employment Act was passed. The Act had a result. The economic ability of Montana lawyers to help our Montana neighbors when they have been wrongfully fired from their jobs was severely diminished. This did not hurt me, or any other lawyer. But it did hurt the Montanans who have the least ability to protect themselves. The hard working employees who are paid the least.

The 1987 Act took away the ability of an employee to prove the human harms caused by the unfair firing. We can't kid ourselves. People end up with serious emotional problems from this kind

Committee Members

March 6, 2013

Page 2

of treatment. And the Act took away the ability to prove to a jury that an employee lost lifetime earnings and benefits. By limiting the earnings an employee could prove to a jury to 4 years, the Act made it virtually impossible for me to represent anyone but an employee who earned high wages. Most employees can't pay a lawyer by the hour. Contingent fees exist in order to give all people the keys to the courthouse. If we can't pay our employees, and the power company, and the telephone company, and the tax man, and our own grocery bills, with the fees we earn, we can't afford to take a case.

The truth is that I cannot afford to help Montanans who earn low wages now. I wish I could. There are a lot of people out there who deserve someone looking out for them. My office turns away at least 10 cases a week. That means I don't even talk to them. I can't afford to take those cases, and it would not be fair for me to lead people to believe that I can. If we reduce the harms that people can prove to two years, even more Montanans will not be able to find a lawyer.

I know that many people believe that employees should not have the right to prove they were wrongfully fired. I have represented many folks who thought that until it happened to them, or one of their loved ones. And let me tell you, it has always been hard to prove to a jury of our neighbors and friends that a firing was wrong, and that compensation was needed. I won't, and lawyers I know won't, take a case unless we see strong evidence of violations of the law, and just plain unfair treatment. Treatment that Montana citizens will not tolerate.

SB 148 will do one thing. It will take away more protections from hard working Montanans. The Wrongful Discharge Act does not make it easy to sue for an unfair firing. That has always been hard. The Act right now does not compensate people enough for what they have gone through. And believe me—the law never allowed suing for a firing unless an employee can prove lack of good cause, or some other legal reason. The Act as it exists makes it almost impossible to find a lawyer even if what happened was dead wrong. If SB 148 passes, you can bet that the longest suffering, hardest working, and most powerless among us will lose. No one else.

On behalf of Montanans who you know, maybe even some who are members of your families, hard working Montanans, I urge you to vote against SB 148.

Sincerely,

BEST LAW OFFICES, P.C.



Elizabeth A. Best

Meloy Law Firm

PETER MICHAEL MELOY

ATTORNEYS AT LAW
THE BLUESTONE
P.O. BOX 1241
HELENA MT 59624-1241
TELEPHONE 406-442-8670

mike@meloylawfirm.com

March 7, 2013

Montana House Business and Labor Committee

Re: SB 148

Chairman Berry & Members of the Committee:

I wanted to address my concerns about the impact SB 148 will have on employees across the State of Montana. Unfortunately, I'm in Washington DC today and unable to attend in person so I am sharing with you by letter my observations about this Bill.

I have represented employees in disputes with employers since I first started private practice in 1973. Over that 40 year stretch I have been involved in innumerable cases ranging from employment discrimination, wage claims, union contract arbitrations and wrongful discharge cases.

From 1973 to 1987, I represented all classes of employees from minimum wage workers to chief executives of large companies. Passage of the Wrongful Discharge Act in 1987 dramatically changed my practice. Although I continued to receive referrals from lower paid employees, the financial practicalities of the four year cap on damages forced me to take on cases only for the well-compensated employees. In general, terminated employees do not have the resources to hire an attorney. Although on rare occasions I have taken employment cases on an hourly basis, the vast majority are done on a contingency fee basis. The contingency fee makes it possible for me to represent clients who cannot afford to hire an attorney. Indeed, the ONLY way for most terminated employees to find legal representation to contest a termination is to find one willing to take the case on a contingency fee basis.

Under a contingency fee, I am only compensated for my time if I recover money through settlement or judgment. In those few cases when I have represented clients on an hourly basis, the total fee to litigate a wrongful discharge case from complaint through verdict averages around \$85,000. In order for me to break even, then, on a contingency fee wrongful discharge case, the potential recovery must exceed \$250,000. So, under the existing four year limit on recovery, after backing out mandatory replacement income, the annual pay of the terminated employee must be in the \$70,000 to \$90,000 range. Otherwise, an attorney can't afford to take the case on a contingency basis. And, the attorney must be willing to assume the risk that if there is no recovery, the attorney will not be compensated.

At bottom, under existing law, any Montana worker making less than \$60,000 per year is simply not able to obtain counsel on a contingency fee basis. As a result, because of the present cap on damage recovery, very few wrongful discharge cases are now litigated in Montana.

