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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

	No. CV-09-1-M-DWM
TIMOTHY J. BENTLEY, Plaintiff, v. CONOCOPHILLIPS PIPELINE COMPANY, Defendant.	**DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION IN LIMINE**

Defendant, ConocoPhillips Pipeline Company ("CPPL") terminated Plaintiff Timothy Bentley's ("Bentley") employment after he refused to allow CPPL to search his vehicle on company property. Bentley has filed suit against CPPL alleging claims for violation of the Wrongful Discharge from Employment Act ("WDEA"), unpaid wages, unpaid overtime, breach of contract, breach of the

implied covenant of good faith and fair dealing, wrongful inducement, negligence, negligent misrepresentation, constructive fraud, violation of the public policy prong of the WDEA and punitive damages.

CPPL has moved for summary judgment on each of Bentley's claims, except the good cause and violation of the employer's express written personnel policy prongs of the WDEA. CPPL brings this current motion for an order excluding any evidence, testimony or argument of counsel regarding the following:

(1) Bentley's alleged lost wages and benefits for his work life expectancy, including Bentley's expert, Dave Johnson's opining as to lost wages and benefits for Bentley's work life expectancy;

(2) Bentley's alleged pain and suffering;

(3) Bentley's alleged lost wages and benefits beyond October 6, 2009; and

(4) Bentley's expert witness, Dr. Lynda Brown, opining as to any issue regarding Bentley's termination.

INTRODUCTION

The Court is familiar with the facts of this case as stated in the numerous briefs filed by the parties. To summarize, Ken Halsor ("Halsor"), a CPPL human resources ("HR") employee, received an unsolicited call on November 4, 2008 from James Turner ("Turner"), one of Bentley's co-workers at CPPL's Missoula Terminal. Turner initiated the call after learning from Bentley himself that Bentley had utilized CPPL's employee assistance program ("EAP") to discuss concerns about his work schedule and gave Turner's name as an employee who allegedly

agreed with those concerns. Turner called Halsor to clarify that he did not, in fact, agree with Bentley's concerns about the work schedule.

Without prompting, Turner also volunteered during this call that he did not believe that Bentley always behaved rationally, Bentley spoke a lot about guns, sometimes kid about "offing" himself, Bentley had commented that Turner might "read about Bentley in the paper" after he walked in with a gun and turned it on himself, and Turner described to Halsor a running joke about giving Bentley a piece of candy everyday so that if Bentley "ever comes in with a gun," he would remember that Turner gave him candy everyday.

Steve Thomas, Bentley's supervisor, also reported that approximately two weeks earlier, Bentley had commented that CPPL could search "under the hood and in the bed" of his truck, but that he would never allow a search of his toolbox or the cab of his truck. Around this same time period, Kerry Sweten ("Sweten"), another of Bentley's co-workers expressed concerns to Thomas that Bentley might have a gun in his vehicle. Thomas corroborated Turner's report that Bentley often discussed guns and had made comments along the lines of "when it comes to guns, bigger is better." Thomas relayed a story in which one of Bentley's friends had told Thomas that if he ever terminated Bentley, he better have a SWAT team there. Thomas also reported an earlier incident in which Bentley had broken a very expensive CPPL analyzer screen. Although Bentley claimed that he had slipped

and fallen into the screen, Bentley's co-workers believed that Bentley had punched the screen in anger.

On November 11, 2008, Halsor, Denise Stoneburner ("Stoneburner") and Patricia Durney ("Durney"), both from ConocoPhillips' Global Security Department, traveled to the Missoula terminal to conduct interviews and searches related to CPPL's concerns over Bentley's behavior. They did not inform the Missoula Terminal personnel or management (including Thomas) of their visit.

During Bentley's interview on November 12, he lied and denied bringing a firearm onto CPPL premises, even though he understood CPPL's firearms policy did not allow him to have a gun on company property. Bentley also refused to give consent to a search of his vehicle, which was parked in the Missoula Terminal's parking lot. Bentley told Halsor, Stoneburner and Durney that he understood CPPL's search policy, which provides than an employee can be suspended or terminated for refusing a search for contraband on the first offense. Stoneburner nevertheless reminded Bentley of the potential consequences of his refusal to give consent. Bentley continued to refuse, citing personal items in his truck, but failing to mention that he had a gun in his vehicle.

