Scott M. Stearns
Thomas J. Leonard
Boone Karlberg P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807-9199
Telephone: (406) 543-6646
Fax Number: (406) 549-6804
Attorneys for Plaintiff

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

TIMOTHY J. BENTLEY, Plaintiff, v. CONOCOPHILLIPS PIPE LINE COMPANY, Defendant.	Cause No. CV-09-1-M-DWM **PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON WRONGFUL DISCHARGE**

INTRODUCTION

This case involves the malicious termination of Plaintiff Tim Bentley ("Bentley"). Utilizing what ConocoPhillips held out as its confidential Employee Assistance Program ("EAP"), Bentley reported unsafe working conditions at the Missoula terminal, the unlawful failure to pay overtime, and harassment by his supervisor. Through ConocoPhillips' "confidential" process, Bentley's complaints

were promptly relayed to the very supervisor he was complaining about. Just days later, Bentley was fired.

In this lawsuit, ConocoPhillips has attempted to argue that the timing of Bentley's discharge was nothing more than an unfortunate coincidence, and that its termination of Bentley was not related to his EAP complaint. The undisputed facts disprove this unlikely story. The record demonstrates, as a matter of law, that Bentley's discharge was: (1) not supported by good cause, (2) retaliatory, and (3) in violation of ConocoPhillips' own personnel policies. Bentley's Motion for Summary Judgment on Wrongful Discharge should be granted.

FACTUAL BACKGROUND

Bentley came to work for ConocoPhillips based on a number of promises and representations by Dave Floyd ("Floyd"), a supervisor at the company's Missoula facility. (Bentley's Statement of Undisputed Facts ("SOF") 1-3.) The salary and amount of overtime pay Bentley would receive, along with the promise that he could work a rotating schedule, were substantial motivating factors for Bentley's acceptance of the employment agreement. (SOF 1-2.)

Initially, when Bentley worked overtime on call-out hours, the company's promises to Bentley were honored. (SOF 4.) Also, though he first worked a training shift that consisted of Mondays through Fridays with every other weekend

on call, Bentley was told he would be given the promised rotating schedule after he completed his training. (SOF 5.)

Approximately seven months after Bentley started working for ConocoPhillips, Steven Thomas ("Thomas") took over for Floyd as supervisor. (SOF 6.) When Thomas took over, he changed the way Bentley was paid overtime. (SOF 7.) Bentley was not offered any consideration for this change. (SOF 8.) In addition, when Bentley successfully completed his training, the company refused to provide a rotating schedule as promised. (SOF 9.) Of course, by the time Bentley learned the company had no intention of abiding by its promises, he had already moved to Missoula, had completed the company's training and probationary period of employment, and needed the job to support his family. (SOF 10.)

Not only did ConocoPhillips refuse to honor the employment contract, but conditions at the facility began to deteriorate. The schedule Thomas imposed on operators led to extreme exhaustion and posed a serious safety risk. (SOF 11.) Bentley was required to work long hours without sleep (sometimes 24 or 32 hours) and to remain on call when he was not working. (SOF 11.)

In addition, Bentley's attempts to follow company policy by addressing his concerns with his direct supervisor began to have unintended consequences.

Thomas' treatment of Bentley became worse. He became openly hostile towards Bentley. (SOF 12.) He attempted to intimidate Bentley by boasting about his violent behavior with other subordinates. He told Bentley he had been disciplined for bashing another employee's head in with a rock. (SOF 13.) And then, when Bentley's best friend tragically perished in a motorcycle accident, Thomas used the situation to remind Bentley of his authority over him, and did not grant Bentley's request to attend the funeral. (SOF 14.)

Grieving about his friend, faced with unsafe working conditions, a supervisor who was retaliating against him, and an employer who had no qualms about disregarding its prior promises, Bentley turned to ConocoPhillips' "confidential" Employee Assistance Program ("EAP"). (SOF 15.) The purpose of the EAP is to provide employees with a forum to resolve workplace productivity issues and resolve personal concerns that may affect job performance. (SOF 16.) Little did he know, Bentley's "confidential" report, rather than bringing much needed help, would signal the end of his employment with the company.

