Land & Water Law Review

Volume 31 | Issue 2 Article 18

1996

Employment Discrimination - The After-Acquired Evidence Doctrine and Its Effect on Recovery in Employment Discrimination Claims - McKennon v. Nashville Banner Publishing Co.

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EMPLOYMENT DISCRIMINATION—The After-Acquired Evidence Doctrine and its Effect on Recovery in Employment Discrimination Claims. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995).

Thirty-two years ago, the United States Congress enacted the Civil Rights Act of 1964 (1964 Act).[1] Three years later it enacted the Age Discrimination in Employment Act of 1967 (ADEA).[2] Under Title VII of the 1964 Act, an employer is prohibited from making employment decisions based on race, color, sex, national origin, or religion.[3] The ADEA is designed to prohibit discrimination by an employer based on the age of an employee or applicant for employment.[4]

Christine McKennon filed suit under the ADEA against Nashville Banner Publishing Company (Banner) on May 6th, 1991.[5] McKennon had been employed by Banner for over thirty years.[6] At the age of sixty-two she was fired, purportedly due to overall reductions in workforce.[7] McKennon insisted that her termination was a result of her age and therefore a violation of the ADEA.[8] During McKennon's pre-trial deposition, Banner discovered that she had copied and removed confidential documents from the company files.[9] McKennon's explanation for this misconduct was that she feared Banner would fire her because of her age and thus copied the documents as a type of "insurance."[10] After her deposition, Banner sent McKennon a letter stating that she had violated company policy by copying and removing the documents, and had it known of her misconduct, it would have fired her immediately.[11] Banner then

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1. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1971, 1975 to 1975d, 2000a to 2000d-4, 2000e to 2000h-4 (1988)).

2. Pub. L. No. 90-202, 81 stat. 602 (codified as amended at 29 U.S.C. §§ 621 to 634 (1988)).

3. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)).

4. 29 U.S.C. § 623(a)(1) (1988). An employee may bring an age discrimination claim if he is between the ages of 40 and 70. 29 U.S.C. § 631(a) (1988).

5. McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 605 (M.D. Tenn. 1992).

6. *Id.* at 605.

7. *Id.*

8. *Id.*

9. *Id.* As secretary to the comptroller of Banner, McKennon had access to confidential financial documents. *Id.*

10. *Id.* at 606.

11. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 883 (1995).

moved for summary judgment, conceding for purposes of the motion that it discriminated against McKennon.[12] The district court granted the motion and held that after-acquired evidence, the discovery of McKennon's misconduct, was grounds for termination and a bar to all recovery.[13] The Court of Appeals for the Sixth Circuit affirmed.[14]

The United States Supreme Court granted certiorari to decide the proper role of after-acquired evidence in an employment discrimination case.[15] The Court unanimously held that this type of evidence is not a complete bar to recovery.[16] The after-acquired evidence does act as a limitation on relief that a court may grant.[17] Specifically, the evidence precludes the recovery of front pay and reinstatement[18] and permits backpay only until the time the misconduct is discovered.[19]

This casenote examines the decision in *McKennon v. Nashville Banner Publishing Company* from five perspectives. First, it describes the differing views on the use of after-acquired evidence among the circuit courts before the Supreme Court decision in *McKennon*. Secondly, it reviews the Court's holding in *McKennon*. It then discusses whether the decision is sufficient in light of the Acts involved. The note also addresses pertinent questions left unanswered by the *McKennon* decision. Finally, this note will discuss the application of the *McKennon* decision to Wyoming law.

BACKGROUND

The ADEA and Title VII of the 1964 Act were enacted in an effort to eliminate discriminatory conduct in the workplace.[20] Both Title VII and

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12. *McKennon*, 797 F. Supp. at 606. Banner argued that it was entitled to summary judgment even assuming it discriminated against McKennon, since her misconduct would have resulted in termination had it been discovered during her employment. *Id.*

13. *Id.*

14. McKennon v. Nashville Banner Publishing Co., 9 F.3d. 539, 543 (6th Cir. 1993).

15. *McKennon*, 115 S. Ct. at 883.

16. *Id.* at 884.

17. *Id.* at 886.

18. *Id.* Front pay is compensation to the employee which runs from the date of the judgment to the date the employee is put into his/her rightful place or some other date determined by the court. ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW § 10.1, at 346 (1992). Reinstatement puts the employee back into the job he/she would have been in without the discriminatory conduct of the employer. ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW § 7.1, at 219 (1992).

19. *McKennon*, 115 S. Ct. at 886. Back pay is defined as the difference between what the employee would have made absent the discrimination and what the employee actually made. BELTON, *supra* note 18, § 7.1 at 219.

20. *McKennon*, 115 S. Ct. at 884. *See also*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (stating that the purpose is the elimination of discrimination in the workplace); Albemarle Pa-

the ADEA act to deter employer discrimination as well as to compensate victims.[21]

Victim compensation comes in several forms. Under the ADEA the court may grant, without limitation, "judgments compelling employment, reinstatement or promotion," or enforce "the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation."[22] In a Title VII discrimination claim, Congress authorized the courts to award such equitable relief as they deem appropriate.[23] The court may award but is not limited to reinstatement or hiring of employees, with or without backpay, or any other equitable relief it deems appropriate.[24] Under the 1991 amendments to Title VII, compensatory damages for pain and suffering, inconvenience, and mental anguish that result from an employer's intentional discrimination are now available to an employee who proves an employer's liability.[25] The question before the Court in *McKennon* was the extent to which relief in an employment discrimination case may be limited or barred completely by using the after-acquired evidence doctrine.[26]

The after-acquired evidence doctrine emerged as a defense in employment discrimination cases in response to what are commonly called "mixed motive cases."[27] Under this doctrine an employer attempts to use the after-acquired evidence to eliminate liability for what would otherwise be unlawful conduct.[28] After-acquired evidence is either evidence of an applicant's or employee's dishonesty on an application/resume or, an employee's misconduct in connection with the workplace.[29] The evidence of dishonesty or misconduct is unknown to the employer at the time of the alleged discriminatory conduct.[30] Usually the evidence is only discovered as a result of an employment discrimination suit.[31]

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per Company v. Moody, 422 U.S. 405, 417-19 (1975) (serving as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices).