After Bentley's refusal to consent to a search of his vehicle, Halsor informed him that he would be suspended pending further review.

On the same day, Halsor, Stoneburner and Durney interviewed and searched seven of Bentley's co-workers. Each of the co-workers' stories substantiated CPPL's concerns about Bentley. In particular, the interviews revealed: (1) other employees overheard Bentley's comments to Thomas about refusing to allow CPPL to search his toolbox or the cab of his truck; (2) Bentley had mentioned that he carried a gun everywhere he goes; (3) other employees had joked about investing in Kevlar because of Bentley; (4) employees were concerned about Bentley "going postal;" (5) Bentley had commented on a news report about a domestic homicide that the husband "had to be a hell of a shot;" (6) when Bentley discussed hunting, he made comments such as being in the "mood for killing" or "I want to go killing;" (7) Bentley had previously discussed that, after a family incident which upset him, he sat in his room and cleaned his guns; and (8) Bentley would be calm one minute and fly off the handle the next.

On November 14, 2008, Halsor advised Bentley in writing that his employment with CPPL had been terminated effective November 12, 2008, as a result of his election to refuse consent to search his vehicle, in violation of CPPL's search policy.

ARGUMENT

I. Alleged Damages for The Duration of Work Life Expectancy May Not be Recovered in This Action, So Evidence and Argument of Those Damages Must be Excluded.

A. Bentley's claims for lost wage and benefit damages for a period of 31.55 years is not supported by the law.

It is beyond dispute that the WDEA is the exclusive remedy for wrongful discharge in Montana. *Ruzicka v. First Healthcare Corporation*, 45 F.Supp.2d 809 (D.Mont. 1997). The WDEA limits the available damages for a wrongful discharge to "lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge." Mont. Code Ann. § 39-2-905(1). "As a matter of policy, the legislature determined that four years should be the maximum period for consideration of wage loss reasoning that claimants could generally be expected to find similar employment by the end of this period." *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 48, 776 P.2d 488, 504 (1989).

Despite the clear statutory limit of four years for lost wages and benefits, Bentley seeks lost wages and benefits for his entire work life expectancy – a period of 31.55 years from the date of discharge – in the amount of $1,195,292. Ex. A, Expert Report of Dave Johnson, at Schedule 7. Evidence of lost wages and benefits beyond the four years allowed by law is irrelevant under Fed. R. Evid. 401, prejudicial and confusing under Fed R. Evid. 403, and should be excluded.

Bentley may argue that he is entitled to recover lost wages and benefits for his work life expectancy pursuant to one of his non-WDEA causes of action. Such an argument must fail. As made clear in the WDEA: "Except as provided in this part, no claim for discharge may arise from tort or express or implied contract." Mont. Code Ann. § 39-2-913. The only way to successfully bring a tort claim, is to prove that tort claim is ***separate and independent*** from a claim for wrongful discharge. *Mysse v. Martens*, 279 Mont 253, 268, 926 P.2d 765, 774 (1996); *Beasley v. Semitool, Inc*., 258 Mont. 258, 263, 853 P.2d 84, 86-87 (1993); *Batchelder v. Home Depot U.S.A., Inc.*, CV 04-52-BU-RWA, Findings & Recommendations of U.S. Magistrate Judge and Orders Docket # 95 (Sept. 27, 2006) and Order Docket #108 (February 6, 2007)(attached hereto for the Court's convenience as Exhibits B and C, respectively). When a claimant does not allege any damages other than those "arising out of her discharge, the complaint is insufficient to indicate a separate claim." *Mysse,* 279 Mont at 268, 926 P.2d at 774.

Bentley's claim for lost wages and benefits necessarily arise out of his discharge from CPPL. Had his employment at CPPL not been terminated on November 12, 2008, he would not have suffered lost wages and benefits beginning on November 12, 2008 and continuing for the next 31.55 years. Thus, all other theories under which Bentley seeks to recover lost wages and benefits are

preempted by the WDEA, and any evidence of damages should be limited to the maximum four-year period prescribed by the WDEA.

