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Emily Steinberg
University of Montana, Alexander Blewett III School of Law, emily.steinberg@umconnect.umt.edu

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PREVIEW; Smith v. Charter Communications, Inc.

Emily Steinberg[1*]

The Montana Supreme Court will hear oral argument in *Smith v. Charter Communications, Inc.*[2] on Friday, September 23, 2022, at 9:00 a.m. in the Delta Hotels Helena Colonial ballroom in Helena, Montana. Eric E. Holm is expected to appear on behalf of appellant, Charles Daniel Smith. Joshua B. Kirkpatrick is expected to appear on behalf of appellee, Charter Communications, Inc. Justin Staples of the Montana Trial Lawyers Association submitted an *Amicus Curiae* brief in support of appellant.

I. INTRODUCTION

The United States Court of Appeals for the Ninth Circuit certified to the Montana Supreme Court the issue of whether, in an action for wrongful discharge pursuant to Mont. Code Ann. § 39-2-904 (1999), an employer must defend a termination solely for the reasons given in a discharge letter, as the Montana Supreme Court held in *Galbreath v. Golden Sunlight Mines, Inc.*,[3] or whether the 1999 statutory amendments have superseded the *Galbreath* rule.[4]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Charles Smith began working for Charter Communications, Inc. ("Charter") in 2013 when Charter acquired Smith's previous employer, Cablevision.[5] In 2016, Smith's role at Charter was vice president of Inside Plant in Billings, Montana. As vice president, Smith was responsible for managing employees located within fifty Charter locations throughout Montana, Wyoming, and Colorado.[6] Charter's Inside Plant Playbook, which stipulated the travel requirements of Smith's position, provided that Smith was to travel to each of his fifty areas at least quarterly.[7]

In 2017, Smith faced disciplinary action on two separate occasions. In April of 2017, Smith's supervisor issued Smith a corrective action report for managerial failures at a Billings site.[8] In July of 2017, Smith sustained an injury while on a personal trip and was granted an approved

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[1*] J.D. Candidate, Alexander Blewett III School of Law at the University of Montana, Class of 2023.
[2] 22 F.4th 1134, 1135 (9th Cir. 2022), *certifying question accepted sub nom.* Order OP 22-0023, Jan. 25, 2022.
[3] 890 P.2d 382 (Mont. 1995).
[4] *Smith*, 22 F.4th at 1136.
[5] Appellant's Opening Brief, *Smith v. Charter Commc'ns, Inc.*, 2021 WL 2212296 at *4 (9th Cir. May 23, 2021) (No. 21-35149).
[6] Appellee's Answering Brief, *Smith v. Charter Commc'ns, Inc.*, 2021 WL 326439 at *4 (9th Cir. July 26, 2021) (No. 21-35149).
[7] *Id*.
[8] *Id*. at *6.

medical leave until November 6, 2017.[9] While on leave, Smith posted a comment on Facebook from his personal account. Smith's Facebook account identified Charter as his employer.[10] The comment, which many people found offensive, led to multiple complaints.[11] Charter placed Smith on suspension without pay until November 20, 2017, and issued him a "final warning in lieu of termination."[12]

On January 29, 2018, Charter discharged Smith and issued him a corrective action report.[13] The report provided two reasons for Smith's termination. First, Smith knowingly allowed a subordinate employee to work as an electrician, which was not the role assigned to the employee. Second, Smith "failed to fulfill the 50% travel requirement to [his] management areas."[14]

B. Procedural Background

Smith brought an action under the Wrongful Discharge from Employment Act ("WDEA") in Montana State District Court, alleging that Charter terminated his employment without good cause in violation of Mont. Code Ann. § 39-2-904(1)(b).[15] Charter removed the action to Federal District Court and, after discovery was complete, moved for summary judgment.[16] Charter cited Smith's entire work record including "years of documented performance issues, pervasive morale issues in the area under his supervision, and multiple specific and plain violations of Company policy in the months leading up to his termination" as good cause.[17]

United States Magistrate Judge Timothy Cavan issued a recommendation to the United States District Court, ruling that (1) genuine issues of material fact existed as to whether Smith allowed unauthorized electric work and (2) genuine issues of material fact existed as to whether there was a 50% travel requirement for Smith in 2017.[18] Judge Cavan also found that the low morale and prior disciplinary warnings cited in Charter's motion were irrelevant to whether Charter's stated reasons for termination in the discharge letter constituted good cause under the WDEA.[19]

