



CUT AND PASTE POST DECEMBER, 2023

Montana Supreme Court Roundup

In November of 2023, the Montana Supreme Court issued 3 HR-related rulings. In all 3 cases, the Court confirmed the District Court’s rulings. Case summaries, as well as links to the cases, are provided below.

[DA 23-0218](#)

Kevin Barber, a Montana resident, sued Bradford Aquatic Group, LLC, a company based in North Carolina, for claims arising from the termination of his employment. The issue before the Supreme Court was whether Barber could sue in Montana, or whether the North Carolina courts were the proper forum. The Eleventh Judicial District Court in Flathead County dismissed Barber’s claims without prejudice for improper venue, applying the choice-of-law and forum selection clauses contained in Barber’s employment agreement. Barber appealed, arguing that Montana law should apply notwithstanding the agreement’s contrary provision.

The following cases were decided by “Memorandum Opinion”*:

[DA 23-0094](#)

Cindy Fuson appealed an adverse ruling from the Ninth Judicial District Court, Toole County, on discrimination, wrongful discharge, and implied covenant of good faith and fair dealing claims arising out of her termination from CHS Inc.

The issues before the Court included: Medical certification requirements for commercial driver’s license, the Montana Human Rights Act as the exclusive remedy for discrimination complaints, and a time barred gender discrimination claim.

[DA 23-0012](#)

Alma Edwards appealed a dismissal of several allegations by the Thirteenth Judicial District Court. The claims arose from the termination of her employment with Defendant Turley Dental Care after she tested positive for marijuana on a random drug test conducted pursuant to Turley Dental’s employee drug testing policy. She challenged the District Court’s August 12, 2021 Order granting summary judgment to Turley Dental on her wrongful discharge claim (Count I); the District Court’s December 13, 2022 Order denying her motion to compel discovery and award sanctions (Count II); and the District Court’s December 13, 2022 Order granting summary judgment to Turley Dental on her age and disability discrimination claim (Count III).

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| <p style="text-align: center;"><i>Inside</i></p> <ul style="list-style-type: none"> • <i>Montana Supreme Court Roundup</i> • <i>U.S. Supreme Court: Religious Accommodations and Undue Hardship</i> • <i>President Biden Issues Executive Order on AI</i> |
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* Cases decided by memorandum opinion “shall not be cited and do not serve as precedent”. Many are decided based on ‘settled law’. In most cases, the case title, cause number, and disposition are included in the Supreme Court’s quarterly list of non-citable cases and/or the Pacific Reporter.



U.S. Supreme Court: Religious Accommodations and Undue Hardship

Gerald Groff was an evangelical Christian who believed for religious reasons that Sunday should be devoted to worship and rest. Groff was employed by the United States Postal Service (USPS), and was impacted by a new USPS policy requiring employees to deliver packages on Sundays. Groff requested a religious exemption from the new policy. The Post Office denied his request, and he sued for discrimination based on religion.

29 C.F.R. § 1605.2(b)(1) reads, part, as follows: “Section 701(j) [of the Civil Rights Act of 1964] makes it an unlawful employment practice ... for an employer to fail to reasonably accommodate the religious practices of an employee ... unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business. “

In determining what constitutes an “undue hardship” under this provision, since 1975 the Courts and the EEOC have used the “more than a *de minimis* cost” standard. This standard basically allowed employers to deny religious accommodations virtually any time an employer was inconvenienced. Applying the *de minimis* cost standard to this case ([Groff v. DeJoy](#)), both the District Court and Third Circuit Court of Appeals ruled in favor of the USPS.

On July 29, 2023, in a unanimous decision, the United States Supreme Court clarified that a religious accommodation only results in “undue hardship” when “the burden of granting [the] accommodation would result in *substantial increased costs in relation to the conduct of its particular business.*”

Under this new standard, the Court requires employers who deny a request for religious accommodations to be able to demonstrate that the requested accommodation would create an “excessive” or “unjustifiable” burden, further explaining that an “excessive” or “unjustifiable” burden occurs whenever the accommodation “substantially interferes with the employer’s ability to conduct business”. The Court said that, in evaluating these requests, “Courts must ... take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer.”

In its decision, the Court also addressed the impact of its decision on EEOC guidance documents, and on the coworkers of persons making these requests in union and non-union environments. The Court vacated the Third Circuit’s decision and remanded the case back to the lower courts to apply the new standard.

Professional Pointer: This decision may cause the EEOC to update its guidance on “undue hardship” in religious accommodation requests. It’s not clear whether other accommodations (e.g., an accommodation for a request for leave for a medical condition) will be similarly affected. While we wait for this to get sorted out HR professionals should consider:

1. Training all employees who are responsible for receiving and/or deciding accommodation requests about this change in the law.
2. Updating any handbooks or policies that use the outdated “more than a *de minimis* cost” standard.
3. Reviewing any recently denied religious accommodations requests and, if necessary, taking corrective actions in light of this new standard.



President Biden Issues Executive Order on AI

On October 30, 2023, the White House issued an [Executive Order](#) which establishes new standards for AI safety and security, protects Americans' privacy, advances equity and civil rights, stands up for consumers and workers, promotes innovation and competition, advances American leadership around the world, and more.

The Executive Order describes the actions to be taken to address the following AI issues:

- Sharing Safety Test Results
- Test Standards
- Biological synthesis screening
- Content Authentication
- Cybersecurity Program
- Privacy
- Protecting Consumers, Patients & Students
- Promoting Innovation and Competition
- Advancing American Leadership Abroad
- Ensuring Responsible and Effective Government Use of AI

As it relates to HR, the Executive Order has established the following goals and directives:

- **The Advancement of Equity and Civil Rights** – Earlier, the Biden-Harris Administration published the [Blueprint for an AI Bill of Rights](#) and issued an [Executive Order to Strengthen Racial Equity and Support for Underserved Communities Across the Federal Government](#). To avoid irresponsible uses in AI leading to and deepening discrimination, bias, and other abuses, the President has directed the following actions:
 - Provide clear guidance to landlords, Federal benefits programs, and Federal Contractors to keep AI algorithms from being used to exacerbate discrimination.
 - Address algorithmic discrimination through training, technical assistance, and through coordination between the Department of Justice and Federal civil rights offices on best practices for investigating and prosecuting civil rights violations related to AI.
 - Ensure fairness throughout the criminal justice system by developing best practices on the use of AI in sentencing, parole and probation, pretrial release and detention, risk assessments, surveillance, crime forecasting and predictive policing, and forensic analysis.
- **Supporting Workers** – According to the Order, *“Responsible AI use has the potential to help solve urgent challenges while making our world more prosperous, productive, innovative, and secure. At the same time, irresponsible use could exacerbate societal harms ... displace and disempower workers; stifle competition; and pose risks to national security.”* In the Executive Order, President Biden directed the following actions to mitigate these risks:
 - Develop principles and best practices to mitigate the harms and maximize the benefits of AI for workers. Goals include providing guidance to prevent employers from undercompensating workers, evaluating job applications unfairly, or impinging on workers' ability to organize.
 - Produce a report on AI's potential labor-market impacts, and study and identify options for strengthening federal support for workers facing labor disruptions, including from AI.

Professional Pointer: This Executive Order primarily affects the developers of AI tools and those who train AI models. However, as AI grows in use, HR professionals will need to continue to make sure that, if challenged, any AI tool they use will pass the muster of the validity and reliability testing described in the [EEOC's Uniform Guidelines on Employee Selection Procedures](#) and related documents.

There is more information on the Administration's work to advance AI visit <https://ai.gov/>

