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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

TIMOTHY J. BENTLEY, Plaintiff, v. CONOCOPHILLIPS PIPELINE COMPANY, Defendant.	No. CV-09-1-M-DWM **DEFENDANT'S CONSOLIDATED BRIEF ON THE FOLLOWING MOTIONS:** **(1) IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS CLAIMS FOR UNPAID WAGES, BREACH OF CONTRACT AND WRONGFUL INDUCEMENT;** **(2) IN SUPPORT OF CPPL'S CROSS MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS FOR UNPAID WAGES, BREACH OF CONTRACT AND WRONGFUL INDUCEMENT** **(3) IN SUPPORT OF CPPL'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS FOR UNPAID OVERTIME, BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, NEGLIGENCE, NEGLIGENT MISREPRESENTATION, CONSTRUCTIVE FRAUD, RETALIATION PRONG OF THE WRONGFUL DISCHARGE CLAIM AND PUNITIVE DAMAGES**

Defendant ConocoPhillips Pipeline Company ("CPPL"), by and through its counsel, Holland & Hart LLP, hereby files this consolidated brief requesting that the Court deny Bentley's motion for summary judgment on his claims for unpaid wages, breach of contract and wrongful inducement and instead grant CPPL's motion for summary judgment on the claims for unpaid wages, breach of contract, wrongful inducement, unpaid overtime, breach of the implied covenant of good faith and fair dealing, negligence, negligent misrepresentation, constructive fraud, wrongful discharge retaliation claim and punitive damages. Submitted contemporaneously herewith is CPPL's combined Statement of Genuine Issues and Statement of Uncontroverted Facts as required by L.R. 56.1(b) and CPPL's Motion for Summary Judgment.

INTRODUCTION

Bentley brings this case against his former employer, CPPL, after he was terminated on November 12, 2008 for not allowing CPPL to search his vehicle on company property. It is undisputed that when Bentley refused to allow CPPL to search his vehicle, he had a handgun in the cab of his vehicle. The sole issue in this case should be whether CPPL violated the good cause and express written personnel policy prongs of the Montana

Wrongful Discharge from Employment Act ("WDEA") when it terminated Bentley.

In addition to the WDEA claim, however, Bentley has brought a claim for unpaid wages, unpaid overtime, breach of contract, breach of the implied covenant of good faith and fair dealing, wrongful inducement, negligence, negligent misrepresentation, constructive fraud, violation of the public policy prong of the WDEA and punitive damages. As a matter of law, CPPL is entitled to summary judgment on each of these claims.

SUMMARY OF THE ARGUMENT

A. Unpaid Wages

Despite Bentley's self-serving statements to the contrary, the evidence actually shows that Bentley has been paid for all hours he worked. Bentley was terminated effective November 12, 2008. Between November 1 and November 12, Bentley claims to have worked 64 hours of regular time. SOF 30.[1] Despite Bentley not working on November 13 and 14 and only working 64 hours during the pay period, CPPL paid Bentley his entire salary (equivalent to 86.67 regular hours) for the pay period November 1 to

[1] The abbreviation SOF will be used to refer to Plaintiff's Statement of Uncontroverted Facts filed in support of his motion for summary judgment.

November 15. SGI ¶¶ 24-26.[2] After Bentley's discharge, CPPL issued his final check on November 18, 2008 for the call-out and overtime hours Bentley had worked from November 1 to November 12, and deducted from that check $384.77 to account for the prior overpayment for November 13 and 14. *Id.* at ¶¶ 27-29. As a result, Bentley has been paid for all hours worked.

B. Breach of Contract

Bentley contends that CPPL changed the way overtime was paid during the course of his employment, and he never worked the schedule that he had been allegedly promised during his pre-employment interview. Bentley had no written employment contract with CPPL, nor has he proven the existence of an oral contract on these terms. In fact, CPPL's offer letter to Bentley expressly states that there would be subsequent changes to his pay per CPPL policy and, as a matter of law, CPPL is free to set the terms and conditions of employment. Bentley was paid pursuant to CPPL's policy and he worked the previously established schedule. After working under these terms and conditions, Bentley now objects to the terms and conditions after he was terminated.

[2] The abbreviation SGI will be used to refer the Court to Defendant's Statement of Genuine Issues filed contemporaneously with this response brief.