Bentley filed his EAP complaint with ConocoPhillips' Workplace Solutions counselor Dixie Wilson. (SOF 17.) Bentley described to Wilson the workplace stress he was under, the harassment, the unsafe working conditions, and the problem with his overtime pay. (SOF 17.) Wilson agreed that Thomas was not

handling the situation appropriately. (SOF 18.) Wilson, in turn, recommended they consult Ken Halsor. (SOF 18.) Ken Halsor worked in the company's Human Resources Department in Texas. (SOF 18.) Wilson commented that "Tim's approach was not as a 'complainer' but rather to try to fix a problem and create a safer work environment." (SOF 19.)

Wilson asked Bentley to sign a release, authorizing her to disclose their conversation to Halsor. (SOF 20.) When Halsor learned of Bentley's concerns, though, he promptly informed Thomas about them! (SOF 21.) Halsor's disclosure to Thomas violated the express provisions of the release, which indicated that the only person authorized to receive the confidential information was Halsor. (SOF 21.) When Bentley learned Thomas had been notified about the EAP complaint, he immediately revoked his consent to disclosure, but by then it was too late. (SOF 22.)

Thomas was hostile toward Bentley for his prior complaints about working conditions, but he could not forgive Bentley for taking those complaints up the chain of command. He wanted to move quickly. Fortunately, he had a like-minded partner in Ken Halsor at the corporate office. Just days after Thomas learned about Bentley's confidential EAP complaint, Bentley was fired.

ConocoPhillips tried hard to veil Bentley's discharge in what it could later argue were legitimate business reasons. On the same day he learned of Bentley's EAP complaint, Thomas sent his supervisors an email about Bentley speeding on company property. (SOF 23.) The email was *nearly a year old*! (SOF 24.) Initially, Thomas made no attempt to clarify that his email concerned an incident almost one-year old, and made it appear that it had just happened. (SOF 24.)

Forty minutes after sending the e-mail, Thomas raced off to confront Bentley about speeding anew. (SOF 25.) Thomas launched a verbal assault on Bentley, shaking his finger in front of Bentley's face, and asked "do I need to terminate you?" (SOF 25.) Bentley described the confrontation as follows:

> He got in my face and he raised his voice, and he was shaking his finger at me, he was probably three or four inches away from my face, shaking his finger at me. And he also at the time threatened me with my job, he said, do I need to terminate you? And I said, no, sir. And he said, well – and then again he said OWST again, which is the policy that was oral, written, suspension, termination, and asked me if I wanted to write it down, and I said no. And I believe he was baiting me, trying to get me to possibly hit him or call human resources again or act, you know, inappropriately.

(SOF 26.)

Following this incident, a flurry of conference calls and emails were exchanged between Thomas and his superiors as to the level of discipline to assess against Bentley. (SOF 27.) Frustrated with the "red tape" and the slow pace of the

process, Thomas decided to try something else: He relayed to his superiors that Bentley was a gun owner who talked frequently about guns and hunting. (SOF 28.) Thomas reported that another employee felt uncomfortable with this, that there were rumors about Bentley making "spooky" comments, and that Bentley may have a firearm in his vehicle. (SOF 28.) Thomas did *nothing* to address these rumors at the time they were raised, apparently recognizing them for what they were: unfounded. (SOF 29.) Indeed, Thomas confirmed in his deposition he was never afraid or concerned about Bentley. (SOF 30.) Even the EAP expressly recognized Bentley "was not an immediate threat to others and there was no duty to warn at this time." (SOF 31.) In the wake of Bentley's EAP complaint, however, these rumors were not only resurrected, but became matters of great urgency. (SOF 32.)[1]

On November 7, 2009, Thomas sent an email to his superiors stating he was "SHOCKED that nothing has been done as of yet." (SOF 32.) Although Thomas had, just two days before, told his superiors that he was not afraid of Bentley, and

---

[1]Bentley is forced to attach the email contained in ConocoPhillips' self-serving and objectionable 1/9/09 "Report of Investigation," which is an investigative report ConocoPhillips generated after firing Bentley (and after this lawsuit was filed). Although Bentley asked for all emails regarding his employment in discovery, ConocoPhillips did not appropriately produce Thomas' 11/7/08 email. The only reason Bentley even knew about the critical email is because it was referenced in the aforementioned Report of Investigation.

although he did nothing when he first heard the rumors, he now passionately made the case to "do something" about Bentley, and to do it quickly: "At what point can we give these men [Bentley's co-workers] a good feeling about their workplace environment?" (SOF 32.) Thomas voiced his frustration with the process: "Please keep this confidential as I'm merely venting some 'red tape' frustrations and this is in no way a 'knock' on you or anyone, just the system. I just want to move on this (at both levels)." (SOF 33.)