21. *McKennon*, 115 S. Ct. at 884. *See also*, H.R. Rep. No. 914, 88th Cong., 2d Sess. (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401 (purpose of Title VII). *See also*, H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214 (Purpose of ADEA).

22. 29 U.S.C. § 626(b) (1988).

23. 42 U.S.C. § 2000e-5(g) (1988).

24. *Id.*

25. 42 U.S.C. § 1981a (Supp. V 1993).

26. *See infra* note 28-31 and accompanying text.

27. *See infra* note 36-45 and accompanying text.

28. Mardell v. Harleysville Life Insurance Company, 31 F.3d 1221, 1222 (1994).

29. *Id.*

30. *Id.*

31. *Id.*

Prior to *McKennon*, conflicting lines of authority had developed in the circuit courts on the use of after-acquired evidence in employment discrimination cases. As explained in more detail below, there were two basic lines of authority. The majority view generally held that if the after-acquired evidence was "material,"[32] the plaintiff was barred from *all* recovery.[33] The minority view, on the other hand, only allowed the evidence to *limit* recovery.[34] Within the later view there were variations on the effect after-acquired evidence would have on backpay recovered by a plaintiff.[35]

A. Mixed Motive Cases

The after-acquired evidence doctrine arose as a result of the mixed motive case. A case is referred to as a mixed motive case when an employer makes an employment decision based on both a legitimate and an illegitimate reason.[36] In *Mt. Healthy City School District Board of Education v. Doyle*,[37] a First Amendment mixed motive case, the Court held that an employer can escape liability by showing that the same decision would have resulted even absent the employer's unlawful basis for the decision.[38]

A prima facie case of unlawful conduct is made if the employee can show that his conduct was constitutionally protected and the employer's unlawful conduct played a substantial part in the employment decision.[39] The court goes on to determine whether the "same decision" would have resulted absent the protected conduct.[40]

In *Price Waterhouse v. Hopkins*, the Supreme Court clarified the "same decision" test from *Mt. Healthy* and extended its coverage to claims brought under federal anti-discrimination statutes.[41] The Court ex-

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32. *See infra* note 59, 60 and accompanying text.

33. *See infra* note 44-60 and accompanying text.

34. *See infra* note 61-78 and accompanying text.

35. *See infra* note 63.

36. *McKennon*, 115 S. Ct. at 885.

37. 429 U.S. 274 (1977).

38. *Id.* at 287. Doyle, an untenured teacher, was terminated for obscene gestures made to female students (legitimate reason) and for making a phone call to a local radio station with regard to a teachers dress code (illegitimate reason). *Id.* at 283-84 n.1.

39. *Id.* at 287.

40. *Id.*

41. 490 U.S. 228 (1989). Ann Hopkins brought a sex discrimination action against Price Waterhouse, an accounting firm, after her partnership candidacy was put on hold and partners in her office later refused to repropose the candidacy. *Id.* at 231-32. Price Waterhouse justified its employment decision based on Hopkins' lack of interpersonal skills. *Id.* at 236. The lower court found that despite the legitimate reason given for the employment decision, Price Waterhouse unlawfully dis-

plained that the employer's showing is "most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point and then the employer, if it wishes to prevail, must persuade it on another."[42] If the employer is successful in showing that the employment decision would have been the same without the discriminatory motive the employer is not held liable for discrimination.[43]

B. Majority View on After-acquired Evidence

Prior to the *McKennon* decision, a majority of courts held that after-acquired evidence completely barred recovery in employment discrimination cases.[44] The rationale to this view was that, in light of the evidence, an employee could not claim to have been injured by the discriminatory conduct of the employer.[45] The courts held that if an employer showed that the discovered misconduct would have lead to termination it is irrelevant whether the employee was discriminated against.[46]

The majority view is articulated in *Summers v. State Farm Mutual Automobile Insurance Co.*[47] *Summers* involved a claim of age and religious discrimination.[48] The district court granted State Farm Mutual

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criminated against Hopkins because of her sex. *Id.* at 236-37. The lower court further held that the employer could avoid equitable relief with clear and convincing evidence that the same decision would result absent the discrimination. *Id.* at 237.

42. *Id.* at 246. Fearing that this decision, as well as other recent Supreme Court decisions, undermined protections against intentional employment discrimination, Congress enacted The Civil Rights Act of 1991 (1991 Act). Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of title 42 U.S.C.). *See also,* H.R. Rep. No.40,102d Cong., 1st Sess., Tit. II, at 17 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710 (this Act was in response to the recent Supreme Court decisions in the mixed motive cases). The 1991 Act effected several other areas of discrimination law besides the mixed motive cases in employment discrimination. *Id.* Under the 1991 Act, even if the employer is able to demonstrate that the same employment decision would result absent the discrimination, there is a violation of Title VII because of the underlying discriminatory reason. 42 U.S.C. § 2000e-2(m) (Supp. V 1993). However, if the employer can show his decision was based in part on a legitimate reason, the employee's relief may be limited. § 2000e-5(g)(2)(B) (Supp. V 1993). *See also,* 1991 U.S.C.C.A.N. 694, 712.

43. *Price Waterhouse*, 490 U.S. at 258.