United States District Court Judge Susan Watters agreed with Judge Cavan's first ruling but disagreed with the second. She concluded that the dispute as to whether there was a 50% travel requirement in place at the time of Smith's discharge was immaterial because Smith had not complied with the quarterly travel requirement that Smith conceded was applicable.[20] Judge Watters ruled that even though the quarterly travel

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[9] Smith v. Charter Commc'ns, Inc., 22 F.4th 1134, 1136 (9th Cir. 2022).
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*. at 1136–37 (internal quotations omitted).
[15] Smith v. Charter Commc'ns, Inc., 22 F.4th 1134, 1137 (9th Cir. 2022).
[16] *Id*.
[17] Smith v. Charter Commc'ns, Inc., No. CV 18-69-BLG-SPW-TJC, 2020 U.S. Dist. LEXIS 248611, at *10–11 (D. Mont. June 19, 2020).
[18] Appellant's Opening Brief, *supra* note 5, at 10.
[19] *Smith*, 2020 U.S. Dist. LEXIS 248611 at *27–28.
[20] *Smith*, 22 F.4th at 1137.

requirement was not mentioned in the termination letter, it could be considered notwithstanding *Galbreath*.[21]

Following the district court's order, Smith appealed to the United States Court of Appeals for the Ninth Circuit.[22] The Ninth Circuit determined that the disposition of the matter depended on whether the Court could consider Smith's admitted failure to comply with the quarterly travel requirement, or if it was confined to only consider the 50% travel requirement listed in the service letter.[23] In broader terms, the outcome of the case hinged on whether Charter could establish good cause using reasons outside those listed on the voluntarily provided termination letter. Since no controlling law exists on the matter, the Ninth Circuit certified the question to the Montana Supreme Court to determine whether the 1999 amendments to the anti-blacklisting statute superseded the *Galbreath* rule, which prohibits employers from presenting evidence of reasons for discharge other than those listed in a termination letter.[24]

III. The Anti-blacklisting Statute, The Wrongful Discharge from Employment Act, and Related Caselaw

Although Montana's anti-blacklisting statute and the WDEA often appear in the same litigation, they are distinct and separate statutes. Montana's anti-blacklisting statute was enacted to prevent blacklisting.[25] The statute requires employers, in response to a demand from a terminated employee, to provide the reasons for the employee's discharge in writing.[26] Meanwhile, the WDEA, enacted in 1987, protects employees from wrongful discharge, including as relevant here, the termination of a non-probationary employee without good cause. [27]

The Montana Supreme Court first considered the bounds of the anti-blacklisting statute in 1977. In *Swanson*, Marjorie Swanson, a nurse anesthetist, was discharged from employment at St. John's Lutheran Hospital after she refused to participate in a tubal ligation for religious reasons.[28] The day after Swanson refused to participate in the procedure, the hospital administrator called her and informed her that she was being discharged from her position at the hospital.[29] Swanson requested that the administrator provide her with the reason for termination in writing.[30] The administrator promptly sent the requested letter citing an "untimely refusal to perform customary and needed services" as the reason for discharge.[31] Swanson sued St. John's alleging that her discharge violated a conscience statute under the Montana Code that mandated that all persons "have the right to refuse to advise concerning, perform, assist, or

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[21] Smith v. Charter Commc'ns, Inc., 22 F.4th 1134, 1137 (9th Cir. 2022).
[22] *Id*.
[23] *Id*. at 1137–39.
[24] *Id*. at 1141.
[25] Swanson v. St. John's Lutheran Hosp., 597 P.2d 702, 706 (Mont. 1979).
[26] Mont. Code Ann. § 39-2-801 (1).
[27] Mont. Code Ann. § 39-2-904 (1)(b).
[28] *Swanson*, 597 P.2d at 705.
[29] *Id*.
[30] *Id*.
[31] Swanson v. St. John's Lutheran Hosp., 597 P.2d 702, 705 (Mont. 1979).

participate in sterilization because of religious beliefs or moral convictions."[32]

At a bench trial, the state district court ruled against Swanson and entered its findings of facts and conclusions. The court found that Swanson was an "employee of questionable value" for several reasons unrelated to her refusal to participate in the tubal ligation.[33] On appeal, the Montana Supreme Court held that the district court erred in considering any reasons for discharge other than those set forth in the discharge letter.[34] The Court further noted that a statute such as the anti-blacklisting law "becomes a part of any employment contract entered into by an employer and an employee in the State of Montana."[35] The Court would later rely on this notion to expand the *Swanson* rule to claims brought under the WDEA.

