

WYOMING

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I. AT-WILL EMPLOYMENT

A. Statute

Wyoming is an “at will” employment state. Wyoming does not have an “at will” employment statute but relies on case law.

B. Case Law

The Wyoming Supreme Court recognizes a contract in every employment situation. *Ormsby v. Dana Kepner Co. of Wyo., Inc.*, 2000 WY 25, 997 P.2d 465, 471 (Wyo. 2000). In Wyoming, unless otherwise stated, all employment contracts are presumed to be at-will. *Finch v. Farmers Co-op Oil Co. of Sheridan*, 2005 WY 41, ¶ 10, 109 P.3d 537, 541 (Wyo. 2005); *Garcia v. UniWyo Federal Credit Union*, 1996 WY 84, 920 P.2d 642, 645 (Wyo., 1996)(citing *Alexander v. Phillips Oil Co.*, 1985 WY 174, 707 P.2d 1385, 1386 (Wyo.1985)). Employment at-will is only presumed in contracts of indefinite duration. *McDonald v. Mobil Coal Producing, Inc.*, 1991 WY 149, 820 P.2d 986 (Wyo. 1991). Any at-will employee may be terminated for any or no reason at all, unless an express or implied contract states or establishes otherwise. *Finch*, 2005 WY 41 at ¶ 10, 109 P.3d at 541; *Davis v. Wyo. Med. Ctr., Inc.*, 1997 WY 43, 934 P.2d 1246, 1249 (Wyo. 1997).

When an employment contract is silent about duration and does not specify reasons for termination, employment is presumed to be at-will. *Kuhl v. Wells Fargo Bank, N.A.*, 2012 WY 85, ¶ 14, 281 P.3d 716, 720-21 (Wyo. 2012). This presumption may be rebutted by showing that the parties had an express or implied agreement, written or oral, that prohibited the employer from discharging without just cause or that employment would last for a set term. *Id.* Whether an express agreement existed is generally a question of fact. *Id.*

“The at-will employment rule offers no remedy to an employee who has been arbitrarily or improperly discharged and has suffered adverse effects on his or her economic and social status regardless of how devastating those effects actually were.” *Townsend v. Living Ctrs. Rocky Mountain*, 1997 WY 127, 947 P.2d 1297, 1299 (Wyo. 1997). “In an at-will employment relationship, either the employer or the employee may terminate the relationship at any time, for

any or for no reason at all.” *Finch*, 2005 WY 41 at ¶ 10, 109 P.3d at 541 (quoting *Boone v. Frontier Refining, Inc.*, 1999 WY 127, 987 P.2d 681, 685 (Wyo. 1999)).

The Wyoming Supreme Court has adopted the “at will” employment rule citing the public policy of economic and business stability. Stability in the business community is preserved by at will employment because, at least at the state level, employers’ and employees’ decisions remain subject only to the express or implied contracts into which they have voluntarily entered or subject to statute. *McLean v. Hyland Enterprises, Inc.*, 2001 WY 111, ¶ 22, 34 P.3d 1262, 1268 (Wyo. 2001); *Townsend*, 947 P.2d at 1299.

In Wyoming, employers and employees are free to contract the terms of employment status. *Wilder v. Cody Country Chamber of Commerce*, 194 WY 7, 868 P.2d 211, 217-18 (Wyo. 1994). At will employment can be modified by either an express or implied-in-fact contract, which are equally enforceable. *Trabing v. Kinko's, Inc.*, 2002 WY 171, ¶ 10, 57 P.3d 1248, 1253 (Wyo. 2002).

The most common abrogation of at will status is an express employment contracts that specially define the duration of employment. See *Wilder*, 868 P.2d at 217-18. If a contract provides for a specific duration of employment, Wyoming law presumes that that dismissal will occur only for cause. *Id.* If the express contract is a verbal contract, Wyoming law places two restrictions on it. First, performance under a contract of definite duration is within the statute of frauds (Wyo. Stat. Ann. § 1-23-105(a)(i) (LexisNexis 2013) making evidence of a writing necessary if the terms are not performed within one year. *Id.* Second, employers and employees are free to enter into express contracts which state a duration, but contain specific language preserving the right to terminate at-will by either party. *Id.*

a) II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

At-will employment is based on a unilateral contract where an employer offers employment and the employee accepts the offer by performing the work. Wyoming courts will use the objective test, as outlined in Restatement (Second) of Contracts §§ 19 and 21, to determine if an implied contract exists, and if so, what it requires.

Under the "objective theory" of contract formation, a contractual obligation is imposed not on the basis of the subjective intent of the parties, but rather upon the outward manifestations of each party's assent sufficient to create reasonable reliance by the other party . . . That [the employer] did not subjectively "intend" that a contract be formed is irrelevant, provided that [the employer] made sufficient intentional, objective manifestations of contractual assent to create reasonable reliance by [the employee].

McDonald v. Mobil Coal Producing, Inc. 1991 WY 149, 820 P.2d 986, 990 (Wyo. 1991).

1. Employee Handbooks/Personnel Materials

The Wyoming Supreme Court has also recognized a special, implied bilateral contract that is formed by the utilization of an employee handbook, in which the employer is deemed to have offered a job for a particular term. The consideration received by the employer is the benefit of having a cooperative work force. *Ormsby v. Dana Kepner Co. of Wyo., Inc.*, 2000 WY 25, 997 P.2d 465, 471 (Wyo. 2000).

Wyoming first recognized that an employee's at-will status could be altered via an employee handbook in *Mobil Coal Producing, Inc. v. Parks*, 1985 WY 107, 704 P.2d 702, 705 (Wyo. 1985). Since then, this exception has been broadened to include an employer's policies and course of dealing. *Jiminez v. Colorado Interstate Gas Co.*, 690 F. Supp. 977, 979 (D. Wyo. 1988) (employer's standard operating procedures posted in employee coffee room created implied employment contract); *Leithead v. Am. Colloid Co.*, 1986 WY 139, 721 P.2d 1059, 1063 (Wyo. 1986) (handbook listing offenses which could result in discharge implies that cause is required); *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 217 (Wyo. 1994) (employer's policies and/or promise of permanent employment plus additional consideration by employee or explicit language in the contract of employment that termination is only for cause, may alter at-will presumption, thus placing an employee on probation as a disciplinary procedure is inconsistent with presumption of at-will employment). See also *Anderson v. S. Lincoln Special Cemetery Dist.*, 1999 WY 9, 972 P.2d 136, 140-41 (Wyo. 1999).

Generally, the presumption of at-will employment is rebuttable only through a systematic discipline procedure or other language in an employee handbook implying termination may be for cause. *Davis v. Wyo. Med. Ctr., Inc.*, 1997 WY 43, 934 P.2d 1246, 1249 (Wyo. 1997) (citing *Lincoln v. Wackenhut Corp.*, 1994 WY 8, 867 P.2d 701, 703 (Wyo. 1994)). See also *Leithead v. Am. Colloid Co.*, 1986 WY 139, 721 P.2d 1059 (Wyo. 1986); *Terry v. Pioneer Press, Inc.*, 1996 WY 123, 947 P.2d 273, 276 (Wyo. 1996).

Generally, if the handbook or policy contains a list of disciplinary procedures, offenses which may result in termination, and/or differentiates between probationary versus permanent employees, it will be found to be an implied contract requiring cause for termination. *Lincoln v. Wackenhut Corp.*, 1994 WY 8, 867 P.2d 701, 703 (Wyo. 1994).

In *Burbank v. Wyodak Resources Development Corp.*, 2000 WY 190, 11 P.3d 943, 947 (Wyo. 2000), the Wyoming Supreme Court held that an employee handbook created an implied-in-fact contract that unambiguously authorized the employer to terminate an employee who tests positive for alcohol. Mr. Burbank tested positive for alcohol while at work. He was suspended for three days awaiting urinalysis test results and was subsequently terminated. The court found that "[a]lthough the Examples of Cause provision of the handbook suggests that reporting to work under the influence of alcohol is cause for discipline, and thus for following the three-step procedure for positive discipline rather than immediately discharging the employee, the Steps of Positive Discipline also authorizes the employer to accelerate discipline." *Id.*

In *Sheaffer v. State ex rel. University of Wyoming ex rel. Board of Trustees*, the Wyoming Supreme Court accepted an invitation to assume that regulations promulgated by the University of

Wyoming (called “UniRegs”) created an implied contract that an employee could only be terminated “for-cause,” and found that the regulations had not been breached and the employee was otherwise terminated for cause. 2009 WY 14, ¶¶ 42-19, 202 P.3d 1030, 1042-44 (Wyo. 2009).

2. Provisions Regarding Fair Treatment

The Wyoming Supreme Court has not addressed the issue of fair treatment in the employment context. However, Wyoming does recognize the implied covenant of good faith and fair dealing in very narrow circumstances, which is discussed in more detail below.

3. Disclaimers

A clear and conspicuous disclaimer will defeat any implication of “for cause” employment. *Bouwens v. Centrilift*, 1999 WY 24, 974 P.2d 941, 947 (Wyo. 1999). A disclaimer that is not set off from the text around it and is “buried in introductory paragraphs” generally is insufficient and will be given no effect. *Sanchez v. Life Care Ctrs. of Am.*, 1993 WY 101, 855 P.2d 1256, 1259 (Wyo. 1993). Whether a disclaimer is conspicuous and unambiguous is a matter of law to be decided by the court. *Arch of Wyo., Inc. v. Sisneros*, 1999 WY 7, 971 P.2d 981, 984 (Wyo. 1999); *McDonald v. Mobil Coal Producing, Inc.* 1991 WY 149, 820 P.2d 986, 988 (Wyo. 1991) (adopting the rule of *Jiminez v. Colo. Interstate Gas Co.*, 690 F. Supp. 977 (D. Wyo. 1988)).

In the first *McDonald* decision, the court held that the disclaimer demonstrated Mobil had no intention of forming a contract, so no contract existed. *McDonald v. Mobil Coal Producing, Inc.*, 1990 WY 36, 789 P.2d 866, 869 (Wyo. 1990). However, the court ruled that despite a disclaimer, the employer could still be held liable for wrongful discharge if other provisions of a handbook reveal language that could be understood to connote promises notwithstanding a lack of contractual obligation, if the employee reasonably relied upon them to his detriment. *Id.* at 870-72. Thus, an employee could establish a promissory estoppel claim based on the other provisions of the written contract, or could claim an implied contract of employment based on a personnel manual or handbook which set forth a progressive disciplinary system, a list of conduct that would result in termination, or distinguished between permanent and probationary employees, for example.

In *McDonald II*, the Wyoming Supreme Court reaffirmed its prior ruling but abandoned both the subjective intent and promissory estoppel aspects of its prior decision. *McDonald v. Mobil Coal Producing, Inc.*, 1991 WY 149, 820 P.2d 986 (Wyo. 1991). It held that in order for a disclaimer to be effective, it must be “conspicuous.” It then concluded that Mobil’s disclaimer was not and was therefore ineffective. The court explained that the other provisions in the handbook that could have given rise to a promissory estoppel claim in *McDonald I*, were objective manifestations of intent, which created an ambiguity in the contract.