Five days later, ConocoPhillips then took an unprecedented step. On November 12, 2008, ConocoPhillips HR representative Ken Halsor, along with two other company personnel, flew up to Missoula from their offices in Texas and approached Bentley. (SOF 34.) Halsor told Bentley that a week after receiving his EAP complaint, ConocoPhillips was informed that Bentley had made a comment to that "they were going to read about [him] in the paper." (SOF 35.) Bentley denies making the statement, and denied it to Halsor. (SOF 35.)

Halsor asked to search Bentley's truck, referencing the company's search policy, of which Bentley was unaware at the time. (SOF 36.) At the time, Bentley was working at the ConocoPhillips terminal and was nowhere near his truck. (SOF 37.) Neither Halsor nor any other ConocoPhillips personnel asked to search Bentley's person, his locker, or anywhere else nearby. (SOF 38.) Although

ConocoPhillips has refused to answer discovery about other occasions on which it has implemented its search policy, Steve Thomas acknowledged that, in his 14 years at ConocoPhillips, this was the first and only time the company search policy was ever used. (SOF 39.)[2]

Bentley did not want the company's personnel to search his vehicle. Having just been to a Christian weekend retreat with his wife (Family Life's "Weekend To Remember," held in Coeur D'Alene on 11/7/08-11/9/08), Bentley had personal items in his truck that he did not want others to see. (SOF 40.) Contrary to the hopes of Halsor and Thomas, there were no hunting rifles in the truck, nor were there any firearms ConocoPhillips would have ever discovered during a search of the vehicle. (SOF 41.) The only thing Bentley was concerned about were the very personal items located in his truck, which included copious notes from the

---

[2] Ironically, ConocoPhillips' concocted basis for firing Bentley was in direct contradiction to its litigation position that Montana citizens enjoy the "right to privacy to be left alone." According to ConocoPhillips' policy statement:

> Montana citizens are guaranteed an individual right of privacy under the Montana constitution. This right provides significantly broader protection than does the federal constitution. The right to privacy to be left alone is precious. It is essential to our quality of life.

ConocoPhillips' Response to Plaintiff's First Motion to Compel, p. 3 (citations omitted).

conference, intimate details about his marriage, and a sexual aide. (SOF 42.)[3]

Bentley wanted to protect his privacy, but he also did not want to jeopardize his job. The ConocoPhillips' search policy provides that, "[s]hould any person have questions about this policy, it is that person's responsibility to obtain answers or clarification before a search." (SOF 46.) Bentley asked Halsor what would happen if he denied permission to search his truck. (SOF 47.) Halsor falsely told Bentley that if he refused a search, he would be suspended. (SOF 47.) Halsor's representations made sense to Bentley because it was not inconsistent with ConocoPhillips' progressive disciplinary policy, "OWST" (standing for Oral warning, Written warning, Suspension, and Termination), being that Bentley had never been written up or in trouble before. (SOF 48.) Based on this policy and Halsor's representation, Bentley refused the search. (SOF 51.)

[3] During the course of this lawsuit, Bentley disclosed there was a handgun bolted underneath a plastic console in his truck. Bentley had placed the gun there when he lived in Seattle and had to drive through dangerous neighborhoods. To access the handgun, screws had to be removed and the plastic console pulled up. (It was Bentley's thinking that, if he ever needed the handgun in an emergency, he could smash the plastic console with his shoulder and retrieve it.) There is *no possibility* ConocoPhillips would have ever discovered the handgun in a search of Bentley's vehicle. Still, Bentley has been forthcoming about its presence in the vehicle. (SOF 43-44.) Regardless, the fact is irrelevant and inadmissible. *See, e.g., Schwartz v. Metro Aviation, Inc.*, 2009 WL 3522599, *5 (D. Mont. 2009).

