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Safe Driver Programs Help Protect Employees and Their Employers' Bottom Lines

By: John M. Semmens

The new year provides the perfect opportunity for a new beginning. At the outset of 2020, Crowley Fleck PLLP's Employment Practices Group invites employers to consider adopting new policies and procedures designed to reduce employment-related motor vehicle crashes. Recent guidelines from the United States Department of Labor ("DOL") provide compelling evidence demonstrating how safe driver programs can help all employers—regardless of size—to reduce costs, protect employees, and improve their bottom line. [1]

Motor vehicle crashes impose significant costs on employers. According to the DOL, motor vehicle crashes "cost employers $60 billion annually in medical care, legal expenses, property damages, and lost productivity." Employment-related crashes cost employers an average of $16,500. If the crash results in any injury, those average costs increase to $74,000. And crashes resulting in fatalities cost in excess of $500,000.

The unfortunate reality is that most motor vehicle crashes are preventable. In recognition of this unique opportunity to protect workers and reduce costs, more employers are choosing to adopt safe driver programs. In particular, the Network of Employers for Traffic Safety ("NETS"), an employer-led, public/private partnership dedicated to improving the health and safety of workers by reducing traffic crashes, has published model policies and best practices for employers of all sizes, including a 10-step program to reduce motor vehicle crashes.

NETS recommends that employers adopt comprehensive policies and procedures to encourage safe driving, including by:

- Adopting traffic safety policies that are clear, comprehensive, and enforceable, and communicating those policies to employees.

- Educating employees on safe driving techniques and creating a workplace culture that values safety and respect.
- Consistently enforcing traffic safety policies against non-complying employees, and rewarding employees who practice safe driving techniques.
- Monitoring the driving records of all employees who drive for work purposes, and disciplining/training workers who fail to maintain good driving records.
- Establishing and enforcing crash reporting and investigation processes for all motor vehicle crashes. These processes are designed to learn more about the root causes of crashes, and identify ways to prevent future crashes.
- Purchasing company vehicles with high safety ratings, as well as properly maintaining and routinely inspecting company vehicles.

Employers who have adopted safe driver programs have experienced significant, demonstrable successes. For example, one company that adopted NETS' 10-step program experienced a 53% decrease in preventable crashes, even though that company also experienced a 19% increase in employee miles driven over the same period. In total, that company experienced a 40% decrease in motor vehicle loss costs.

Driving a vehicle can be a dangerous proposition, and motor vehicle crashes are a leading cause of death and injury for all age groups. For many companies—especially those located in large, western states where city centers are separated by miles of highway—employment-related driving is an unavoidable cost of doing business.

Safe driver programs provide companies with one option to mitigate those costs. Safe driver programs can help employers: (i) save lives, and prevent serious injuries to employees; (ii) protect employer resources and investments; (iii) reduce various employer costs; and (iv) reduce corporate and personal liability associated with motor vehicle crashes. And according to DOL, the costs associated with implementing these safe driver programs "are minimal compared to the costs of crashes to your organization."

Americans traditionally adopt personal resolutions for self-improvement at the beginning of the new year. This holiday season, we invite you to consider adopting new policies to improve your business by reducing employment-related motor vehicle crashes. If you are interested in learning more about safe driver programs appropriate for your business, please contact Crowley Fleck's Employment Practices Group. And, on behalf of Crowley Fleck PLLP, we wish you a very Happy New Year.

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[1] *See* U.S. Department of Labor Occupational Safety & Health Administration, *Guidelines for Employers to Reduce Motor Vehicle Crashes*, https://www.osha.gov/Publications/motor_vehicle_guide.html (accessed December 17, 2019).

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When a Demotion Becomes a Discharge under Montana's Wrongful Discharge from Employment Act

By: Scott Hagel

Montana employers faced with how best to deal with a troublesome or poorly performing employee often wonder whether they can permissibly demote the worker without incurring liability for wrongful discharge. The employer may reasonably believe that reducing an employee's pay and eliminating some job responsibilities will serve dual purposes: (1) limiting the employee's ability to harm the business and (2)

motivating the employee to voluntarily quit.

However, this is an area where employers need to be particularly careful. The Montana Supreme Court has held that under some circumstances, employers who adopt this approach may incur liability under the Montana Wrongful Discharge from Employment Act ("WDEA").

First, the WDEA defines a "discharge" rather broadly. It includes a "constructive discharge" as well as "any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason." Mont. Code Ann. § 39-2-903(2). Obviously, not every discharge is wrongful, but particular attention must be paid to the potential for an employee to voluntarily resign and assert a claim for constructive discharge. This form of discharge is defined as "the voluntarily termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntarily termination is the only reasonable alternative." However, "[c]onstructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment." Mont. Code Ann. § 39-2-903(1).