The following language was found to be a sufficient disclaimer in *Lincoln v. Wackenhut Corp.*, 1994 WY 8, 867 P.2d 701 (Wyo. 1994):

THIS HANDBOOK IS INTENDED AS A GUIDE FOR THE
EFFICIENT AND PROFESSIONAL PERFORMANCE OF YOUR
JOB. NOTHING HEREIN CONTAINED SHALL BE

CONSTRUED TO BE A CONTRACT BETWEEN THE EMPLOYER AND THE EMPLOYEE. ADDITIONALLY, THIS HANDBOOK IS NOT TO BE CONSTRUED BY ANY EMPLOYEE AS CONTAINING BINDING TERMS AND CONDITIONS OF EMPLOYMENT. THE COMPANY RETAINS THE ABSOLUTE RIGHT TO TERMINATE ANY EMPLOYEE, AT ANY TIME, WITH OR WITHOUT GOOD CAUSE. MANAGEMENT RETAINS THE RIGHT TO CHANGE THE CONTENTS OF THIS HANDBOOK AS IT DEEMS NECESSARY, WITH OR WITHOUT NOTICE.

The basis for the decision was that the language was prominent; its placement was such that a reasonable person ought to notice it; the language was unambiguous to constitute an effective notice to a reasonable person that no promises modifying the existing employment at-will were being offered; and it preserved the employer's right to alter the language of the handbook without notice. *Id.* at 704-705; *See also Davis v. Wyo. Med. Ctr., Inc.*, 1997 WY 43, 934 P.2d 1246, 1251-1252 (Wyo. 1997).

The Wyoming Supreme Court has shifted its analysis of disclaimer cases to a "clarity requirement of disclaimer language" under a contract formation analysis. Thus, Wyoming courts analyze disclaimers in an employee handbook under offer, acceptance, and a mutuality of assent approach. In *Bouwens v. Centrilift*, 1999 WY 24, 974 P.2d 941, 947 (Wyo. 1999), the employee wanted to rely on a provision in a contract which said that in the case of a layoff, long-term employees would be given special consideration. The court found there was clear, conspicuous language in a handbook stating: "NOTHING IN THIS HANDBOOK WAS TO BE UNDERSTOOD AS AN EMPLOYMENT CONTRACT BETWEEN THE COMPANY AND THE EMPLOYEE." *Id.* at 946. Under the traditional rules espoused in *Sanchez* and *Lincoln*, this would have been insufficient. However, the *Bouwens* court ruled this language was sufficient to rebut any presumption of "for cause" employment. The court relied upon a contract formation analysis, with mutual assent being the legal standard for the formation of a binding contract. A reasonable employee reading the disclaimer language would know that Centrilift's intention with the handbook provisions was not to create an enforceable term of an employment contract.

The employee in *Bear v. Volunteers of Am. Wyoming, Inc.*, 1998 WY 114, 964 P.2d 1245 (Wyo. 1998) was held to be an at-will employee, notwithstanding her argument that she never signed the disclaimer distributed by the employer. The court held that whether or not the employees read or signed it makes no legal difference. The disclaimer, as well as all provisions of the entire handbook, was binding on the employer and employee, even if the employee is unaware of them. *Id.* at 1251.

The court in *Boone v. Frontier Refining, Inc.*, 1999 WY 127, 987 P.2d 681 (Wyo. 1999) reaffirmed application of the contract formation analysis in determining what effect a handbook has on the employment relationship when it was not generally distributed to employees, holding that the plaintiff could not have relied on the manual's terms since he was not given a manual. Therefore, the manual did not alter his at-will status. *Id.* at 686.

In another significant decision, the Wyoming Supreme Court held in *Andrews v. Southwest Wyoming Rehab. Ctr.*, 1999 WY 26, 974 P.2d 948 (Wyo. 1999) that the employee did not have a claim for breach of implied contract, regardless of the contents of the handbook, or the conspicuousness of the disclaimer, where he had actual knowledge of his at-will status. Andrews could not reasonably believe that the handbook promised job security or reasonably relied on the employer's practice of following progressive discipline prior to termination as a promise that similar procedures would be followed in his case. *Id.* at 952. The Court recently decided a similar case and found that an employee could not argue that disclaimers in a handbook were not adequately conspicuous when he admitted that he had in-fact read and understood the disclaimers. *Kuhl v. Wells Fargo Bank, N.A.*, 2012 WY 85, ¶¶ 24-32, 281 P.3d 716, 724-27 (Wyo. 2012).

In *Hoff v. City of Casper-Natrona County Health Dep't*, 2001 WY 97, 33 P.3d 99 (Wyo. 2001), the Wyoming Supreme Court affirmed its prior decisions with respect to at-will disclaimers. However, there is an argument that it softened the requirements with respect to ambiguity, holding that the contract formation analysis as determined in *Bouwens* is the standard to be applied. Under the *Bouwens* standard, the court looks to the language of the disclaimer to determine whether the employer intended to be legally bound to the obligations imposed under an employee manual, as opposed to any specific words or statements. *Id.* at 103.

In *Trabing v. Kinkos*, the Wyoming Supreme Court held that an employee was at-will where she signed an employment agreement on her first day of work that contained a disclaimer that her employment was at-will. 2002 WY 171, ¶¶ 9-20, 57 P.3d 1248, 1252-54 (Wyo. 2002). The disclaimer signed by the employee was held to overcome an employee handbook that implied employees could only be terminated for cause. *Id.*

In *Life Care Centers of American, Inc. v. Dexter*, 2003 WY 38, 65 P.3d 385, 391 (Wyo. 2003), the Wyoming Supreme Court highlighted that disclaimer cases present mixed questions of law and fact. The question of whether a disclaimer is physically conspicuous and sufficiently clear is a question of law, but the ultimate question of whether an implied contract is created is factual and reserved for the trier-of-fact. *Id.* at ¶¶ 8-9, 389-90; *See also Sanchez v. Life Care Centers*, 855 P.2d 1256 (Wyo. 1993).

The Wyoming Supreme Court has held that an express disclaimer that employment was at-will prevented an employee from relying on verbal statements that he could have a position as a propane truck driver should his position as a shop manager not work out. *Finch v. Farmers Co-op. Oil Co. of Sheridan*, 2005 WY 41, ¶¶ 10-21, 109 P.3d 537, 541-43 (Wyo. 2005).

4. Implied Covenants of Good Faith and Fair Dealing

The implied covenant of good faith and fair dealing was first recognized in *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 221 (Wyo. 1994). However, while all employment contracts contain the implied covenant, a claimant must establish a special relationship of trust and reliance in order to recover for its breach. *Id.* at 222.

An implied covenant of good faith and fair dealing is a substitute for an express or implied-in-fact promise by the employer and tests a defendant's compliance with a duty imposed by law

rather than with a promise voluntarily made. *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 221 (Wyo. 1994). Wyoming recognizes that the bad motives of an employer may be actionable in limited circumstances under a claim for breach of the implied covenant of good faith and fair dealing. *Loghry v. Unicover Corp.*, 1996 WY 155, 927 P.2d 706, 710 (Wyo. 1996). An employee's assertion that he was treated unfairly by his employer is not enough to support a claim for breach of the implied covenant. Only in those rare and exceptional cases in which a special relationship of trust and reliance exists between the employer and employee is a duty created which can give rise to tort liability. *Id.* at 712; *see also Terry v. Pioneer Press, Inc.*, 1996 WY 123, 947 P.2d 273, 277 (Wyo. 1996); *Jewell v. No. Big Horn Hosp. Dist.*, 1998 WY 11, 953 P.2d 135, 139 (Wyo. 1998).

Trust and reliance may be found by the existence of separate consideration, common law, statutory rights, or rights accruing with longevity of service. *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 221 (Wyo. 1994). Longevity of service standing alone is insufficient to give rise to a special relationship necessary to support this cause of action. *Garcia v. UniWyo Federal Credit Union*, 1996 WY 84, 920 P.2d 642, 646 (Wyo., 1996). Rather, it should be coupled with a discharge calculated to avoid employer responsibilities to the employee (i.e. benefits, salary increase, and commissions). *Id.* at 646.

The court warned in *Wilder* that the doctrine would rarely apply and has held true to this warning. To date, the court has not found a single case to have met this burden. *See, e.g., Kuhl v. Wells Fargo Bank, N.A.*, 2012 WY 85, ¶¶ 35-39, 281 P.2d 716, 727-28 (Wyo. 2012); *Pittard v. Great Lakes Aviation*, 2007 WY 64, ¶ 45, 156 P.3d 964, 976-77 (Wyo. 2007); *Finch v. Farmers Co-op. Oil Co. of Sheridan*, 2005 WY 41, ¶¶ 25-26, 109 P.3d 537, 544 (Wyo. 2005); *Hoflund v. Airport Golf Club*, 2005 WY 17, 105 P.3d 1079 (Wyo. 2005). *Life Care Ctrs. of Am. v. Dexter*, 2003 WY 38, 65 P.3d 385, 394, ¶ 21-23 (Wyo. 2003); *Jewell v. No. Big Horn Hosp. Dist.*, 1998 WY 11, 953 P.2d 135 (Wyo. 1998); *See also In re West Park Hosp. Dist.*, 2010 WY 69, ¶ 13, 231 P.3d 1275, 1280 (Wyo. 2010) (no breach of duty of good faith and fair dealing for termination where employee claimed an expectation of continued discipline short of termination); *Anderson v. S. Lincoln Special Cemetery Dist.*, 1999 WY 9, 972 P.2d 136, 141 (Wyo. 1999) (implied covenants cannot create duties that supersede the express provisions of a written contract); *VanLente v. Univ. of Wyoming Research Corp.*, 1999 WY 33, 975 P.2d 594, 998 (Wyo. 1999) (Wyoming does not recognize a contract remedy for breach of the covenant of good faith and fair dealing, especially in this context, where employee was at-will and no contract existed).

Finally, it is worth noting that the Wyoming Supreme Court has held that governmental entities may enjoy immunity from tortious claims of breach of good faith and fair dealings under the Wyoming Governmental Claims Act, unless the governmental entity has purchased liability insurance providing coverage for the same. *Metz v. Laramie County School Dist. No. 1*, 2007 WY 166, ¶¶ 63-66, 173 P.3d 334, 350-51 (Wyo. 2007); *Hoff v. City of Casper – Natrona County Health Dep't*, 2001 WY 97, ¶ 32, 33 P.3d 99, 107 (Wyo. 2001); *see* Wyo. Stat. Ann. § 1-39-101 *et seq.* (LexisNexis 2015) (the “Wyoming Governmental Claims Act”).

5. Modification--Consideration Required

“In Wyoming, an employer may, under certain conditions, amend an employee handbook promising job security if it had previously included language in its handbook reserving the right to unilaterally modify.” *Brodie v. Gen. Chemical Corp.*, 1997 WY 49, 934 P.2d 1263, 1266 (Wyo. 1997). However, if the employer has not reserved this right, the employer must provide additional consideration for the modification to be effective to restore at-will status. *Id.* at 1268. This is true regardless of whether the contract is express or implied. *Id.* Continued employment is insufficient consideration to support the modification. *Id.* The court held:

Consideration to modify an employment contract to restore at-will status would consist of either some benefit to the employee, detriment to the employer, or a bargained for exchange. The question of what type of consideration is sufficient cannot be answered with specificity because we have long held that absent fraud or unconscionability, we will not look into the adequacy of consideration. As long as the consideration given meets the definition of legal consideration, it will be considered sufficient consideration.

