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The Downfall of Grease Hazard Technicians and Products Delivery Specialists or “Why French Fry Cooks and Pizza Delivery Guys Should Not Pad Their Resumes”: Scrutinizing *Crawford Rehabilitation Services, Inc. v. Weissman**

I. INTRODUCTION

Regardless of the form resume fraud assumes, it is usually detrimental to the employer and beneficial to the employee. Those who have engaged in this form of creative expression feel that they need to embellish their resumes in order to have a chance of being hired. Therefore, many of those who practice resume padding take liberties with job titles, previous duties, and past experiences.

Recently, case law has developed which is detrimental to those who rewrite the history of their lives. In fact, precedent exists that allows employers to use misstatements made by employees on resumes and applications to shield the employers from claims of wrongful discharge. Courts also allow employers to use misdeeds committed on the job discovered after the termination of the employee as a further defense to wrongful discharge. Courts call this evidence, discovered by employers after an employee files a lawsuit, after-acquired evidence.¹

This Note will first discuss the splintered and varied ways that circuit courts have dealt with after-acquired evidence. Followed by a discussion of *McKennon v. Nashville Banner Publishing Co.*,² a U.S. Supreme Court case that streamlined the application of the after-acquired evidence rule by allowing certain damages when public policy concerns are present. Finally, this Note will dissect the Colorado Supreme Court's holding in *Crawford Rehabilitation Servs., Inc. v. Weissman*,³ and examine how this case has further added to the confusion of the after-acquired evidence rule. More specifically, this note will analyze

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1. *Weissman*, 938 P.2d at 547.

2. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995).

3. 938 P.2d 540 (Colo. 1997).

how the Colorado Supreme Court erred by deviating from the after-acquired rule in *McKennon*.⁴

II. DEVELOPMENT OF THE TREATMENT OF EMPLOYEES' RIGHTS IN AFTER-ACQUIRED EVIDENCE SITUATIONS

A. The Varied Opinions of the Circuit Courts

Historically, circuit courts were split regarding their treatment of after-acquired evidence as it applied to employees' rights against their employers. The Sixth, Seventh, Tenth, and Eleventh Circuit Courts, in particular, addressed how after-acquired evidence was to be applied.⁵ The conflict did not come from the use of after-acquired evidence because all the courts allowed the evidence to be admitted. The discrepancy between the courts' decisions arose out of their varied applications of the after-acquired evidence. Some courts allowed the detrimental evidence to extinguish the entire claim, while others limited the use of the evidence to eliminate employee remedies of reinstatement and front pay.⁶

The Sixth Circuit's analysis determined that the application of after-acquired evidence absolved the employer of any claims against it, if the employee made material misrepresentations or omissions on their resume or application.⁷ The court outlined two requirements before this rule would apply.⁸ First, the intentional misstatements must relate to a factor the employer used in deciding whether to hire the employee.⁹ Second, the employer must have actually relied on those misstatements.¹⁰ The court established these requirements as a safeguard against employers freeing themselves from wrongful discharge claims by "combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial."¹¹ In doing this, the Sixth Circuit used a method that resembled promissory estoppel. Thus, the employer could not defend a claim of wrongful discharge unless it

4. *Id.*

5. *See Massey v. Trump's Castle Hotel & Casino*, 828 F.Supp. 314, 318 (D.N.J. 1993).

6. *See id.*

7. *Id.* at 320 (citing *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 414 (6th Cir. 1992)).

8. *See Massey*, 828 F. Supp. at 319-20 (quoting *Johnson*, 955 F.2d at 414).

9. *See id.*

10. *See id.*

11. *Id.* at 320.

showed that the employment contract with the employee was based on the employee's fraudulent misrepresentations.