In 1995, the Court applied the Swanson rule to a WDEA claim outside of the blacklisting context. In *Galbreath*, appellee Golden Sunlight Mines, Inc., ("GSM") terminated an employee, Bruce Galbreath, after he attempted to return to work from short term disability leave.[36] Galbreath's supervisor, Paul Dale, told Galbreath that he needed to provide medical documentation certifying the reason for his absence and that he could return to work.[37] Despite Galbreath's multiple attempts to provide documentation, GSM terminated his employment. GSM voluntarily provided Galbreath a discharge letter that cited a failure to provide specific documentation explaining his absence as the reason for discharge.[38] Galbreath brought action against GSM alleging four statutory violations, including a WDEA claim that GSM terminated his employment without good cause.[39]

At trial, the district court allowed GSM to present evidence that Galbreath was terminated for reasons aside from what was detailed in the discharge letter.[40] Following a jury verdict for GSM, Galbreath appealed.[41] The Montana Supreme Court held that the district court erred in allowing GSM to present evidence supporting a reason for discharge other than what was provided for in the discharge letter.[42] The Court explained that "[a]ny collateral reasons suggested by the evidence, other than the sole reason stated in the discharge letter, were irrelevant, and therefore, inadmissible."[43]

In 1999, the Legislature passed Senate Bill 271 which amended the anti-blacklisting statute. Prior to the amendments, the statute required employers, upon an employee's request, to provide a "full, succinct, and complete reason of discharge."[44] The 1999 amendments deleted "full,

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[32] *Id*. at 704.
[33] *Id*. at 706.
[34] *Id*.
[35] *Id*.
[36] Galbreath v. Golden Sunlight Mines, 890 P.2d 382, 383–84 (Mont. 1995).
[37] *Id*. at 384.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 385.
[41] *Id*. at 384.
[42] Galbreath v. Golden Sunlight Mines, 890 P.2d 382, 385 (Mont. 1995).
[43] *Id*.
[44] Swanson v. St. John's Lutheran Hosp., 597 P.2d 702, 706 (Mont. 1979).

succinct, and complete" so that the statute now only requires a written statement of the reasons for discharge.[45] In addition, the Legislature added the following subsection:

> A response to the demand may be modified at any time and may not limit a person's ability to present a full defense in any action brought by the discharged employee. Failure to provide a response as required under subsection (1) may not limit a person's ability to present a full defense in any action brought by the discharged employee.[46]

Since the 1999 amendment, courts have differed as to how they interpret the amendment. Some courts have found that the amendments did not affect the *Galbreath* rule, and *Galbreath* is therefore still good law.[47] Meanwhile, other courts have found that the amendments overruled *Galbreath*, and therefore, an employee can modify its reason for discharge in any situation in which a service letter is provided, whether the letter was requested or not.[48] The Montana Supreme Court has never directly addressed the amendments and their effect, if any, on the *Galbreath* rule.

IV. SUMMARY OF THE ARGUMENTS

A. Appellant's Arguments

Smith argues that Charter should not be able to present evidence that supports any reason for termination beyond what was set forth in the voluntarily provided discharge letter.[49] Smith contends that *Galbreath* properly expanded the *Swanson* rule to apply in all termination cases where a service letter is provided.[50] In addition, Smith argues that the 1999 amendments did not supersede *Galbreath's* application to WDEA claims as evidenced by the clear language of the statute and Senate Bill 271's legislative history.[51] Smith cites subsequent caselaw as evidence of the *Galbreath* rule's vitality.[52] Finally, Smith argues that as a matter of public policy *Galbreath* should remain good law.[53]

Smith contends that Montana's long line of precedent clearly illustrates that the *Swanson* rule applies beyond the blacklisting context. Specifically, Smith cites *Flanigan v. Prudential Federal Savings & Loan Ass'n*,[54] which established the "after acquired evidence rule" prohibiting employers from presenting evidence that was compiled after the