Id. at 1268 (citations omitted).

In *Miech v. Sheridan Cty., Wyo.*, 2002 WY 178, 59 P.3d 143 (Wyo. 2002), the Wyoming Supreme Court answered a certified question for the U.S. District Court for Wyoming as follows:

The *Brodie* requirement of additional consideration does not apply when a newly elected governing body modifies personnel policies to restore at-will status and no adequate showing has been made that the “for cause” contract was reasonably necessary or of a definable advantage to the governing body when the contract was made. If, however, an adequate showing is made that the implied “for cause” contract was reasonably necessary or of a definable advantage to the governing body when the contract was made, the contract cannot be voided, the usual rules of employment contract law apply, and additional consideration is required when a newly elected governing body modifies the contract to restore at-will status.

Id. at ¶ 12,147-48.

The court also noted that the employee must meet the burden of showing that the extended term of the implied-for-cause employment contract was justified by necessity or benefit to the government at the time the contract was made. The court stated:

One method of making this showing is by presenting competent evidence that the implied “for-cause” employment contract promoted a stable, secure, and loyal work force. If the employee meets that burden the governing body cannot void the contract, and the usual rules of employment contract law apply, including the

Brodie requirement that additional consideration must be provided when an employment contract is modified. If the employee fails to meet that burden, the governing body can void the contract, and the *Brodie* requirement of additional consideration does not apply.

Id. at ¶ 11, 147.

In *Trabing v. Kinko's Inc.*, an employee attempted to argue that an employment agreement which contained a sufficient disclaimer that her employment was at-will which she signed on her first day of work failed to modify an employee handbook that suggested employees could only be terminated for cause. 2002 WY 171, ¶¶ 14-16, 57 P.3d 1248, 1252-54 (Wyo. 2002). She argued that the employment agreement was not supported by sufficient consideration. However, the Wyoming Supreme Court held that because she signed the agreement when she began work, it constituted the original terms of her employment as opposed to modification of the existing handbook. *Id.*

In *Finch v. Farmers Co-op Oil Co. of Sheridan*, the Wyoming Supreme Court reaffirmed that “for-cause” employment can be modified to at-will employment when supported by additional consideration, where an employee signed a disclaimer and acknowledgment of his at-will status in exchange for fifty dollars (\$50.00). 2005 WY 41, ¶ 20, 109 P.3d 537, 543 (Wyo. 2005).

Most recently, the Wyoming Supreme Court rejected an employee’s argument that her termination as an at-will employee was unjustified. *In re West Park Hosp. Dist.*, 2010 WY 69, 231 P.3d 1275 (Wyo. 2010). In that case, the employee began her employment in 1984. *Id.* at ¶ 3, 1276. In 2002, the employer adopted a new employee handbook providing that employees hired after 2002 were “at-will” employees, and also providing a step discipline procedure to apply to “for cause” employees hired prior to 2002. *Id.* at ¶ 4. In 2003, the employee resigned from her position in consideration of waiving potential claims she had against the employer and twelve weeks pay. *Id.* at ¶ 3. She subsequently began a new position with the employer but was ultimately terminated in 2007. *Id.* at ¶ 5, 1276-77. Under these circumstances, the Wyoming Supreme Court held that the employee was at-will, since she resigned from her old for-cause position in exchange for sufficient consideration and began a new position under the at-will policy of the new handbook. *Id.* at ¶¶ 7-10, 1277-79.

B. Public Policy Exceptions

1. General

The Wyoming Supreme Court first indicated its willingness to consider the public policy exception in *Allen v. Safeway Stores, Inc.*, 1985 WY 58, 699 P.2d 277, 282-83 (Wyo. 1985).

The court in *Allen* applied the rationale that the underlying basis for the public policy exception is the protection of strong policies of the community. *Allen v. Safeway Stores, Inc.*, 1985 WY 58, 699 P.2d 277, 282-83 (Wyo. 1985). The court noted that if these policies are not preserved by other remedies, then the public policy is insufficiently served. *Id.* at 282.

"[A]pplication of the public policy exception requires two factors: (1) that the discharge violates some well-established public policy; and (2) that there be no remedy to protect the interest of the aggrieved employee or society." *Dynan v. Rocky Mountain Fed. S & L*, 1990 WY 48, 792 P.2d 631, 640 (Wyo. 1990) (citation and quotations omitted). *See also McLean v. Hyland Enterprises, Inc.*, 2001 WY 111, 34 P.3d 1262, 1268 (Wyo. 2001).

The public policy exception has been narrowly applied. Specific approval for its application appears in only one Wyoming Supreme Court decision, *Griess v. Consol. Freightways*, 1998 WY 147, 776 P.2d 752 (Wyo. 1989). "We hold that a person whose employment is terminated for exercising rights under the Workers' Compensation statutes and who is not covered by the terms of a collective bargaining agreement has a cause of action in tort against the employer for damages." *Id.* at 753. It is important to note that as of the date of this article, *Griess* is the only case in which the Wyoming Supreme Court has concluded that an employee could maintain a claim of wrongful termination in violation of public policy.

In attempting to establish a prima facie case of retaliatory discharge and that the employer actually had a retaliatory motive for discharging him, an employee may begin with proximity in time between the claim and the firing, coupled with evidence of satisfactory work performance and supervisory evaluations. *Boone v. Frontier Refining, Inc.*, 1999 WY 127, 987 P.2d 681, 687 (Wyo. 1999).

The court declined to apply the public policy exception in *Lankford v. True Ranches*, 1998 WY 170, 822 P.2d 868, 872 (Wyo. 1991), *Dynan v. Rocky Mountain Fed. S & L*, 1990 WY 48, 792 P.2d 631, 640 (Wyo. 1990); *Drake v. Cheyenne Newspapers, Inc.*, 1995 WY 30, 891 P.2d 80, 82 (Wyo. 1995); *Leonard v. Converse County Schs. Dist. 2*, 1990 WY 24, 788 P.2d 1119, 1122 (Wyo. 1990), or in *McLean v. Hyland Enterprises, Inc.*, 2001 WY 111, 34 P.3d 1262, 1268 (Wyo. 2001); *Hoflund v. Airport Golf Club*, 2005 WY 17, 105 P.3d 1079 (Wyo. 2005); *Kolar v. R&P Inc.*, 2009 WY 56, 205 P.3d 1041 (Wyo. 2009); *McGarvey v. Key Property Management LLC*, 2009 WY 84, 211 P.3d 503 (Wyo. 2009) .

In *McLean*, the court found that the plaintiff had satisfied the first element of the test for a violation of public policy holding it is a violation of public policy to terminate an employee for refusing to work in unsafe conditions. *McLean v. Hyland Enterprises, Inc.*, 2001 WY 111, 34 P.3d 1262, 1268 (Wyo. 2001). "Thus, the well-established public policy that we now recognize is a policy requiring employers to provide a safe workplace and included in that policy is the related goal of encouraging employees to report unsafe working conditions." *Id.* at 1269. While the plaintiff met the first element, he was still unable to meet the second, that there was no other remedy to protect the employee. The court noted that there were administrative remedies which could provide an avenue to address the plaintiff's claims. There is no claim for wrongful termination in violation of public policy under Wyoming law under the circumstances of this case where an administrative remedy exists. *Id.* at 1272.

In recent years, the Wyoming Supreme Court has discussed administrative remedies under the rubric of "exhaustion of administrative remedies." For instance, in *Hoflund v. Airport Golf Club*, 2005 WY 17, 105 P.3d 1079 (Wyo. 2005), a plaintiff's claim that she was wrongfully terminated because she reported sexual harassment was disposed of because she never made a

claim to the Wyoming Department of Employment, as she was entitled to do under Wyoming's Fair Employment Practices Act (FEPA). In *Kolar v. R&P Inc.*, 2009 WY 56, 205 P.3d 1041 (Wyo. 2009), the plaintiff did file a disability discrimination claim with the state agency first, but he was still not allowed to maintain his cause of action because he failed to request an independent hearing with the agency prior to filing suit. Referring to the duty to exhaust administrative remedies might suggest that those suits might have been actionable in state court had the proper agency procedures first been followed.

It should be noted that contrary to the "exhaustion of administrative remedies" language used in *Hoflund* and *Kolar*, there is authority that might suggest the sole and proper remedy in Wyoming state courts for those seeking redress for adverse state administrative determinations of employment claims is to seek judicial review pursuant to the Wyoming Administrative Procedure Act, rather than file a tort suit. See, e.g., *Rollins v. Wyoming Tribune Eagle*, 2007 WY 28, 152 P.3d 367 (Wyo. 2007)(affirming on judicial review pursuant to the Wyoming Administrative Procedure Act a hearing examiner's final determination of a FEPA claim); see also *McLean*, *supra* at ¶ 40, p. 1272 ("We hold that there is no claim for wrongful termination in violation of public policy under Wyoming law under circumstances of this case where an administrative remedy exists").

Finally, in *McGarvey v. Key Property Management LLC*, the Wyoming Supreme Court addressed whether a wrongful termination suit could be maintained against a private party employer on the basis of infringement upon the employee's freedom of speech. 2009 WY 84, 211 P.3d 503 (Wyo. 2009). The Court expressly held that such a suit cannot be based upon the federal constitution because the First Amendment only protects against abridgment of speech by a governmental entity and does not apply where the defendant is a private entity. *Id.* at ¶ 15, 507. The Court expressly declined to address whether the Wyoming Constitutional provision protecting speech applies to private entities, instead holding that even if it did the employee's speech in this case exceeded the limits of what would be constitutionally protected. *Id.* at ¶¶ 20-22, 508-09. The question of whether Wyoming's constitutional protection of speech applies to private employers remains unanswered. See also *Drake v. Cheyenne Newspapers, Inc.*, 891 P.2d 80 (Wyo. 1995) and *Allen v. Safeway Stores Inc.*, 699 P.2d 277, 283 (Wyo. 1985) (both implying that a wrongful termination suit against a private party employer might be maintainable for infringement upon the right to free speech under the Wyoming Constitution, but refusing to allow such suits on the facts of those cases).

2. Exercising a Legal Right

Wyoming courts have not addressed this issue specifically. However, case law suggests that an employee may be able to establish a claim for retaliatory discharge in violation of public policy if the employer takes adverse action against the employee for exercising a legal right. See *Bear v. Volunteers of Am. Wyoming, Inc.*, 1998 WY 114, 964 P.2d 1245, 1253 (Wyo. 1998), *Allen v. Safeway Stores, Inc.*, 1985 WY 58, 699 P.2d 277, 284 (Wyo. 1985); *Griess v. Consol. Freightways*, 1998 WY 147, 776 P.2d 752 (Wyo. 1989).