The Tenth Circuit in *Summers v. State Farm Mutual Automotive Insurance Co.*,¹² held that after-acquired evidence constituted a legitimate reason to fire an employee.¹³ The court, relying on *Mt. Healthy City School District Board of Education v. Doyle*,¹⁴ determined that it was appropriate for courts "to 'make [an] after-the-fact rationale' regarding the circumstances that would have existed absent the discriminatory conduct."¹⁵ The court allowed retroactive application of newly discovered information to justify the employee's discharge. Thus, unlike the Sixth Circuit, the Tenth Circuit did not require the employer to rely on the employee's misrepresentation when it hired the employee.¹⁶

The Seventh Circuit's application of after-acquired evidence is more strict than the Sixth Circuit's. The Seventh Circuit allows the evidence to totally extinguish the employee's claim if the employer can prove that the employee would have been terminated had the employer known about the misconduct.¹⁷ The court refused to assume that an employer would terminate all employees who had made material misrepresentations on their resumes or conducted themselves in an adverse manner. In order to use the after-acquired evidence as a defense, the employer is required to state that such misrepresentation or misconduct by the employees was not tolerated, and that the employers would have fired anyone who acted in such a manner.¹⁸

In addition to the after-acquired evidence rule, the Eleventh Circuit also addressed the issue of appropriate damage calculation. It reasoned that "where after-acquired evidence provides the employer with a legitimate reason to fire the employee, reinstatement, front-pay, and injunctive relief are unavailable, but back-pay, attorney's fees, and nominal damages remain available."¹⁹ The court chose to allow employees to pursue backpay because it thought that otherwise employers would "devote less resources to preventing discrimination" because the employers

12. *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988).

13. *See id.* The case involved an insurance claims representative who sued on the basis of age and religious discrimination but the court extinguished his claims when after-acquired evidence showed that he had filed 150 false claims.

14. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

15. *Massey*, 828 F.Supp. at 319. (citing *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 623 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984)).

16. *See id.* at 319.

17. *See id.* at 320.

18. *Id.*

19. *Massey*, 828 F.Supp. at 321 (discussing *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1184 (11th Cir.1992)).

could escape liability by investigating the employee's background.²⁰ The court believed that even though the after-acquired evidence justified the termination of an employee, "courts must strike a balance between preserving the employer's lawful prerogatives to fire employees and the statutory requirement to make persons whole for injuries suffered from illegal employment decisions."²¹

The lack of continuity between circuits prevented the establishment of uniform rules on which employers and employees could rely. To remedy this lack of uniformity between the circuits the Supreme Court granted certiorari in *McKennon v. Nashville Banner Publishing Co.*

B. McKennon v. Nashville Banner Publishing Co.

Christine McKennon, a 62-year-old woman, was employed as a secretary at Nashville Banner Publishing Company for 30 years before she was discharged. Nashville Banner claimed its work force reduction plan for financial restructuring was the reason McKennon's employment was terminated.²² However, McKennon believed that her age was the real reason behind Nashville Banner's decision to discharge her.²³ She filed suit,²⁴ alleging age discrimination under the Age Discrimination in Employment Act (ADEA).²⁵

After-acquired evidence surfaced during McKennon's deposition. McKennon admitted that she had stolen financial records from the comptroller's office during the final year she worked at Nashville Banner.²⁶ She explained that her sole motive for acquiring the confidential financial records was to have some "insurance" and "protection" because she anticipated her wrongful termination.²⁷ Shortly after these statements were recorded in the deposition, McKennon received a correspondence from Nashville Banner stating that they were terminating her employment because her actions were in direct conflict with her

20. See *Massey*, 828 F.Supp. at 321 (discussing *Wallace*, 968 F.2d 1174). *Wallace v. Dunn Constr. Co.* was based on a claim of sexual discrimination under Title VII. Thus, the court may have been trying to effectuate the purpose of the law in passing down this particular decision.

21. *Massey*, 828 F.Supp. at 321.

22. See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 354 (1995).

23. See *id.*

24. See *McKennon*, 513 U.S. at 354. The basis for her claim comes from the fact that the "ADEA makes it unlawful for any employer: 'to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.'" *Id.* at 355 (quoting the language of Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et. seq.* (1988 and Supp. V)).

25. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et. seq.* (1988 and Supp. V).

26. *McKennon*, 513 U.S. at 355.

