

State Trial Courts

VERDICT: Defense, wrongful discharge, auto dealer finance/insurance manager, alleged/denied termination for objecting to finance "padding" of used cars.

A 12-0 Billings jury found that Mary Mayer was terminated from Billings Nissan for good cause and not in retaliation for refusing to violate public policy.

Mayer was employed with Billings Nissan first as a sales person and then as finance & insurance manager. She was terminated 10/14/03. There were no prior oral or written warnings of deficient performance. She claimed that she was terminated in retaliation for refusing to violate public policy on truth in lending, alleging that Billings Nissan had engaged in "padding" used vehicles by listing nonexistent options to obtain a larger loan amount or qualify a substandard credit risk, and claimed to be a "whistleblower."

Billings Nissan denied all allegations and contended that it acted in good faith, she was terminated for good cause, and she failed to mitigate. It contended that she was argumentative over a sales meeting which she believed had been called to justify her termination, and that the employer asked her to calm down several times during the day and then gave in to her demand that she be fired. Mayer denied that she demanded to be fired or used any profanity the day of her firing.

Mayer claimed wages & fringes for 4 years, claiming that she could not obtain employment due to Billings Nissan's actions. She contended that her pay ranged from \$7,000-\$10,000/mo plus use of a car and fringes.

No experts.

Demand, \$80,000; no offer. Jury request, \$7,000-\$12,000/mo for 4 years; jury suggestion, 0.

Jury deliberated 1½ hours including dinner 3rd day; Judge Todd.

Mayer v. Billings Nissan, Yellowstone DV 04-321, 3/21/05.

Jeffrey Simkovic (Simkovic Law Firm), Billings, and Mary Ann Sutton (JURISCONSULTUS), Missoula, for Mayer; James Halverson & Eric Bunn (Herndon, Sweeney & Halverson), Billings, for Billings Nissan (Universal Underwriters Group).

WRONGFUL DISCHARGE: Plaintiff allowed to impeach witness as to prior statements, but neglected to take full advantage of opportunity... Defense verdict on auto dealer finance/insurance manager's claim of termination for objecting to finance "padding" of used cars affirmed... Todd affirmed (unpublished).

Marylynn Mayer was fired as finance manager at Billings Nissan 10/14/03 purportedly for rudeness to customers, insubordination, and work quality. She alleges that Billings Nissan engaged in the illegal practice of "padding" used vehicles, and wrongfully fired her after she confronted management a number of times about it, and after she ultimately refused to finance a vehicle until she viewed all documents to be sure padding had not occurred. According to Mayer, padding involves listing items or features that do not exist to obtain a larger loan or qualify a customer's otherwise substandard credit risk. When one enters a VIN into Karpower, a generic list of options is dis-

played, but not necessarily options actually present on the vehicle, and additional options can be entered manually. The printed list of options—the "book-out" sheet—is used by the dealership for pricing and sent to financial institutions. Mayer sued alleging wrongful discharge. At trial GM Dean Benjamin conceded that Billings Nissan made mistakes using Karpower, but testified that Mayer never discussed padding with him, he never heard a customer other than those who testified at trial complain about options listed that did not exist, and a book-out sheet with nonexistent options would rarely affect a loan because the primary factors are the customer's credit history, time on the job, and time in the area. He testified that on 10/14/03 Mayer became excessively belligerent under the mistaken belief that a sales meeting had been held without her concerning her performance. Her declining customer satisfaction scores were brought up at the meeting, but it was not called on account of her. Throughout the day she used obscene language, demanded that Benjamin make the sales crew respect her, threw documents on the floor, and repeatedly urged that she be fired since no one in the office respected her or wanted her there. After advising her to take a few days off to cool down, which she refused, Benjamin acceded to her demands and fired her. Her lawyer Jeffrey Simkovic made numerous attempts to impeach Benjamin with alleged prior inconsistent statements in an affidavit supporting his motion for a protective order, including trying to have him read it to the jury and an attempt by Simkovic to read it to Benjamin. Upon each attempt, Defense counsel objected on grounds of "form" and Judge Todd sustained each objection. Todd stated:

This line of questioning is not going to fly. You can rephrase anything you want with your attempts to get this affidavit in the way you're going, and it's not going to happen. So you've tried three times. If you ask another question like you've asked about this, I urge you to also read the rule on contempt. I'm not here to make a law school exam out of this, but the Rules of Evidence are there. There are ways of getting the answer that you want, but you're not doing it, and you're not going to do it by repeatedly asking this question...

Simkovic stated that he was attempting to impeach Benjamin. Todd replied:

Well, then impeach him. Do it the right way. You're not doing it the right way, and I'm not going to instruct you how to do it.

Reverting to previous tactics, Simkovic again attempted to impeach Benjamin with his affidavit, first by asking him to read it and then by asking him whether he would make any changes in it. Defense counsel objected on each attempt as to "form," and Todd sustained the objections. Simkovic later again attempted to impeach Benjamin with Karpower. Because he had not listed Karpower in the pretrial order exhibit list, Todd did not let him introduce it. The Billings jury found that Mayer was terminated for good cause and not in retaliation for refusing to violate public policy (MLW 4/23/05:5). She appeals.

Todd did not abuse his discretion in handling Simkovic's attempts to impeach Benjamin. Mayer

argues that he did not let her impeach Benjamin, and that absent impeachment evidence the jury viewed her claims in a vacuum. We take her argument to mean that she was unable to conclusively prove that illegal padding occurred under Benjamin's management, and therefore she could not prove that Billings Nissan had a wrongful motive to fire her. Under Her theory, if the jury had found her more credible than Benjamin it could have inferred that Billings Nissan did have a wrongful motive in firing her. She maintains that this critical battle over credibility depended on her ability to impeach Benjamin with prior inconsistent statements in his pretrial affidavit. Benjamin testified regarding a book-out sheet for Leray McEntyre:

Simkovic: How would these options that he previously testified are not on his vehicle come up?