As an example, I was referred two cases just this week and elected not to take either case. One involved a technician at a large manufacturing facility who was terminated by a supervisor to make an opening for the son-in-law of a friend of the plant manager. The employee had a spotless 7 year record of employment with the company, but was making only 29k annually. He only had a high school degree, so he is out in the job market without much prospect of rehiring.

The second case involved a 57 year old woman who had been employed since 1998 and had steadily advanced through the ranks and was a mid-level manager with a superior employment record. A new supervisor was hired and tried to bully this longer term employee into doing some personal work for him. She refused and complained to the CEO. The CEO refused to take action and the supervisor made life so miserable for the woman that she had to quit. She was making 40k a year. She had talked with the few attorneys around the state with experience litigating wrongful discharge cases. She was unable to find counsel willing to take the case. Her constructive discharge will go unremedied. Because of her age, she will have a difficult time finding replacement work.

And that's under existing law. Under SB 148, the potential recovery to merit taking a case on a contingency fee basis is still \$250,000, but the annual salary necessary to achieve that result is \$150,000. In my 40 years litigating wrongful discharge cases, I can only think of two cases in which the annual earnings of the terminated employee were in that range.

SB 148 still affords a remedy, but only for employees that can either pay an hourly fee to obtain an attorney or for employees making in excess of \$150,000. Those salaries are rare in Montana.

In my experience, there is no relationship between mistreatment of workers and their annual pay. Some of the most egregious abuse of employees by an employer has occurred in minimum wage jobs. And, while highly paid executives are also fired for reasons unrelated to their performance, they usually find replacement employment, at the same rate or higher. This is not true for the average middle-class employee in Montana. Not only will they be unable to contest a termination, regardless of how wrongful, they do not readily find re-employment. And, because they did not contest the termination, it serves as a blemish on their work record making it even more difficult to become re-employed. That's why limits on recovery are wrong-headed. The situations in need of remedy are ignored unless the worker is well paid. SB 148 amplifies that inequity, twofold.

Unfortunately I was unable to attend the Senate hearing on the Bill, so I remain uneducated about the genesis of this Bill. I'm assuming the sponsor believes the Bill will cut down on wrongful discharge litigation. I have no doubt the Bill will accomplish that result. But, in doing so, it will deny the vast majority of Montana employees a remedy for wrongful treatment at the hands of their employers.

When the Wrongful Discharge Act from Employment was challenged in *Meech v Millhaven* in 1989, a divided court ruled that the legislature had the power to replace a common law cause of action with a statutory cause. The dissenters, calling it the "blackest day in history" argued that the elimination of the right to recover damages for emotional distress and the four year cap on wage recovery deprived employees of "right and justice" for their injuries as guaranteed by Article II, Section 16 of the Montana Constitution. The majority looked solely at the issue of legislative replacement of a common law remedy with a statutory remedy and avoided a discussion of the impact of the four year cap on damages.

If SB 148 passes, it will certainly be challenged. The focus of the challenge this time will be whether the two year cap, as applied, deprives employees of the right to redress under the Constitution. Because the two-year cap, as applied, effectively eliminates the remedy for most workers in favor of a few high salaried employees, an access to justice challenge will almost certainly prevail. Moreover, because the equal protection argument will be much stronger, the State will have an uphill battle satisfying the rational basis test. The result will be the opposite of what the sponsor hopes to accomplish. A successful challenge will eliminate the caps altogether and will open courts to all Montana workers regardless of their annual income.

Sincerely,

PETER MICHAEL MELOY



MORRISON & FRAMPTON, PLLP

FRANK LLOYD WRIGHT BUILDING

341 CENTRAL AVENUE

WHITEFISH, MONTANA 59937

TELEPHONE (406) 862-9600

FACSIMILE (406) 862-9611

doug@morrisonframpton.com

SEAN S. FRAMPTON
SHARON M. MORRISON
DOUGLAS SCOTTI *
RYAN D. PURDY
LORI B. MILLER**
BRIAN JOOS

FRANK B. MORRISON, JR. (1937-2006)
FORMER MONTANA SUPREME
COURT JUSTICE

* Licensed also in State of Louisiana

** Licensed also in States of
Washington and California

March 6, 2013

Re: SB 148

Dear Sirs:

I urge you to reject SB 148, which will effectually gut the wrongful discharge act and consequently prevent Montanans from representation. I have represented plaintiffs and defendants in wrongful discharge claims. If the provisions in SB 148 were in effect while I considered past plaintiff cases, I would probably have taken none of those persons on as clients because the recovery would not have been justified based upon time spent pursuing such claims.