B. Bentley's expert analysis is unreliable and fails to account for established statutory limitations on the availability of lost wages and benefits, and thus should be excluded.

Bentley's proffered economic expert – Dave Johnson – fails to account for the WDEA's limitation that lost wages and fringe benefits are only recoverable for a period of four years. Despite the limitations on damages discussed above, Mr. Johnson submitted an expert report calculating lost wages and fringe benefits for Bentley's work life expectance – a period of 31.55 years and totaling $1,193,869. Ex. A, Johnson Expert Rpt. at Schedule 7.

Expert testimony calculating damages to which Bentley has no legal right to recover is irrelevant under Fed. R. Evid. 401, prejudicial and confusing under Fed. R. Evid. 403, and is not helpful to the jury in deciding a fact at issue as required by Fed. R. Evid. 702. Courts have consistently excluded expert testimony on similar grounds. *See, e.g., Herbert v. Lisle Corp.*, 99 F.3d 1109, 1117 (Fed. Cir. 1996) (citation omitted) ("Incorrect statements of law are no more admissible through 'experts' than are falsifiable scientific theories."); *Justice* v. *Carter*, 972 F.2d 951, 956 (8th Cir. 1992) ("The district court did not abuse its discretion in not admitting expert testimony which was based upon an inapplicable interpretation of the law."); *Federal Realty Inv. Trust* v. *Pacific Ins. Co.*, 760 F. Supp. 533, 538 (D. Md.

1991) (because standard to which experts would testify was "wrong as a matter of law," court granted motion in limine to prohibit experts from testifying about allocation of defense costs); *Exxon Corp*. v. *Superior Court*, 60 Cal Rptr. 2d 195, 202 (Cal. Ct. App. 1997) ("the court is not bound by an expert opinion that is speculative or conjectural or that is based on an incorrect legal theory"); *Hacker* v. *Holland*, 570 N.E.2d 951, 959 (Ind. Ct. App. 1991) (reversing because expert's testimony "was an improperly admitted incorrect statement of law"); *Franch* v. *Ankney*, 670 A.2d 951, 958 (Md. 1996) (because opinions of experts were "based on an incorrect interpretation of Maryland law, the trial court was fully justified in striking the testimony"); *Greenspan* v. *Norfolk County*, 161 N.E. 894, 895 (Mass. 1928) (holding that motion to strike expert testimony should have been granted where expert based land valuation on legally incorrect assumption); *Doolittle* v. *City of Everett*, 786 P.2d 253, 262 (Wash. 1990) (en banc) (stating that expert testimony "was entirely premised on an incorrect legal principle" and, therefore, "must be disregarded").

Here, Mr. Johnson's expert report, his anticipated trial testimony and any other evidence regarding lost wages and benefits for Bentley's work life expectancy is entirely at odds with the plain language of the WDEA. As such, an order in limine excluding all evidence regarding lost wages and benefits through Bentley's work life expectancy is mandated.

II. Bentley's Alleged Pain and Suffering is Irrelevant and Should Be Excluded.

In addition to improperly claiming damages for his work life expectancy, Bentley is also improperly claiming $100,000 in damages for pain and suffering. See Pl's Preliminary Pretrial Statement at 19. Again, the WDEA is quite clear as to the damages recoverable should a plaintiff prove a wrongful discharge:

> (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest on the lost wages and fringe benefits. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.
> (2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-2-904(1)(a).
> (3) ***There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in subsections (1) and (2)***.

Mont. Code Ann. §39-2-905 (emphasis added).

Pursuant to this clear statutory language, Bentley cannot recover for pain and suffering. Thus, the only reason to raise those claims at trial would be to incite

the sympathy of the jury, thus allowing evidence that is not relevant to unfairly prejudice the jury. Fed. R. Evid. Rule 403 was designed to avoid such unfair prejudice:

> "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

Advisory Committee Notes to Rule 403.

