IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. OP 22-0023

CHARLES DANIEL SMITH,

Plaintiff and Appellant,

vs.

CHARTER COMMUNICATIONS, INC.,

Defendant and Appellee.

APPELLANT'S REPLY BRIEF

Certified question from the Ninth Circuit Court of Appeals
Cause No. 21-35149

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

ARGUMENT

I. The 1999 amendments to Montana's anti-blacklisting statute do not impact this case and did not supersede *Galbreath*.

A. The unambiguous language of the amended statute has no application to this wrongful discharge claim.

The plain language of the 1999 amendments to § 39-2-801, MCA, applies that statute only to a blacklisting context where an employee requests a service letter itemizing the reasons for discharge and the employer provides such letter in response to the request. § 39-2-801, MCA. Here the parties both assert that the subject provision is unambiguous; however, Charter exercises a strained interpretation of the amended statute in an attempt to apply it outside the context of a blacklisting case and into a Wrongful Discharge from Employment Act ("WDEA") claim. Such approach is not allowed under the clear language of the statute. For this reason, Charter is not allowed under Section -801 to change its reason for discharge specifically itemized in its timely discharge letter.

First, there is no reference in Section -801 to the WDEA or beyond the blacklisting context of Title 39, Chapter 2, Part 8. This anti-blacklisting statute is self-contained and self-referential. Subsection (3), which Charter wishes to invoke in order to argue grounds for termination not itemized in the discharge letter, specifically allows an employer to only amend its "response to the demand [for a service letter]." § 39-2-801, MCA. With the Part read as a whole, references to an

"action" mean a blacklisting lawsuit, as explicitly authorized by Sections -802 and -803. There can be no other reasonable interpretation of the statute.

Even resorting to legislative history makes clear that the repeatedly stated purpose of the amendments was to allow an employer protection to speak openly about a former employee during post-discharge reference requests in order to avoid a potential *blacklisting* lawsuit. While there were limited references made to wrongful discharge claims, language to that effect never made it into the final version of the bill and never became law. Language was even proposed during the legislative process but was not incorporated into the current version of the statute. It is not the law. This anti-blacklisting statute amendment in its final state did not restrict employees' rights in the WDEA context, only the blacklisting context, which was the stated and understood purpose for S.B. 271.

In its response brief, Charter notes that, "[i]ronically," Smith argues that Section -801 does not apply here. Appellees' Br., p. 36, n. 13. This is true. If Smith had requested a service letter, if Charter had supplied a service letter, and if Smith had sued for blacklisting, then Section -801(3) may arguably allow for Charter to amend its service letter in defense of such blacklisting lawsuit. None of that happened in this case. Smith did not request a service letter and did not sue for blacklisting. Section-801 does not apply, and Charter cannot raise any new discharge reasons after the fact in this separate WDEA case.

B. *Galbreath* was correctly decided and remains good law after the 1999 amendments.

Contrary to Charter's argument, *Galbreath* was not wrongly decided. In *Galbreath*, the Court interpreted the relatively new WDEA statute. In doing so, it relied upon reasoning from a non-WDEA context in *Swanson*. That reasoning was functionally relatable to the WDEA context given that the employer in *Swanson* attempted to introduce several reasons outside the one reason itemized in the discharge letter (refusing to participate in sterilization procedures). From the holdings and context of both cases, if an employer wrote a discharge reason into a contemporaneous termination letter, it must have been and should be considered the actual reason for the discharge and no other reasons crafted after the fact should be introduced.

For example, in *Galbreath*, Bruce Galbreath was not fired for boating or serving tables after his work accident – he was specifically fired only for not producing sufficient medical documentation to return to work as a miner. *Galbreath v. Golden Sunlight Mines, Inc.*, 270 Mont. 19, 23, 890 P.2d 382, 385 (1995). In that case, the employer's attorneys should not have been allowed to purport other reasons for discharge after the employer itself investigated the medical documentation, made a termination decision based on that reason, and wrote a contemporaneous discharge correspondence listing only that reason. This is sound reasoning, and *Galbreath* was correctly decided. It properly interpreted

the WDEA provisions as to what a tendered "good cause" reason for termination is. Charter does not explain why it matters that *Galbreath* adopted its reasoning from a non-WDEA case or from an anti-blacklisting context. It is sound legal reasoning with significant public policy support that was adopted into other contexts, as well. *See Galbreath* (workers' compensation anti-retaliation statute and Unfair Trade Practices Act); *Bean v. Mont. Bd. of Labor App.*, 1998 MT 222, 290 Mont. 496, 965 P.2d 256, (unemployment claim).