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[45] MONT CODE ANN. § 39-2-801(1).
[46] MONT CODE ANN. § 39-2-801 (3).
[47] *See* McCue v. Integra Imaging, P.S., No. CV 19-147-M-DLC, 2021 U.S. Dist. LEXIS 30477, (D. Mont. 2021) (noting that Montana courts have consistently applied the Swanson rule to non-blacklisting cases after the 1999 amendment (citing McConkey v. Flathead Elec. Coop., 125 P.3d 1121 (Mont. 2005) and Smith v. Charter Commc'ns, Inc., No. CV 18-69-BLG-SPW-TJC, 2020 U.S. Dist. LEXIS 248611 (D. Mont. June 19, 2020))).
[48] *See* Bourdelais v. Semitool, Inc., No. DV 01-073(B), 2002 Mont. Dist. LEXIS 2244, at *32 (September 13, 2002) (stating "*Galbreath* no longer applies.").
[49] Appellant's Opening Brief at 23, *Smith v. Charter Commc'ns, Inc.*, https://perma.cc/P7MZ-GWKZ (Mont. Mar. 28, 2022) (No. OP 22-0023).
[50] *Id*. at 2.
[51] *Id*.
[52] *Id*. at 14–15.
[53] *Id*.
[54] 720 P.2d 257 (Mont. 1986).

termination of an employee in a non-blacklisting suit.[55] *Flanigan* and *Galbreath*, Smith asserts, are a clear indication that the Swanson rule is not confined to anti-blacklisting causes of action.

Smith further argues that language of the amended statute and the legislative history of Senate Bill 271 illustrate that the 1999 amendments did not supersede *Galbreath*. Smith claims that the statutory language allowing employers to modify their reasons for discharge and present a full defense in a subsequent action is clearly specific to a scenario in which an employee has requested a service letter.[56] Smith further contends that the understood purpose of the bill, as well as the public comment and input of committee members, support this conclusion.

Smith cites subsequent caselaw as evidence that *Galbreath* remains good law. Smith highlights United States District Court Judge Dana Christensen's opinion in which he stated that Montana courts have continued to consistently apply the Swanson rule to non-blacklisting cases even after the 1999 amendment.[57] In addition, Smith argued that the two Montana trial courts that have ruled to the contrary are not persuasive.[58]

Lastly, Smith contends that policy supports the *Galbreath* rule. Smith notes that employers should be encouraged to communicate truthfully with their employees, especially when it involves discharge.[59] Smith avers that truthful communication regarding discharge is not an "onerous burden".[60] Smith notes that in the present case, Charter took the time to thoroughly review Smith's actions before disciplining him. In addition, two of Smith's supervisors and human resources all provided input in drafting the discharge letter.[61] Smith presumes that they chose their words carefully and should be held to those words in litigation.[62]

B. Appellee's Arguments

Charter concedes that the Court has applied *Swanson's* holding to cases beyond the blacklisting framework, but it argues that the 1999 amendments superseded the holding in *Galbreath*. Charter argues that the plain language of the statute, the legislative history of Senate Bill 271, and subsequent case law support this finding. In the alternative, Charter argues that *Galbreath* was wrongly decided in the first place and that the effects of upholding *Galbreath* would be contrary to public policy.

Charter cites the testimony and letters of various stakeholders as evidence supporting its argument. Specifically, Charter references a statement from Senator Keating in which he addresses the amended subsection three and explains that it is intended to address a flaw in current law that requires employers to be bound by an original statement

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[55] Appellant's Opening Brief, *supra* note 48, at 5.
[56] *Id*. at 9–10.
[57] *Id*. at 19–20 (citing *McCue*, 2021 U.S. Dist. LEXIS 30477).
[58] *Id*. at 16–19.
[59] *Id*. at 21.
[60] *Id*. at 22.
[61] Appellant's Opening Brief, *supra* note 48, at 22.
[62] *Id*.

given for the reason of firing.[63] He alleges that if an employer is not comfortable with giving the employee information regarding the reason for termination and simply states that their work is "sloppy," he is then bound by that statement.[64] In addition, Charter highlights a letter from an attorney, Anderson Forsythe, that proposes changes to the language that he believed would solve what he described as a problem created by *Swanson*, *Galbreath*, and *Javenpaaa*.[65] Lastly, Charter cites amendments made by Governor Racicot as evidence of the Legislature's intent to abrogate *Galbreath*.[66]

