AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

GALLATIN VALLEY HUMAN RESOURCES ASSOCIATION
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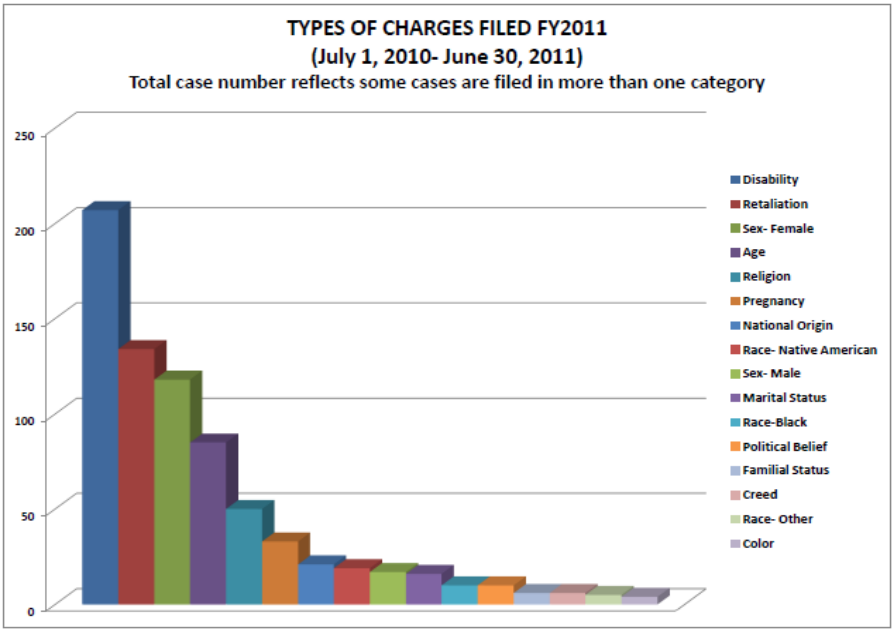
Cut and Paste Post:
December, 2011
Focus on Discrimination Plus Some Quick Facts/Quick Resources

Looking Back At 2010-2011

The following table shows the number and types of charges filed with the Montana Human Rights Commission between July 1, 2010 and June 30, 2011.



At the federal level, there were 99,947 charges of employment discrimination charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) in fiscal year 2011—Oct. 1, 2010, through Sept. 30, 2011. This is the largest number of charges filed in one year since the agency was established in 1965.

The EEOC also hit other milestones in 2011, including a record 10 percent reduction in the EEOC's backlog of pending cases and $364.6 million in back pay and penalties paid to victims of workplace discrimination. In addition, the EEOC's private-sector national mediation program hit a milestone by collecting more than $170 million in monetary benefits for plaintiffs and by resolving 9,831 cases—another record.

Approximately 80 percent of charges filed with the agency are dismissed for a variety of reasons, including duplicate claims, filing errors and withdrawals of complaints.

Looking Forward To 2012:
A New EEOC Regulation Boosting Age Bias Claims

The U.S. Equal Employment Opportunity Commission (EEOC) has approved a final regulation that says an employment practice that adversely impacts older workers is discriminatory unless the practice is justified by a "reasonable factor other than age" (RFOA).

The rule emphasizes the need for an individualized, case-by-case approach to determine whether an employment practice is based on reasonable factors other than age and that the RFOA defense applies only when an employment practice is not based on age. It provides lists of factors for determining whether an employment practice is reasonable and whether it's based on a factor other than age, according to background provided by the EEOC.

The **"Final Regulation on Disparate Impact and Reasonable Factors Other than Age (RFOA)"** under the Age Discrimination in Employment Act now goes to the U.S. Office of Management and Budget (OMB) for review. Upon OMB approval, the regulation will be published in the *Federal Register*.

Back to Basics:
McDonnell Douglas and the Analysis of Discrimination Claims

You've just received a "love letter" from the Human Rights Commission informing you that one of your employees has filed a complaint against you. What do you need to consider?

We all know that Montana law prohibits discrimination in employment based on race, color, religion, creed, sex, age (all ages), marital status, national origin and disability and, for public employees, political ideas. It also prohibits retaliation against people who have participated or assisted in an investigation, proceeding or hearing to enforce any provision of either the Human Rights Act or the Governmental Code of Fair Conduct Act. Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas.*

The first tier of *McDonnell Douglas* requires ***employees to establish a prima facie case of discrimination.*** For example, in a hiring complaint, the employee must demonstrate:

> "(I) that the employee belongs to a [protected class] . . .; (ii) that the employee applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, the employee was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.".

Once the plaintiff has established a prima facie case, the ***burden shifts to the employer to establish a legitimate, nondiscriminatory reason*** for its act or actions. This proof is necessary for two reasons:

> "[It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."

The third step in the analysis provides for an opportunity for the complainant to prove that the legitimate reasons given by the employer are a pretext for discrimination. This burden now merges with the ultimate burden of persuading the court that [plaintiff] has been the victim of intentional discrimination. Throughout the process, the burden of persuasion remains with the complainant.