See also the following Wyoming statutes:

- a. Under Wyo. Stat. Ann. § 27-11-109(e) (LexisNexis 2015), no employee may be discharged for filing a complaint or participating in proceeding under the state occupational safety and health act.
- b. Wyo. Stat. Ann. § 35-6-106 (LexisNexis 2015) provides that no employee may be discharged for refusing to participate in an abortion.
- c. Wyo. Stat. Ann. § 9-11-103 (LexisNexis 2015) may protect state employees from adverse employment consequences for reporting fraud, waste, gross mismanagement, violation of law, safety or health risks, among other things.
- d. Wyo. Stat. Ann. § 35-2-910(b) (LexisNexis 2015) prohibits licensed health care facilities from taking adverse employment action against employees reporting a violation of law, unless the employee is found to have made a knowingly false report.

3. Refusing to Violate the Law

Wyoming courts have not addressed this issue directly. However, as discussed above, an employee may be able to establish a claim for retaliatory discharge in violation of public policy.

4. Exposing Illegal Activity (Whistleblowers)

Wyoming courts have not addressed this issue directly. However, as discussed above, an employee may be able to establish a claim for retaliatory discharge in violation of public policy. Also, as to state employees, see Wyoming Statute Section 9-11-103 discussed above. As to employees of licensed health care facilities, *see* Wyoming Statute Section 35-2-910(b) discussed above.

III. CONSTRUCTIVE DISCHARGE

In Wyoming, a choice to resign or be fired is recognized as constructive discharge. *Jewell v. No. Big Horn Hosp. Dist.*, 1998 WY 11, 953 P.2d 135, 140 (Wyo. 1998).

Typically, an administrative agency is not the proper venue for claims of constructive discharge, unless expressly given authority to hear such claims and the “district court is the proper forum for resolution of the issues involved in a constructive discharge.” *Wagoner v. State, Dep’t of Admin. & Info.*, 924 P.2d 88, 91 (Wyo. 1996)

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

Employment contracts are created by either express contracts or implied-in-fact contracts, as outlined previously. If the employment contract says that an employee may not be fired except

for just cause, then cause must be shown or there is a breach of contract. *Alexander v. Phillips Oil Co.*, 1985 WY 174, 707 P.2d 1385 (Wyo.1985). A like rule applies in the case of employee handbooks listing causes for termination. If the procedures are not utilized, or no cause exists, the employer may be liable for breach of contract. *Mobil Coal Producing Inc. v. Parks*, 1985 WY 107, 704 P.2d 702 (Wyo. 1985).

“Just cause” is defined by the circumstances under which the employee was discharged. “Just cause” has been defined as a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice. The test is that a reasonable employer acting in good faith would consider it good and sufficient reason for terminating the services of an employee was provided as follows:

Under this standard, the question to be resolved by the fact finder is not, “Did the employee *in fact* commit the act leading to dismissal?” Rather, it is, “Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?” Cause” is defined under this standard as

fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.

Sheaffer v. State ex rel. University of Wyoming ex rel. Board of Trustees, 2009 WY 14, ¶ 46, 202 P.3d 1030, 1044 (Wyo. 2009)(quoting *Life Care Centers of American, Inc. v. Dexter*, 2003 WY 38, ¶ 15, 65 P.3d 385, 392 (Wyo. 2003))

B. Status of Arbitration Clauses

The Wyoming Supreme Court has not directly addressed arbitration clauses in the context of employment contracts. However, it has stated with consistency over the years that it favors arbitration or other forms of alternative dispute resolution. *Vogt v. MBNA America*, 2008 WY 26, ¶ 11, 178 P.3d 405, 408 (Wyo. 2008); *Welty v. Brady*, 2005 WY 127, ¶ 21, 123 P.3d 920, 926 (Wyo. 2005); *Scherer v. Schuler Custom Homes Const., Inc.*, 2004 WY 109, 98 P.3d 159, 163 (Wyo. 2004), citing *Stewart Title Guaranty Co. v. Tilden*, 2003 WY 31, ¶ 7, 64 P.3d 739, ¶ 7 (Wyo. 2003); *Simon v. Teton Board of Realtors*, 2000 WY 89, 4 P.3d 197, 201 (Wyo. 2000).

In *Pittard v. Great Lakes Aviation*, the Wyoming Supreme Court held that the state district court improperly ruled on an employment dispute that was subject to a mandatory arbitration requirement under the federal Railway Labor Act, 45 U.S.C. § 151 *et seq.*, where an airline sued its former pilot for reimbursement of training costs. 2007 WY 64, ¶¶ 15-26, 156 P.3d 964, 970-72 (Wyo. 2007).

V. ORAL AGREEMENTS

A. Promissory Estoppel

The Wyoming Supreme Court finally recognized the applicability of promissory estoppel in employment cases in *Worley v. Wyoming Bottling Co.*, 2000 WY 52, 1 P.3d 615 (Wyo. 2000). In that case, an employee, who was arguably not "at-will," wanted to make some personal financial commitments so he sought assurances from his employer about the security of his job. He was told, allegedly, that his job was safe and that he would have his job as long as he wanted it. He was later demoted and when he complained about the demotion he was terminated. The lower court granted summary judgment but on appeal the Wyoming Supreme Court reversed, formally recognizing for the first time that promissory estoppel was a viable cause of action in Wyoming in the employment context. The Wyoming Supreme Court found that when the employer gave the employee assurances regarding job security it had made a clear and definite promise. Further, the plaintiff relied upon that promise when he made financial commitments. The court held that in cases where a definite, clear promise is made and there is detrimental reliance, courts must find, as a matter of law, that equity will support enforcement of the promise. In prior cases where promissory estoppel had been pled and argued, the Wyoming Supreme Court had stated that an adequate, effective disclaimer would make detrimental reliance impossible and would defeat a claim of promissory estoppel.

In *Worley*, the court followed prior cases regarding the effect of a disclaimer on a promissory estoppel claim. However, the holding offered the defendant no relief because the disclaimers contained in employment applications and handbooks were not effective as a matter of law. In addition, one of the disclaimers stated that only the president of the company could make promises inconsistent with at-will employment and the person who allegedly told the plaintiff his job was secure was, in fact, the president of the company. As a result of *Worley*, an adequate disclaimer cannot only prevent the creation of an implied contract of employment, it can also defeat a promissory estoppel claim, unless the person making the promises has the apparent authority to do so.

In *Trabing v. Kinko's Inc.*, an employee who routinely read the at-will provision of the employee handbook to new employees was charged with actual knowledge of the at-will policy, and as a result was precluded from arguing that she reasonably relied on any statements or practices that indicated she was anything but an at-will employee. 2002 WY 171, ¶¶ 21-23, 57 P.3d 1248, 1254-55 (Wyo. 2002).

In *Finch v. Farmers Co-op Oil Co. of Sheridan*, the Wyoming Supreme Court held that a valid at-will disclaimer defeated the employees claim of promissory estoppel, where the employee was told by his supervisor prior to his discharge that he could have a position as a truck driver if his promotion to a managerial position did not "work out." 2005 WY 41, ¶¶ 22-24, 109 P.3d 537, 543-44 (Wyo. 2005).

In *Kuhl v. Wells Fargo Bank, N.A.*, an employee who admitted he had read and understood at-will disclaimers in an employment handbook was precluded from arguing promissory estoppel,

because he could not show the reasonableness of any reliance upon any promise not to modify the at-will relationship. 2012 WY 85, ¶¶ 33-34, 281 P.3d 716, 727 (Wyo. 2012).

B. Fraud

Wyoming Supreme Court does not appear to have addressed this issue to date.

C. Statute of Frauds

Employment contracts for a definite duration are subject to the statute of frauds, (Wyo. Stat. Ann. § 1-23-105(a)(i)), and thus must be in writing if the contract is for a term of more than one year. *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 218 (Wyo. 1994); *Finch v. Farmers Co-op. Oil Co. of Sheridan*, 2005 WY 41, 109 P.3d 537 (Wyo. 2005).

The Wyoming Supreme Court has not decided the issue of whether the affirmative defense of substantial performance to the statute of frauds applies when the contract is for an indefinite duration. *WERCS v. Capshaw*, 2004 WY 86, 94 P.3d 421 (Wyo. 2004). In *WERCS*, the court upheld the findings of the trial court because the appellant employee failed to include a jury instruction regarding the applicability of the statute of frauds and the doctrine of substantial performance on the special verdict form. *Id.* In his concurring decision, Justice Lehman warned that the majority's decision should not be read to suggest that the substantial performance doctrine can apply to save an employment contract from the statute of frauds. *Id.*; but see *Schmid v. Schmid*, 2007 WY 148, ¶ 30, 166 P.3d 1285, 1292-93 (Wyo. 2007) (suggesting in *dicta* that the doctrine of substantial performance might apply to employment contracts contrary to Justice Lehman's suggestion, but ultimately leaving the question unsettled).

VI. DEFAMATION

A. General Rule

In *Hoblyn v. Johnson*, 2002 WY 152, ¶ 41, 55 P.3d 1219, 1233 (Wyo.2002), this court defined defamation *per se*:

Defamation *per se* means a statement which is defamatory on its face and, therefore, actionable without proof of special damages. The only statements classified as defamatory *per se* or damaging on their face, and which therefore do not require proof of special harm, are those which impute (1) a criminal offense; (2) a loathsome disease; (3) a matter incompatible with business, trade, profession, or office; or (4) serious sexual misconduct. (Internal citations and quotation marks omitted.)

While a defamation *per se* claim does not require proof of pecuniary or economic loss, it does require a *prima facie* showing that: (1) the defendant made a false and defamatory communication concerning the plaintiff; and (2) the defendant made an unprivileged publication to a third party; and (3) at the time of the publication the defendant knew the communication was false, or the defendant acted in reckless disregard of whether the statement was false; or the defendant acted negligently in failing to ascertain whether the communication was false. Restatement (Second) of Torts § 558 (1977); see also *Tschirgi*

v. Lander Wyoming State Journal, 706 P.2d 1116, 1119–20 (Wyo.1985) (discussing the requirement that defamatory communication be false); *Lever v. Community First Bancshares, Inc.*, 989 P.2d 634, 638 (Wyo.1999) (discussing privilege as related to defamatory communications); *Blake v. Rupe*, 651 P.2d 1096, 1107 n. 9 (Wyo.1982) (adopting Restatement (Second) Torts § 577 definition of publication as “communication intentionally or by a negligent act to one other than the person defamed”).

Thomas v. Sumner, 2015 WY 7, ¶ 49, 341 P.3d 390, 402 (Wyo. 2015).

1. Libel

Defamation is a recognized tort in Wyoming. “A defamatory communication is one which tends to hold the plaintiff up to hatred, contempt, ridicule or scorn or which causes him to be shunned or avoided; one that tends to injure his reputation as to diminish the esteem, respect, goodwill or confidence in which he is held.” *Wilder v. Cody County Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 224 (Wyo. 1994) (*quoting Tschirgi v. Lander Wyo. State Journal*, 1985 WY 153, 706 P.2d 1116, 1119 (Wyo. 1985)). In *TSCHIRGI*, the Court held that communications that are “substantially true” are a complete defense to a defamation action for libel. We explained, “it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true, or, as it is often put, to justify the gist, the sting, or the substantial truth of the defamation.” *Tschirgi*, 706 P.2d at 1119 (internal quotation marks omitted).