C. Wrongful Inducement

There is a factual dispute as to whether Bentley was promised what he claims to be promised, but even if we assume these promises to be true, as a matter of law, the plain language of the statute bars the wrongful inducement claim.

D. Overtime Claim

The Montana Wage Payment Act and the Fair Labor Standards Act ("FLSA") require employers to pay time and one-half for all hours worked over 40 within one work week. Mont. Code Ann. § 39-3-405; 29 U.S.C. § 207. The uncontroverted evidence shows that Bentley was paid a minimum of time and one-half, and in many instances, was paid a premium above the requirements of the law.

E. Breach of the Implied Covenant of Good Faith and Fair Dealing.

Bentley did not have a written contract of employment which bars both his contract and breach of the implied covenant of good faith and fair dealing claims.

F. Negligence, Negligent Misrepresentation and Constructive Fraud.

Bentley's claims for negligence, negligent misrepresentation and constructive fraud are preempted by the WDEA. Moreover, they are based on alleged pre-employment misrepresentations that could not have induced Bentley to accept the actual written offer of employment.

G. WDEA Retaliation and Punitive Damages.

Bentley's claim for retaliation does not fit with the WDEA requirement that he report a violation of public policy. It is undisputed that Bentley complained about his schedule. However, complaining is not the same as "reporting a violation". CPPL violated no laws. Bentley contends the schedule was unsafe. His opinion does not constitute a violation. No employees were hurt working this schedule. No OSHA standards were violated. No wage and hour laws were violated. Absent an actual violation of public policy, Bentley does not have a WDEA retaliation claim for reporting a violation of public policy.

Since CPPL is entitled to summary judgment on the retaliation claim, Bentley's independent cause of action for punitive damages does not apply. Mont. Code Ann. § 39-2-905.

The sole remaining issues for trial should be whether Bentley's discharge was not for good cause, and whether CPPL violated it express written personnel policies in discharging Bentley.

ARGUMENT

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there is no genuine issue of material fact and that the moving party is

entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of establishing the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law. *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). The burden then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* In considering a motion for summary judgment, courts must view the evidence in the light most favorable to the non-moving party. *Id.* "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Parth v. Pomona Valley Hosp. Med. Center*, 584 F.3d 794 (9th Cir. 2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

All reasonable doubts as to the existence of genuine issues for trial must be resolved against the moving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the non-moving party, summary judgment must be denied. *Id.*

A. CPPL HAS PAID BENTLEY ALL WAGES OWED.

Relying on Montana Wage Payment Act and the FLSA, Bentley claims that CPPL has failed to pay him for 64 regular hours worked between November 1 and November 12, and improperly deducting 17.31 regular hours from his last pay check. Pl's Br. at 7-8. Although Bentley is correct that the Montana Wage Payment Act and the FLSA require payment of wages, his motion for summary judgment on this claim must be denied because the undisputed evidence shows that Bentley was actually paid for all hours worked.

At the time of his termination, Bentley was paid a salary of $3,853 per month, or $1,926.50 per pay period, for his regular hours of work. SGI ¶ 19. Bentley received additional pay for overtime hours and call-out hours. *Id.* at ¶ 22. Bentley was paid twice a month at CPPL. *Id.* at ¶ 19. The first pay period each month ends on the fifteenth day of the month. *Id.* at ¶ 20. The second pay period begins on the sixteenth day of the month and ends on the last day of the month. *Id.* Bentley's salary, or regular earnings, were paid at the end of the pay period it is earned. *Id.* at ¶ 21. Overtime and call out hours were paid at the end of the following pay period because payroll is run midway through the pay period so it is not possible to gather the overtime and call out hours worked for future dates..

Bentley claims to have worked 64 hours of regular time between November 1 and his termination on November 12. SOF 30. Despite not working the last two business days of the pay period, November 13 and 14, CPPL paid Bentley his entire salary, or $1,926.50, for the pay period because it had processed payroll prior to his termination. SGI ¶ 24-25. Thus, on November 14, Bentley was paid for all 64 hours that he worked **and** two days he did not work (November 13 and 14). *Id.* at ¶ 26.