While *Galbreath*'s central holding is not specifically stated in the WDEA itself, Courts are authorized to interpret laws and have previously done so through decisional caselaw within the WDEA statutory framework. For example, this Court has previously interpreted the WDEA to require a balance between an employer's right to decide who it will employ with an employee's legitimate interest in maintaining secure employment. *Buck v. Billings Mont. Chevrolet*, 248 Mont. 276, 281-82, 811 P.2d 537, 540 (1991). That balancing analysis is not stated in the WDEA. Further, this Court has interpreted the WDEA's "legitimate business reason" to be one that "is not false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business." *Id.* That definition is nowhere to be found in the statute. The Court has also interpreted that enforcement of a company policy against one employee but not others may constitute an "arbitrary" reason for discharge and fail the "good cause" test. *Johnson v. Costco*

Wholesale, 2007 MT 43, 336 Mont. 105, 152 P.3d 727. That bright-line rule is not in the WDEA; however, it is entirely appropriate for the courts to perform such interpretative analysis in deciding cases under statute.

The question before the *Galbreath* Court and now again this Court is how to determine what a claimed "good cause" reason for termination is. This can properly be decided by this Court and was correctly done so in *Galbreath* and nearly every other Montana Supreme Court and District Court case after its pronouncement in 1995. *See* Smith's Opening Br., discussion at pp. 14-21. The *Galbreath* rule's precedential value should be affirmed.

II. The factual circumstances here demonstrate conclusively why exclusion of termination reasons other than those itemized in a timely discharge correspondence should be upheld.

The facts[1] of *Smith v. Charter* presently before this Court demonstrate why the *Galbreath* rule is well-reasoned, is necessary to employees and employers in the State of Montana, and should be upheld by this Court. Charter argues it should be allowed to legally terminate Smith for failing to travel to each of his regional sites once per quarter, even though this was not mentioned in a very specific termination letter drafted by a very sophisticated corporate employer. The facts of

[1] Unless otherwise noted, the facts relied upon herein were set forth in Smith's Opening Brief at the Ninth Circuit Court of Appeals, Case 21-35149, Doc. 10 (May 23, 2021), and in the Ninth Circuit's Order Certifying Question to the Supreme Court of Montana.

this case reveal why this tactic should not be allowed in this or future cases in the State of Montana.

Charter did not fire Smith for his quarterly site travel; therefore, it cannot be a truthful, legitimate reason for discharge. Following Q1 2017, Smith was not terminated for failure to make quarterly site visits. Following Q2 of that year, Smith was also not fired for any failure to travel that quarter. In fact, Smith's supervisor, Gary Heimstead, issued him a corrective action notice during that quarter on April 6, 2017, listing four technical areas of deficiency. *Smith v. Charter Commns., Inc.*, Findings and Recommendations of U.S. Magistrate Judge, 1:18-cv-00069-SPW-TJC, p. 4 (D. Mont. Jun. 19, 2020)[2]. Clearly Charter was willing and able to raise performance concerns with this employee that it believed were legitimate and to issue him formal discipline that it deemed necessary; however, neither quarterly site visits nor travel in general was mentioned in this formal corrective action notice. *Id.*, p. 5. If Charter did, in fact, terminate Smith for failing to complete quarterly site visits in Q1 2017 and/or Q2 2017, then it surely would have stated so in the timely formal correct action notice when his performance was being reviewed or, at the very least, in the termination letter itself.