2. Slander

In *Wilder v. Cody County Chamber of Commerce*, the court held that comments made by the plaintiff’s former employer, the Chamber of Commerce, to a security guard at a travel industry conference, that the plaintiff was no longer a Chamber employee, that he should not be admitted, that he might steal their work, was “sneaky,” “lazy,” “good for nothing,” and a “son-of-a-bitch” were not actionable. 868 P.2d at 224. The tenor of the language quoted and other language allegedly used by the Chamber official and employee was disparaging and offensive, but was not actionable as defamation. “Disparaging words, to be actionable per se . . . must affect the plaintiff in some way that is peculiarly harmful to one engaged in his trade or profession.” *Id.* (*quoting* Restatement (Second) of Torts, § 573 at 194, cmt. e (1977)). None of the comments to the security guard met this standard. *Id.*

B. References

See discussion below under “Privileges.”

C. Privileges

Wyo. Stat. Ann. § 27-1-113 (LexisNexis 2015) provides:

- (a) An employer who discloses information about a former employee’s job performance to a prospective employer or to

an employer of the former employee is presumed to be acting in good faith. Unless lack of good faith is shown by a preponderance of evidence, the employer is immune from civil liability for the disclosure or for the consequences resulting from the disclosure.

- (b) For purposes of subsection (a) of this section, the presumption of good faith is rebutted upon a showing that the information disclosed by the former employer was knowingly false or deliberately misleading or was rendered with malicious purpose.

To date, the Wyoming Supreme Court has not relied on the above statute in an opinion. In *Bues v. Uinta County Bd. Of County Com'rs*, the Tenth Circuit Court of Appeals explained that Wyo. Stat. Ann. § 27-1-113 derives from the common law. 143 Fed.Appx. 945, 949 (10th Cir. 2005) (unpublished). In that case, the Court relied in part on the statute to dispose of state tort claims advanced by a former employee of the county attorney's office, where she was terminated after her supervisor and two co-workers told the newly elected county attorney that she was untrustworthy and engaged in an illicit sexual relationship with the former county attorney. *Id.*

D. Other Defenses

1. Truth

With regard to private individuals, proof that a statement is substantially true is all that is generally required to defend against a charge of defamation. *Casteel v. News-Record, Inc.*, 1994 WY 58, 875 P.2d 21, 25 (Wyo.1994), *see also*, TSCHIRGI AND THOMAS SUPRA.

When a public figure is involved, the actual malice standard of liability applies. The Wyoming Supreme Court has stated that a public figure who has been libeled by the publication of a false statement of fact on a matter of public concern will not prevail in proving defamation under the actual malice standard unless he proves with convincing clarity that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Martin v. Committee for Honesty and Justice at Star Valley Ranch*, 2004 WY 128, 101 P.3d 123, 131-32 (Wyo. 2004)(citing *Davis v. Big Horn Basin Newspapers, Inc.*, 1994 WY 129, 884 P.2d 979, 984 (Wyo.1994), and *Dworkin v. L.F.P., Inc.*, 1992 WY 120, 839 P.2d 903, 912 (Wyo. 1992)).

The actual malice standard established by the United States Supreme Court in the *New York Times* case is a subjective one that focuses on the defendant's state of mind: 'knowledge of falsity' involves a *subjective* awareness of the falsity of the statements, and 'reckless disregard' involves sufficient evidence to permit an inference that the defendant must have, in fact, *subjectively* entertained serious doubts as to the truth of the statements.

Martin, 101 P.3d at 131-32 (emphasis in original)(citing *Oil, Chemical and Atomic Workers Int’l Union v. Sinclair Oil Corp.*, 1987 WY 178, 748 P.2d 283, 287 (Wyo.1987)(quoting *McMurry v. Howard Publ’g, Inc.*, 1980 WY 57, 612 P.2d 14, 18 (Wyo.1980) (Rooney, J., specially concurring))).

With respect to the standard of convincing clarity, the standard is a stringent one. It is greater than a mere preponderance of the evidence. It requires proof that is clear, precise and indubitable or unmistakable and free from serious and substantial doubt. It is that kind of proof which would persuade a trier of fact that the truth of the contention is highly probable. *Martin*, 101 P.3d at 132 (quoting *MacGuire v. Harriscop Broadcasting Co.*, 1980 WY 46, 612 P.2d 830, 839 (Wyo. 1980)).

2. No Publication

Wyoming Courts have not specifically addressed this issue.

3. Self-Publication

Wyoming Courts have not specifically addressed this issue.

4. Invited Libel

Wyoming Courts have not specifically addressed this issue.

5. Opinion

The Wyoming Supreme Court subscribes to the approach espoused by the United States Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-20, 110 S.Ct. 2695, 2705-06 (1990) that no wholesale defamation exemption is necessary for statements that are “opinions.” *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 914 (Wyo. 1992). Instead, applicable inquiries may be whether a statement contains a provably false connotation or whether it cannot be reasonably interpreted as stating actual facts about an individual. *Id.* “A court must scrutinize the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made.” *Id.*; *See also Spence v. Flynt*, 816 P.2d 771, 775 (Wyo. 1991)(citing with favor *Milkovich, supra* and Restatement (Second) Torts, § 566, comment a (1976)(an expression of an opinion can be defamatory if it “was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community to deter third persons from associating or dealing with him.”))

E. Blacklisting Statutes

The Wyoming Legislature has enacted no blacklisting statutes.

F. Non-Disparagement Clauses

Wyoming Courts have not specifically addressed this issue.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress is an available remedy in the employment context. *Griess v. Consol. Freightways*, 1998 WY 147, 776 P.2d 752, 754 (Wyo. 1989). A claimant must show (1) a person by extreme and outrageous conduct (2) intentionally or recklessly caused the claimant severe emotional distress. *Worley v. Wyoming Bottling Co.*, 2000 WY 52, 1 P.3d 615 (Wyo. 2000); *Leithead v. Am. Colloid Co.*, 1986 WY 139, 721 P.2d 1059, 1066 (Wyo. 1986). Extreme and outrageous conduct is defined as conduct “which goes beyond all possible bounds of decency, is regarded as atrocious, and is utterly intolerable in a civilized community.” *Id.* Whether conduct meets the threshold of being extreme and outrageous must first be determined by the court, and if reasonable men may differ on the question, then it may be presented to the jury. *Id.*

The Wyoming Supreme Court has held that the tort of intentional infliction of emotional distress is available in cases involving sexual misconduct in the workplace. *Kanzler v. Renner*, 1997 WY 65, 937 P.2d 1337 (Wyo. 1997). In *Kanzler*, the court listed the following “recurring factors” to use in determining whether the particular conduct is sufficiently outrageous to survive a preliminary motion:

- i) Abuse of power: Extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests;
- ii) Repeated incidents/pattern of harassment: Repeated harassment may compound the outrageousness of incidents which, taken individually, might not be sufficiently extreme to warrant liability;
- iii) Unwelcome touching/offensive, non-negligible physical contact: Touching areas of the female anatomy which are generally considered off-limits to anyone other than a consensual sexual partner or a physician;
- iv) Retaliation for refusing or reporting sexually-motivated advances: Conditioning the future success of a person’s employment upon the performance of sexual favors goes far beyond the ambit of insults or demeaning remarks.

Kanzler v. Renner, 1997 WY 65, 937 P.2d 1337, 1343 (Wyo. 1997).

Presenting evidence that meets the “extreme and outrageous” conduct threshold sufficient to present the case to a jury has proven difficult. The Wyoming Supreme Court has decided numerous cases by finding that complained of conduct could not meet the standard. *See, e.g.*,

Cook v. Shoshone First Bank, 2006 WY 13, ¶¶ 18-19, 126 P.3d 886, 891-92 (Wyo. 2006); *Hoflund v. Airport Golf Club*, 2005 WY 17, 105 P.3d 1079 (Wyo.2005); *Trabing v. Kinko's Inc.*, 2002 WY 171, ¶¶ 28-30, 57 P.3d 1248, 1256 (Wyo. 2002); *Terry v. Pioneer Press, Inc.*, 947 P.2d 273 (Wyo.1997). On the other hand, several cases decided by the Wyoming Supreme Court have been deemed sufficient to survive summary judgment and be presented to a jury. See, e.g., *Loya v. Wyoming Partners of Jackson Hole, Inc.*, 2001 WY 124, ¶¶ 11-15, 35 P.3d 1246, 1251-53 (Wyo. 2001), *Worley v. Wyoming Bottling Co., Inc.*, 1 P.3d 615 (Wyo. 2000); *Kanzler v. Renner*, 937 P.2d 1337 (Wyo. 1997); *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211 (Wyo. 1994).

B. Negligent Infliction of Emotional Distress

This tort is currently unavailable in the employment context in Wyoming. See *Townsend v. Living Ctrs. Rocky Mountain*, 1997 WY 127, 947 P.2d 1297, 1299 (Wyo. 1997)(noting that the only tort remedies available in the employment context in Wyoming are breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and retaliatory discharge in violation of public policy where no other remedy is available); see also *Hoff v. city of Casper-Natrona County Health Dept.*, 2001 WY 97, ¶ 18, 33 P.3d 99, 103 (Wyo. 2001); *Jewell v. No. Big Horn Hosp. Dist.*, 1998 WY 11, 953 P.2d 135, 139 (Wyo. 1998); *Gates v. Richardson*, 1986 WY 111, 719 P.2d 193, 198-199 (Wyo. 1986) (describing requirements for cause of action).

VIII. PRIVACY RIGHTS

A. Generally

Under Wyoming law, an employee cannot pursue claims against his employer for deceit or invasion of privacy where such acts are connected with his/her termination. *Jewell v. No. Big Horn Hosp. Dist.*, 1998 WY 11, 953 P.2d 135, 139 (Wyo. 1998). The court in *Jewell* held:

In this case, Jewell's allegations of deceit and invasion of privacy directly result from events surrounding the manner of her discharge, and for these claims, we will extend *Townsend* to the for-cause employment context. Because in Wyoming, a choice to resign or be fired is recognized as constructive discharge, Jewell has claims for breach of contract and breach of the implied covenant of good faith and fair dealing, but cannot pursue claims for deceit or invasion of privacy.

Id. at 139-40.

B. Specific Issues

1. Workplace Searches

Wyoming Courts have not specifically addressed this issue.

2. Electronic Monitoring

Wyoming Courts have not specifically addressed this issue.

3. Taping of Employees

Wyoming Courts have not specifically addressed this issue.

4. Medical Information

Wyoming Courts have not specifically addressed this issue.