On November 18, CPPL issued Bentley his final check for the overtime and call-out hours he worked from November 1 to November 12. *Id.* at ¶ 27. CPPL deducted $384.77 of regular time from his final check to account for the overpayment in the prior pay check. *Id.* at ¶ 28. There were 10 working days in the first half of November, since Bentley did not work 2 of those 10 working days, the system deduced (2/10) x $1,926.50 or $384.77, which is equal to 17.31 hours. *Id.* at ¶ 29.

Thus, Bentley has been paid for all hours worked. Bentley's motion for summary judgment on this wage claim must be denied and CPPL's cross-motion should be granted. CPPL is also entitled to attorney's fees on this claim.

B. CPPL HAS NOT BREACHED ANY EMPLOYMENT CONTRACT WITH BENTLEY.

Despite the fact that Bentley worked the exact same schedule during his entire employment at CPPL and was paid pursuant to his offer letter and company policy, Bentley brings a purported breach of contract claim based on these terms and conditions of employment that he now alleges were different than what was discussed with him during his pre-employment interview. CPPL is entitled to summary judgment because Bentley was paid pursuant to CPPL's written personnel policies, and has failed to prove damages for CPPL's alleged failure to follow the schedule allegedly promised during his interview.

Bentley has failed to meet his burden that he had a contract on these terms. To establish the existence of a contract, Bentley must prove four essential elements: (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) consideration. Mont. Code Ann. § 28-2-102.

The Montana Supreme Court has held consent is established when there has been an offer and an acceptance to that offer. *Kortum-Managhan v. Herbergers NBGI*, 2009 MT 79, ¶18, 349 Mont. 475, ¶18, 204 P.2d 693, ¶18; *citing Keesun Partners v. Ferdig Oil Co.*, 249 Mont. 331, 337, 816 P.2d 417, 421 (1991). Montana law requires acceptance of an offer to be

absolute and unqualified. 28-2-504; *see also Zier v. Lewis*, 352 Mont. 76, 81 (2009) ("Acceptance of an offer on terms varying from those offered is a rejection of the offer, putting an end to the negotiation unless there is assent to the new terms.").

On March 23, 2007, CPPL offered Bentley a job. SGI ¶ 5. The terms and conditions of the employment offer were stated in the offer letter. *Id.* at ¶ 6. Specifically, the offer letter stated that "subsequent changes to your salary will be based on your performance and our compensation policy." *Id.* at ¶ 7. The offer letter did not provide that Bentley would be paid in excess of CPPL's call-out policy, nor did the offer letter state that Bentley would work a schedule different from the other pipeline operators at the Missoula terminal as Bentley now alleges. *Id.* at ¶ 8. Instead, Bentley accepted employment based upon the terms prescribed by the offer letter. He did not qualify his acceptance, nor did he reject the terms in the offer letter.

Absent an agreement to the contrary, the terms of an employment contract are set forth in the employer's personnel manual. *Langager v. Crazy Creek Productions, Inc.*, 1998 MT 44, ¶ 26, 287 Mont. 445, ¶ 26, 954 P.2d 1169, ¶ 26. The employer is free to set the terms and conditions of employment and compensation. *McConkey v. Flathead Electric Co-op.*, 2005 MT 334, ¶23, 330 Mont. 48, ¶23, 125 P.3d 1121, ¶23, *citing Langager*

at ¶25 (quoting *Rowell v. Jones & Vining, Inc.*, 524 A.2d 1208, 1211 (Maine 1987). The employee is free to accept or reject those conditions. *McConkey* at ¶23, *citing Langager* at ¶25.

Here, Bentley was paid pursuant to CPPL's call out policy and worked the schedule that all other pipeline operators at the Missoula terminal worked. Bentley has failed to establish alleged promises to him that exceeded the terms and conditions that every other pipeline operator worked and which Bentley worked while he was employed at CPPL.

1. Bentley Has Been Paid For All Call-Outs Pursuant to CPPL's Call-Out Policy.

CPPL's Call-Out Policy is clear and unambiguous. As an operator, Bentley was required to answer telephone calls from truck drivers or come back to the facility after normal working hours to perform work when he was on-call. SGI ¶ 9. CPPL's call out policy was designed to pay the employee a premium for the imposition on the employee's personal time. *Id.* at ¶ 11. Pursuant to the call-out policy, if Bentley received a call out and could fix the problem without going to the facility, the policy provided that he record either (1) the time he actually worked at the rate of time and one-half; or (2) two hours of straight time, whichever is greater. *Id.* at ¶ 12. If Bentley received a call out that required him to go to the facility, the policy provided that he record either (1) the time he actually worked at the rate of

time and one-half; or (2) four hours of straight time, whichever is greater. *Id.* at ¶ 13.