Testimony that Bentley felt bad or suffered emotionally or physically would have no reasonable purpose. If it is admitted into evidence, in the colorful words of Judge McCarvel, "the goose is already cooked." *Workman v. MacIntyre Construction Co.*, 190 Mont. 5, 13, 617 P.2d 1281, 1285 (1980)(McCarvel, J. sitting by designation). Certain facts just "cannot be erased from the minds of the jurors." *Id.* For this reason, Bentley should be precluded from introducing any evidence, directly or by implication, of any pain and suffering allegedly suffered as a result of his discharge, or testimony or evidence of or how he *felt* when he was discharged.

III. Bentley's Damages Should be Limited by After-Acquired Evidence of Wrongful Conduct.

On October 6, 2009, Bentley testified that when CPPL asked to search his vehicle on November 12, 2008, his "vehicle would have been on the premises with that firearm [.38 Special] under the console." Ex. D; Deposition of Tim Bentley, 58:24-59:21 (October 6, 2009). In fact, he had this firearm in his vehicle the entire

time he was employed at CPPL. *Id.* Bentley understood that CPPL's firearms policy prohibited guns on company property. *Id.* at 56:19-57:4.

In 1995, the United States Supreme Court resolved a split in the circuits regarding whether an employee should be denied all relief when the employer later discovers some wrongful conduct that would have led to the employee's lawful termination had it been discovered earlier. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

In *McKennon*, after the employee brought suit alleging that she had been terminated in violation of the Age Discrimination in Employment Act ("ADEA"), the employer learned in a deposition that the employee had removed and copied confidential documents. *Id*. at 355. The Court held that if an employer establishes that "the wrongdoing was of such severity that the employee would in fact have been terminated on those grounds alone had the employer known of it at the time of the discharge," the employee's damages will be limited. *Id*. at 362-63. The appropriate measure of damages in such cases is generally backpay from the date of the unlawful discharge to the date the new information was discovered. *Id*. at 362. "Neither reinstatement nor front pay is an appropriate remedy." *Id.*

Since *McKennon* was decided, two lines of cases have developed regarding the use of after-acquired evidence in state law wrongful discharge actions. The first line of cases has adopted the *McKennon* rule that after-acquired evidence of

conduct for which an employee could have been legally terminated limits, but does not bar, an employer's liability for wrongful discharge. *See, e.g.*, *Silver v. CPC-Sherwood Manor, Inc.*, 151 P.3d 127, 131 (Okla. 2006); *Trico Technologies Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997); *Barlow v. Hester Indus., Inc.*, 479 S.E.2d 628, 633 (W. Va. 1996); *Walters v. United States Gypsum Co.*, 537 N.W.2d 708, 711-12 (Iowa 1995); *Wright v. Rest. Concept Mgmt., Inc.*, 532 N.W.2d 889, 892 (Mich. Ct. App. 1995). These cases typically involve wrongful discharge claims based on retaliation and/or discrimination and the respective courts have generally adopted *McKennon*'s reasoning that after-acquired evidence should not act as a complete bar to recovery because of public policy considerations. Instead, damages for wrongful discharge are limited to the date of discovery. This is the line of cases upon which CPPL bases this motion.

The second line of cases holds that, in wrongful discharge cases in which no public policy implications are present, such as a claim alleging violation of an implied contract, after-acquired evidence of conduct for which an employee could have been legally terminated may serve to completely bar any recovery for wrongful discharge. *See, e.g., Teter v. Republic Parking Sys., Inc.*, 181 S.W. 330, 341 (Tenn. 2005); *Lewis v. Fisher Serv. Co.*, 495 S.E.2d 440, 442-45 (S.C. 1998); *Crawford Rehabilitation Servs., Inc. v. Weissman*, 938 P.2d 540, 547-48 (Colo. 1998) (en banc); *Gassmann v. Evangelical Lutheran Good Samaritan Society, Inc.*,

933 P.2d 743, 745 (Kan. 1997). The rationale behind this second line of cases is that "an employee cannot complain about being wrongfully discharged because the individual is no worse off than he or she would have been had the truth of his or her misconduct been presented at the outset." *Gassmann*, 933 P.2d at 746.