In a recent example, I represented a woman who worked as a janitor for about two years. I'll call her Jane. Jane was punctual, honest and very hardworking. Her job allowed her to raise her child modestly but effectively. In Jane's employment, she was repeatedly sexually harassed by a man whom she trusted, and when she complained about it, she was treated like a liar and then terminated by her supervisor. She earned a wage of approximately \$10.00 per hour at the time of her termination. When Jane was referred to me, her frustration was overwhelming.

Had SB 148 been in effect at the time I met Jane, I would have politely refused to represent her because the cost and time spent to do so would have greatly outweighed her possible recovery. Running a private law office requires a steady stream of income. Cases based on contingency payments must be worthwhile. IF SB 148 passes, then it seems that only the highest wage earners who are wrongfully discharged might receive their day in court with qualified counsel.

Please do not let some past verdicts (which represent a small minority of cases) or special interests control your decision. Think about people like Jane. The recovery that I helped her obtain, through a reasonable settlement, restored her faith in the system and held those who had wronged her accountable. The impact to them, in my opinion, was appropriate and did not in any way threaten their livelihood. I don't think any of that would have happened, had the damages been reduced to the extent that SB 148 proposes. Thank you for your consideration.

Sincerely,

DS

Doug Scotti
Morrison & Frampton, PLLP

Law Office of

MICHAEL J. SAN SOUCI

Stoneridge Professional Plaza
2135 Charlotte St., Suite 1A
Bozeman, MT 59718-2741

Phone (406) 586-2221
Fax (406) 582-1966
Email misansouci@aol.com
sansoucilaw.com

March 7, 2013

House Bus. & Labor Committee
P.O. Box 200400
Helena, MT 59620-0400

Re: SB-148; Proposed Amendment to Further Limit Damages Under WDEA

Dear Chairman Berry and Committee Members:

I am writing at this time to urge you and the other committee members to reject the above-referenced bill introduced by Sen. Jones.

I have been actively engaged in private practice here in Gallatin County for more than 20 years, specializing almost exclusively in civil litigation and appellate matters involving employment and labor law. By virtue of my practice, I have necessarily gained extensive background in, and involvement with, the Montana Wrongful Discharge from Employment Act ("WDEA") – primarily in representing former employees – although I do have the occasion to advise and represent employers, as well. As part and parcel of this hands-on experience, I have become quite familiar with the practical aspects and limitations of those damages potentially recoverable under current version of its "Remedies" provision, which SB-148 seeks to further reduce by substantially diminishing the already severely limited recovery available thereunder.

As you are no doubt aware, under the current version of the WDEA's remedies provision, Section 39-2-905, MCA, a prevailing plaintiff-employee may be awarded a total amount of lost earnings, along with the value of related employee benefits which, in the jury's discretion, may not exceed 4 years, and which must also take into account, and be offset and reduced by, any interim wages, etc., the employee has earned, or could have earned with reasonable diligence. Based on my many years of handling such litigation, it has been my experience that the jury verdicts returned in those cases in which I, and other practitioners, have been involved, routinely tend to be extremely conservative in terms of the damages actually awarded. As a general rule, I find that juries in wrongful discharge cases – even when deciding in favor of the plaintiff – will tend to return "compromise" awards.

For example, in *Marcy v. Delta Airlines* – a case I still consider among the most important wrongful discharge cases I have handled to date in terms of the underlying issues involved – even though the unanimous jury found that my client had been wrongfully discharged from her longtime position, it nevertheless awarded her a verdict of \$66,000.00 (which essentially was the equivalent of 50% of her projected damages over the course of four years). In another case which comes to mind, *Peden v. Louisiana-Pacific Corp.*, a unanimous jury once again found that my client had been wrongfully discharged although, after taking into account, and reducing the verdict by, his interim earnings, he was awarded approximately \$56,000.00 in compensatory damages. More recently, in *Steingruber v. Luzenac America, Inc.*, in finding that my client had been wrongfully discharged, an 11-1 jury nevertheless awarded him a verdict in the amount of \$75,000.00 (even though, as I recall, his economic damages, calculated over the allowable period of four years, were projected at more than \$130,000.00). I also recall a rather prescient remark the presiding judge in *Steingruber* had made to opposing counsel and I, prior to the jury's deliberation, that it had been his experience that "if the jury likes the plaintiff or his case, they'll probably award him something, although not everything," or words to that effect.

The *Marcy* case, like numerous other such litigations, was then compounded by the fact that the former employer unsuccessfully appealed the judgment which, in turn, added considerable, additional time and expense – not to mention nearly another 24 months – to the process. As I recall, even with the interest on the judgment which thereafter accrued, while on appeal, the final judgment totaled approximately \$80,000.00 and, based on my contingent fee arrangement with the client, I believe my fee totaled less than \$27,000.00. Conversely, the time expended on this case over the course of more than four years, and based on an extremely conservative hourly rate, totaled far in excess of \$60,000.00. Similarly, in the *Peden* case, I recall that my contingent fee came to approximately \$20,000.00 (even though the time devoted to that case, based on a very conservative hourly rate, would have been in the \$40,000.00-range). The only saving grace in the *Steingruber* case involved the rare exception where, given the former employer's rejection of our early offer to arbitrate, I was then able to request, and recoup, on a post-trial basis, those private legal expenses actually incurred on behalf of the client.