27. See *id.*

duties with the organization. Nashville Banner also stated that it would have promptly terminated McKennon at an earlier date if it had known of her grievous misconduct.²⁸ The company then filed for summary judgment based on the after-acquired evidence.²⁹

The district court granted the summary judgment request holding that Nashville Banner had the right to terminate McKennon because of her misconduct.³⁰ The court also barred McKennon from recovering "back pay [or] any other remedy . . . available to her under the ADEA."³¹ McKennon appealed but the Sixth Circuit upheld the decision.³² McKennon appealed this decision and was granted certiorari by the United States Supreme Court. The Court granted the writ because it wanted to "resolve conflicting views among the Courts of Appeals on the question whether all relief must be denied when an employee has been discharged in violation of the ADEA and the employer later discovers some wrongful conduct that would have led to discharge if it had been discovered earlier."³³

The Supreme Court was not comfortable with the lower court's conclusion that after-acquired evidence could completely extinguish the employee's ability to recover anything under the ADEA.³⁴ The Court refused to ignore the fact that the employer violated federal law and discriminated against an employee by terminating the employee on the sole basis of age.³⁵ However, the Court did not want to limit its analysis of the effect of after-acquired evidence to violations of the ADEA. It recognized that the "ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide."³⁶ Quoting *Oscar Mayer & Co. v. Evans*, the Court stated that ADEA and Title VII share a common goal in that they both seek to achieve "the elimination of discrimination in the workplace."³⁷ The Court observed that these statutes achieve their goals through deterrence and compensation. Thus, the Court concluded that "[i]t would not accord with this scheme if af-

28. *See id.*

29. *See id.*

30. *See id.*

31. *Id.*

32. *See id.* at 356.

33. *Id.*

34. *See id.*

35. *See id.*

36. *Id.* at 357. The court referred to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* (1988 and Supp. V); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et. seq.* (1988 Supp. V); the National Labor Relations Act, 29 U.S.C. § 158(a); the Equal Pay Act of 1963, 29 U.S.C. § 206(d).

37. *McKennon*, 513 U.S. at 358 (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)).

ter-acquired evidence of wrongdoing that would have resulted in termination operates . . . to bar all relief for an earlier violation of the Act.”³⁸ However, the Court struggled because it could not ignore the after-acquired evidence for fear of absolving the employees of their misconduct.

First the Court considered the theory of unclean hands:

Equity’s maxim that a suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands, a rule which in conventional formulation operated *in limine* to bar the suitor from invoking the aid of the equity court.³⁹

The Court deemed the theory of unclean hands inappropriate for situations in which the “private suit serves important public purposes.”⁴⁰ Thus, in such situations the Court considered that one person’s misconduct should not stand in the way of developing case law that would benefit society.⁴¹

The Court finally held that deference had to be given to the ADEA, and that after-acquired evidence should be considered, “not to punish the employee,”⁴² but to allow the employer to prosecute a claim to which it is entitled. In reaching this conclusion, the Court held that “[a]n absolute rule barring any recovery of backpay . . . would undermine the ADEA’s objective of forcing employers to consider and examine their motivations.”⁴³ The Court also provided a framework by which lower courts may calculate the appropriate amount of backpay by calculating the amount accrued from the time of the wrongful termination to the time the after-acquired evidence was discovered.⁴⁴

McKennon set an important precedent for handling after-acquired evidence. It resurrected some remedies for employees and prohibited the use of after-acquired evidence in situations where public policy concerns were present. *McKennon*, however, did not address the application of the after-acquired evidence in situations where no public policy concerns were involved. *McKennon* was also unclear whether the doctrine of unclean hands applies to situations in which there is only a private individual and the employer. The Colorado Supreme Court, in

38. *McKennon*, 513 U.S. at 358.

39. *Id.* at 360.

40. *Id.* (quoting *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 342 U.S. 134, 138 (1968)).

41. *See id.*

42. *Id.* at 362.