The Montana Supreme Court has not yet addressed the situation presented by *McKennon* and its progeny. Bentley may argue that Judge Lynch has opined on the issue. *Schwartz v. Metro Aviation, Inc.*, 2009 WL 3522599, *5 (D. Mon. 2009). However, Judge Lynch's order addressed whether after-acquired evidence could be offered to determine liability; not whether after-acquired evidence would limit damages. In *Schwartz*, the employee was terminated after he authorized a damaged helicopter to fly from Arlee to Missoula without authority to do so and submitted the "poorest signoff" and the "worst log entry" his supervisor had ever seen. Three days after the employee's discharge, the Federal Aviation Administration ("FAA") issued warning to the employee for authorizing the flight. In the wrongful discharge lawsuit, Metro Aviation sought to use the FAA warning, issued after termination, as evidence supporting its reason for termination. Judge Lynch held that since Metro Aviation did not know of the FAA warning when making the decision and it did not directly support the original reasons for discharge ("poorest signoff" and "worst log entry"), the FAA warning could not be used as evidence to prove liability.

Here, CPPL's motion is clearly distinguishable from *Schwartz*, as the after-acquired evidence is being submitted to limit damages pursuant to *McKennon* and its progeny that have followed the first line of cases discussed above. After terminating Bentley, CPPL obtained evidence that would have led to Bentley's firing had it been discovered earlier. In his deposition, Bentley testified that when CPPL asked to search his vehicle on November 12, 2008, his "vehicle would have been on the premises with that firearm [.38 Special] under the console." Ex. D; Bentley Depo. at 58:24-59:21. In fact, he had this firearm in his vehicle the entire time he was employed at CPPL. *Id.* Bentley understood that CPPL's firearms policy prohibited guns on company property. *Id.* at 56:19-25. Had CPPL known that Bentley was repeatedly violating its firearms policy by having a handgun in his vehicle on company property, CPPL would have terminated him at that time. Ex. E, Declaration of Bruce Owens at ¶ 12. Thus, CPPL's discovery of Bentley's violation of the firearms policy cuts off his damages for wrongful discharge as of the date of discovery. *See McKennon*, 513 U.S. at 362. No evidence of wrongful discharge damages after that date should be admitted into evidence.

A. Bentley's expert Lynda Brown's testimony and opinions should be excluded as improper expert testimony.

Bentley intends to offer the testimony and opinions of Lynda Brown, Ph.D., SPHR, to support his wrongful discharge claim. Dr. Brown's proposed testimony not only exceeds the scope of proper expert testimony, but it also will not assist the

jury to understand the evidence or determine a fact in issue. Further, Dr. Brown is not qualified to opine on the only issue that could possibly require expert testimony; workplace violence and responding to threats of workplace violence. The Court should enter an order wholly excluding the testimony and opinions of Dr. Brown.

1. Dr. Brown's opinions goes to the ultimate questions to be decided by the jury.

Expert witness testimony is appropriate "[i]f scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. "Experts may not opine on issues that are committed exclusively to the finder of fact. For example, expert testimony is inadmissible if it does no more than tell the finder of fact what conclusion to reach." 4 Weisntein's Federal Evidence § 702.03[3] (2004); *see also United States v. Bilzerian*, 926 F.2d 1285, 1294 (2nd Cir. 1991) (expert testimony is not permitted where it would usurp the role of the jury in applying the law to the facts before it). Federal courts have routinely prohibited expert testimony in employment cases where the expert's opinion goes to this ultimate determination that must be made by the jury. *See, e.g., Torres v. County of Oaklan*d, 758 F.2d 147, 151 (6th Cir. 1985) (expert witness' testimony that plaintiff "had been discriminated against because of her national origin" was inadmissible because it tracked statutory language and had precise legal meaning).

Dr. Brown's expert disclosure offers the opinions "ConocoPhillips did not have a legitimate business reason to terminate Tim Bentley", "Mr. Bentley was terminated in retaliation for making his EAP report" and "ConocoPhillips violated their own personnel policies." *See* Exhibit F, Expert Witness Reports of Dr. Lynda Brown (Nov. 25, 2009 and January 22, 2010). These are plainly conclusions inappropriate for expert testimony.