Benjamin: When you plug in the VIN number, it already knows that it's four-wheel drive, half-ton, V-8, short box. *Some of the options you have to manually add but not all of them.*

Simkovic: He said he didn't have an auxiliary fuel tank. How did that come up?

Benjamin: *Someone had to manually add it.*

From this Mayer argues that Benjamin testified that Karpower could be manually altered, while in his affidavit he had claimed that it could not be manually altered. However, the claimed inconsistency is more imaginary than real. The relevant part of his affidavit states:

6. To obtain an options list for the Horn vehicle, I simply got the VIN number from the vehicle and entered it into Nissan's Karpower program. The Karpower program then generated a list of options that were to be included on the vehicle. *No extra options were added to this list generated by Karpower.*

Benjamin's affidavit clearly references a particular client, Horn. The testimony at issue concerned a different client, McEntyre. In his discussion regarding Horn he makes no generalized statement as to how Karpower functions, but states that for the Horn deal he did not manually enter additional options to those generated by Karpower. His statement that he *did not* add additional options to the list generated by Karpower for the Horn deal cannot be reasonably construed to mean that one *cannot* manually enter additional options. His statement that "no extra options were added to this list generated by Karpower" leads to the inference that one can add options to the list. To impeach him with the claimed prior inconsistent statement from his pretrial affidavit, Simkovic had to first demonstrate that he made an inconsistent statement while on the stand. *Baker* (Mont. 2000); *Pinkerton* (Mont. 1995). He made no inconsistent statement while on the stand; thus, had Simkovic further examined him he would have verified that his affidavit and trial testimony were in accord rather than contradictory. Instead of detracting from his credibility, he would have bolstered it. Further, he did have the opportunity to impeach Benjamin with his affidavit. After a first round of attempts to impeach him with his affidavit he refocused and questioned him about Karpower. He then returned to the affidavit and questioned him extensively regarding the Horn deal:

Simkovic: I thought you said in your affidavit you created the Horn deal.

Benjamin: I don't believe I did. I worked up the numbers on the deal from the day before, but I don't believe I produced the book-out sheet.

Simkovic then attempted to read Benjamin's affidavit to him. Defense counsel objected on grounds of form and Todd sustained.

Simkovic: He just said he didn't do it, Your Honor.

Todd: Well, that's true. So you've been able to now talk to him about the affidavit, but this objection is sustained. You still need to ask questions.

Simkovic: Is it your testimony here today that you did not do the book-out sheet on the Horn deal?

Benjamin: No sir, I did not do the book-out sheet on the deal. ... [The affidavit] says "we," meaning the company, Billings Nissan. That's how we got the VIN number of the car.

...
Simkovic: So did you or didn't you do this book-out sheet for Kermit Horn?

Benjamin: I did not do this book-out sheet, no.

Simkovic: Why did you say that you did?

Benjamin: It should say "we."

Simkovic: Who would be "we?"

Benjamin: Whoever did the book-out sheet. "We" being the company.

Simkovic diverged from the affidavit and then again returned to it and the Horn deal:

Simkovic: And no one at Billings Nissan ever saw that car?

Benjamin: Other than the lot personnel that washed the car and the driver we hired to deliver it, no.

Simkovic: So you — if your affidavit is true, someone else at Billings Nissan made up that window sticker?

Benjamin: We're not talking about a window sticker, sir.

Simkovic: Book-out sheet.

Benjamin: Yes. We need a book-out sheet to get sent in with the loan.

Simkovic: So you or someone who works for you made it up?

Benjamin: Correct, based on the VIN number that we were provided that we bought the van from.

Simkovic: Karpower didn't generate that?

Benjamin: Yes, Karpower did generate that.

Simkovic: All those extras?

Benjamin: All the equipment, I have no idea.

...
Simkovic: Do you see a VIN number on here?

Benjamin: No.

Simkovic: So these must have been manually done then?

Benjamin: Possibly.

Simkovic: By you, or someone who works for you?

Benjamin: Possibly, I don't know.

Simkovic: By you in your affidavit.

To the extent that this colloquy shows anything but confusion, Todd did allow Simkovic to impeach Benjamin. He did not let him impeach him in the manner Simkovic desired. He never told Simkovic he could not question Benjamin about the affidavit. He

clearly afforded Simkovic the opportunity to make his point effectively by asking questions in the proper form. That Simkovic was unable to do so is hardly Todd's fault. Nevertheless, Simkovic brought to light what he believed to be inconsistencies in Benjamin's affidavit by posing a question to him and giving him a chance to explain the claimed inconsistency. This was clearly the line of questioning Todd desired, and Simkovic, instead of refocusing his inquiry on the alleged prior inconsistent statements, continued his inquiry regarding the Horn deal and eventually moved on from the affidavit altogether. Todd allowed Simkovic to impeach Benjamin with his prior inconsistent statements, to the extent that they were inconsistent, but Simkovic neglected to fully take advantage of the opportunity afforded him.

Nelson, Gray, Leaphart, Warner, Cotter.

***Mayer v. Billings Nissan*, 05-404, 7/12/06.**

Jeffrey Simkovic (Simkovic Law Firm), Billings, and Mary Ann Sutton, Missoula, for Mayer; James Halverson & Jesse Cook (Halverson & Gilbert), Billings, for Billings Nissan.