It's also important to know that the employer only needs to set forth some legitimate reason for the actions taken against the employee. For example, in the case of a failure to hire, the employer has to set forth the legitimate business reason, but it does not have to prove that the legitimate business reason was the motivation to reject the applicant. If the employer can forth a legitimate business reason, the complainant's prima facie case is considered rebutted.

Professional Pointer: If you wait to build your case until you've received the 'HRC love letter', you're probably too late. As employment decisions are made, employers must ensure that they are made for legitimate (non-discriminatory) business reasons, and that the documentation is 'tight' enough that the employer will be able to prove these reasons were not discriminatory when (not if!) a claim is filed.

Retaliation: Shield or Sword?

As the chart on Page 1 shows, the number of retaliation claims has spiked in Montana. Do employees who have filed a complaint against their employer have 'free reign' in the work environment? In other words, can employees use the anti-retaliation provisions as a Sword rather than a Shield? Boone v. Great Falls Transit (GTF) says "No" …

Boone filed discrimination complaints against GFT in 2006 and 2007, and a union grievance against GFT in 2010. In April, 2010, Boone filed a Retaliation complaint against GFT claiming that GFT retaliated against her because of these earlier complaints. Boone claimed the retaliatory actions included:

- Requiring her to move her parked car so that it was within one marked parking space in the employee parking area;
- Affixing a "safe driver" award Boone had earned to the front of her locker, instead of presenting it in person to her, with others present and affixing a PSR ("Passenger Service Report," basically a complaint from a customer or observer -- not an employee – about the conduct of a transit driver) to the front of her locker, for her to sign and return, instead of providing it to her personally, in private, and
- Disapproving her request to use sick leave to attend the funeral of her stepfather (a leave request already approved by the operations manager).

In addition, during the same time period, Boone applied, but was not hired, for a job which she believed would have allowed her to return to work (within her limitations) following a workers' compensation injury. Boone's Supervisor (Helgeson) participated in the decision to award the position to another employee.

In Montana, retaliation occurs when an employer takes "*a significant adverse action against a person who has participated or assisted in an investigation, proceeding or hearing to enforce any provision of either the Human Rights Act or the Governmental Code of Fair Conduct Act*." Under the Administrative Rules of Montana, a significant adverse act taken against a person during or *within six months* after that person participated or assisted in one of these protected activities triggers a "disputable regulatory presumption of retaliatory motivation" for that significant adverse act.

Many of the actions of which Boone complained of came within the 6 month time period specified in the rule, Boone had to prove that (1) she engaged in protected activity; (2) GFT took a significant adverse action against her; and (3) there was a causal connection between the significant adverse action and Boone's protected activity.

After the Hearing, the Hearing Officer found as follows on Boone's claims:

- Helgeson properly had Boone move her car because there was limited parking available, and Boone had taken up 2 parking spaces;
- Helgeson's failure to provide the safe driving award and PSR directly to Boone was because of Boone's work schedule, that Helgeson took proper steps to ensure the privacy of the PSR, and that
- The disapproval of paid leave was consistent with written GFT policy, which did not include "step" relatives in the list of those eligible for funeral leave.

As it relates to the job for which she was not hired, the Hearings Officer noted that it was not clear that the job actually would have been within her limitations, but found that the selection of the other employee for the job was based upon comparative qualifications, not retaliatory animus.

In his decision (http://erd.dli.mt.gov/human-rights/complaint-process/decisions/doc_download/6455-boone-v-great-falls-transit.html), the Hearings Officer suggested that "It might be a good idea for GFT to train its General Manager to be a little less candid about his negative personal feelings toward an employee he supervises, to avoid further complaints which, even if ultimately not well-founded, will still cause GFT to go to the expense of successfully defending against them." At the end of the day, though, the Hearing Officer found that GFT "successfully overcame the disputable presumption of causation with its persuasive evidence of legitimate and non-retaliatory business reasons for its allegedly retaliatory actions against Boone". Based on these findings, the Hearing Officer dismissed the case.

Human Rights Commission Issues Final Agency Decision in Groven vs. Havre Eagles Club

As you will recall from earlier *Cut N Paste Posts*, Kaycee Groven filed a complaint against the Eagles, claiming she was subjected to a sexually hostile work environment during the years she worked at the Eagles. A Hearing was conducted, and the Hearings Officer found in favor of Groven, awarding her $75,000 for extreme emotional distress related to the actions of Eagles Manager Thomas Farnham. (Remember? He's the guy who wasn't fired!)

The Eagles appealed the Hearing Officer's decision to the Commission and, in August 2011, the Commission remanded this case to the Hearings Bureau for further consideration of the compensatory award for emotional distress damages. (The Commission didn't think Groven's award was substantial enough.) In a 9/28/11 Hearings Bureau Order After Remand, the Hearing Officer determined that the record supported an increase in the award of emotional distress damages to the total amount of $100,000.00.