For example, if Bentley received a call out at home, and it took him fifteen minutes to address the issue over the telephone, he should record two hours at his regular rate of pay. If it took longer than 1.33 hours, he should record his actual time at the rate of time and one-half. Similarly, if Bentley was required to travel to the facility, and it took him fifteen minutes to complete the call out, he should record four hours at his regular rate of pay. If it took longer than 2.66 hours, he should record his actual time at the rate of time and one-half. Bentley was paid a minimum of time and one-half for all hours worked, and was paid a premium on call out hours handled from home that took less than 1.33 hours, and those handled at the facility in less than 2.66 hours. *See* charts below illustrating the policy.

When Bentley started at CPPL, he recorded his call out time incorrectly. SGI ¶ 14. If a call out required him to travel to the facility, but only took 20 minutes, Bentley recorded four hours at time and one-half, instead of four hours of straight time. *Id.* at ¶ 15. Similarly, if he received a 15 minute call at home, Bentley recorded two hours at time and one-half instead of two hours of straight time. *Id.* at ¶ 16.

When Steve Thomas was hired as Bentley's supervisor, Thomas explained to Bentley he was recording call out time improperly, and instructed Bentley on the proper way to record call out time. *Id.* at ¶ 17. Bentley never objected to the way call outs were paid during the next 12 months of his employment. Indeed, Bentley raised this issue for the first time in this litigation.

Here is a chart comparing what Montana law and the FLSA required CPPL to pay Bentley, what Bentley was paid pursuant to CPPL's call-out policy and what Bentley is asking for in his motion:

CALL OUT PAY FOR MATTERS HANDLED FROM HOME

Time Worked on Call-Out	MT Law and FLSA Minimum for Overtime (time and one-half rate for time worked)	Amount Actually Paid to Bentley under CPPL's policy (paid for 2 hours straight time for any work up to 1.33 hours; time and one-half rate for all time worked over 1.33 hours)	Pay as contended by Bentley (2 hours at time and one-half rate)
0.25	$8.34	$44.46	$66.69
0.5	$16.67	$44.46	$66.69
0.75	$25.01	$44.46	$66.69
1	$33.35	$44.46	$66.69
1.33	$44.35	$44.46	$66.69
1.5	$50.02	$50.02	$66.69
2	$66.69	$66.69	$66.69

CALL OUT PAY WHEN EMPLOYEE LEAVES HOME AND GOES TO FACILITY

Time Worked on Call-Out	MT Law and FLSA Minimum for Overtime (time and one-half rate for time worked)	Amount Actually Paid to Bentley under CPPL policy (paid for 4 hours straight time for any work up to 2.66 hours; time and one-half rate for all time worked over 2.66 hours)	Pay as contended by Bentley (4 hours at time and one-half rate)
0.5	$16.67	$88.92	$133.38
1	$33.35	$88.92	$133.38
1.5	$50.02	$88.92	$133.38
2	$66.69	$88.92	$133.38
2.5	$83.36	$88.92	$133.38
2.66	$88.70	$88.92	$133.38
3	$100.04	$100.04	$133.38
4	$133.38	133.38	$133.38

As the Court can see from this chart, in many instances Bentley was paid a premium on what is required by Montana law and the FLSA. Indeed, Bentley's breach of contract claim is not based on the allegation that he was paid less than the time and one-half required by Montana law, nor does he

claim an entitlement to additional call-out pay under the FLSA. Simply put, Bentley claims that he should have been entitled to record his call out time incorrectly for his entire employment at CPPL (and be paid more than the other operators) because he got away with it during his first five months of employment.