Bentley was told he was suspended and instructed to leave the premises. (SOF 52.) In reality, Bentley was being terminated and the decision had already been made. (SOF 52.) On November 17, 2008, Bentley received a letter from Ken Halsor, terminating his employment for refusing a search of his vehicle. (SOF 53.)[4]

Remarkably, ConocoPhillips' retaliation against Bentley did not even cease after his discharge. Steve Thomas filled out Bentley's final timecard. (SOF 1, 7-8, 55.) When he received his last paycheck, Bentley discovered he was not paid for 64 hours of regular time. (SOF 55.) In addition, the company inexplicably deducted 17.31 hours of overtime from his paycheck. (SOF 55.) ConocoPhillips has still not remedied these deficiencies and has not paid Bentley.

ConocoPhillips' contrived reason for discharging Bentley is amply refuted by the record. As a matter of law, the discharge was not supported by good cause, was retaliatory, and violated ConocoPhillips' own policies. Because the undisputed facts establish the discharge was wrongful, Bentley's Motion for Summary Judgment on Wrongful Discharge should be granted.

---

[4] Despite the central role that Halsor played, ConocoPhillips has repeatedly refused to make Halsor available for deposition. This refusal, in and of itself, warrants judgment in favor of Bentley. *See, e.g., Peschel v. Missoula*, CV 08-79-M-JCL (D. Mont. Oct. 15, 2009), Order Granting Default Judgment (available at 2009 WL 3364460).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248 (1986). The moving party must initially identify those portions of the record before the Court that it believes establish an absence of material fact. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn.*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party carries its burden, the party opposing summary judgment must then set forth *specific* facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–323, 106 S. Ct. 2548, 2552 (1986). "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' 'designate specific facts showing that there is a genuine issue for trial'." *Id*. at 324. A mere scintilla of evidence, or evidence that consists of mere speculation, personal belief, hope that helpful evidence will be developed before trial, or irrational inferences is not sufficient. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986).

ANALYSIS

I. CONOCOPHILLIPS VIOLATED MONTANA'S WRONGFUL DISCHARGE FROM EMPLOYMENT ACT.

Under Montana's Wrongful Discharge from Employment Act (WDEA), Mont. Code Ann. § 39–2–901, *et seq.*, an employee's discharge is wrongful in either of three circumstances:

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

Mont. Code Ann. § 39–2–904(1)(a)–(c). Here, the undisputed facts demonstrate that ConocoPhillips violated all three subsections.

A. ConocoPhillips Did Not Have Good Cause.

Employers have good cause to discharge an employee only if the discharge is based on "reasonable job related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. . . ." Mont. Code Ann. § 39–2–903(5). Here, ConocoPhillips has never claimed Bentley failed to satisfactorily perform his job duties or that he disrupted the work place. In fact, the opposite was true. Bentley

had always performed well in his job and had never been written up or in trouble. His evaluations were good.

ConocoPhillips will rely, as it must, on the concept of "legitimate business reason" to support the discharge. A "legitimate business reason" is a "reason that is neither false, whimsical, arbitrary or capricious and [that has] some logical relationship to the needs of the business." *Johnson v. Costco Wholesale*, 152 P.3d 727, 733 (Mont. 2007). The employer's discretion to discharge an employee must be balanced against the employee's "equally legitimate right to secure employment." *Johnson*, 152 P.3d at 733 (citing *Kestell v. Heritage Health Care Corp.*, 858 P.2d 3, 8 (Mont. 1993)). That balance must favor an employee who, like Bentley, presents evidence that the stated reason for the discharge was false, arbitrary or capricious, and unrelated to the needs of the business." *Id.*; *Schwartz v. Metro Aviation, Inc.*, CV 08–32–M –JCL, 2009 WL 352599 (Feb. 9, 2009 D. Mont.)

Where the facts show the reason for discharge was merely pretextual, a violation of the WDEA is established. *See, e.g., Kestell*, 858 P.2d at 8. In *Kestell*, the plaintiff had served as director of a hospital's chemical dependency unit. *Id.* at 4. The hospital entered a contract with an outside company that required someone from the outside company to direct the chemical dependancy unit. *Id.* The

hospital reassigned the employee to a different, less desirable job, claiming the reassignment had nothing to do with the new contract but, rather, was prompted by declining revenues. *Id.* at 8. The Montana Supreme Court rejected this concocted "legitimate business reason," finding the discharge was wrongful. *Id.*

