ORIGINAL

FILED
May 10 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. _____
(To be assigned by the Clerk of the Supreme Court)

Reid J. Perkins
Worden Thane P.C.
Attorney for Plaintiff Amy Blehm
111. N. Higgins, Suite 600
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CLERK OF THE SUPREME COURT
STATE OF MONTANA

AMY R. BLEHM,
Appellant

NOTICE OF APPEAL

v.

ST. JOHN'S LUTHERAN HOSPITAL, INC.

Appellees.

NOTICE is given that Amy R. Blehm, the Appellant above-named and whom is the Plaintiff in that cause of action filed in the Montana Nineteenth Judicial District, in and for the County of Lincoln, as Cause No. DV-09-123 hereby appeal to the Supreme Court of the State of Montana from the final judgment or order entered in such action on the 7th day of April, 2010 and entered as a final judgment on the 13th day of April, 2010.

THE APPELLANT FURTHER CERTIFIES:

1. That this appeal is subject to the mediation process required by M. R. App. P. 7. If subject to mediation, the money judgment being sought is not less than $5,000.

2. That this appeal is not an appeal from an order certified as final under M. R. Civ. P. 54(b).

3. That the notice required by M. R. App. P. 27 has been or will be given, within 11 days of the date hereof, to the Supreme Court and to the Montana Attorney General with respect to a challenge to the constitutionality of any act of the Montana Legislature.

4. Appellants have ordered the transcript of the summary judgment oral arguments from the court reporter contemporaneously with the filing of this notice of appeal. If all available transcripts have not been ordered, Appellants have complied with the provisions of M. R. App. P. 8(3) contemporaneously with the filing of this notice of appeal.

5. That included herewith is the filing fee prescribed by statute, or the affidavit to proceed without payment of the required filing fee prescribed in the Appendix of Forms as Form 3.

Dated this 6 day of May, 2010.

WORDEN THANE P.C.

By:_____
Reid Perkins
Attorney for Plaintiff and Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Clerk of District Court
Montana Nineteenth Judicial District Court,
Lincoln County
Lincoln County Courthouse
512 California Ave.
Libby, MT 59923

Scott D. Hagel
Daniel D. Johns
Crowley Fleck PLLP
P.O. Box 759
Kalispell, MT 59903-0759

Attorneys for St. John's Lutheran Hospital, Inc.

Dated this 6 day of May, 2010.

Reid Perkins
Worden Thane P.C.
111 N. Higgins Ave., Suite 600
Missoula, MT 59806

Reid Perkins

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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. _____
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Reid J. Perkins
Worden Thane P.C.
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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

AMY R. BLEHM,
Appellant

v.

ST. JOHN'S LUTHERAN HOSPITAL, INC.

Appellees.

NOTICE OF CONSTITUTIONAL ISSUE

NOTICE is given that the above captioned appeal will raise the issue of whether Mont. Code Ann. § 39-2-904 (providing for a probationary period of 6 months from the "date of hire") is constitutional if the statute is applied as requiring an employee to wait six months before reporting public policy violations or face the risk of termination without recourse. In this case, the District Court held that when an employer is violating public policy (and potentially putting other's lives and health at risk), an employee allegedly in their probationary period may be terminated for reporting those public policy violations and that the employee has no recourse.

It is the Appellant's position that if the statute is applied in the manner that the District Court applied it, then the statute violates constitutional equal protection guaranties. The right to equal protection can be examined under three possible levels of scrutiny; (1) strict scrutiny, (2) middle tier scrutiny, and (3) rational relation. See McKamey v. State (1994), 885 P.2d 515, 521. Strict scrutiny is reserved for "classifications which infringe [upon] fundamental rights or involve suspect classifications, such as race or national origin...." McKamey v. State (1994), 885 P.2d 515, 521 (citation omitted). If this statute is interpreted to mean that one class of employees may be terminated for reporting public policy violations which put employees health and lives at risk while another class of employees may not be terminated, then probationary employees will be subjected to health risks that non-probationary employees will not be. Those health risks may very well threaten the life of the probationary employees. Moreover, given that employees whom make it through the probationary period without reporting violations are presumably less likely to report violations after their probationary period, all employees' lives and health may be put at

risk. Life is a fundamental right. As such, the classification infringes upon a fundamental right and strict scrutiny is appropriate.

Because strict scrutiny applies, the legislation (or perhaps more accurately the district court's interpretation of the statute) must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest. Armstrong v. State (1999), 296 Mont. 361, 989 P.2d 364, ¶34 citing Gryczan v. State (1997), 283 Mont. 433, 449, 942 P.2d 112, 122. In this case, there is no compelling state interest justifying putting one class of employees at risk and not another. The state has a compelling interest in protecting employees whom are trying to ensure that state and federal laws are followed. The state does *not* have a compelling interest in protecting businesses whom violate state and federal laws. As such, allowing businesses to terminate whistle-blowing employees during their first six-months is not a compelling state interest nor is this statute narrowly tailored to effectuate a compelling state interest.

In addition, to the extent that this statute was interpreted to mean that employees whom are in their probationary period may be terminated without recourse for following federal laws (e.g. COBRA and ERISA), that interpretation of the statute also violates the Supremacy Clause by holding state law (i.e. the probationary period) as controlling over federal laws.

Dated this 6 day of May, 2010.

WORDEN THANE P.C.

By: _____

Reid Perkins
Attorney for Plaintiff and Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing NOTICE OF CONSTITUTIONAL ISSUE with the Clerk of the Montana Supreme Court, the Montana Attorney General, and each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Clerk of District Court
Montana Nineteenth Judicial District Court,
Lincoln County
Lincoln County Courthouse
512 California Ave.
Libby, MT 59923

Attorney General Steve Bullock
Department of Justice
P.O. Box 201401
Helena, MT 59620-1401

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P.O. Box 759
Kalispell, MT 59903-0759

Attorneys for St. John's Lutheran Hospital, Inc.

Dated this 6 day of May, 2010.

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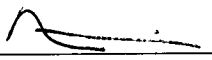

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