Bentley's counsel argues at length that CPPL promised to pay call outs pursuant to the way Bentley was mistakenly recording time, and that this was a "lynchpin of the employment agreement" for Bentley. Pl.'s Br. at 9-10. Bentley's affidavit, however, tells a different story. Bentley does not claim that CPPL promised to pay him call outs in this manner, nor does Bentley claim that Dave Floyd promised to pay him call outs in this manner. Instead, Bentley's affidavit simply states that "[w]hile I was employed at ConocoPhillips, Steve Thomas (my second supervisor) paid me my overtime and call-out wages differently than my first supervisor, Dave Floyd." SOF ¶ 2 (Ex. A, ¶¶ 11-13). This is consistent with Bentley's deposition testimony:

> Q: Okay, my question was a little different. Did you ever look at your paycheck and see how you were paid and complain to Conoco that you didn't think you were being paid appropriately for call-out or overtime?
>
> A: No, I made a comment to Steve that that's not how Dave did it, that not how we were told to do it. And Steve said, well, this is how you're supposed to do it. Seeing how he was the supervisor – James had

> made the same comment to him, James Turner, you know, that we had been doing it this was and that's how Dave wanted us to do it, and Steve said, well, this is how it's supposed to be done. We took his word for it and started doing it.

SGI ¶ 31.

Bentley has also argued that CPPL could not change the way he was paid (changing from Bentley's improper method of recording call-out time to compliance with CPPL policy) without additional consideration. *Gates v. Life of Montana Insurance Co.*, 196 Mont. 178, 183, 638 P.2d 1063, 1066 (1982). This case is factually distinguishable from *Gates*. In *Gates*, a former employee brought an action for wrongful discharge against her employer, asserting in part that her employer "breached the contractual terms of her employment as set forth in [an] employment handbook." *Gates*, 196 Mont. at 183, 638 P.2d at 1066. The Court held that where the employer distributed the handbook ***two years after*** the plaintiff was hired, there was no new and independent consideration for its terms and its terms were not bargained for. *Gates*, 196 Mont. at 183, 638 P.2d at 1066.

Here, CPPL did not change its policy after Bentley was hired. Instead, the call-out policy was effective August 25, 2000, **seven years prior** to Bentley's employment, and stayed in effect throughout Bentley's employment at CPPL. SGI ¶ 10. Bentley simply was not correctly

recording time and, when CPPL learned of this, enforced its policy. Thus, no additional consideration is required.

Moreover, in its offer letter, CPPL reserved the right to change Bentley's pay. As stated by the Montana Department of Labor and Industry, Labor Standards Bureau, Wage and Hour Unit, employers are free to cut an employee's rate of pay. SGI at ¶ 18.

CPPL is entitled to summary judgment on Bentley's breach of contract claim because he was paid pursuant to CPPL's written policy and Bentley has failed to prove that CPPL promised to pay any additional amounts.

2. Bentley has suffered no damages as a result of not working the schedule he claims to have been promised.

Bentley claims that CPPL breached an alleged contract by promising a rotating schedule different from the schedule he worked during his entire employment at CPPL, which would have resulted in more time off and less pay. Even assuming Bentley can establish a contract incorporating this term, which CPPL disputes as argued above, Bentley has failed to prove any damage.

Damages represent an essential element for a breach of contract claim. *See Sebena v. American Auto. Ass'n* (1996), 280 Mont. 305, 310, 930 P.2d 51, 54. Failure to satisfy all of the elements of a claim causes the claim to fail as a matter of law. *See Estate of Schwabe v. Custer's Inn,* 2000 MT 325,

¶ 27, 303 Mont. 15, ¶ 27, 15 P.3d 903, ¶ 27. The amount equal to what the party would receive if the contract had been fully performed constitutes the measure of damages for the breach of an obligation arising from a contract. *Arrowhead Sch. Dist. # 75, Park Co. v. Klyap*, 2003 MT 294, ¶ 20, 318 Mont. 103, ¶ 20, 79 P.3d 250, ¶ 20 (citation omitted); *see also* § 27-1-311, MCA.

Here, Bentley has suffered no damages from CPPL not implementing Bentley's proposed schedule. Even assuming Bentley's allegations are true, and that he did not work the schedule promised and given more time off, he would be entitled only to work the schedule he advocates which results in less hours and less pay. Bentley has suffered no damages and his claims fail as a matter of law. *See Estate of Schwabe*, ¶ 27, 15 P.3d 903.