Here, the facts are far clearer than in *Kestell*, warranting summary judgment in Bentley's favor. It is undisputed that, on the very day Thomas found out about Bentley's EAP complaints about him, he sent a year-old email to his supervisors about Bentley's speeding at the terminal. (SOF 24.) It is undisputed that, 40 minutes after sending the old email, he confronted Bentley anew about speeding and asked "do I need to discharge you?" (SOF 25.) It is undisputed that Thomas then resurrected stale rumors for his supervisors – rumors he thought nothing about prior to Bentley's EAP complaint. (SOF 28-30.) It is undisputed that Thomas and Halsor then conducted the first-ever search at the Missoula facility, and were so "concerned" about the threat Bentley posed that they did not even ask to search his person or personal storage area – they just wanted to search his truck in the parking lot. (SOF 36, 38.) Without restating the factual background section above, these and other facts amply demonstrate that the purported reason for Bentley's discharge – refusal to allow a search – was entirely pretextual. ConocoPhillips desired to rid itself of a "squeaky wheel" after Bentley complained about unsafe

working conditions, harassment, and the company's broken promises. It may believe the manner in which it accomplished this was clever, but the undisputed facts render its true motivations abundantly apparent.

Moreover, even assuming *arguendo* that ConocoPhillips did, in fact, discharge Bentley for refusing the vehicle search, this does not amount to good cause under the statute and is, as explained more fully below, inconsistent with its discipline policies. Although ConocoPhillips now wishes to portray Bentley as a Christian gun nut, the facts reveal he was a good worker, and no disciplinary process was pending against him. The EAP and even Thomas realized he was not a threat. Moreover, Bentley relayed that there were personal items in his truck that related to his marriage and he did not want others to see them. Finally, ConocoPhillips never informed Bentley about the search policy and he was unaware of it until the date of his discharge. Given these facts, the decision to discharge Bentley bore no logical relationship to the needs of the business. At the most, the discipline should have been what Halsor said it would be – a suspension and nothing more.

On a related note, Ken Halsor is, without a doubt, one of the key witnesses in this case. He was the individual who ultimately initiated the search process and then fired Bentley after falsely telling him he would only be suspended. Bentley

requested Halsor's deposition at least as far back as on June 12, 2009. (SOF 54.) Bentley continued to request dates for Halsor's deposition – asking a total of *at least* seven times. (SOF 54.) ConocoPhillips repeatedly promised to produce Halsor. (SOF 54.) Finally, it gave Bentley a date for the deposition: January 7, 2010. (SOF 54.) However, ConocoPhillips has since informed Bentley that Halsor no longer works for the company and that it cannot contact him. (SOF 54.) By failing to make Ken Halsor available, ConocoPhillips has failed to provide any legitimate justification for the unwarranted search of Bentley's vehicle. Because ConocoPhillips has repeatedly refused to make this evidence available, the fact should be read in favor of Bentley. *See, e.g., See Peschel v. Missoula*, CV 08-79-M-JCL (D. Mont. Oct. 15, 2009), Order Granting Default Judgment (available at 2009 WL 3364460).

In sum, the undisputed facts demonstrate that good cause was lacking to support the discharge of Bentley. The Court should rule that ConocoPhillips violated the WDEA in this respect.

B. ConocoPhillips Wrongfully Retaliated Against Bentley.

Bentley's discharge not only lacked good cause, but it was retaliatory, providing a separate and independent basis for summary judgment under the WDEA. Montana law provides that a discharge is wrongful if "it was in retaliation

for the employee's refusal to violate public policy or for reporting a violation of public policy." Mont. Code Ann. § 39–2–904(1)(a). Here, Bentley complained to ConocoPhillips that he was not being paid the overtime wages he had been promised and complained about unsafe working conditions. When he did so, ConocoPhillips retaliated by discharging him.

The WDEA defines "public policy" as "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provisions, statute, or administrative rule." Mont. Code Ann. § 39–2–903(7). Matters concerning wages and workplace safety clearly fall within the realm of public policy. *See* Montana Wage Act, Mont. Code Ann. §§ 39–3–201 *et seq.*; Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.; Duties of Employer and Employee, Mont. Code Ann. § 50–71–201 to 50–71–202; Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq.; *see also Motarie v. Northern Mont. Jt. Refuse Disposal Dist.*, 907 P.2d 154 (Mont. 1995) (discussing how a discharge based on an employee's reporting of unsafe working conditions would be wrongful). Thus, if an employee is discharged for reporting unsafe working conditions or the employer's failure to adequately pay overtime wages, then the discharge is wrongful under the WDEA.