Charter further argues that *Swanson's* own reasoning requires that the language of the amended anti-blacklisting statute supersede *Galbreath*.[67] Because the Court in *Swanson* held that the language of the anti-blacklisting statute becomes a part of any employment contract between an employer and an employee, the new language of the anti-blacklisting statute that allows employers to present a full defense in any action brought by a discharged employee must apply to all wrongful discharge actions.[68] Thus, Charter argues that *Galbreath* is no longer good law.[69]

Likewise, Charter contends that caselaw following the 1999 amendments illustrates that *Galbreath* is no longer good law. Charter cites two Montana district court cases, one in which the judge specifically stated "*Galbreath* no longer applies."[70] Charter also claims that the caselaw cited by Smith is inappropriate and unpersuasive.[71]

In addition, Charter argues that as a matter of public policy, employers should be able to fully defend themselves in wrongful discharge suits by providing all evidence that illustrates its reasons for termination.[72] Practically, Charter argues, upholding *Galbreath* will mean that if an employee requests a discharge letter, the employer may present additional reasons for discharge in a subsequent wrongful discharge action.[73] In contrast, if the employer voluntarily provides a specific reason for termination in writing, the employer would be prohibited from presenting a full defense in a subsequent wrongful discharge action.[74] Effectively, this would encourage employers to give no reason at all, or, if asked for a letter under § 39-2-801, to be as vague and broad as possible.[75] Therefore, Charter argues, even if *Galbreath* was not superseded by the 1999 amendments, it should be overruled because it was wrongly decided.

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[63] Appellee's Answering Brief at 20, *Smith v. Charter Commc'ns, Inc.*, https://perma.cc/5Q8V-4VKU (Mont. May 26, 2022) (No. OP 22-0023).
[64] *Id*.
[65] *Id*. at 21.
[66] *Id*. at 22–23.
[67] *Id*. at 29.
[68] *Id*.
[69] *Id*. at 30.
[70] *Id*. at 30–31 (citing Bourdelais v. Semitool, Inc., 2002 Mont. Dist. LEXIS 2244 (September 13, 2002)).
[71] *Id*. at 32.
[72] *Id*. at 25.
[73] *Id*. at 26.
[74] *Id*. at 26–27.
[75] *Id*. at 27.

C. Amicus Curiae

Justin Stalpes wrote an Amicus Curiae Brief in Support of Smith on behalf of The Montana Trial Lawyers Association ("MTLA"). MTLA argues that as a matter of public policy, the state should encourage honest communication between employers and employees.[76] MTLA asserts that the Court's jurisprudence on termination of employment illustrates the expectation that employers will deal in good faith and honesty with their employees.[77]

D. ANALYSIS

The Court will likely find that the 1999 amendments to § 39-2-801 did not supersede *Galbreath* for three reasons. First, the plain language of the statute indicates that the amendments were specific to the anti-blacklisting statute–to actions brought against a former employer after the discharged employee requested a discharge letter to be used in securing future employment. Second, a thorough review of the legislative history supports the conclusion that the amendments were intended to apply only in the blacklisting context. Third, even though upholding *Galbreath* could discourage open communication between employers and discharged employees, the Court's purpose is not to fix legislation it deems impractical. Rather, the Court's role is to interpret the statute as written.

A. Plain Language of the Statute

In interpreting the legislative intent of a statue, the Court must begin with the "plain meaning of the words."[78] Here, the plain language of Mont. Code Ann. § 39-2-801 and its location in the Montana Code indicates that the 1999 amendments were specific to anti-blacklisting. The statute as amended reads in full:

> **Employee to be furnished on demand with reason for discharge.**
>
> (1) It is the duty of any person after having discharged any employee from service, *upon demand by the discharged employee,* to furnish the discharged employee in writing a statement of reasons for the discharge. Except as provided in subsection (3), if the person refuses to do so within a reasonable time after the demand, it is unlawful for the person to furnish any statement of the reasons for the discharge to any person or in any way to blacklist or to prevent the discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed in this part.
>
> (2) A written demand under this part must advise the person who discharged the employee of the possibility that the statements may be used in litigation.
>
> (3) *A response to the demand* may be modified at any time and may not limit a person's ability to present a full defense in any action brought by the discharged employee. *Failure to provide a response as*

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[76] Brief of Amicus Curiae Montana Trial Lawyers Association at 2, *Smith v. Charter Commc'ns, Inc.*, https://perma.cc/A6V3-MJ65 (Mont. Mar. 28, 2022) (No. OP 22-0023).
[77] *Id*. at 2–3.
[78] Clarke v. Massey, 897 P.2d 1085, 1088 (Mont. 1995).