C. CPPL DID NOT WRONGFULLY INDUCE BENTLEY TO CHANGE HIS EMPLOYMENT.

Bentley contends that CPPL misrepresented the work schedule and the call-out policy which induced him to quit his job in Washington and move to Montana. To prevail on this claim, Bentley must prove that he moved "from one place to another in this state", Mont. Code Ann. 39-2-303, and CPPL knowingly misrepresented the schedule and call-out pay for the purpose of inducing Bentley to quit his job and move. Here, Bentley moved from Washington, so this statute does not apply. Even if the statute were to

apply, Bentley is not entitled to summary judgment because a factual dispute exists as to whether CPPL induced him to move.

1. The Unambiguous Statutory Language Controls.

As noted above, MCA § 39-2-303 plainly provides that "a person or an entity doing business in this state may not induce, influence, persuade, or engage workers to ***change from one place to another in this state*** …". (emphasis added).

As has long been the rule of law in this State, it is the Court's duty "to construe the law as it is written." *In re Estate of Magelssen*, 182 Mont. 372, 378, 597 P.2d 90, 94 (1979). In ascertaining the Legislature's intent, "it is beyond dispute that [the court is] bound by [the] plain and unambiguous language used in a statute and may not consider legislative history or any other means of statutory construction." *McKirdy v. Vielleux*, 2000 MT 264, ¶ 22, 302 Mont. 18, ¶ 22, 19 P.3d 207, ¶ 22. "If no ambiguity exists in a statute, the letter of the law will not be disregarded under the pretext of pursuing its spirit." *Magelssen*, 182 Mont. at 378, 597 P.2d at 94. *See also Saari v. Winter Sports, Inc.*, 2003 MT 31, ¶22, 314 Mont. 212, 64 P.3d 1038.

Here, the statutory interpretation is clear and straight forward. It is undisputed that Bentley moved from Seattle, Washington to Missoula,

Montana to take the CPPL job. SGI ¶ 2. The statute does not apply and CPPL is entitled to summary judgment on this claim.

2. A Factual Issue Exists as to Whether CPPL induced Bentley to move.

Even if the Court concluded that MCA 39-2-303 were to apply, there is a question of fact as to whether CPPL induced Bentley to move to Montana precluding his motion for summary judgment. Bentley testified that prior to applying to CPPL in Missoula, he and his wife had decided to move out of Seattle, Washington because of weather, crime and traffic. *Id.* at ¶ 2. Bentley had quit his part time job. *Id.* at ¶ 3. Bentley applied for jobs in Spokane, Washington and Vancouver, Washington prior to applying in Missoula. *Id.* at ¶ 4. Given this testimony, Bentley cannot contend CPPL induced him to quit his job in Seattle and move. At a minimum, if the statute applies, there is a factual issue for trial.

D. CPPL IS ENTITLED TO SUMMARY JUDGMENT ON BENTLEY'S FAILURE TO PAY OVERTIME CLAIM

In addition to claiming CPPL breached an employment contract by the way it paid Bentley for call outs, Bentley has also brought a claim for unpaid overtime. Specifically, Bentley has alleged that CPPL failed to pay time and one-half for call outs. Under Montana law and the FLSA, CPPL is required to pay time and one-half for all hours worked over 40 in a work

week. Mont. Code Ann. § 39-3-405; 29 U.S.C. § 207. As shown in the chart above, Bentley was guaranteed a minimum of time and one-half on all overtime and, in many instances, received a premium. Thus, CPPL is entitled to summary judgment and attorneys' fees on this claim.

E. CPPL IS ENTITLED TO SUMMARY JUDGMENT ON BENTLEY'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

The implied covenant of good faith and fair dealing does not apply absent a written contract. *Story v. City of Bozeman*, 242 Mont. 436, 449, 791 P.2d 767, 775 (1990). In *Story*, the court limited actions for tortious breach of the covenant of good faith and fair dealing to situations involving written contracts, and then only in "exceptional circumstances" where the party complaining had unequal bargaining power and a lack of a profit motive. *Id.* at 451, 791 P.2d at 776. Thus, absent a written contract, the covenant is not implicated. *Tvedt v. Farmers Ins. Group of Companies*, 2004 MT 125, ¶ 27, 321 Mont. 263, ¶ 27, 91 P.3d 1, ¶ 27. As shown above, Bentley has failed to prove the existence of a contract and the breach of the implied covenant of good faith and fair dealing does not apply.