As set forth above, Bentley was discharged from ConocoPhillips for reporting unsafe working conditions and the inadequate overtime pay. Both of these matters are important public policy issues. For these reasons, Bentley is also entitled to summary judgment under Mont. Code Ann. § 39–2–904(1)(a).

C. ConocoPhillips Violated Its Own Written Personnel Policies.

The WDEA provides that a discharge is wrongful if "the employer violated the express provisions of its own written personnel policy." Mont. Code Ann. § 39–2–904(1)(c). Here, ConocoPhillips failed to follow its "confidential" EAP policy and its graduated disciplinary policy when it discharged Bentley.

First, there can be no dispute that ConocoPhillips violated its own written personnel policy regarding its "confidential" Employee Assistance Program. Relying on the company's assurances of confidentiality, Bentley filed a complaint with EAP counselor Dixie Wilson. Bentley informed Wilson that he was not being paid the overtime wages he was promised and that working conditions were unsafe. Wilson asked Bentley if she could relay this complaint to an individual (Halsor) in ConocoPhillips' Human Resources department. He agreed, because he wanted the issues addressed and because he believed the disclosure would be limited as represented. However, Halsor breached the confidentiality requirement and told Thomas and others about the complaint, and Bentley was fired only days

later.

In addition to the EAP policy, ConocoPhillips also violated its disciplinary policy. If an employer has a graduated disciplinary policy, like ConocoPhillips, but did not follow the steps when discharging an employee, the discharge is wrongful. *Hager v. J.C. Billion, Inc.*, 184 P.3d 340, 343 (Mont. 2008). In *Hager*, for instance, the employer had a graduated disciplinary policy that required an oral and written warning before termination, but it demoted an employee without issuing either type of warning. *Id.* at 342. The jury returned a verdict for the employee, and the Montana Supreme Court affirmed, concluding it was proper for the trial court to instruct the jury that it is wrongful for the employer not to follow its own graduated disciplinary policy. *Id.* at 343.

Just as in *Hager*, ConocoPhillips violated its own graduated disciplinary policy when it discharged Bentley. Under ConocoPhillips' graduated disciplinary policy, if the company believes an employee has violated work rules, the employee is first orally warned, and if that warning does not remedy the conduct, the employee is issued a written warning, then suspended and, finally, terminated as a last resort. (SOF 48). The policy is referred to as "OWST" for short. (SOF 48).

ConocoPhillips completely disregarded its OWST policy when it discharged Bentley. Bentley was told by Halsor that if he did not allow the search of his

vehicle, he would only be suspended. (SOF 47). Not only was Bentley entitled to a written warning before being suspended, but when Bentley refused to allow the search of his vehicle, the company went beyond suspension and immediately discharged him. (SOF 52–53).

ConocoPhillips argues that its OWST policy was not written, and cannot therefore form a basis for violation of the WDEA. ConocoPhillips' attempt to bypass the effect of the statute should not be countenanced, however. First, there is no dispute that the OWST policy existed and was in place at the Missoula facility. (SOF 49). Thomas testified at his deposition that the company's corporate office held OWST out as the company's "progression of disciplinary action," and that it was to be followed with all Missoula terminal employees, including Tim Bentley. (SOF 49.) ConocoPhillips has acknowledged in its briefing in this case that it adhered to an "OWST-type disciplinary procedure" during Bentley's employment. (SOF 50.) As set forth in Bentley's Second Motion To Compel, currently pending before the Court, in discovery ConocoPhillips refused to produce the documents that refer or relate to the OWST procedure it had in place. ConocoPhillips' should not be allowed to benefit from its blatant failure to provide discovery, and its reliance on a technical argument should be disregarded by the Court.

The undisputed facts demonstrate that, in terminating Bentley, ConocoPhillips violated its own written personnel policies. As such, summary judgment is warranted under Mont. Code Ann. § 39–2–904(1)(c).