44. *See e.g.*, Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988); Smallwood v. United Air Lines, Inc., 728 F.2d 614 (4th Cir. 1984); Millegan-Jensen v. Michigan Technological University, 975 F.2d 302 (6th Cir. 1992); Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992). The Seventh Circuit turned away from the majority view in 1993. *See e.g.*, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993).

45. Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700, 708 (10th Cir. 1988).

46. *See e.g.*, Milligan-Jensen v. Michigan Technological University, 975 F.2d 302, 305 (6th Cir. 1992).

47. 864 F.2d 700 (10th Cir. 1988).

48. *Id.* at 702.

Automobile Insurance Co.'s (State Farm) motion for summary judgment and denied any recovery by Summers.[49] The court based its decision on after-acquired evidence of insurance claim falsification.[50] The claim falsification would have been sufficient grounds for termination had the employer known about it prior to Summer's discharge.[51]

The Tenth Circuit relied on the Supreme Court decision in *Mt. Healthy* to affirm the lower court holding.[52] While acknowledging that the after-acquired evidence could not have been the "cause" of Summers' discharge, the court held that the evidence was relevant to the issue of "injury."[53] The court explained that this type of case is not concerned with the reason for the discharge but rather with the significance of the additional evidence.[54] The issue to be resolved under *Summers* is whether the claim is actionable at all in light of the after-acquired evidence.[55] When after-acquired evidence is used under the *Summers* rule, the discriminatory conduct of the employer is admitted or at least assumed.[56]

Since the *Summers* decision, courts subscribing to the majority view have allowed after-acquired evidence as a bar to employer liability in cases of resume and/or application fraud as well as in cases involving on-the-job misconduct.[57] The rule was applied to application fraud by the Sixth Circuit in *Johnson v. Honeywell Information Systems, Inc.*[58] Honeywell argued that had it known of misrepresentations made by Johnson, it never would have hired her.[59] Agreeing with Honeywell's position,

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49. *Id.*

50. *Id.* at 703. While preparing for trial, State Farm discovered 150 falsifications on insurance claim forms made by Summers. *Id.* Eighteen of the falsifications occurred after Summers returned from a probationary period. *Id.* Based on this after-acquired evidence, discovered four years after Summers' dismissal, State Farm moved for summary judgment. *Id.* State Farm argued that even though the falsifications were unknown at the time of dismissal and were therefore not the cause of the employment decision they should be considered in determining what, if any, relief Summers could receive. *Id.* at 704.

51. *Id.* at 708.

52. *Id.* at 705-06.

53. *Id.* at 708.

54. *Id.* at 704-05. The after-acquired evidence does not affect the prima facie showing of an employment discrimination claim. *Id. See also,* McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). In an employment discrimination claim the plaintiff first has the burden of proving a prima facie case of discrimination. Once the employee demonstrates discrimination, the burden shifts to the employer to show a legitimate reason for the employment decision. The employee then has the opportunity to show the employer's reason is simply pretext for his discrimination. *Id.*

55. *Summers*, 864 F.2d at 705.

56. *Id.* at 708.

57. *See e.g.*, Welch v. Liberty Machine Works, Inc., 23 F.3d 1403 (8th Cir. 1994); Millegan-Jensen v. Michigan Technological University, 975 F.2d 302 (6th Cir. 1992).

58. 955 F.2d 409 (1992) (applying the *Summers* holding to a state civil rights act rather than a federal antidiscrimination statute).

59. *Id.* at 414. In applying for the job with Honeywell, Johnson answered an ad which speci-

the court stated that summary judgment was appropriate in this situation because the misrepresentation was "material, directly related to measuring a candidate for employment, and was relied upon by the employer in making the hiring decision."[60]

C. *The Minority View on After-Acquired Evidence*

The minority view on after-acquired evidence allowed the evidence to be used at the remedy phase of an employment discrimination suit.[61] The courts held that in light of the evidence neither reinstatement nor front pay should be awarded.[62] The backpay was also limited although there were variations among the courts on the method of determining how this remedy should be limited.[63]

The Third Circuit addressed the after-acquired evidence issue in *Mardell v. Harleysville Life Insurance Co.*[64] The employee in *Mardell* alleged violations of both the ADEA and Title VII.[65] The court of appeals rejected the *Summers* rule.[66] The court distinguished the after-acquired evidence case from the mixed motive cases relied on by the *Summers* court.[67] The court emphasized the fact that the "legitimate reason" articulated in the after-acquired evidence case is unknown to the employer at the time of the employment decision.[68] In the mixed motive cases the employer is acting on a "legitimate reason" as well as a discriminatory reason at the time of the employment decision.[69] The Third Circuit explained that the only question to be answered at the

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fied education requirements for the job. *Id.* Johnson represented that she had the qualifications to satisfy the educational requirements. *Id.*

60. *Id.*

61. *See e.g.*, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992).

62. *Mardell*, 31 F.3d at 1239-1240.

63. *See e.g.*, Kristufek v. Hussmann Foodservice Company, 985 F.2d 364 (7th Cir. 1993) (cutting off back pay at the time of discovery of the after-acquired evidence); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992) (allowing backpay to run to the date employer shows the evidence would have been discovered).

64. 31 F.3d 1221 (3d Cir. 1994). Harleysville Life Insurance, Co. (Harleysville) terminated Mardell based on her failure to meet quotas and hired a younger male to replace her. *Id.* at 1223. During the course of discovery, Harleysville found several instances of application misrepresentation by Mardell concerning her education and work background. *Id.* Based on this evidence Harleysville granted, *arguendo*, that it discriminated against Mardell but moved for summary judgment based on the after-acquired evidence doctrine. *Id.* at 1224.

65. *Id.* at 1222.

66. *Id.*

67. *Id.* at 1228.

68. *Id.* at 1228-29.