2. Dr. Brown's "opinions" do not assist the trier of fact.

The cornerstone of Rule 702's requirement that expert testimony "assist the trier of fact" is the inquiry regarding whether the issues are beyond the ordinary understanding of the jury. If so, then expert testimony is not admissible. 4 Weisntein's Federal Evidence § 702.03[2][a] (2004); 29 Wright and Gold, FEDERAL PRACTICE AND PROCEDURE § 6264 (1997). Indeed, in the Ninth Circuit, this question asks whether the expert testimony will be of "appreciable help" to the jury. *Little Oil Co. v. Atlantic Richfield Co.*, 852 F.2d 441, 446 (9th Cir. 1988). Similarly, the Montana Supreme Court has adopted the following test:

> . . . whether the subject is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness, or whether the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

State v. Howard, 195 Mont. 400, 404-405, 637 P.2d 15, 17 (1981); *citing State v. Campbell*, 146 Mont. 251, 258, 405 P.2d 978, 983 (1965).

In order to provide appreciable help to the jury, expert opinion testimony must contain "more than an expression of the witness' general belief as to how the case should be decided." *Kizer v. Semitool, Inc.*, 824 P.2d 229, 233 (Mont. 1991) (rejecting expert testimony that employer breached the implied covenant of good faith and fair dealing and that employer's reduction of force was not legitimate); *see also Heltborg v. Modern Machinery,* 244 Mont. 24, 795 P.2d 954 (1990) (rejecting expert testimony that employer breached the implied covenant of good faith and fair dealing and was negligent).

Here, Dr. Brown's "opinions" are nothing more than her spin on the facts. For example, Dr. Brown asserts that Halsor "became party to Mr. Thomas's engineered disciplinary actions resulting in Mr. Bentley's termination", and Thomas "intentionally misrepresented the speeding incident". See Ex. F, Dr. Brown Expert Disclosure. These are not expert "opinions". Instead, Dr. Brown is simply reviewing the evidence and instructing the jury how to rule on that evidence.

To make matters even worse, Dr. Brown was only provided a part of the evidence to spin the facts into improper expert "opinions".

On November 5, 2009, Steve Thomas sent an e-mail to Bruce Owens, Scott Spicher and Ken Halsor regarding a speeding incident at the Missoula terminal involving Bentley in January 2008. Ex. G, Deposition of Steve Thomas at 96:13-

98:25. Thomas had drafted this e-mail in January, 2008, kept it in his draft folder, but did not send the e-mail until Ken Halsor asked for additional information in November 2008. *Id.* Dr. Brown reviewed this e-mail and reached the following conclusions:

- Thomas "intentionally misrepresented the speeding incident". Ex. H, Deposition of Dr. Lynda Brown at 80:15;
- "This falsification of information constitutes unethical conduct". *Id.* at 82:2-18.
- "Mr. Thomas lied to ConocoPhillips officials". *Id.* at 82:25-84:1.

What Dr. Brown ignored was a follow-up e-mail Thomas sent to Bruce Owens, Scott Spicher, Ken Halsor, later in the day on November 5, 2008, which explained that the original "e-mail was constructed January 22nd and I've kept it in my draft file and the reason I'm sending today is because Ken wanted more information on the subject." Ex. H, Brown Depo. at 85:11-19, Depo. Ex. 37. Although she recalled the specifics of the first e-mail, Dr. Brown did not know whether she had seen the second e-mail. *Id.* When presented with all of the evidence, Dr. Brown's so called "opinions" regarding misrepresenting the speeding incident, Thomas' alleged falsification of information and alleged lie to CPPL's officials fail in light of Thomas' second e-mail fully explaining the reason for sending the first e-mail. Dr. Brown's testimony must be excluded because she

could not possibly provide "appreciable help" to the jury by simply reciting incomplete facts of which she has no personal knowledge.

