



CUT AND PASTE POST FEBRUARY, 2020

With everything in government being so focused on upcoming elections and impeachment proceedings, I didn't think I was going to find anything to *Cut N Paste* about... until I found this...

Montana Supreme Court Decision Ups Ante on Discrimination Claims

Let's go back to the basics for just a couple of seconds:

1. The Montana Human Rights Commission is a Fair Employment Practice Agency (FEPA) for the Equal Employment Opportunity Commission (EEOC). Across the nation, FEPA's process more than 48,000 discrimination charges on behalf of the EEOC annually. These cases can be jointly filed as state and federal claims, but are handled using the FEPA's 'usual' process.
2. Under the Montana Human Rights Act (MHRA), claims of discrimination may proceed to a bench trial: they are not eligible for a jury trial.

Jay Spillers has a visual disability. In 2016, he applied for a position with the Montana Department of Public Health and Human Services ("DPHHS"). He was not interviewed for the position and was not hired. All the applicants DPHHS interviewed, and the applicant hired, were nondisabled females.

In August of 2017, Spillers filed a state court action against DPHHS alleging violations of the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the MHRA, and the Governmental Code of Fair Practices. In his complaint, he claimed that DPHHS intentionally discriminated against him on the basis of his sex and/or disability. He sought damages for economic loss, mental anguish, pain and suffering, and other nonpecuniary losses, as well as punitive damages. He demanded a jury trial.

In February 2019, DPHHS filed a motion to strike Spillers' demand for a jury trial. It argued that the entire matter should proceed to a bench trial, as authorized by/ required under the MHRA. In my lay understanding, DPHHS' argument went sort of like this:

- ☞ Montana law does not allow jury trials for discrimination claims.
- ☞ Even though the ADA and Title VII allow for jury trials, in Montana, that right would only apply if the case was filed in federal court.
- ☞ Since Spillers filed in state court, the case should be processed under Montana law, including a bench trial.

The 3rd District Court agreed with DPHHS, concluding that, because Montana procedural law does not provide for a jury trial in discrimination cases, Spillers did not have a right to a jury trial on his federal discrimination claims.

Spillers appealed to the Montana Supreme Court.

In a 4-2 decision, the Supreme Court overturned the District Court. It found that: "Congress ...established the right to a jury trial in the [Civil Rights Act of 1991] for claims previously not afforded a jury trial." It found Spiller has a right to a jury trial on his federal claims in state district court.

The Court remanded the case to the District Court, telling it: "The MHRA applies to his state claims and § 1981a of the 1991 Act applies to his federal

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claims. The right to a jury trial is guaranteed under federal law and is separate and distinct from the MHRA’s procedures. The District Court has broad discretion to determine how the trial of Spillers’ complaint will be administered.”

Justices McKinnon and Rice dissented from the rest of the Court. In the dissenting opinion, Justice McKinnon said, “The Court’s decision upends well-established Montana judicial procedure based entirely on the fact that a federal remedial statute allows for a jury.” She argued that, while the Civil Rights Act of 1991 expanded the remedies (e.g., money) available for acts of discrimination, it did not expand the substantive rights [i.e., the right to a jury trial] afforded these claims. She also observed that, in the future, all a litigant needs to do is “attach a § 1981a claim to defeat Montana’s neutral procedure [e.g., bench trial review] for litigating unlawful discrimination claims.”

Professional Pointer – Depending on how the District Court administers the trial, this decision does seem to raise the possibility that attorneys will attach (frivolous?) federal claims to state discrimination claims, which will result in more jury trials and, potentially, higher jury awards for acts of discrimination.

The case is [Spillers v. 3rd Judicial District OP 19-0109](#). Decision Date: 01/21/2020.

House Passes Protecting Older Workers Against Age Discrimination Act

On January 15th, the U. S. House of Representatives passed the **Protecting Older Workers Against Age Discrimination Act** by a 261 to 155 vote. This Act would amend the Age Discrimination in Employment Act (ADEA) to:

- 1) permit complaining parties to rely on any type or form of evidence in presenting their claims; and
- 2) clarify that complaining parties are not required to prove that a protected characteristic or activity was the sole cause of an unlawful employment practice.



The bill attempts to overturn U.S. Supreme Court precedent established in [Gross v. FBL Financial Services](#), in which the court held that a plaintiff bringing an ADEA claim must prove that age was the "but-for" cause of the challenged adverse employment action.

The Bill has to pass the Senate and be signed by the President before it can become law. Stay tuned!

OSHA Fines Increase

In 2015, the Federal Penalties Inflation Adjustment Act of 2015 (also known as the “Inflation Act”) was passed to adjust monetary penalties assessed by OSHA and other agencies. The aim of this law was to adjust these penalties for inflation and to continue to deter violations of federal laws intended to protect workers. All OSHA penalties assessed after January 15, 2020 are increased as follows:

Violation	2019 Penalty	2020 Penalty
<ul style="list-style-type: none"> • Serious • Other than Serious • Posting Requirements 	\$13,260 per violation	\$13,494 per violation
Failure to Abate	\$13,260 each day beyond the abatement date	\$13,494 each day beyond the abatement date
Willful or Repeated	\$132,598 per violation	\$134,937 per violation

The penalties will apply to all citations issued by OSHA after January 15, 2020, including companies with inspection cases pending on January 15th. For anyone doing business in a state where a state agency enforces OSHA, civil penalty amounts may differ. In case you’re wondering, OSHA enforces the OSH Act in Montana.