69. *Id.*

liability stage "is whether the employer discriminated against the employee on the basis of an impermissible factor at the instant of the adverse employment action."[70]

The Third Circuit held that after-acquired evidence is relevant at the remedy stage.[71] At this stage the employer has the opportunity to demonstrate that the evidence would have been discovered in the normal course of business.[72] This showing can be made, for example, by demonstrating that the customary procedure followed in all processing of applications would uncover any misrepresentations.[73] Under this scheme, backpay would end on the date the employer proves that the evidence would have been discovered.[74] It must also be established that the misconduct was severe enough to lead to termination.[75] If the employer can not show that the evidence would have been uncovered absent litigation backpay would run till the date of judgment.[76]

In *Kristufek v. Hussmann Foodservice Company, Toastmaster Division*, the Seventh Circuit held that backpay should be allowed to run only until the date the employer discovered the evidence.[77] In making this determination the court stated that there was "nothing to be gained by further penalizing Hussmann after [the] resume fraud came to light."[78]

PRINCIPAL CASE

In *McKennon v. Nashville Banner Publishing Co.* the Supreme Court resolved the split in the circuits regarding after-acquired evidence.[79] The

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70. *Id.* at 1228.

71. *Id.* at 1238-39.

72. *Id.* at 1240.

73. *Id.* It should be noted that the employee has the opportunity to show that the employer has a practice of investigating only or primarily only the members of a protected class which may itself violate Title VII and the ADEA. *Id.* at 1238 n.31.

74. *Id.* at 1240.

75. *Id.*

76. *Id.* at 1239. In employment discrimination the 'normal rule' when awarding backpay is to allow the relief to run to the date of judgment or a date the court deems appropriate. *Id.*

77. 985 F.2d 364 (7th Cir. 1993). The employee in *Kristufek* alleged he was terminated because of his age and for retaliatory reasons. *Id.* at 366. Kristufek was employed with Hussmann Foodservice Company, Toastmaster Division (Hussmann) from 1981 to 1986 as Director of Employee and Community Relations and was fifty-seven when terminated. *Id.* When interviewed for employment, Kristufek represented that he had a Bachelor of Science degree in business administration and that he had taken graduate courses. *Id.* Kristufek admitted the falsity of his educational claims during the course of his deposition. *Id.* The district court granted Hussmann's JNOV as a result of the evidence discovered during Kristufek's deposition. *Id.* at 369.

78. *Id.* at 371.

79. *McKennon*, 115 S. Ct. 879 (1995); McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099, *rev'd* 115 S. Ct. 879 (1995).

Court rejected the *Summers* rule and its reliance on *Mt. Healthy*.[80] In resolving McKennon's suit, the Court held that *Mt. Healthy* was "inapposite" because an unlawful motive was the only basis for McKennon's discharge.[81] With this in mind the Court noted that since the evidence of misconduct was discovered after McKennon's termination, it could not have been the cause of her discharge.[82] Relying on its decision in *Price Waterhouse*, the Court held that showing the employment decision would have been *justified* had the evidence been known at the time of termination, is not the equivalent to showing the same decision could have been *made*.[83]

To support its holding the Court examined the purposes of the ADEA and Title VII.[84] It concluded that the use of after-acquired evidence at the liability stage to completely bar recovery would not further these purposes.[85] The Court held, however, that the evidence does become relevant at the remedy stage. This is not because the employee should be punished for her misconduct, but rather because the employer's legitimate business interests must be taken into account.[86] A limitation on the relief available to a prevailing plaintiff in this situation allows an employers interests to be taken into account.[87]

The Court noted that trial courts have discretion to grant equitable relief that may be appropriate to achieve the purposes of the ADEA.[88] An instruction to determine whether the evidence would have been severe enough to cause termination, in the Courts opinion, balanced the interests of both parties.[89] The Court held, however, as a general rule in after-acquired evidence cases, neither reinstatement nor front pay are appropriate remedies.[90] As to the proper measure for backpay, the Court stated that it should run from the time of the unlawful termination to the point

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80. *McKennon*, 115 S. Ct. at 885.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 884. *See supra* note 20-21 and accompanying text.

85. *Id.*

86. *Id.* at 886.

87. *Id.* The Court noted the prerogatives and discretion an employer has in making hiring, promotion and termination decisions in the course of running a business. *Id.* Further, the Court stated that "[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.*

88. *Id.* The Court specifically refers to the ADEA in this instance but the discussion of Title VII and the ADEA's shared featured and common purposes indicates an intention to apply the holding to both Acts. *Id.* at 884.

89. *Id.* at 886-87.

90. *Id.* at 884.

the employer actually discovers the employee misconduct.[91] The Court concluded that any fear of an employer over-investigating an employee's background to find some evidence that would reduce the amount of recovery is alleviated by the court's authority to award attorney fees and impose sanctions under Rule 11.[92]

ANALYSIS

A. Purpose of the Acts

The Court in *McKennon* emphasized the purpose of the ADEA and Title VII in making its decision.[93] The purpose of both Acts is ultimately: 1) to deter employers from practicing discriminatory conduct when making employment decisions and 2) to compensate persons who have been injured by an employer's conduct.[94]

Fulfillment of the first purpose is achieved by the disclosure of violations of the antidiscrimination acts in the litigation process whether or not any relief is granted.[95] The litigation process not only vindicates a wronged employee but it exposes the wrongdoer's action to the entire community.[96] It is true, of course, that without the compensation relief, few employees could afford to pursue such claims.