43. *Id.*

44. *See id.*

Crawford Rehabilitation Services Inc. v. Weissman, took it upon itself to answer these questions.⁴⁵

III. CRAWFORD REHABILITATION SERVICES, INC. V. WEISSMAN

A. Facts

Crawford Rehabilitation Services, Inc. employed Susan Weissman as a clerical typist from 1988 to 1990. Susan Weissman argued with Leonard Francois, her manager at Crawford, regarding the number of breaks that an employee is entitled to take during day. After the argument, Weissman telephoned the Department of Labor to inquire about her rights to breaks at work. Weissman continued to take her rest breaks after being informed that Crawford could not prohibit her breaks. Subsequently, on January 25, 1990, Weissman asked her superiors if she could take the following Monday off work. When she was told that she could not take the day off, Weissman informed her supervisor that she would not show up for work on Monday.⁴⁶ On Friday, January 26, 1990, Weissman took the day off without permission. She also did not show up for work on the subsequent two days. Following her absence on January 30th, Crawford terminated Weissman's employment.⁴⁷

After her termination, Weissman brought a cause of action claiming breach of implied contract, promissory estoppel, outrageous conduct, and wrongful discharge, seeking punitive and compensatory damages.⁴⁸ The claim for wrongful discharge stemmed from the argument between Weissman and Francois. Weissman claimed that Crawford was angered by the fact that she placed the telephone call to the Department of Labor, and this was the main reason for firing her.⁴⁹

Unlike *McKennon*, the evidence in *Weissman* concerned misrepresentations made by Weissman on her application for employment rather than misconduct on the job.⁵⁰ As in *McKennon*, the after-acquired evidence surfaced during the deposition of the plaintiff.⁵¹ The deposition revealed that Weissman had failed to state on her application that she was discharged from the Association of Operating Room Nurses

45. *Crawford Rehabilitation Servs., Inc. v. Weissman*, 938 P.2d 540 (1997).

46. *See id.* at 543.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.* at 543-44.

(AORN), that she did not actually work full-time at Kirk Advertising but on a part-time basis, and that she previously sued an employer over an allegedly wrongful termination.⁵² When trying to explain her discrepancies, Weissman stated that she did not "list AORN as a previous employer because she believed she was prohibited from doing so by the terms of a release she signed"⁵³ However, she used the same reasoning to justify her erroneous statement that she worked at Kirk Advertising full-time when, in fact, she only worked on a part-time basis.⁵⁴

After discovering these misstatements, Crawford filed a motion to dismiss the case due to the newly discovered evidence uncovered in the deposition. The court held that Weissman's fraudulent statements voided any existing employment contract between Crawford and Weissman.⁵⁵ The trial court granted Crawford's motion to dismiss the "claims for breach of implied contract and promissory estoppel on the theories of unclean hands, fraud in the inducement, and the after-acquired evidence doctrine . . . [and] that the after-acquired evidence doctrine precluded the claim for wrongful discharge."⁵⁶ The court also dismissed the claim of outrageous conduct because Weissman failed to properly state a basis for relief.⁵⁷ Weissman appealed and the court of appeals granted a review.⁵⁸ The court of appeals sustained dismissal of the claim of outrageous conduct but reversed on the issue of wrongful discharge. The court of appeals relied on *McKennon's* decision, which stated that an employee's rights to backpay could not be extinguished by newly discovered evidence of the employee's misconduct.⁵⁹ The court of appeals remanded the claim of breach of implied contract and promissory estoppel, stating that Weissman's situation was not one that constituted a public concern.⁶⁰

52. *See id.* at 544.

53. *Id.* at 545.

54. *See id.*

55. *See id.*

56. *Id.*

57. *See id.*

58. *See id.*

59. *See id.* at 546.