IX. OTHER TORTS

A. Negligent Hiring/Supervision

The Wyoming Supreme Court has expressly recognized a cause of action for negligent hiring. *Cranston v. Weston County Weed and Pest Bd.*, 826 P.2d 251, 258 (Wyo. 1992). In *Cranston*, the Court adopted the definition Restatement (Second) of Agency § 213(b) (1958), which states: “A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless...in the employment of improper persons or instrumentalities in work involving the risk of harm to others.” *Id.* A required element of the cause of action is a showing of some form of misconduct by the employee that caused damage to the plaintiff. *Beavis ex rel. Beavis v. Campbell County Memorial Hosp.*, 20 P.3d 508, 515 (Wyo. 2001). A claim of a negligent hiring may not depend upon an employment relationship, meaning liability might be found for contracting for services of an improper person in work involving the risk of harm to others. *See Romero v. Shulze*, 974 P.2d 959, 964-65 (Wyo. 1999).

Recently, the Wyoming Supreme Court reaffirmed its holdings in *Cranston* noting, Negligent hiring, however, is not premised on the theory of *respondeat superior*, but instead rests on the owner/operator's own negligent acts in hiring the independent contractor.” *Basic Energy Servs., L.P. v. Petroleum Res. Mgmt., Corp.*, 2015 WY 22, ¶ 22, 343 P.3d 783, 789 (Wyo. 2015) (internal citations omitted). The Court continued stating, “While *Cranston* is not directly on point, we find that its holding is logically extended to hiring independent contractors. Our precedent supports this conclusion.” *Id.* at 790.

Although the Wyoming Supreme Court had tangentially spoken of negligent supervision on several occasions, it first recognized it as a distinct and separate claim in *Shafer v. TNT Well Services, Inc.*, 2012 WY 126, 285 P.3d 958 (Wyo. 2012). The Court stated in relevant part:

Further, we are satisfied that the policy considerations relevant to imposition of a duty are weighted in favor of recognizing an employer's duty to supervise its employees as set forth in [Restatement (Second) of Torts § 317]. Accordingly, we agree with the [Plaintiffs] that an employer's failure to supervise an employee

using an employer's chattel while acting outside the scope of his employment gives rise to the potential for liability.

Id. at ¶ 26, 966-67. The Court explained that a claim for negligent supervision is different from *respondeat superior*, because it is not based on imputed or vicarious liability but rather on the employer's own negligence. *Id.* at ¶ 10, 962. Section 317, as adopted by the Court, provides as follows:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control

Id.

It is not known whether the Wyoming Supreme Court would adopt a similar rule for negligent supervision of an employee who is acting within the course and scope of his employment. *See, e.g.*, Restatement (Second) of Agency § 213(b) (1958). However, the United States District Court for the District of Wyoming has predicted that if confronted with the issue, the Wyoming Supreme Court would adopt it as a separate and distinct claim as well. *See Sisco v. Fabrication Technologies, Inc.*, 350 F.Supp.2d 932, 944 (D.Wyo. 2004); *Glover v. TransCor America, Inc.*, 57 F.Supp.2d 1240,1246 (D.Wyo. 1999).

B. Tortious Interference with Business/Contractual Relations

The necessary elements for a claim of intentional interference with a contractual relationship are:

1. Existence of a valid contractual relationship;
2. Defendant's knowledge of the contract;

3. Intentional and improper interference resulting in breach of contract; and
4. Damages.

Gore v. Sherard, 2002 WY 114, ¶ 15, 50 P.3d 705, 710 (Wyo. 2002); *Bear v. Volunteers of Am. Wyoming, Inc.*, 1998 WY 114, 964 P.2d 1245, 1253-54 (Wyo. 1998); *Casper v. Mudge*, 1988 WY 1, 748 P.2d 713 (Wyo. 1988).

The key element is “intentional and improper interference.” Comments truthfully given concerning the plaintiff that result in a breach are not actionable. *Allen v. Safeway Stores, Inc.*, 1985 WY 58, 699 P.2d 277 (Wyo. 1985). Lawful interference is permitted when the interferer acts in good faith to protect an economic interest (interferer must have a good faith belief that his interest may be impaired or destroyed by the performance of the contract). *Id.* For example, in *Bear*, the court stated that as long as an employee acts within the scope of his authority, his actions in recommending that another employee be discharged may be justified. *Bear v. Volunteers of Am. Wyoming, Inc.*, 1998 WY 114, 964 P.2d 1245, 1254 (Wyo. 1998).

One key difference must be pointed out between interference with a contract and intentional interference with a prospective advantage, discussed below. In order to maintain an action for intentional interference with a contract, there must be an actual contract to which the plaintiff is a party. If there is no contract, there is no tort action for interference with a contract. *Doud v. First Interstate Bank of Gillette*, 1989 WY 58, 769 P.2d 927 (Wyo. 1989).

"Wyoming recognizes the tort of intentional interference with a prospective contractual relationship," and has adopted the Restatement (Second) of Torts § 766B. *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 225 (Wyo. 1994). The elements of this tort are:

1. Business expectancy of plaintiff;
2. Defendant’s knowledge of the expectancy;
3. Intentional and improper interference resulting in the termination of the expectancy by the third party; and
4. Damages.

Martin v. Wing, 1983 WY 84, 667 P.2d 1159 (Wyo. 1983) (adopting Rest. (Second) of Torts § 766B).

Protected expectancies include any prospective relations, except those leading to marriage. It is not necessary that the expectancy be reduced to a formal contract (as opposed to interference with contract).

Truthful statements are not actionable. See *Four Nines Gold, Inc. v. 71 Constr., Inc.*, 1991 WY 49, 809 P.2d 236 (Wyo. 1991). Interference is lawfully permitted when the interferer acts in good faith to protect an economic interest. *Id.* Where some competitive interest is being served, “the fact that a competitor may also be directed by a desire for revenge or other improper motive is not sufficient, alone, to create improper interference.” *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 225 (Wyo. 1994) (citing Rest. (Second) of Torts § 768, cmt. g. (1979)).

A noteworthy case is *Fremont Homes, Inc. v. Elmer*, 974 P.2d 952 (Wyo. 1999). In that case, the Wyoming Supreme Court held that an employment contract which exempted an employee from liability for intentional torts, including intentional interference with a known economic advantage, was unenforceable as a matter of public policy. *Id.* at 955-57. As a result, the Court reinstated the employer’s previously dismissed claims that its former employee intentionally interfered with its business and contractual relationships by quitting his employ to open a competitor business and luring away its employees, customers and manufacturers. *Id.*

Finally, the Wyoming Supreme Court has discussed the torts of interference with a contract and interference with a prospective contract as being one in the same in recent years. For instance, in *Sheaffer v. State ex. Rel. University of Wyoming ex rel. Board of Trustees*, the Court recited the following elements for interference with a contract:

In Wyoming, the following elements must be demonstrated to sustain a cause of action for tortious interference with a contract or prospective economic advantage: (1) the existence of a valid contractual relationship or prospective economic advantage; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional and improper interference inducing or causing breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

2009 WY 14, ¶ 51, 202 P.3d 1030, 1044 (Wyo. 2009) (quoting *Gore v. Sherard*, 2002 WY 114, ¶ 13, 50 P.3d 705, 710 (Wyo. 2002)).

In *Sheaffer*, the Wyoming Supreme Court found a former University of Wyoming employee’s claim of intentional interference with a contract to have no merit where she was terminated after initiating a secret tape recording of a committee meeting. *Id.* at ¶¶ 50-53, 1044. While she presented evidence that some of the defendants stated their opinion that she should be terminated, they did so during interviews conducted by the University as part of an investigation of the improper recording. *Id.* There was no evidence that the recommendations were made outside the scope of the defendants’ employment or that their actions were legally improper. *Id.*

X. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Wyoming's preeminent case on covenants not to compete and their enforceability is *Hopper v. All Pet Animal Clinic, Inc.*, 1993 WY 125, 861 P.2d 531 (Wyo. 1993), which held that in order to be enforceable, the covenant must be:

1. In writing;
2. Part of a contract of employment;
3. Based on reasonable consideration;
4. Reasonable in durational and geographical limitations; and
5. Not against Public Policy.

A covenant not to compete violates public policy if it is an unreasonable restraint on trade, for example: (a) is greater than is needed to protect the employer's legitimate interest, or (b) the employer's need is outweighed by the hardship to the promisor and the likely injury to the public. *Id.* at 539. While an employer may seek protection from improper and unfair competition of a former employee, the employer is not entitled to protection against ordinary competition. *Id.* The following are considered legitimate business interests of an employer:

1. Employer's trade secrets which have been communicated to the employee during the course of employment;
2. Confidential information communicated by the employer to the employee, but not involving trade secrets, such as information on a unique business method; and
3. Special influence by the employee obtained during the course of employment over the employer's customers.

Id. at 540.

Employers should also be aware that the covenant not to compete will likely be found unenforceable if the employee is fired "without cause." As the court in *Hopper* held:

The agreement did not state a length of employment and it permitted termination at will. Without more, the terms present the potential for an unreasonable restraint of trade. For example, if an employer hired an employee at will, obtained a covenant not to compete, and then terminated the employee, without cause, to arbitrarily restrict competition, we believe such conduct would constitute bad faith. Simple justice requires that a termination by the employer of an at will employee be in good faith if a covenant not to compete is to be enforced.

Id. at 541. Covenants not to compete are construed against the party seeking to enforce them. *Id.*

The *Hopper* court went on to state that, "[l]ost profits are generally recognized as a proper element of recovery for breach of a covenant not to compete. However, such damages must be proven with a reasonable degree of certainty in order to recover, which can be difficult in cases such as these." *Id.* at 548. As such, an employer should seek immediate equitable relief in the form of a temporary restraining order or preliminary injunction. *See, e.g., CBM Geosolutions, Inc. v. Gas Sensing Technology Corp.*, 2009 WY 113, 215 P.3d 1054 (Wyo. 2009)(affirming a grant of a preliminary injunction pending a trial on the merits where the defendants breached a three year non-compete agreement with their former employer by forming a coal bed methane measuring company).

B. Blue Penciling

The Wyoming Supreme Court has adopted the "blue pencil" rule of the Restatement (Second) of Contracts, § 184, which permits enforcement of a narrower term which is reasonable in a covenant not to compete:

(1) If less than all of an agreement is unenforceable under the rule stated in § 178 [dealing with restraints in violation of public policy in general], a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.

(2) A court may treat only part of a term as unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.

Hopper v. All Pet Animal Clinic, Inc., 1993 WY 125, 861 P.2d 531, 546 (Wyo. 1993); *see also CBM Geosolutions, Inc. v. Gas Sensing Technology Corp.*, 2009 WY 113, 215 P.3d 1054 (Wyo. 2009)(stating "if any part of a covenant not to compete is found unreasonable and therefore unenforceable, the court may decline to enforce the unreasonable provisions).

C. Confidentiality Agreements

Confidentiality agreements are generally enforceable in Wyoming.

D. Trade Secrets Statute

Wyo. Stat. Ann. § 40-24-101 et seq. is the states Uniform Trade Secrets Act.

"Trade secret" means information, including a formula, pattern, compilation, program device, method, technique or process that:

(A) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Wyo. Stat. Ann. § 40-24-101 (LexisNexis 2015). Wyo. Stat. Ann. § 16-4-203(d)(v) (LexisNexis 2015) also provides that with regard to the public's right to inspect public records:

“The custodian shall deny the right of inspection of the following records, unless otherwise provided by law: Trade secrets, privileged information and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person.”