The second purpose, compensation, is accomplished by making the wronged employee whole. The make-whole aspect is achieved by placing the employee in the same position she would have been in absent the injury caused by the discrimination.[97] The *Summers* no-recovery rule is based on the rationale that make-whole relief is unwarranted because the employee suffers no injury in light of the after-acquired evidence.[98] This

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91. *Id.*

92. *Id.* at 887. Rule 11 refers to the ability of the court to impose appropriate sanctions on an attorney. FED. R. CIV. P. 11(c). Under this rule the sanctions may be imposed when the court determines that representations to the court have been made for such improper purposes as to harass or cause unnecessary delay or needless increase in cost of litigation; FED. R. CIV. P. 11(b)(1); when the claims, defenses or legal contentions are not warranted by existing law or by a frivolous argument for the extension, modification, or reversal of existing law; FED. R. CIV. P. 11(b)(2); when the allegations and other factual contentions do not have evidentiary support or, are not likely to have that support after reasonable opportunity for investigation or discovery; FED. R. CIV. P. 11(b)(2); and denials of facts are not warranted on the evidence or, are not reasonably based on a lack of information and belief; FED. R. CIV. P. 11(b)(4).

93. *McKennon*, 115 S. Ct. at 884-85.

94. *Id.* at 884.

95. *Id.* at 885.

96. *Mardell*, 31 F.3d at 1235.

97. *Wallace*, 968 F.2d at 1181.

98. *Summers*, 864 F.2d at 708.

reasoning makes it necessary to examine what constitutes an injury for the purpose of the employment discrimination statutes.

One result of discrimination in the employment realm is economic loss.[99] Courts following the *Summers* rule assume that the employee suffers no economic loss because had the employer known of the misconduct, she would have been terminated anyway and would be in the same economic position. This rule considers the employers interest but ignores the employees injury.[100] The *McKennon* Court states that the employer can not be required to ignore the after-acquired evidence.[101] However, denial of reinstatement and front pay allows the employers interest to be considered.[102] By allowing the employee to recover backpay from the time of the wrongful termination to the point of discovery, the make-whole policy is satisfied at least under the assumption that the employer would have discovered the evidence absent the litigation process. This rule attempts to account for both the employers and the employee's interests.

The Court does not seem concerned, however, with the fact that the employer may not have discovered the evidence absent the discrimination suit.[103] A general rule to cut backpay off at the time the employer discovers the evidence during litigation without a demonstration that the evidence would have been discovered at that time absent litigation rewards the employer for his wrongdoing.[104] This rule also does not necessarily put the employee in the same position she would have occupied absent the employer's discriminatory conduct. That is, absent the discriminatory conduct there would have been no litigation and perhaps no occasion to discover the employee's misconduct. The Third Circuit's holding in

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99. An example of economic loss is the difference between wages received before the discriminatory conduct and that received after the conduct. *See supra* note 18-19.

100. There is no reason to require an employer to continue the employment of an employee who has been demonstrated to be unqualified or disqualified for employment. Once an employer demonstrates that the evidence would have been discovered absent litigation, there are no future wages that are lost as a consequence of the discrimination. Samuel A. Mills, Note, *Toward an Equitable After-Acquired Evidence Rule*, 94 COLUM. L. REV. 1525, 1552, 1556 (1994). *See also*, Cheryl K. Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 207 (noting that an employer has the right to make legal employment decisions and may lawfully discharge an employee).

101. *McKennon*, 115 S. Ct. at 886.

102. *See supra* note 87.

103. *McKennon*, 115 S. Ct. at 886. "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit." *Id.*

104. *See e.g.*, Christine Neylon O'Brien, *Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing*, 23 PEPP. L. REV. 65, 122 (1995).

Mardell, which requires the employer to show that the discovered misconduct was severe enough to result in the same action, *and* that the evidence would have been uncovered absent the litigation is a more equitable approach.[105] This method preserves both the interests of the employee and the employer.

B. Compensatory and Punitive Damages

In its determination of how after-acquired evidence should effect the relief available to a prevailing plaintiff the *McKennon* Court did not address awarding compensatory or punitive damages. Courts should recognize that discrimination causes its victims to suffer harms besides lost wages.[106] Compensatory damages that might be awarded include but are not limited to, damages for emotional pain, suffering and mental anguish.[107] Even if the court determines that the employer would have made the same decision based on the after-acquired evidence, it does not follow that the employee has not been injured beyond lost wages as a result of the employer's conduct.[108]

An award of punitive damages is proper under Title VII when an employer engages in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[109] Because punitive damages are designed to punish and deter, courts should look exclusively at the actions of the employer. An employee's misconduct should play no part in this determination when the employer's intentional discrimination has been shown.[110]

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105. *Mardell*, 31 F.3d at 1240. *See also*, Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992). The EEOC recently responded to the *McKennon* holding with enforcement guidelines requiring backpay to continue until the judgment unless the employer shows that the same decision would have been made based on the after-acquired evidence. *EEOC: Guidance on After-Acquired Evidence*, 8 Lab. Rel. Rep. (BNA) No. 788 at 405:7331 (Dec. 14, 1995). The calculation of backpay may be affected, however, if the evidence is discovered as a result of a retaliatory investigation in response to the discrimination suit. *Id.*

106. *See supra* note 25 and accompanying text. The availability of relief for harms suffered beyond lost wages depends on the particular statute involved in the claim. The ADEA provides for liquidated damages if the discrimination is willful. 29 U.S.C. § 626(b) (1988).

107. *See supra* note 25 and accompanying text.

108. *See e.g.*, Zemelman, *supra* note 100, at 206. ("[P]ersonal injuries do not cease on the date an employer discovers after-acquired evidence.").

109. 42 U.S.C. § 1981a(b)(1) (Supp. V 1993).