Then, during all of Q3 2017 and the majority of Q4 2017, Smith was out of work on approved leave for an international mission trip and associated medical

[2] Smith's supervisor, Heimstead, admitted that each of these four technical deficiencies was resolved without any further disciplinary action.

issues he suffered during that trip. Smith did not return to work until November 20, 2017, with less than half of Q4 left. As the undisputed record reflects, Smith was inundated with thousands of emails upon his return, and Smith presented substantial evidence that the specific winter weather and travel conditions Smith observed during the month of December 2017 were severe and risky. Smith testified that he spoke with his supervisor Heimstead about his workload upon his return to work and about the weather conditions, and Heimstead was not requiring Smith to travel under those circumstances.

In sum, despite documented, albeit later resolved, corrective action on other issues during Q2, insufficient site visits during that quarter were not raised in that corrective action or later in the discharge letter. Further, Smith could not have been terminated for failure to visit all sites during Q3 or Q4, since he was on leave for all or most of those quarters – approved by the company.

Smith was formally terminated on January 29, 2018, and the only reason pertinent to this Court's consideration was, "In December 2017, you failed to fulfill the 50% travel requirement to your management area. You completed 5% travel. Dan did not inform Gary Heimstead, Regional VP, ISP, of any reason he was not able to fulfill this requirement." Of course, the District Court, the Ninth Circuit, and even Charter have all but conceded that this reason is false – that Charter had no 50% travel requirement during 2017.

Rejecting the *Galbreath* rule would mean that a court would ignore as a matter of law the very real and practical fact that an employer actually meant this one and only written discharge reason to be the real discharge reason. To the contrary, there *has* to be some reason this one pertinent item was the only specific ground set forth in the termination letter regarding travel. There *has* to be a reason why this specific claimed policy "requirement" (50% travel time) was mentioned twice in two short sentences and why Smith was conspicuously *not* terminated for alleged violation of a separate claimed policy (quarterly site visits). Put simply, an employer like this simply would not have written its termination letter in this fashion if it did not actually intend this to be the reason it believed Smith deserved to be fired.

Charter has never offered an explanation, valid or otherwise, as to why it itemized "50% travel" as a reason in the discharge letter and not "quarterly site visits." Smith has provided substantial evidence that Charter did not have a 50% travel rule in December 2017. Again, there *has* to be for a reason for that: the employer did not want or did not choose to have that policy in place at that time, based on how it intended to manage its employees and conduct its business. This evidence that Charter terminated a long-time employee over a non-existent rule clearly shows Charter misunderstood or misapplied its own policies and is now attempting through its legal team to improperly enforce different policies against

Smith in order to deny a Montana worker his day in court. This type of tactic should not be encouraged, and reaffirmation of *Galbreath* would protect against it.

As such, the circumstances of the case (viewing all factual inferences in the light most favorable to the nonmoving party) dictate that Charter clearly meant to rely on "50% travel" as the reason for termination and not "quarterly site visits." The former is decidedly not a true and sufficient reason for termination as a matter of law. While Smith submits that material fact issues exist regarding the latter, it is merely a creative, after-the-fact assertion by the employer's legal team in order to find some valid ground to escape liability when, in fact, no valid ground existed at the time the termination decision was made by the employer. This is not only unfair to Montana employees because it justifies elimination of a job based on false pretenses, but it is also unfair to Montana employers because it forces them to risk perjurious conduct and face exacerbated litigation.

In sum, based on the language of the discharge letter specifying "December 2017," and its failure to terminate or discipline Smith for travel concerns in Q1 or Q2, clearly Charter was focusing on Smith's travel *after* his return from his approved leave. Smith, however, could not have been legally terminated for not visiting all sites in Q4 because this would not have been a "reasonable" directive given he missed most of Q4 on approved leave and because winter weather made

travel difficult or impossible. An employer's directives must be "reasonable[3]" in order to terminate an employee for their violation. The facts of this case demonstrate that the *Galbreath* rule is appropriate and necessary within the WDEA context.

III. Charter's policy arguments fail to consider other applicable evidentiary standards and the practical realities of termination decisions justifying an opposite result.