> *required under subsection (1)* may not limit a person's ability to present a full defense in any action brought by the discharged employee.[79]

Subsection (3), the subsection at the center of this litigation, references subsection (1). Subsection (1) governs a situation in which an employee demands a written statement of reasons for discharge. Therefore, a reasonable interpretation suggests that the language of subsection (3) is specific to a situation in which a discharged employee has requested a written reason for discharge. Further, this section is titled "Employee to be Furnished on Demand with Reason for Discharge." If the Legislature had intended for the language in subsection (3) to apply to scenarios in which an employer voluntarily provided a service letter, it would have modified the title of the statute as well as the language in subsection (1).

If the Court follows the plain language of the anti-blacklisting statute, they will likely rule in favor of Smith. However, the Court's pre-amendment application of the statute suggests that the Court may not follow the plain language. Like the current anti-blacklisting statute, the plain language of the pre-amended anti-blacklisting statute indicated that it was specific to scenarios in which a discharged employee requested a discharge letter.[80] However, the *Swanson* Court commanded that the anti-blacklisting statute "becomes a part of any employment contract entered into by an employer and an employee in the State of Montana."[81] The Court's prior application of the anti-blacklisting statute to scenarios in which a discharge letter was voluntarily provided suggests that the Court may not attribute significance to the words "on demand."

B. Legislative History

If the Court cannot ascertain the legislative intent from the language itself, the Court may review the relevant legislative history.[82] Here, the relevant legislative history suggests that the legislature did not intend to impact the *Galbreath* rule. The sponsor's description of the purpose of the legislation and the testimony of proponents support this conclusion.

The sponsor of Senate Bill 271, Senator Mike Taylor, described the purpose of the bill as limiting the liability of an employer who provides information about a former or current employee.[83] In Senator Taylor's opening statement on February 4, 1999, he explained that employers are currently forced to subject new employees to a probationary period because employers are unable to acquire adequate information from references.[84] References only provide the dates of the former employee's employment and lack any information about performance.[85] Therefore, Senator Taylor explained, Senate Bill 271 would be beneficial to both employers and employees.[86]

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[79] MONT. CODE ANN. § 39-2-801 (emphasis added).
[80] *See* MONT CODE ANN. § 39-2-801 (1979).
[81] Swanson v. St. John's Lutheran Hosp., 597 P.2d 702, 706 (Mont. 1979).
[82] *Clarke*, 897 P.2d at 1088.
[83] Senator Mike Taylor, Sponsor of Senate Bill 271, Opening Statement to the Senate Commission on Labor and Employment Relations of the 56th Montana Legislature, https://perma.cc/9752-EEA9 (Feb. 4, 1999).
[84] *Id*.
[85] *Id*.
[86] *Id*.

Testimony from proponents of the bill also suggest that the intent was to limit the liability of a former employer that provided a reference for a former employee to the employee's prospective employer. Riley Johnson, appearing on behalf of the National Federation of Independent Business, testified that employers are fearful that providing truthful references will expose them to liability.[87] He claimed that "an employer has nothing to gain and a law suit to lose [sic] by giving complete and full references."[88] To illustrate the negative effects of this fear, he cited an airplane crash in North Carolina that led to the death of thirteen passengers.[89] According to Johnson, prior press reports suggested that employees at another airline questioned the pilot's competence, but his incompetence was never revealed in reference checks. Johnson urged the senators to join the thirty other states that have passed legislation to prevent such catastrophic and avoidable consequences.[90]

Anderson Forsythe, an attorney who wrote a letter in favor of the bill explained that he only provided dates of employment during reference checks in order to insulate himself from the possibility of litigation.[91] He shared the following reflection of his experiences:

> A typical scenario involves an unsuspecting small employer who fires an employee for rude language and threats. Because the employer wants to be rid of the guy, **when he receives an innocent looking letter asking for the reasons he was fired**, he writes back and says something bland like, "Things just did not work out." The discharged employee and his attorney, who have been planning this move, then sue for wrongful discharge with a letter that limits the defense the employer can offer–- in effect keeping the employer from telling the real and convincing reason for discharge. It is not fair.[92]

While Charter contends that Forsythe's letter demonstrates that the amendment was intended to apply broadly, a more thorough analysis of the letter suggests that Forsythe's concerns were specific to letters provided in response to a request from the employee.