Moreover, the employment relationship does not fit within the "special circumstances" outlined in *Story*. It goes without saying that one enters into an employment relationship with a profit motive, so even with a

written contract, the covenant would not apply. Bentley has not alleged, nor has he produced any written contract between him and CPPL. CPPL is entitled to summary judgment on this claim as well.

F. CPPL IS ENTITLED TO SUMMARY JUDGMENT ON BENTLEY'S CLAIMS FOR NEGLIGENCE, NEGLIGENT MISREPRESENTATION AND CONSTRUCTIVE FRAUD.

Bentley has also brought claims for negligence, negligent misrepresentation and constructive fraud against CPPL. The negligent misrepresentation, constructive fraud and part of the negligence claim are based on the same alleged pre-employment misrepresentations and failure to pay wages and overtime as discussed above. The rest of the negligence claims is based on allegations that CPPL's failed to supervise its employees, enforce its policies and ensure that Bentley would not be harassed or retaliated against, which all lead to his discharge.

CPPL is entitled to summary judgment on the negligent misrepresentation, constructive fraud and part of the negligence claim for the same reasons as stated above in this brief. Specifically, there were not misrepresentations of the working conditions. Bentley received a written offer letter, accepted the terms of the written offer letter and worked pursuant to the terms of the written offer letter for over 18 months. Moreover, Bentley has been paid for all wages and overtime, and CPPL's

call out policy expressly complies with the Montana Wage Payment Act and the FLSA.

CPPL is also entitled to summary judgment on the rest of the negligence claim and the negligent misrepresentation and constructive fraud claims because these claims are preempted by the WDEA.

1. Bentley's negligence claim is preempted by the WDEA because the allegations are not separate and independent from the discharge.

It is beyond dispute that the WDEA is the exclusive remedy for wrongful discharge in Montana. *Ruzicka v. First Healthcare Corporation,* 45 F.Supp.2d 809 (D.Mont. 1997). "Except as provided in this part, no claim for discharge may arise from tort or express or implied contract." Mont. Code Ann. § 39-2-913. The only way to successfully bring a tort claim, is to prove that tort claim is ***separate and independent*** from a claim for wrongful discharge. *Mysse v. Martens*, . 279 Mont253, 268, 926 P.2d 765, 774 (1996); *Beasley v. Semitool, Inc*., 258 Mont. 258, 263, 853 P.2d 84, 86-87 (1993).

Here, Bentley's negligence claim necessarily arises from the discharge claim. Bentley was terminated for refusing a search of his vehicle. However, Bentley has alleged (and moved for summary judgment on the grounds) that his termination was the result of filing a claim with CPPL's

"confidential" Employee Assistance Program, CPPL disclosing the "confidential" report to Bentley's supervisor, Steve Thomas, and Steve Thomas harassing and retaliating against Bentley for contacting EAP. Pl.'s Br. In Support of Motion For Summary Judgment on the Wrongful Discharge Claim, pages 5-11. These are the exact same allegations Bentley plead for his negligence claim:

- ConocoPhillips owed a duty to Bentley to appropriately hire, train, and supervise its supervisory employees, including Steve Thomas, so as to prevent harassment and retaliation against subordinate employees. Compl. at ¶ 78.
- ConocoPhillips owed a duty to Bentley to enact and enforce policies and procedures to prevent harassment and retaliation in the workplace. Compl. at ¶ 78.
- ConocoPhillips owed a duty to Bentley not to disseminate confidential information to unauthorized persons. Compl. at ¶ 78.
- ConocoPhillips owed a duty to Bentley to enforce its firearms policy in a fair and balanced manner, and not as a pretext to discharge Bentley. Compl. at ¶ 78.
- ConocoPhillips owed a duty to Bentley to listen to his valid concerns about safety and overtime issues, rather than retaliate against Bentley for voicing his concerns. Compl. at ¶ 78.
- ConocoPhillips owed a duty to Bentley not to violate his constitutional rights to privacy and to bear arms. Compl. at ¶ 78.

Thus, Bentley's claim for negligence is preempted by the WDEA, and CPPL is entitled to summary judgment on that claim.

2. Bentley's claims for negligence, negligent misrepresentation and constructive fraud are preempted by the WDEA because

The WDEA provides the exclusive remedy for wrongful discharge and precludes any claims that "may arise from tort or express or implied contract." Mont. Code Ann. § 39-2-913. When a claimant does not allege any damages other than those "arising out of her discharge, the complaint is insufficient to indicate a separate claim." *Mysse*, 279 Mont at 268, 926 P.2d at 774.