3. Montana law does not impose "generally accepted human resources policies" on employers to determine whether an employer violated its express written personnel policies.

Dr. Brown's opinions are based on what she considers to be generally accepted Montana human resources practices and policies. For example, in addition to the above opinions, Dr. Brown is expected to provide the following testimony:

- ConocoPhillips' release of confidential employee information ***violated established Human Resources policies and practices***.
- ***According to established policies and practices within the profession of human resource management***, this falsification of information constitutes unethical conduct on the part of a supervisor and is another example of ConocoPhillips violating their own internal policies.
- Mr. Thomas' deception represents a clear breach of ***policies and practices in the human resource management profession.***
- ***Based on established HR practices and policies***, ConocoPhillips had no legitimate business reason to terminate Mr. Bentley, and the conduct was retaliatory and in violation of its own policies.

See Ex. F, Dr. Brown's expert witness disclosures. None of these opinions are relevant in a statutory wrongful discharge action in Montana. The WDEA does not apply a negligence or "bad faith" standard, so "generally accepted human resources practices" are irrelevant.

Prior to the enactment of the WDEA, the standard in a wrongful discharge case was whether or not the employee breached the covenant of good faith and fair dealing . Accordingly, pre-WDEA case law does suggest that it was appropriate for an expert to opine as to whether or not the employer violated its personnel policies, and if the violations satisfied the good faith and fair dealing standard. *See, e.g., Crenshaw v. Bozeman Deaconess Hospital*, 693 P.2d 487 (Mont. 1984); *see also Flanigan v. Prudential Federal Savings & Loan*, 720 P.2d 257 (Mont. 1986). This required a jury to make a determination whether the employer "observ[ed] … reasonable commercial standards of fair dealing in the trade." Mont. Code Ann. § 28-1-211.

Upon passage of the WDEA in 1987, the Montana Legislature eliminated breach of the implied covenant and other tort claims as a cognizable cause of action for wrongful discharge. Mont. Code Ann. § 39-2-905(3).[1] The WDEA changed the standard from the tort-like "good faith and fair dealing" standard to a simple factual inquiry: *did the employer violate its express written personnel policies*? This distinction was recognized in *Miller v. Citizen's State Bank*, 830 P.2d 550 (Mont. 1992). In that case, the plaintiff claimed she was dismissed without good cause. As part of her proof, she sought to impose a standard on the

[1] CPPL has moved for summary judgment on Bentley's claim for breach of the implied covenant of good faith and fair dealing as it is clearly preempted by the WDEA.

employer which required factual findings regarding "whether the employer followed industry standards of progressive discipline, and whether the defendant exercised good faith." *Id.* at 552. The Montana Supreme Court held that those are not proper standards under the WDEA, which statutorily defines "good cause." *Id.* As commentators on the WDEA have observed:

> [E]xpert testimony that an employer did not follow industry standards of progressive discipline, or adopt other enlightened personnel policies ***would not be allowed in an action brought under the [WDEA]***, which limits an employee's claim to the case where the employer violated the "express" provisions of its "written" personnel policies.

Donald C. Robinson, "The First Decade of Judicial Interpretation of the Montana Wrongful Discharge From Employment Act," 57 MONT. L. REV. 375, 417-18 (Summer 1996)(emphasis added).

Bentley attempts to support his claim that CPPL violated its own written personnel policies with Dr. Brown's opinions that CPPL did not follow generally accepted human resources practices and policies. While Dr. Brown's belief on how the termination should have been conducted under generally accepted policies is arguably appropriate for an academic discussion in her classroom, these same belief's are inadmissible in a Montana courtroom. Bentley cannot impose standards on CPPL through the testimony of Dr. Brown, when those standards are not required by Montana law. As such, Dr. Brown's opinions must be excluded.

4. Dr. Brown is unqualified to provide testimony regarding workplace violence investigations.

If there is any area where expert testimony could assist the trier of fact in this case, it is with regard to workplace violence and proper responses to potential threats of workplace violence. Bentley was terminated because he refused a search of his vehicle that was parked on company property. CPPL asked to search Bentley's vehicle as a result of Bentley's comments to co-workers regarding guns and violence.