60. The court stated that since there were no public concerns the claims could be eliminated under the idea of "resume fraud if: (1) the misstatement or omission related to a material fact; (2) it related directly to the evaluation of the application; and (3) it was reasonably relied upon by Crawford in hiring Weissman." *Id.*

B. The Colorado Supreme Court's Holding

The Colorado Supreme Court granted review. In its analysis of the claims for breach of implied contract and promissory estoppel, the court relied on case law that discussed the after-acquired evidence doctrine and "[b]asic principles of law and equity"⁶¹ In its examination of *Camp v. Jeffer, Mangels, Butler & Marmaro*,⁶² the court held that newly discovered evidence that shows an employee in an unfavorable light can be used by employers to protect themselves from liability and to limit relief.⁶³ The court reasoned that "an employee cannot complain about being wrongfully discharged because the individual is no worse off than she would have been had the truth of her misconduct been presented at the outset."⁶⁴ In other words, the employee never had a legally binding contract with the employer because the employment relationship was formed under the influence of the employee's misstatements. The court also applied a rule based on contract theory that allows a party who has been fraudulently induced into entering a contract to break the contract and "restore the status quo." The court reasoned that this rule also applies in situations where the employee misconduct was not discovered until after the wrongful termination.⁶⁵

The court used the doctrine of unclean hands to examine the use of after-acquired evidence. The doctrine of unclean hands is based on basic principles of equity which state that "he who seeks equity should do equity and come with clean hands."⁶⁶ Thus, persons seeking an equitable remedy must not have engaged in any misconduct. Therefore, employees who either made material misstatements in their resume or engaged in misconduct on the job should not be able to recover from their employers because employees are not entirely innocent. As to the claim of wrongful discharge, the court held that Wiessman did not state a "cognizable cause of action" that would allow her to recover any remedies.⁶⁷

61. *See id.*

62. 35 Cal. App. 4th 620 (Cal. Ct. App. 1995).

63. *See id.* This case was about a husband and wife who were fired from a law firm. It was later discovered that the wife had illegally taken some documents.

64. *Weissman*, 938 P.2d at 547 (quoting *Gassman v. Evangelical Lutheran Good Samaritan Soc'y*, 921 P.2d 224, 226 (1996), *aff'd* (Kan. 1997)).

65. *Weissman*, 938 P.2d at 548. (using the analysis in *Bassi v. Western & Southern Life Ins. Co.* which stated that "after-acquired evidence may completely bar a claim for breach of the employment contract because the employer's duty arises from the contract itself and falls with that contract." *Bassi v. Western & Southern Life Ins. Co.*, 808 F.Supp. 1306, 1309 (E.D.Mich. 1992)).

66. *Weissman*, 938 P.2d at 548 (quoting *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951)).

67. *Id.* at 551.

The court stated that the only exceptions to the at-will employment law in Colorado are public policy and implied contract exceptions. The public policy exception protects an employee from termination by the employer for refusing to participate in illegal activities.⁶⁸ In *Martin Marietta Corp. v. Lorenz*,⁶⁹ the Colorado Supreme Court held that in order to present a prima facie case for wrongful discharge, an employee must show:

[T]hat the employer directed the employee to perform an illegal act as part of the employee's work related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege; that the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen or the employee's right or privilege as a worker; and that the employee was terminated as the result of refusing to perform the act directed by the employer.⁷⁰

The court also held that the public policy exception only applies when the issue at hand "affects society at large rather than a purely personal or propriety interest of the plaintiff or employer . . . [and] lead to an outrageous result clearly inconsistent with a stated public policy . . . or 'strike[s] at the heart of a citizen's social rights, duties, and responsibilities.'"⁷¹ Applying these guidelines, the court held that neither Weissman's right to contact the Department of Labor nor her right to take breaks rose to the level of a public policy concern.⁷² In determining this, the court cautioned that the development of case law for the public policy exceptions should be done carefully. It stated that an issue must be thoroughly examined before it be considered a public policy concern.⁷³ The court did not elaborate on whether the use of "after-acquired evidence of resume fraud would completely preclude an employee's action for retaliatory firing in violation of public policy or whether *McKennon* would operate to limit the application of the after-acquired evidence rule."⁷⁴

68. See *id.*

69. 823 P.2d 100 (Colo. 1992).

70. *Id.* at 109.