Likewise, the broader context of Senator Keating's statement suggests that his testimony was specific to scenarios in which a former employer was asked to provide a reference to a prospective employer. For example, on February 4, 1999, twelve days before Senator Keating testified, a human resources manager from a Montana resort wrote Senator Keating asking him to "make the changes in the law necessary to allow employers giving references the freedom to reflect the actual quality of work completed."[93] The letter cites an incident in which a respiratory therapist was fired from a hospital for raping a patient and then went on to rape another patient in a subsequent hospital because the first hospital could not provide a full reference, presumably due to fear of

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[87] Riley Johnson, National Federation of Independent Business, Testimony in Support of Senate Bill 271 to the Senate Commission on Labor and Employment Relations of the 56th Montana Legislature, https://perma.cc/9752-EEA9 (Feb. 4, 1999).
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] Open Letter from Anderson Forsythe to the Montana Chamber of Commerce, https://perma.cc/9752-EEA9 (February 9, 1999).
[92] *Id*. (emphasis added).
[93] Open Letter from Janet Stice, Human Resources Manager at Big Sky Ski & Summer Resort, to Senator Keating and the Members of the Committee on Labor and Employment, https://perma.cc/9752-EEA9 (February 4, 1999).

litigation.[94] The same day, an automotive parts store owner wrote the committee with similar concerns regarding an employer's inability to provide a full reference to other employers.[95] The letter stated that changing the law "raises the standard of accountability and increases motivation for employees to do better and be more productive."[96] Both of these letters, included in the exhibits, suggest that Senator Keating's comments were specific to references provided under the anti-blacklisting statute.

Governor Racicot's letter, cited by Charter, does not conclusively support Charter's argument that the Governor intended the amended language to apply to any situation in which a service letter was provided, whether it was in response to a request or not. In the letter, Governor Racicot wrote that "Senate Bill 271 is intended to protect employers who disclose job-related employee information to a prospective employer, upon the request of the employee or prospective employer."[97] Later, he references the bill's potential repeal of § 39-2-801 that required an employer to provide a written statement of the reasons for discharge upon the request of an employee.[98] He stated that the intent of this provision was to address the inability of employers to fully defend themselves if an employee brought a wrongful discharge action.[99] Governor Racicot's first statement regarding the purpose of Senate Bill 271 negates a conclusion that he amended the statute so that it would apply beyond the blacklisting context.

The weight of the legislative history surrounding Senate Bill 271 suggests that the legislature intended that the 1999 amendments apply only to wrongful discharge actions brought against an employer after the discharged employee requested the reasons for termination in writing. Given the sponsor's description of the purpose of the bill and the letters and testimony provided by proponents, the Court will likely conclude that the Legislature did not intend to abrogate *Galbreath*.

C. Public Policy

Charter's argument regarding the practical effect of upholding *Galbreath* outside of the anti-blacklisting context merits consideration. Indeed, a ruling in Smith's favor could hinder future communication between employers and former employees. Employers may be inclined to provide broad and vague reasons for termination. This could be harmful to employees as they will not be able to correct prior shortcomings for future roles. However, despite the possible negative implications of upholding *Galbreath*, the Court's role is to interpret statutes, "not to insert what has been omitted or to omit what has been inserted."[100] If the Court were to find that the 1999 amendments superseded *Galbreath*,

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[94] *Id*.
[95] Open Letter from Dean Randash, Owner of NAPA Auto Parts in Helena, to Senator Keating and the Members of the Committee on Labor and Employment, https://perma.cc/9752-EEA9 (February 4, 1999).
[96] *Id*.
[97] Open Letter from Governor Marc Racicot to the President of the Senate and the Speaker of the House, https://perma.cc/9752-EEA9 (April 16, 1999).
[98] *Id*.
[99] *Id*.
[100] MONT CODE ANN. § 1-2-101.

despite the specific language of the statute and the legislative history indicating otherwise, it would effectively be omitting much of the statute, including the title itself.

A. CONCLUSION

The Court will likely find that the 1999 amendments to the anti-blacklisting statute did not supersede *Galbreath*. The plain language of the anti-blacklisting statute and the legislative history surrounding the 1999 amendments will likely support this conclusion.