Notwithstanding the seriousness of the concerns expressed by Bentley's co-workers, Dr. Brown attempts to "down play" Bentley's own actions by arguing that the comments were dated and no one took them seriously when they were initially raised. Not only are Dr. Brown's "opinions" not supported by the evidence, Dr. Brown is willing to make these opinions, despite the fact that she is not an expert on either workplace violence or proper response to workplace violence. Ex. H, Deposition of Dr. Lynda Brown at 8:3-8. Indeed, she failed to disclose any experience or expertise in workplace violence:

> Q. Just starting with your disclosure, was there anything in here where you describe your experience that referred in this report specifically to your experience or expertise in workplace violence?
>
> A. I don't think so.

Id.

When asked for all the workplace violence investigations Dr. Brown has conducted, she was able to identify four. The first incident involved a woman coming back from lunch and stating "My mother's right, I should do something, I should get rid of myself." Ex H, Deposition Dr. Brown at 18:7-11. In that situation, Dr. Brown acknowledged that she was not qualified to help this individual and referred the employee "to a trained professional" who could actually help the employee. *Id.* at 19:20-25.

Ten to fifteen years ago, Dr. Brown had "to confront" an employee who was accused of sexual harassment. *Id.* at 20:25-23:14. This employee ultimately "lost his job because of the sexual harassment." *Id.* However, it had "[n]othing to do with the violence." *Id.*

The third situation involved a terminated employee that had filed a grievance. *Id.* at 23:20-26:15. As part of the grievance, other employees were concerned about their safety because the terminated employee had apparently "pushed a chair in their direction". *Id.* The terminated employee alleged he was the one being intimidated and was scared. *Id.* As part of the terminated employee's grievance, Dr. Brown investigated the terminated employee's concerns. *Id.*

The final incident Dr. Brown could remember involved a physical rape and assault that occurred in the 1980s at the University of Montana. *Id.* at 26:16-28:1.

Once again, Dr. Brown appropriately turned the matter over to people trained to handle the situation: the police and the university attorney. *Id.*

Rule 702, Fed. R. Evid., requires that the witness be "qualified as an expert by knowledge, skill, experience, training, or education. . .". Dr. Brown's general expertise on human resources is simply not sufficient for her to opine on the workplace violence and responding to potential threats of workplace violence.

The Montana Supreme Court was faced with a similar situation in *Mannix. v. The Butte Water Company*, 854 P.2d 834, 844-845 (1993). In that case, the plaintiff, a corporate officer, brought suit for wrongful discharge. In support of his claim, the plaintiff retained Alan Brown to testify about the proper employment and termination practices in effect at the time. Mr. Brown's expertise was based upon his experience as a labor relations manager and personnel representative from 1967 to 1984 with Anaconda Company and Champion International and as a consultant since then. The employer, however, moved to exclude Mr. Brown's testimony on the ground that he was not qualified to testify regarding the relationship between corporate officers and boards of directors or the termination of a corporate officer. The district court granted the motion based on Mr. Brown's depositions where he admitted that he had no experience, training or skill in conducting such a high-level termination, nor did he have any expertise on

corporate law and governance. The Montana Supreme Court affirmed based on these facts. *Id.* at 844-845.

A similar analysis applies here. Testimony regarding workplace violence and responding to threats of workplace violence requires some specialized skill, training or experience for the witness to generally be competent to provide testimony. Dr. Brown, despite her credentials in human resources generally, does not possess that skill. In each of the incidents she identified above, when they involved violence or the potential for violence, Dr. Brown involved people who were qualified to actually address the situations. Accordingly, she is not qualified to provide the proffered testimony regarding workplace violence.

CONCLUSION

For the foregoing reasons, the Court should enter an order in limine excluding all testimony, arguments, documents, and other evidence regarding the matters discussed herein.

Respectfully submitted this 12th day of February, 2010.

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CERTIFICATE OF COMPLIANCE

The undersigned, Jason S. Ritchie, certifies that this Brief complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 5,853 words, excluding caption and certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Jason S. Ritchie
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