Bentley has not identified any damages for his negligence, negligent misrepresentation or fraud claims. Plaintiff's Preliminary Pretrial Statement at page 19. Instead, the damages claimed relate to the loss of his employment, specifically, loss of income and benefits. *Id.* Bentley's expert, Dave Johnson, not only calculated lost wages and benefits for the four year period allowed by the WDEA, but he also calculated lost wages and benefits for Bentley's work life expectancy. SGI ¶ 32. Since the only damages related to these claims are the lost earnings and benefits caused by Bentley being discharged from CPPL, these alleged damages necessarily result from Bentley's discharge, his sole claim is the WDEA and his negligence, negligent misrepresentations and constructive fraud claims are preempted.

G. CPPL IS ENTITLED TO SUMMARY JUDGMENT ON BENTLEY'S CLAIM FOR RETALIATION AND PUNITIVE DAMAGES UNDER THE WDEA.

Under the WDEA's retaliation prong, a discharge can be wrongful if an employee is fired "in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy." Mont. Code Ann. § 39-2-904. The WDEA defines public policy as "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule." Mont. Code Ann. § 39-2-903(7) (emphasis added). To prevail on this claim, then, Bentley must prove that he was fired for either (1) refusing to violate public policy or (2) for reporting a violation of public policy. If he cannot prove these particular facts by "clear and convincing evidence" then he cannot get punitive damages. Mont. Code Ann. § 39-2-905(2):

> (2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-2-904(1)(a).

If there is no violation of § 39-2-904(a), there can be no award of punitive damages. That is the case here.

The "public policy" section of the WDEA is intended to "protect good faith 'whistle blowers.'" *Krebs v. Ryan Oldsmobile*, 255 Mont. 291, 296,

843 P.2d 312, 315 (1992). Bentley does not fit into that category. Nowhere does he allege that he reported a violation of public policy. This is fatal to his claim, as demonstrated by the cases decided under the "public policy" section of the WDEA. In *Motarie v. Northern Montana Joint Refuse Dist.*, 274 Mont. 239, 244, 907 P.2d 154, 157 (1995), the court reversed summary judgment for the employer and held that a probationary employee who had been fired shortly after he reported a workplace violation to the federal Occupational Health and Safety Administration stated a claim under the WDEA. In *Krebs, supra* the court found the public policy section of the WDEA applicable to the discharge of an employee who had reported to law enforcement that co-workers were engaged in illegal drug activity. There, the plaintiff was fired for being a "snitch" when his boss discovered he was working with the police. *Krebs,* 255 Mont. at 297, 843 P.2d at 316.

Bentley did not report any violation of public policy. Although he alleges his discharge was in retaliation for using the EAP program and complaining that his work schedule was unsafe, that is not the same as reporting a violation of public policy to law enforcement or a regulatory agency. Pl.'s Br. in Support of Motion for Summary Judgment on the Wrongful Discharge Claim, pages 5-11. No one was injured working this

schedule, no federal or Montana laws or regulations were violated with this schedule. SGI ¶ 31.

As established in his deposition, the only "report" he allegedly made regarding the way call outs were made was to tell Steve Thomas that Dave Floyd paid call outs differently. *Id.* at 30. Again, as shown above, CPPL violated no wage and hour laws by the way it paid call outs. Instead, CPPL exceeded the minimum requirements of the law on many instances. Simply put, absent an actual "violation of public policy" for Bentley to report, CPPL could not have violated Mont. Code Ann. § 39-2-904(1)(a).

CONCLUSION

For the foregoing reasons, CPPL requests that the Court deny Bentley's motion for summary judgment on his claims for unpaid wages, breach of contract and wrongful inducement and instead grant CPPL's motion for summary judgment on the claims for unpaid wages, breach of contract, wrongful inducement, unpaid overtime, breach of the implied covenant of good faith and fair dealing, negligence, negligent misrepresentation, constructive fraud, retaliation and punitive damages.

DATED this ___ day of February, 2010.

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CERTIFICATE OF COMPLIANCE

The undersigned, Jason S. Ritchie, certifies that this Brief complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 6,187 words, excluding caption and certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

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