110. *See e.g.*, Russell v. Microdyne Corporation, 65 F.3d 1229 (4th Cir. 1995) (prevailing plaintiff is eligible for compensatory and punitive damages regardless of whether the doctrine of after-acquired evidence applies); *see also*, Mills, *supra* note 100, at 1551 (1994) (relying on EEOC guidelines and the 1991 Civil Rights Act, after-acquired evidence should not bar recovery of compensatory and punitive damages); in response to *McKennon*, however, EEOC guidelines allow compensatory damages for emotional harm to continue past the discovery of the evidence if the employee can show

C. *Attorneys' Fees*

The 1964 Act provides that Attorneys' fees may be awarded at the courts discretion to the prevailing party in a civil rights action.[111] In cases where after-acquired evidence is successfully used the question becomes, is that employee a prevailing party and thus entitled to attorneys' fees?

The Supreme Court defined prevailing party in *Hensley v. Eckerhart*.[112] *Hensley* involved the Civil Rights Attorneys' Fees Awards Act (Attorneys' Fees Awards Act) rather than Title VII or the ADEA.[113] However, the policy of awarding attorneys' fees under Title VII and the ADEA is similar to that of the Attorneys' fees Awards Act.[114] The *Hensley* Court stated, for purposes of awarding attorneys' fees, plaintiffs have prevailed "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."[115] It is not required that a plaintiff receive all the relief requested to be considered the prevailing party.[116] However, in determining reasonable attorneys' fees the court must look at the extent of success as it relates to the amount of the fee requested.[117] The court has the discretion to limit the attorneys' fees awarded when a plaintiff achieves only limited success.[118]

The *McKennon* Court addressed the issue of awarding attorneys' fees in

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that the employer's actions caused the harm *and* that the harm continued past the discovery of the evidence. *EEOC: Guidance on After-Acquired Evidence*, 8 Lab. Rel. Rep. (BNA) No. 788 at 405:7331, (Dec. 14, 1995). These guidelines also allow punitive damages in after-acquired evidence cases when the employee can show the employment decision was discriminatory and the employer acted with malice or when the evidence was discovered as a result of retaliation. *Id.* Neither punitive or compensatory damages are available under the ADEA. *See supra* note 106 and accompanying text.

111. Under Title VII attorneys' fees are awarded to the prevailing party as part of the cost. 42 U.S.C. § 2000e-5(k) (1988 and Supp. V 1993). The prevailing plaintiff(s) under the ADEA are awarded reasonable attorneys' fees in addition to any judgment received. 29 U.S.C. §§ 626(b), 216(b) (1988).

112. 461 U.S. 424 (1983). The plaintiffs brought an action against a state hospital challenging the constitutionality of treatment and conditions at the hospital. *Id.* at 426. The district court held that the plaintiffs were prevailing parties even though they did not succeed on every claim and granted the request for an award of attorneys' fees. *Id.* at 428.

113. 42 U.S.C. § 1988 (1988).

114. *See e.g.*, Hanrahan v. Hampton, 446 U.S. 754 (1980) (awarding attorney fees in U.S.C. § 1988 was patterned after those in Title VII).

115. *Hensley*, 461 U.S. at 433 (*citing* Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)). The Court held that when a party fails to prevail on a claim distinct in all respects from the successful claims, the hours spent on the unsuccessful claim should be excluded from the reasonable fee. *Id.* at 440.

116. *Id.* at 435-36 n.11.

117. *Id.* at 439-40.

118. *Id.* at 440.

the context of preventing employers from excessively investigating an employee's background.[119] According to the Court, the ability to award attorneys' fees along with the court's discretion to invoke Rule 11 will prevent employers from abusing the availability of the after-acquired evidence doctrine.[120] The Court did not elaborate on how awarding attorneys' fees will have this effect or the policy behind awarding this relief.

The possibility of limiting attorneys' fees because of limited success could work to encourage an employer to investigate an employee's background rather than to discourage such action as the *McKennon* Court suggests. When an employee brings a discrimination claim, the relief most often sought is reinstatement, front pay and backpay.[121] If an employer introduces after-acquired evidence and the court finds it sufficient, backpay will be cut off on the date the employer discovered the evidence. Under these circumstances relief in the form of reinstatement and front pay will be lost as well. In the court's discretion that limitation on the success of the employee's claim may be enough to allow the attorneys' fees to be limited as well.

The issue of awarding attorneys' fees in an after-acquired evidence case was addressed by the Seventh Circuit in *Kristufek v. Hussmann Foodservice Co.*[122] Along with declaring that backpay should be cut off at the point of discovery, the *Kristufek* court stated that attorneys' fees should also be cut off at that point.[123] This approach does not take into account the fact that the after-acquired evidence should have no effect on the liability of the employer.[124] It is a very real possibility that a plaintiff in this type of case will incur attorneys' fees in connection with showing liability after the employer discovers the evidence.

It might be argued that allowing an employee in an after-acquired evidence case to recover attorneys' fees past the date of the discovery punishes the employer and rewards the employee for her own misconduct.[125] However this is not the case since reinstatement and front pay are denied in light of the after-acquired evidence.

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119. *McKennon*, 115 S. Ct. at 887.
120. *Id.*
121. *See supra* note 22-25 and accompanying text.
122. *Kristufek*, 985 F.2d at 371.
123. *Id.*
124. *McKennon*, 115 S. Ct. at 885.
125. *See supra* notes 87 and 100.

D. After-Acquired Evidence and Wyoming Law

The issue of after-acquired evidence as applied in *McKennon* has been addressed by the Tenth Circuit as recently as December 18th, 1995 in *Duart v. FMC Wyoming Corporation*.[126] Duart alleged four caused of action: 1) violation of the ADEA, 2) breach of contract and promissory estoppel, 3) negligent infliction of emotional distress, and 4) breach of the duty of good faith and fair dealing.[127] Duart's ADEA claim was the only federal question involved in the case, the three additional claims were based on Wyoming law.[128] The United States District Court for the District of Wyoming granted FMC Wyoming Corporation's (FMC) motion for summary judgment on all four claims.[129] The district court based its decision on after-acquired evidence of misrepresentations make by Duart on his resume and employment application.[130] In reaching its' conclusion the district court relied on *O'Driscoll v. Hercules*.[131]

On appeal the Tenth Circuit Court of Appeals noted the Supreme Court holding in *McKennon* and the subsequent remand of *O'Driscoll* for consideration in light of *McKennon*.[132] With these decisions in mind, the court stated that after-acquired evidence is not a basis for summary judgment on Duart's ADEA claim.[133] The court explained that it was uncertain whether the *McKennon* rule would effect possible recovery by an employee on the claims brought under Wyoming law.[134]

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126. 72 F.3d 117 (10th Cir. 1995).