E. Other Considerations

Wyo. Stat. Ann. § 35-24-104(e) (LexisNexis 2015) provides that trade secrets contained in applications by health care providers for an exception to state or federal antitrust laws shall be protected in accordance with Wyo. Stat. § 16-4-203(d).

In *Briefing.com v. Jones*, the Wyoming Supreme Court held on a certified question from the United States District Court for the District of Wyoming that a cause of action for misappropriation of trade secrets and/or confidential information is recognized in Wyoming, where former employees of a business were alleged to have misappropriated their former employers trade secrets to open a competing business. 2006 WY 16, 126 P.3d 928 (Wyo. 2006). The elements of the cause of action are found in Restatement (Third) of Unfair Competition, §§ 39-45 (1995). *Id.* at ¶¶ 8, 16, p. 932-33, 936.

In recent noteworthy case is *Preston v. Marathon Oil Co.*, 277 P.3d 81 (Wyo. 2012), which dealt with an intellectual property assignment from an employee to an employer. In that case, the Wyoming Supreme Court held that continuing the employment of an at-will employee is sufficient consideration to support an agreement containing an intellectual property-assignment provision.

XI. DRUG TESTING LAWS

Wyoming has no specific drug testing laws in the employment context. However, an employer should be aware that any drug testing policy, procedure, or manual implemented by it will be subject to the same general rules regarding employee handbooks, and may indicate intent to discipline or discharge only for cause or may constitute an implied contract. Therefore, appropriate disclaimers should be used. Additionally, an employer may be able to discharge an employee immediately for intoxication, without first following steps of disciplinary procedure in employment contract. *See, Burbank v. Wyodak Res. Dev. Corp.*, 11 P.3d 943, 947 (Wyo. 2000).

A. Public Employers

There are no statutes in Wyoming that limit employee drug testing by public or private employers. No additional limitations are placed on private employers. However, public employers who wish to implement employee drug testing programs must comply with the Fourth Amendment of the United States Constitution. The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV. The Fourth Amendment is applied to the states by virtue of selective incorporation through the Fourteenth Amendment, and it governs searches by all state and federal officials including those done by government employers or supervisors of their employees’ private property. *O’Conner v. Ortega*, 480 U.S. 709, 715, 107 S.Ct. 1492, 1496 (1987). Collection of blood, breath and urine for alcohol and/or drug tests is considered a compelling intrusion upon bodily integrity, and further chemical analysis of the samples obtained also invades an employee’s privacy interests. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1412-13 (1989)(citing *Schmerber v. California*, 384 U.S. 757, 767-68, 86 S.Ct. 1826, 1833-34 (1966); *Arizona v. Hicks*, 480 U.S. 321, 324-25, 107 S.Ct. 1149, 1152, 53 (1987)). Accordingly, such testing may be considered “searches” subject to Fourth Amendment scrutiny. *Id.*

The Fourth Amendment does not prohibit all searches and seizures, only those that are unreasonable. *Skinner*, 489 U.S. at 619, 109 S.Ct. at 1414. The question of whether a search or seizure is “reasonable” under the Fourth Amendment “depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *Id.* (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 1568, 1573 (1985)). As a result, “the permissibility of a particular practice is judged by balancing its intrusion on the individuals’ Fourth Amendment Interests against its promotion of legitimate governmental interests.” *Id.* Most often (particularly in criminal cases) this balance is struck in favor of procedures described by the Warrant Clause of the Fourth Amendment, and a search or seizure is generally not reasonable unless conducted pursuant to a judicial warrant issued upon probable cause. *Id.* There are exceptions to the warrant requirement, however, including the consent of the applicant or a showing of a special need. *Id.*; *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989, J. Scalia, dissenting). When faced with a special need, the governmental and privacy interests at stake are balanced to assess the practicality of a warrant and probable-cause requirement in that particular context. *Id.*; see also *O’Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987) (considering the reasonableness of a search of an employee’s desk and office).

In *Skinner*, for example, the United States Supreme Court held that regulations promulgated by the Federal Railroad Administration that mandated and authorized blood, breath and urine tests for certain private railroad employees were justified privacy intrusions absent a warrant or individualized suspicion, where the government interests in ensuring railroad safety outweighed the privacy interests implicated by the testing. 489 U.S. 602, 109 S.Ct. 1402 (1989). Similarly, the United State Supreme Court has upheld a drug-testing program implemented by the United States Custom Service that required the collection of urine samples for placement of employment in positions involving drug interdiction or the carrying of firearms. *National Treasure Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989). Once again, the Court employed a balancing test of the governmental and privacy interests at stake to determine

whether the testing was reasonable under the circumstances without regard to the warrant or individualized suspicion requirements. *Id.*

Although never directly addressed by the Wyoming Supreme Court, a drug testing program which is implemented by a public employer might also fall within the limitations of the Wyoming Constitution. *See, e.g., Hageman v. Goshen County School Dist. No. 1*, 2011 WY 91, 256 P.3d 487, 491 (Wyo. 2011) (considering whether a policy allowing random drug tests of student athletes violated the Wyoming Constitution). The Wyoming Constitution states, “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.” Wyo. Const. Art. I, § 4. The Wyoming Constitution affords greater protection than its federal counterpart because it requires that a search warrant be supported by an affidavit. *O’Boyle v. State*, 2005 WY 83, ¶ 24, 117 P.3d 401, 408-09 (Wyo. 2005) (*citing State v. Peterson*, 27 Wyo. 185, 194 P. 342 (1920)). Accordingly, it might be assumed that a public employer is prohibited by the Wyoming Constitution from requiring an employee or job applicant to submit to drug testing unless a judicial warrant has been issued or an exception to the warrant requirement applies, such as a special governmental need. *See Skinner supra; National Treasury Employees Union, supra.*

B. Private Employers

“Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the government.” *Skinner*, 489 U.S. at 614, 109 S.Ct. at 1411. Thus, in *Skinner* the United States Supreme Court imposed Fourth Amendment protections upon private railroad employers where federal regulation mandated and authorized them to perform blood, urine and breath tests on certain employees. *Id.* For further discussion of search and seizure constitutional standards that might apply in such situations, see the above discussion under “Public Employers.”

XII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

Wyoming’s “Fair Employment Practices Act of 1965” (FEPA) applies to the “state of Wyoming or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing two (2) or more persons within the state but excludes religious organizations or associations.” Wyo. Stat. Ann. § 27-9-102(b) (LexisNexis 2015).

B. Types of Conduct Prohibited

Section 105 of FEPA provides:

- (a) It is a discriminatory or unfair employment practice:

(i) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment against, a qualified disabled person or any person otherwise qualified, because of age, sex, race, creed, color, national origin, ancestry or pregnancy;

(ii) For a person, an employment agency, a labor organization, or its employees or members, to discriminate in matters of employment or membership against any person, otherwise qualified, because of age, sex, race, creed, color, national origin, ancestry or pregnancy, or a qualified disabled person;

(iii) For an employer to reduce the wage of any employee to comply with this chapter;

(iv) For an employer to require as a condition of employment that any employee or prospective employee use or refrain from using tobacco products outside the course of his employment, or otherwise to discriminate against any person in matters of compensation or the terms, conditions or privileges of employment on the basis of use or nonuse of tobacco products outside the course of his employment unless it is a bona fide occupational qualification that a person not use tobacco products outside the workplace. Nothing within this paragraph shall prohibit an employer from offering, imposing or having in effect a health, disability or life insurance policy distinguishing between employees for type or price of coverage based upon the use or nonuse of tobacco products if:

(A) Differential rates assessed employees reflect an actual differential cost to the employer; and

(B) Employers provide written notice to employees setting forth the differential rates imposed by insurance carriers.

(b) The prohibitions against discrimination based on age in this section apply only to persons at least forty (40) years of age.

(c) It is not a discriminatory practice for an employer, employment agency or labor organization to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no employee benefit plan shall excuse the failure to hire any individual, and no seniority system or employee benefit plan shall require or permit involuntary

retirement of any individual protected under this chapter because of age. Involuntary retirement is not prohibited if permitted under Title 29, United States Code § 631(c).

(d) As used in this section “qualified disabled person” means a disabled person who is capable of performing a particular job, or who would be capable of performing a particular job with reasonable accommodation to his disability.

Wyo. Stat. Ann. § 27-9-105 (LexisNexis 2015).

C. Administrative Requirements

Section 106(a) through (m) of FEPA provides as follows:

(a) (a) Any person claiming to be aggrieved by a discriminatory or unfair employment practice may, personally or through his attorney, make, sign and file with the department within six (6) months of the alleged violation a verified, written complaint in duplicate which shall state the name and address of the person, employer, employment agency or labor organization alleged to have committed the discriminatory or unfair employment practice, and which shall set forth the particulars of the claim and contain other information as shall be required by the department. The department shall investigate to determine the validity of the charges and issue a determination thereupon.

(b) (b) through (j) Repealed by Laws 2001, ch. 162, § 2.

(c) (k) If the employer, employment agency, labor organization or employee is aggrieved by the department's determination, the aggrieved party may request a fair hearing. The fair hearing shall be conducted pursuant to the Wyoming Administrative Procedure Act.

(d) (m) The department shall issue an order within fourteen (14) days of the decision being rendered, requiring the employer, employment agency or labor organization to comply with the hearing officer's decision. If the employer, employment agency or labor organization does not timely appeal or comply with the order within thirty (30) days, the department may petition the appropriate district court for enforcement of the order.

(e) Wyo. Stat. Ann. § 27-9-106 (LexisNexis 2015). In addition, the Department of Workforce Services, Labor Standards Division, has adopted rules and regulations to administer the above statutes (Chapter III: Fair Employment Rules). A copy of the regulations can be found at the Wyoming Secretary of State's website, <https://rules.wyo.gov/Default.aspx>

D. Remedies Available

The remedies for violation of FEPA are enumerated in Wyo. Stat. § 27-9-106 (LexisNexis 2015), which states as follows:

(n) Where the hearing officer determines that the employer, employment agency or labor organization has engaged in any discriminatory or unfair employment practice as defined in this chapter, the hearing officer's decision may:

(i) Require the employer, employment agency or labor organization to cease and desist from the discriminatory or unfair practice;

(ii) Require remedial action which may include hiring, retaining, reinstating or upgrading of employees, referring of applications for employment by a respondent employment agency or the restoration to membership by a respondent labor organization;

(iii) Require the posting of notices, the making of reports as to the manner of compliance and any other relief that the hearing officer deems necessary and appropriate to make the complainant whole; or

(iv) Require the employer, employment agency or labor organization to pay backpay or front pay.