Because of the very real, and fairly routine, outcomes of this nature, I have also witnessed a fairly steady exodus of a number of litigation attorneys, who previously had been inclined to handle wrongful discharge cases for plaintiffs, because of the stark realization that the pursuit of such cases are simply too time-consuming and costly in terms of the potential recovery even in the event they ultimately might prevail. Because of the downside risk already inherent in the existing version of Section 39-2-905, several of these practitioners, who formerly represented plaintiffs in such cases, now advertise for, and solely represent, employers. Like many other attorneys in the state who engage in employment and labor law, I routinely receive referrals about, and calls from, potential clients who are, quite clearly, victims of the unlawful termination of their employment. For the vast majority, however – particularly those in fairly low-paying jobs – I often have to advise them that, in all likelihood, their prospective damages, even when

factored over the course of as much as four years, will not conceivably amount to enough to warrant or justify the pursuit of litigation for either the client or the attorney. This is an all-too-familiar refrain I routinely hear from other practitioners, as well. In other words, even under the existing version of this statute, as a pure and simple matter of economics, both clients and attorneys are, quite often, dissuaded from pursuing the same. The passage of SB-148 will, of course, only further compound this already existing problem.

In reading the amendment being advocated under SB-148, subsection (a) provides in relevant part that the employee may be awarded "*lost wages and fringe benefits for a period not to exceed 4 years .. [but] ... in an amount equal to [no more than] 6 months of employment for every full year of employment completed by the employee prior to the date of discharge.*" ... It further specifies, under proposed subsection (b), that "*[t]he total amount awarded ... may not exceed 24 months of employment.*" Consequently, apart from the very clear cap or limitation to no more than 2 years, as specified in subsection (b), a close reading of this version also makes it clear that even in a case, for example, where the employee has successfully completed his or her probationary period (usually 6 months from hiring), and is gainfully employed for 2 years prior to his or her termination, a jury would be precluded from awarding more (and, quite likely, award far less) than a total 12 months lost earnings and benefits (or 6 mos. x 2 yrs.) less, of course, a further reduction for any interim earnings "*and unemployment benefits*" (which, incidentally, is considered a collateral source generally not allowed under the prior version), not to mention an offset for any other amounts the jury may determine that the employee "could have earned with reasonable diligence." In the above example, assuming the employee's annual earnings were even \$24,000.00, and he or she had been with the company for 2 years, under Sen. Jones' proposal the optimum recovery would be in the neighborhood of \$24,000.00 (or 6 mos. x 2) less, of course, any interim earnings, etc. Hypothetically, if the former employee remained out of work for 2 months before being able to find new employment that paid, for example, a reduced salary of \$20,000.00, the maximum recoverable damages would be no more than \$8,000.00 – i.e., the \$4,000.00 differential between maximum allowed of 12 months salary (\$24,000.00), reduced by the new salary (\$20,000.00) over the same period, plus the 2 additional months they remained unemployed (\$4,000.00), which could then be further reduced or offset by unemployment benefits or otherwise. Obviously, in a not altogether unfamiliar example such as this, neither the potential client nor any practitioner with whom I am familiar, could seriously consider pursuit of the same given its financial unfeasibility.

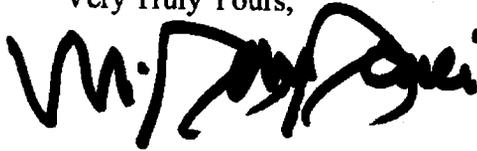
Suffice it to say that it is my considered opinion that this proposed amendment is very bad law which, I sincerely believe, will only further tilt an already uneven playing field in this legal process. In the final analysis, it is fairly safe to assume that it inevitably will result in a dramatic increase in the number of attorneys realizing they are no longer in a position to assist fellow Montana citizens who are victims of discharges from their employment in violation of those very legal standards and requirements already passed by the legislature and embodied in the WDEA.

House Bus. & Labor Comm.
March 7, 2013
Page 4

Accordingly, it is respectfully requested that, following Friday's hearing, your committee members give SB-148 a heartfelt and resounding thumbs-down and thereby preserve a far preferable, albeit limited, version of this remedies provision.

Thank you for your time and consideration in this matter.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Michael J. San Souci". The signature is stylized and cursive, with a prominent "M" and "J" at the beginning and a flourish at the end.

MICHAEL J. SAN SOUCI

MJSS:mw