127. *Id.* at 117.

128. *Id.*

129. Duart v. FMC Wyoming Corporation, 859 F. Supp. 1447, 1456 (D. Wyo. 1994).

130. *Id.* at 1456. The court held that the misrepresentations were material and that had FMC been aware of them when they hired Duart they would be sufficient grounds for termination. *Id.* In the alternative, disregarding the after-acquired evidence, the district court held that summary judgment was appropriate on the ADEA claim because FMC demonstrated a legitimate, nondiscriminatory reason for termination, unsatisfactory job performance. *Id.* at 1457. The circuit court affirmed the alternative holding. *Duart*, 72 F.3d at 120.

131. *Id* at 119. O'Driscoll v. Hercules, 12 F.3d 176 (10th Cir. 1994). The plaintiff in *O'Driscoll* alleged violations of the ADEA. *Id.* at 177. The court granted Hercules summary judgment based on after-acquired evidence that O'Driscoll had made misrepresentations on her employment application. *Id.* at 178.

132. *Duart*, 72 F.3d at 119-20.

133. *Id.* at 120.

134. *Id.* The court did, however, affirm the lower courts decision to grant summary judgment to FMC on the claims brought under Wyoming law. *Id.* The district court granted FMC summary judgment on Duarts claim of breach of contract and promissory estoppel based on the fact that Duart was an at-will employee and nothing in the employer's documents or workbooks changed that employment status to a contractual relationship. *Duart*, 859 F. Supp. at 1458-1462. On the claim of breach of duty of good faith and fair dealing, the district court concluded that summary judgment was appropriate because Duart had not demonstrated that FMC had acted with "extremely outrageous or venal conduct." *Id.* at 1464. FMC had not violated "community standards of decency, fairness or reasonable-

Although this note is written in the context of employment discrimination law, the Tenth Circuits' mention of how *McKennon* might be applied to Wyoming law justifies a brief discussion on that subject. Wyoming is an at-will employment state.[135] The Wyoming courts have recognized exceptions to the at-will employment rule including actions premised on violations of public policy.[136] For an employee to prevail on a claim that an employer's action was a violation of public policy it must be established that: 1) the action was a violation of a well-established public policy; and 2) there is no other available remedy to protect the interest of the employee or society.[137] The Wyoming courts note that the purpose for allowing a tort claim premised on violations of public policy is to vindicate valuable social policies.[138]

The at-will status of employment can be altered when an employment contract states a definite duration.[139] This creates a presumption of dismissal for cause only.[140] The altered employment status along with other factors such as longevity of employment creates a special relationship between the employer and employee.[141] Under Wyoming law, the demonstration of a special relationship establishes an actionable tort claim of breach of implied covenant of good faith and fair dealing.[142]

The issue of applying after-acquired evidence to tort claims brought by an at-will employee or an employee by contract has not been addressed in Wyoming courts. The question did arise in *Weissman v. Crawford Rehabili-*

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ness." *Id.* Finally, the court held that summary judgment should be granted to FMC on the claim of negligent infliction of emotional distress because Duart did not allege any facts to show the infliction of serious bodily harm or death. *Id.*

135. *See e.g.*, Drake v. Cheyenne Newspaper, Inc., 891 P.2d 80, 81 (Wyo. 1995). An at-will employee is employed for an indefinite period of time and either party can end the employment relationship at any time for any reason or no reason at all. *Id.*

136. *See e.g., Id.* at 80; Allen v. Safeway Stores, Inc., 699 P.2d 277 (Wyo. 1985); Wilder v. Cody County Chamber of Commerce, 868 P.2d 211 (Wyo. 1994).

137. *Allen*, 891 P.2d at 284. The other remedies available to a Wyoming employee include the Wyoming Fair Employment Practices Act of 1965 and, of course, any of the applicable federal antidiscrimination statutes. *Id.*

138. *Id.* at 284.

139. *Wilder*, 868 P.2d at 217. An employment contract can be created by either an express or implied in fact contract. *Id.* at 216. The express contract is created by writing or orally at the time the contract is formed. *Id.* An implied in fact contract results from the acts or conduct of the parties involved. *Id.*

140. *Id.* at 217.

141. *Id.* at 221-22.

142. *Id.* at 222. The court recognized the line of cases reserving the decision on whether a claim of breach of implied covenant of good faith and fair dealing was actionable under Wyoming law and declared that it was time to decide the issue. *Id.* at 220. *See e.g.*, Hatfield v. Rochelle Coal Co., 813 P.2d 1308 (Wyo. 1991); Nelson v. Crimson Enterprises, Inc., 777 P.2d 73 (Wyo. 1989); Reese v. Dow Chemical Co., 728 P.2d 1118 (Wyo. 1986).

tation Services, Inc., a Colorado case involving wrongful discharge based upon retaliation in violation of public policy.[143] The plaintiff in *Weissman* asserted retaliatory discharge as a result of her contact with the Division of Labor.[144] The district court granted Crawford Rehabilitation Services, Inc. (Crawford) summary judgment based on after-acquired evidence of resume misrepresentation.[145] Relying on *McKennon*, the Colorado Court of Appeals held the trial court erred in granting summary judgment.[146]