II. CONOCOPHILLIPS VIOLATED THE FAIR LABOR STANDARDS ACT.

Like Montana's WDEA, the Fair Labor Standards Act (FLSA) prohibits employers from "discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." 29 U.S.C. § 215(a)(3). This prohibition applies to complaints regarding payment of regular and overtime wages for employees engaged in interstate commerce. *See* 29 U.S.C. §§ 206, 207. Employees in the interstate oil pipeline industry are "plain[ly]" engaged in interstate commerce. *Brennan v. Greene's Propane Gas Serv., Inc.*, 479 F.2d 1027, 1030–1031 (5th Cir. 1973); *see also Wirtz v. Lunsford*, 404 F.2d 694 (6th Cir. 1968).

The terms of FLSA's anti-retaliation provision are liberally construed—employers are liable for retaliation when employees have complained to a manager, foreman, or other officers of the employer, even if a formal complaint was not made. *Lambert v. Ackerly*, 180 F.3d 997, 1004–1005, 1007 (9th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 1116; *Tenn. Coal, Iron, & R. v.*

Muscoda Local No. 123, 321 U.S. 590, 597 (1944) ("[FLSA] must not be interpreted or applied in a narrow, grudging manner."). In *Lambert*, for instance, the Ninth Circuit expressly held that:

> [I]t is clear that so long as an employee communicates the *substance* of his allegations to the employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage), he is protected by [FLSA's anti-retaliation provision].

180 F.3d at 1008 (emphasis original).

A former employee establishes a prima facie case of retaliatory discharge if he can show: (1) he was discharged after complaining about his pay, and (2) the employer was aware of the complaint. *See Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 642–644 (7th Cir. 2002) (en banc) (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–804 (1973)); *Adair v. Charter Co. of Wayne*, 452 F.3d 482 (6th Cir. 2006). This showing creates a presumption that the employer unlawfully retaliated against the employee. *Stone*, 452 F.3d at 489 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)). The burden then shifts to the employer to show legitimate, non-retaliatory reasons for the discharge. *Id.*

Timing is a critical factor when showing that a discharge was retaliatory. *See, e.g., Lambert*, 180 F.3d 997. In *Lambert*, an account executive for the Seattle SuperSonics, a professional basketball team, complained to her supervisor about

her overtime wages. *Id.* at 1001. The account executive eventually settled her claim with the SuperSonics, but a week after the settlement, the executive vice president announced he was planning to lay off all account executives in less than two months. *Id.* at 1002. The account executives then filed a lawsuit in federal court alleging they had been fired in retaliation for their complaints about overtime wages. *Id.* The jury awarded the plaintiffs lost wages, damages for each plaintiff's emotional distress, and $12 million on their retaliation claim under FLSA. *Id.* The district court also awarded attorneys' fees to the plaintiffs. *Id.* The Ninth Circuit upheld the verdict in each respect and concluded that substantial evidence supported the verdict. *Id.* at 1012.

Here, the undisputed facts lead to one conclusion—Bentley was discharged from ConocoPhilips because he raised legitimate concerns about his overtime pay and other working conditions. Bentley expressed his concerns directly to Thomas and then filed a complaint through the company's "confidential" EAP program. In breach of the confidentiality requirement, Thomas was informed of the complaints and Bentley was fired in a few short days.

As set forth above, ConocoPhillips, a sophisticated corporate litigant, tried to mask its reasons for discharging Bentley. The undisputed facts refute the company's dubious tale. Those facts will not be restated here. Suffice it to say

that the following is undisputed: (1) Bentley was discharged after complaining about his pay, and (2) ConocoPhillips was aware of the complaint. *See Stone*, 281 F.3d at 642–644. Under federal law, this creates a presumption that ConocoPhillips unlawfully retaliated against Bentley, and it is ConocoPhillips' burden to prove otherwise. *See id.* at 489. As set forth above, this is a burden it cannot meet.

CONCLUSION

For the reasons stated, Bentley respectfully requests the Court grant Bentley's Motion for Summary Judgment on Wrongful Discharge.

DATED this 25th day of January, 2010.

BOONE KARLBERG P.C.

By: /s/ Scott M. Stearns
Scott M. Stearns
Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.l(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and contains approximately 5,265 words, excluding the parts of the brief exempted by L.R. 7.1(d)(2)(E).

DATED this 25th day of January, 2010.

BOONE KARLBERG P.C.

By: /s/ Scott M. Stearns
Scott M. Stearns
Attorneys for Plaintiff