It is currently unclear whether a final agency determination of a FEPA claim is subject solely to judicial review under the Wyoming Administrative Procedure Act, or whether a claimant may file a state tort suit for wrongful discharge in violation of public policy provided they first exhaust their administrative remedies. Compare *Kolar v. R&P Inc.*, 2009 WY 56, 205 P.3d 1041 (Wyo. 2009) (discussing FEPA administrative remedies in the context of the duty to “exhaust administrative remedies,” which might suggest an ability to file a tort suit after the administrative process is fully complete) to *McLean v. Hyland Enterprises Inc.*, 2001 WY 111, ¶ 40, 34 P.3d 1262, 1272 (Wyo. 2001) (“We hold that there is no claim for wrongful termination in violation of public policy under Wyoming law under circumstances of this case where an administrative remedy exists”) and *Rollins v. Wyoming Tribune Eagle*, 2007 WY 28, 152 P.3d 367 (Wyo. 2007) (judicial review of final FEPA determination). This distinction is important because judicial review is essentially an appeal that allows limited review of the agency’s final determination, where as a suit would allow for the presentation of all admissible evidence to a judge or jury.

XIII. STATE LEAVE LAWS

A. Jury/Witness Duty

Wyo. Stat. Ann. § 1-11-401 (LexisNexis 2015) provides that no employee may be discharged for serving on jury duty.

B. Voting

Wyo. Stat. Ann § 22-2-111 (LexisNexis 2015) provides that employees have a right to take time off from work to vote.

C. Family/Medical Leave

Wyoming has no specific state laws requiring that employers permit employees family and/or medical leave.

D. Day of Rest Statutes

Wyoming has no specific laws requiring that employers grant employees Sunday as a day of rest.

E. Military Leave

Wyo. Stat. Ann. § 19-10-105(e) (LexisNexis 2013) provides:

No member of the Wyoming state guard who is an officer or employee of the state of Wyoming, or a county, city, town, school district or other political subdivision thereof shall suffer any loss of pay, vacation privilege, seniority or efficiency rating because of serving in the state guard under orders of the governor.”

F. Sick Leave

Wyoming has no specific laws requiring that employers grant employees sick leave.

G. Domestic Violence Leave

Wyoming has no specific laws requiring that employers grant employees leave who are victims of domestic violence.

H. Other Leave Statutes

None.

XIV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage

The minimum wage by Wyoming state law is generally \$5.15 per hour. Wyo. Stat. Ann. 27-4-202(a). (LexisNexis 2015). “Tip employees” who customarily and regularly receive more than 30.00 in tips per month need only be paid \$2.13 per hour, except such employees are required to

provide their daily I.R.S. tip reports to their employers on a monthly basis who must make up the difference if the wage paid by the employer combined with the tips received by the employee does not at least equal compensation of \$5.15 per hour in any given pay period. Wyo. Stat. 27-4-202(b). An employee under the age of 20 may be paid \$4.25 for the first 90 consecutive days of their employment. Wyo. Stat. 27-4-202(c). Of course, employers may be subject to the federal minimum which is substantially different.

B. Deductions from Pay

Wyoming requires no deductions from pay, other than those mandated by federal requirements or by court order (aka garnishment or child support).

C. Overtime Rules

Wyoming law regulates hours of labor for state and county employees, as well as underground mine workers. The regular period of employment for state and county employees is eight (8) hours per day and forty (40) hours per week, and employees are entitled to overtime compensation of one and one-half (1½) times their regular compensation for services required to be performed in excess of this amount. Wyo. Stat. Ann. § 27-5-101 (LexisNexis 2015). The working day in all underground mines is eight (8) hours per day unless mutually agreed upon by employer and employee or an employees' representative, but never to exceed sixteen (16) hours in any twenty-four (24) hour period. Wyo. Stat. Ann. 27-5-102 (LexisNexis 2015).

D. Time for payment upon termination

Payment must be made no later than the employer's usual practice on regularly scheduled payroll dates. Wyo.Stat. §27-4-104(a)

E. Meal and Break Period

Wyoming has no state law requiring an employer to provide employees either meal or rest breaks.

F. Employee Scheduling and Wage Laws

All employers are required to pay the agreed upon wage or benefit. No advance notice of a change in wage agreement is required, but such changed may not be retroactive. The form of communicating a change in rate or manner of pay is not mandated by law, however, an employer and employee may agree to a wage payment arrangement that is other than semimonthly. Wyo.Stat. § 27-4-507 and Wyo. Stat. §27-4-102.

Employers are free to change an employee schedule.

XV. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Under Wyo. Stat. Ann. § 27-11-109(e) (LexisNexis 2015) no employee may be discharged for filing a complaint or participating in proceedings under the state occupational safety and health act.

B. Wyo. Stat. Ann. § 35-6-106 (LexisNexis 2015) provides that no employee may be discharged for refusing to participate in an abortion.

C. Wyo. Stat. Ann. § 9-11-101 *et seq.* (LexisNexis 2015) protects state employees from adverse employment consequences for reporting fraud, waste, gross mismanagement, violation of law, safety or health risks, among other things.

D. Wyo. Stat. Ann. § 35-2-910(b) (LexisNexis 2015) prohibits licensed health care facilities from taking adverse employment action against employees reporting a violation of law, unless the employee is found to have knowingly made a false report.

E. Wyoming's child labor laws are codified at Wyo. Stat Ann. §§ 27-6-107 through 116 (LexisNexis 2015). As a general rule, it is unlawful to employ any child under the age of fourteen (14) except for farm, domestic or lawn and yard services. Wyo. Stat. § 27-6-107. In addition, it is unlawful to employ any child under the age of sixteen (16) for certain dangerous jobs. Wyo. Stat. § 27-6-112. Generally, children under sixteen (16) may not work more than eight (8) hours in any twelve (12) hour period. Wyo. Stat. Ann. § 27-6-110.

F. Wyoming has adopted an equal pay for women statute:

(a) No employer shall discriminate, within the same establishment in which the employees are employed, between employees on the basis of gender by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite gender for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions, except where the payment is made pursuant to:

(i) A seniority system;

(ii) A merit system;

(iii) A system which measures earning by quantity or quality of production; or

(iv) A differential based on any other factor other than gender.

Wyo. Stat. Ann. § 27-4-302 (LexisNexis 2015).

G. In Wyoming, it is policy that workers' have collective bargaining rights. *See* Wyo. Stat. 27-7-101 (LexisNexis 2015). Wyoming is a "right to work" state, generally meaning that no person may be required to participate or abstain from participating in a labor organization as a condition of employment. *See* Wyo. Stat. Ann §§ 27-7-108 through 115 (LexisNexis 2015). Firefighters are separately and expressly granted the authority to collectively bargain with any city, town or county. *See* Wyo. Stat. Ann. § 27-10-101 *et seq.* (LexisNexis 2015).

H. Workers' compensation insurance in Wyoming is administered by the state of Wyoming. *See* Wyo. Stat. Ann. § 27-14-101 *et seq.* (LexisNexis 2015) (the "Wyoming Worker's Compensation Act"). The rights and remedies set forth in the Wyoming Worker's Compensation Act for employees injured in the course of their employment are in lieu of all other remedies against the employer and co-employees "unless the employees intentionally act to cause physical harm or other injury to the injured employee." *Van Patten v. Gipson*, 2011 WY 98, ¶ 10, 253 P.3d 505, 508 (Wyo. 2011); Wyo. Stat. Ann. § 27-14-104(a) (LexisNexis 2015). The Wyoming Supreme Court has interpreted "intentionally act to cause physical harm or injury" to mean "willful and wanton misconduct." *Id.* (quoting *Bertagnolli v. Louderback*, 2003 WY 50, ¶ 15, 37 P.3d 627, 632 (Wyo. 2003)).

I. Pursuant to Wyo. Stat. Ann. § 30-3-304, smoking materials are strictly prohibited in underground mines.

J. Labor and employment benefits may not be payable on "the basis of services performed by an alien unless the alien was lawfully admitted for permanent residence in the United States at the time the services were performed, was lawfully present for purposes of performing the services, or was permanently residing in the United States under color of law at the time the services were performed, pursuant to section 212(d)(5) of the Immigration and Nationality Act." Wyo. Stat. Ann. § 27-3-309 (LexisNexis 2015).

K. Wyoming has no statutes governing the lawful conduct of employees while off-duty. However, marijuana is not legal in Wyoming and therefore employers can still prohibit its use by employees.

L. Wyoming has no statutes regarding expression of gender/transgender by employees.

XVI. OTHER DEVELOPMENTS

The Wyoming Supreme Court refused to recognize a claim of negligent investigation of employee termination in *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211 (Wyo. 1994).

Wyoming does not recognize civil conspiracy or prima facie tort as theories of recovery in the employment context. *Townsend v. Living Ctrs. Rocky Mountain*, 1997 WY 127, 947 P.2d 1297 (Wyo. 1997).

An employer may impose a reduction in force on employees for legitimate business reasons and may pay 30 days severance pay instead of notice. *Deering v. Bd. of Dirs. of the County Library of Fremont County*, 1998 WY 25, 954 P.2d 1359 (Wyo. 1998).

“Generally in Wyoming, only contract remedies are available to provide relief for wrongful termination, and tort remedies are rarely available in the employment context.” *Townsend v. Living Ctrs. Rocky Mountain*, 1997 WY 127, 947 P.2d 1297, 1299 (Wyo. 1997). However, an at-will employee does may have tort remedies for (1) breach of the implied covenant of good faith and fair dealing, *Wilder v. Cody Country Chamber of Commerce*, 1994 WY 7, 868 P.2d 211, 221 (Wyo. 1994), (2) intentional infliction of emotional distress, *Griess v. Consol. Freightways*, 1998 WY 147, 776 P.2d 752, 754 (Wyo. 1989), and (3) retaliatory discharge in violation of public policy when no other remedy is available, *Dynan v. Rocky Mountain Fed. S & L*, 1990 WY 48, 792 P.2d 631, 640 (Wyo. 1990); *VanLente v. Univ. of Wyoming Research Corp.*, 1999 WY 33, 975 P.2d 594, 998 (Wyo. 1999); *Jewell v. No. Big Horn Hosp. Dist.*, 1998 WY 11, 953 P.2d 135, 139 (Wyo. 1998); *Hoff v. city of Casper-Natrona County Health Dept.*, 2001 WY 97, ¶ 18, 33 P.3d 99, 103 (Wyo. 2001)

In *Capshaw v. WERCS*, 2001 WY 68, 28 P.3d 855 (Wyo. 2001) a former employee claimed he was terminated in breach of an employment contract and in retaliation for statements he made about mismanagement by company owners. WERCS countered that he was an at-will employee who could be terminated for any reason and, in any event, he was terminated for cause by engaging in a campaign to disparage management. *Id.* at 856. *Capshaw* argued this reason was a pretext and did not satisfy the good cause standard. *Id.* at 857. The Friday before the Monday trial date, to decide claims of breach of contract, promissory estoppel and the employer’s counterclaim for defamatory statements, WERCS filed a motion *in limine* to prevent *Capshaw* from presenting any evidence of mismanagement. The trial court granted the motion. On writ of review (interlocutory review), the Wyoming Supreme Court held that trial court’s ruling which precluded the introduction of evidence demonstrating mismanagement was an abuse of discretion and that such evidence was relevant to *Capshaw*’s theory that he was discharged in bad faith. *Id.* at 857-58. The Wyoming Supreme Court then reversed and remanded the case to the district court.