The Court of Appeals concluded that the *McKennon* "approach should be used in adjudicating state wrongful discharge tort claims" in the same way it applies to federal antidiscrimination statutes.[147] The court noted the similarities of tort actions brought in response to violations of public policy and actions based on legislation designed to deter discrimination in the workplace.[148] To demonstrate this the court stated that "[i]t is on less against public policy, for example, to discharge an employee because that . . . employee exercises a legislatively-granted right, than it would be to discharge that same employee because of his or her age."[149] With this statement the court recognized the similar motivations behind allowing public policy claims and federal and state antidiscrimination claims, deterrence and compensation.[150]

Relying upon public policy, the Supreme Court of Wyoming recognized the tort claim of retaliatory discharge in *Griess v. Consolidated Freightways Corporation of Delaware*.[151] The court stated that a claim of retaliatory discharge based on a violation of public policy is actionable if there is no other remedy available.[152] The public policy involved in *Griess* was the right of an employee to file a worker's compensation claim.[153] The courts recognition of the importance of bringing a cause of action for a retaliatory discharge is analogous to the justification articulated in *Weissman* for applying the *McKennon* approach to employment tort actions.[154]

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143. No. 93CA1905, 1995 WL 215557 (Colo. App. Apr. 13, 1995).

144. *Weissman*, No 93CA1905, 1995 WL 215557 at 2.

145. *Id.* at 1. Weissman did not list her previous employer on her application, an employer with whom she had litigation pending. *Id.*

146. *Id.* at 4-5.

147. *Id.* at 5.

148. *Id.*

149. *Id.*

150. *Id.*

151. 776 P.2d 752 (Wyo. 1989). *See also*, Allen v. Safeway Stores Inc., 699 P.2d 277 (Wyo. 1985); Drake v. Cheyenne Newspaper, Inc., 891 P.2d 80 (Wyo. 1995).

152. *Griess*, 776 P.2d at 753.

153. *Id.* at 753. The ability to file a worker's compensation claim was held to be a right based on WYO. CONST. art. XIX, § 7 and WYO. STAT. § 27-14-104(b). *Id.*

154. *See supra* notes 148-151 and accompanying text.

The *McKennon* approach to after-acquired evidence can also be applied in suits brought under the Wyoming Fair Employment Practices Act of 1965 (WFEPA).[155] The WFEPA provides that an employer may not base employment decisions on age, sex, race, creed, color, national origin or ancestry.[156] An employer is further precluded from basing a decision on the handicapped status of a person if that person is otherwise qualified for the job.[157]

The WFEPA provision prohibiting handicapped discrimination was applied in *World Mart, Inc. v. Ditsch*.[158] Ditsch filed a complaint with the Fair Employment Commission alleging employment discrimination based on his handicap.[159] The issue was resolved in favor of Ditsch and World Mart was ordered to compensate Ditsch in the form of backpay.[160] World Mart sought judicial review of the commissions order.[161] The court held that the order was proper and the amount of backpay did not make Ditsch "'more whole' than he would have been if he had not been the victim of handicap discrimination."[162]

When deciding whether or not after-acquired evidence should be applied to actions brought under the WFEPA, the purpose of the remedy should be examined. The courts reference to the 'make whole' aspect of awarding backpay in *Ditsch* illustrates the desire to put the plaintiff in the same position he would have been in absent the litigation. This purpose parallels those of the ADEA and Title VII. The purpose of the WFEPA would, in a case of after-acquired evidence, justify the application of the evidence at the remedy stage in the same manner it is applied in a federal antidiscrimination case.[163]

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155. WYO. STAT. §§ 27-9-101 to -108 (1977).

156. WYO. STAT. § 27-9-105(a)(1) (1977).

157. *Id.*

158. 855 P.2d 1228 (Wyo. 1993).

159. *Id.* at 1231.

160. *Id.* at 1232. WFEPA authorizes the commission to issue orders "requiring the respondent to cease and desist from discriminatory or unfair employment practice and to take affirmative action, including hiring, reinstatement or upgrading of employment, with or without backpay . . . as in the judgment of the commission will effectuate the purposes of this chapter." WYO. STAT. § 27-9-106 (1977).

161. *Ditsch*, 855 P.2d at 1232. WFEPA authorizes judicial review of a commission order. WYO. STAT. § 27-9-107 (1977).

162. *Ditsch*, 855 P.2d at 1238.

163. Note, it is the author's contention that the application of after-acquired evidence should be taken one step further than was done in *McKennon*. The employer should be required to show that the evidence would have been discovered absent litigation.

CONCLUSION

While the Tenth Circuit's *Summers* rule took into account the employers legitimate interests, it did not consider the injury to the employee. The injury to an employee caused by the employer's discriminatory conduct and the employees misconduct are separate issues. By taking the evidence out of the liability stage of an employment discrimination case, the courts are allowed to recognize the distinction between the employers actions and the employees misconduct.

The Supreme Court's holding in *McKennon v. Nashville Banner Publishing Co.* purports to apply after-acquired evidence in accord with the purposes of the antidiscrimination laws. *McKennon* does not go far enough, however, in requiring determination that the evidence would have been discovered in the absence of an employment discrimination suit before it can be used to limit recovery. By not taking this into account the employee is not necessarily put into the same position she would have been in absent the discriminatory action.

When deciding how to apply the after-acquired evidence in *McKennon*, the purpose of the antidiscrimination statutes played a key role. In determining how *McKennon* should apply to Wyoming law the same considerations must be made. The Wyoming Supreme Court's recognition of the importance of bringing a public policy claim and the make whole aspect of the WFEPA parallel the purposes of the Acts involved in *McKennon*. These similarities warrant the application of the *McKennon* holding to Wyoming law.

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