Establishing a constructive discharge presents a difficult standard for an employee to meet. While an employee may be insulted to be demoted and may suffer some hardship due to a reduction in pay, if an employer can show any justification for the demotion, the employee will be hard-pressed to show that voluntarily termination was the only reasonable alternative. Unless the demotion was manifestly improper or the reasons for the demotion were a pretext for some other reason (such as motivating the employee to voluntarily quit), an objective, reasonable person would likely find that the employer's actions in demoting the employee were reasonable.

Setting aside the issue of constructive discharge, the Montana Supreme Court has previously considered whether an employer's demotion of an employee constituted an involuntary discharge under the WDEA. In *Howard v. Conlin Furniture*, 272 Mont. 433, 901 P.2d 116 (1995). The Plaintiff, Howard, worked as manager of a Conlin's Furniture store in Billings starting in 1990. He received an excellent performance evaluation from his supervisor in 1992. A new supervisor was hired in 1993, and the new supervisor began to record written complaints about Howard's performance. On May 20, 1993, Howard was terminated from position as store manager and then offered a sales position at a greatly reduced salary of $1000 per month, plus a commission opportunity. Howard was not first advised of job performance deficiencies or given an opportunity improve his performance.

Howard rejected the sales job and sued for wrongful discharge. Conlin's argued that Howard was demoted, not discharged, and the District Court dismissed the case on summary judgment. The District Court held that Howard's rejection of the sales job was at most a constructive discharge, but Howard failed to offer any evidence that work conditions would have been intolerable.

The Montana Supreme Court reversed the lower court decision and remanded the case to the trial court for further proceedings. The important factors in the determination that Howard was discharged, rather than merely demoted, were as follows:

- Howard's supervisor made a written statement to the Job Service in response to Howard's application for unemployment insurance benefits that Howard was "discharged from his position as store manager" and at that time offered a sales position, which he declined on May 25, 1993.
- The action was not a lateral transfer or a minor change in the job description. The new pay level in the sales job was less than 25 percent of what Howard had been earning as store manager.
- To hold that the employment action was not a termination would allow the employer to circumvent the Act's damage provisions, which are based on the employee's level of wages at the time of termination.

In 1996, the Montana Supreme Court considered a similar case, but reached a completely different result. In *Clark v. Eagle Systems*, 279 Mont. 279, 927 P.2d 995 (1996), Plaintiff Clark was employed as a railroad

terminal manager for a company called Eagle Systems. The company loaded and unloaded trains for Burlington Northern Railroad Company, and also provided other services at the Billings terminal. Clark was hired in 1985 and on November 21, 1991, was notified he was being replaced as terminal manager the next day, and was being demoted to a position as a utility worker.

Eagle Systems maintained that Clark was difficult to work with, was verbally abusive to customers and co-workers, and subordinates said they had difficulties with his paranoia and penchant for meting out harsh discipline. Clark pursued discrimination claims that were eventually dismissed. His state court lawsuit included a number of claims, among them wrongful discharge under the WDEA. The District Court granted summary judgment to Eagle Systems on all counts, on grounds that the WDEA was the exclusive remedy and that Clark was not wrongfully discharged. The District Court held that while the demotion might be viewed as a discharge, triggering the WDEA as was the case in *Howard*, Eagle Systems had good cause for the reclassification; therefore, no wrongful discharge occurred.

This time, the Supreme Court affirmed the lower court decision in favor of the employer, but the affirmance was for a different reason – specifically, that Clark was merely demoted and not discharged. The key factors in the affirmance were:

- The plaintiff did not allege a constructive discharge.
- Unlike the facts in the Howard case, Clark was replaced as the terminal manager and immediately reassigned, so there was no cessation of employment. A claim under the WDEA requires a complete severance of the employment relationship.
- The record did not reflect whether there was a substantial change in salary or benefits.

The relevant factual differences between these two cases are very subtle. In determining whether a demotion is actually a discharge and actionable under the WDEA, a key factor will be whet-her the employee continues working at the inferior position (i.e., was there a complete severance of the employment relationship). Further, how the employer characterizes the event in any written statements or testimony (such as in an unemployment insurance claim) will be important. Finally, a demotion can give rise to a constructive discharge claim, even if a Court agrees with the employer that the change in employment status was a demotion, rather than an involuntary termination of employment.

Employers who wish to deal with troublesome or poorly performing employees by demotion, rather than an outright discharge, should be very cautious and seek legal counsel before taking this approach. A better alternative is to adopt and follow consistent employment practices, including regular written performance evaluations, clear and concise written documentation of behavioral issues and any resulting discipline, and clear articulation of the employer's policies and expectations. If an employer follows such practices and finds it necessary to discharge an employee, the employer will have a strong defense. Employers should not demote employees in hopes they will voluntarily quit, because if the employee can show this is the employer's motivation, the employee will have a strong claim for constructive discharge.

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