The Eagles once again appealed to Human Rights Commission, arguing that the Hearing Officer's award for compensatory damages was excessive. The Commission heard the matter on November 17, 2011, with neither party requesting oral arguments.

Following the Hearing, the Commission affirmed the Hearing Officer's findings of fact and conclusions of law in its entirety. The Commission found that the Hearing Officer's decision to increase the emotional distress damage award was justified by the years Groven was forced to endure extreme sexual harassment in her workplace. The Commission cited the fact that Groven repeatedly requested the Eagles to intercede and stop the harassment, but it did nothing, as well as the fact that Farnham's sexual harassment eventually resulted in a criminal conviction for sexual assault against Groven.

Either party may petition the district court for judicial review of the Final Agency Decision. This review must be requested within 30 days of the date of this order. Let's see how far the Eagles want to take this!

Quick Facts/Quick Links:

SHRM 2011 Employee Job Satisfaction Survey Report

According to the *SHRM 2011 Employee Job Satisfaction Survey Report* employee job satisfaction in the U.S. reached its peak in 2009 -- possibly because employees were especially grateful for their jobs at the height of the recession. But since then, it has been dropping slightly each year. ***A much-discussed March 2011 report from MetLife found that more than one out of three surveyed employees hoped to be working elsewhere within the next 12 months.***

View and download an expanded version of the *Employee Job Satisfaction Survey Report*, including charts and tables, **by accessing the online version.**

Healthcare

- **The U.S. Supreme Court will Hear Challenge to the Health Care Reform Law in 2012:** The four issues to be reviewed will include:

  - The constitutionality of the "individual mandate" – the requirement that almost every American obtain health insurance by 2014 or be subject to a financial penalty.
  - Whether the overall law must fail if the individual mandate is struck down.
  - Whether the federal Anti-Injunction Act, which bars suits "for the purpose of restraining the assessment or collection of any tax" prohibits any challenge to the individual mandate until the first penalty is due in April 2015.
  - Whether Congress exceeded its constitutional authority by expanding the eligibility and coverage thresholds that states must adopt to remain eligible to participate in Medicaid.

  The high court set aside 5.5 hours, probably in March, for oral argument. A decision will likely be issued in late June. ***Because some parties see similarities between this law and other laws, such as the Civil Rights Act, and the Social Security Act, this will be an important case to follow in 2012.***

- **DOL Issues FAQs On Health Care Reform And The Mental Health Parity And Addiction Equity Act -** The FAQs found at http://www.dol.gov/ebsa/faqs/faq-aca5.html clarify the permissible non-quantitative limitations that health plans may apply to mental health and substance abuse benefits.

Montana Public Employees: Right to Privacy vs. Public's Right to Know:

Three recent Montana cases evaluated the employee's right to privacy versus the public's right to know. In each of these cases, it was determined that the public's right to know outweighed any right to privacy. Two decisions required the redaction of third party names from the document being released.

Montana Supreme Court:

DA 10-0615: The City Of Billings, Defendant And Appellant, V. The Billings Gazette, A Division Of Lee Enterprises, Plaintiff and Appellee.

Issue: Disciplinary action against police department civilian employee
Document to be released: Due Process Letter
Link: http://searchcourts.mt.gov/index.html

Human Rights Commission:

Issue: Discrimination based on political ideas.
Document to be released: HRC Settlement Agreement

- Case No. 483-2012: In Re Information Request By Harlowton Times-Clarion
- Case Nos. 650-2012, 652-2012 and 679-2012: In Re Information Requests By Lee Tickell, Bill Lacroix and Michael Howell .

Put Down the Lamp Shade:
Holiday Office Party Behaviors to Avoid

CFO Daily News, December 15, 2008

Don't let your staffers become a walking punchline on Monday after the holiday office party, be on the lookout for these common blunders.

Bringing someone who doesn't belong. Many companies are expected to hold smaller, more intimate gatherings this holiday season. So, follow this general rule: If you're not 100% positive you can bring a guest, then don't.

Becoming too socially lubricated. A holiday party is an extension of the office, not your local dive bar. At every party, some staffer (or staffers) imbibes a bit too much. At best it can be embarrassing — at worst it can cost you your job. At the same time, don't go around asking drinkless co-workers why they're not indulging. It's awkward for everyone when someone has to justify not drinking or explain the virtues of AA.

Not shutting up about work. While you're supposed to remain professional, it's important to remember to leave shop talk out of the party. Holiday parties are meant to be a respite from the rigors of the daily grind, not informal meetings that serve eggnog.

Trying to be a comedian. In a relaxed setting with a little liquid courage, it's easy to take your co-workers' laughter as a sign to step it up a notch. But be aware of where the line is and stay away from off-color jokes and comments or gossip about co-workers that could potentially create vicious rumors.

HAPPY HOLIDAYS FROM THE GVHRA BOARD OF DIRECTORS!

It has been a privilege and pleasure to serve as your Legislative Chair for the past "umpteen" years. I hope you have gained as much from this work as I have gained from doing it. Thank you for the opportunity!

Pattie Berg.