Charter suggests that, under the current *Galbreath* rule, an employer that declines to provide any reason at the time of termination is unbound in the evidence it may submit. This argument holds no water, since all reasons for discharge of a non-probationary, non-contract employee are still analyzed under the "good cause" standard and must be analyzed for relevancy, Rule 403 issues, and other evidentiary standards, whether they are itemized in a discharge letter or not. The real reason relied upon by an employer that did not issue a discharge letter simply must be parsed out through further discovery as opposed to determining it conclusively from a contemporaneous writing from the company. This is by no means an absurd result. In any event, it is not a difficult burden under *Galbreath*

[3] "Good cause" is defined as "*reasonable* job-related grounds for dismissal." § 39-2-903(5), MCA (emphasis added); *see also Pankratz Farms, Inc. v. Pankratz*, 2004 MT 180, ¶ 74, 322 Mont. 133, 95 P.3d 671; *Mysse v. Martens*, 279 Mont. 253, 262, 926 P.2d 765, 770 (1996) (both analyzing whether employer's directives were reasonable so as to constitute "good cause").

for an employer that does provide a reason for discharge, as all it must to do is provide a sufficient, truthful reason supported by evidence.

Charter's position also ignores the realities of an employee-discharge scenario. Terminating an employee without providing any reason at all is much more likely to invite litigation than would providing a clear and truthful reason for the termination. Like almost any action in the course of business, an employer can certainly evaluate the pros and cons of either providing a reason for discharge or not and act accordingly. Some of the benefits of providing a clear and truthful reason for discharge would certainly be to encourage open and honest communication with the employee, to provide explanation and closure as to what went wrong, and to avoid post-termination litigation.

Business owners, managers, human resources professionals, and in-house counsel are routinely required to understand or seek advice regarding the laws that impact their companies. Encouraging an employer to provide a truthful and substantiated reason for termination – consistent with Montana law, including the *Galbreath* rule – is not a difficult proposition and should be encouraged as a fair business practice.

Charter similarly opines that an employer who provides a specific reason for termination is punished compared to an employer that provides a broad or vague reason. That is not the case, as an employee fired for a generic reason like "poor

performance" or "misconduct" is much more likely to be unsatisfied with the explanation and likely to pursue litigation, if nothing else, to simply to find out why. It is also less likely for a jury to believe that intentionally vague reasons were actually truthful at the time. Nonetheless, an employer can certainly decide for itself whether it desires to issue specific discharge letters, generically vague discharge letters, or none at all.

Finally, it is crucial to point out that, if an employer does not include something in a discharge letter as a reason to support the discharge, at the very least a question of material fact exists as to whether the employer itself actually relied on that reason when firing the employee and whether it actually felt that such excluded reason was sufficient grounds to terminate the employee based on how the employer intended to manage its workforce. Yet, the District Court in this case granted summary judgment as a matter of law under such circumstances. At a minimum, a jury question exists as to what the real reason for discharge was: a reason stated in the timely discharge letter that is overtly false (50% travel policy) or a new and different reason that at least existed but is still questionable factually (quarterly site visit policy).

As a result, this case is a perfect example of how summary judgment was improper, and, therefore, even if Charter is allowed to argue reasons outside of its discharge letter, a jury of Smith's peers in the Billings District should be allowed

to decide whether (1) Charter's "50% travel in December 2017 without explanation" stated reason was the real reason for termination or whether its current position of "travel to all sites quarterly" was the real reason; (2) whether, under either scenario, such directive was "reasonable" under the circumstances of Smith's return from leave, permission from his supervisor, and dangerous winter weather; and (3) whether, under either scenario, such reason constitutes "good cause" to legally terminate a non-probationary employee.

CONCLUSION

Affirmation of the *Galbreath* rule would properly follow the legislative directives of § 39-2-801, MCA, and its 1999 amendments. It is a fair and well-reasoned foundational principal of employment law in the State of Montana that courts across this State have followed for decades and should continue to do so. Smith respectfully requests this Court to uphold its holding and limit Charter to the reasons for termination itemized in its final discharge correspondence.

Dated this 9th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing is proportionally spaced using 14-point Times New Roman font; is double-spaced; and contains 3,142 words calculated by Microsoft Word's word count, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

Dated this 9th day of June, 2022.

By: /s/ Eric E. Holm
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CERTIFICATE OF SERVICE

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