71. *Weissman*, 938 P.2d at 552 (quoting *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. 1981) (citations omitted)).

72. See *id.*

73. See *id.* at 553.

74. *Id.*

IV. ANALYSIS OF THE PUBLIC POLICY EXCEPTION

A. *Background of the Public Policy Exception*

Courts have never been able to clearly answer the question of what constitutes a public policy matter in employer-employee relationships. The conflict arises out of the "difficulty . . . in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee."⁷⁵ Courts have distinguished public policy matters from private matters by specifying that public policy matters affect society at large rather than any of the individual or proprietary interests of the plaintiff, and that the "policy must be 'fundamental,' 'substantial' and 'well established' at the time of the discharge."⁷⁶ Courts have generally found that clear public policy violations arise in four employment situations.⁷⁷

The first situation occurs when an employee refuses to perform certain illegal acts and is terminated as a result.⁷⁸ *Petermann v. International Brotherhood of Teamsters*⁷⁹ is a prime example of this situation. The teamsters hired Petermann as a business agent, but fired him when he refused to commit perjury. The court, though recognizing the importance of an at-will employment relationship, refused to allow Teamsters to terminate Petermann because he would not commit perjury.⁸⁰ The court reasoned that it would be contrary to the state's interests and public policy to allow an employer to terminate an employee for refusing to commit an illegal act.⁸¹ The court concluded that to preserve the integrity of state law, "the civil law . . . must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration"⁸² In essence, the court found that to allow terminations predicated on the failure of an employee to commit an illegal act under state law would promote the very behavior that the state wishes to restrict.

The second public policy violation in the employment relationship occurs when the employer acts in a manner that prevents the employee

75. *Gantt v. Sentry Ins.*, 824 P.2d 680, 683 (Cal. 1992).

76. *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1998).

77. *See Sentry Ins.*, 824 P.2d at 683.

78. *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

79. *Id.*

80. *See id.* at 27.

81. *See id.*

82. *Id.*

from performing the employee's legal responsibilities. These cases involve statutes that courts consider as important American institutions; statutes that confer important obligations onto the citizens.⁸³ The court in *Nees v. Hocks*⁸⁴ held that jury duty was a statutory obligation that should be protected from employer interference. The court, using a balancing test that weighed the community interest in having jury duty with an employer's rights to terminate an employee, concluded that the government's extensive steps to guarantee jury trials demonstrates the importance of allowing citizens to serve on juries.⁸⁵ The court concluded that allowing employers to sanction employees in order to dissuade the employees from performing their legal obligations would contradict the purpose of the law.⁸⁶

The third situation courts have declared a public policy violation occurs when an employer prevents an employee from exercising a statutory right or privilege. In *Wetherton v. Growers Farm Labor Association*,⁸⁷ the court found that an employer who terminated employees because of their involvement in union activities violated public policy.⁸⁸ The court went even further, creating a cause of action for employees where their employers had prevented them from exercising their rights and privileges.⁸⁹

The final public policy exception applies to an employee who reports an employer's illegal activity. *Hentzel v. Singer Co.*⁹⁰ dealt with such a situation. In *Hentzel*, the court reasoned that allowing employees to report illegal actions performed by employers is beneficial to employers because it increases employee morale.⁹¹ Moreover, allowing this type of system forces the employer to obey the law, thus benefiting society as a whole.⁹²

The four situations where courts find public policy violations in the employment relationship all involve statutory violations. Some courts, however, have found that besides legislation, "administrative rules, regulations or decision[s] and judicial decisions" are sources from which public policy can be derived and then used to limit the at-will

83. See *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975).

84. See *id.*

85. See *id.*

86. See *id.*

87. *Wetherton v. Growers Farm Labor Ass'n.*, 79 Cal.Rptr. 543, 547 (Cal. Ct. App. 1969).

88. See *id.* at 547.

89. See *id.* at 548.

90. *Hentzel v. Singer Co.*, 188 Cal. Rptr. 159 (Cal. Ct. App. 1982).

91. See *id.* at 164.

92. See *id.*

employment relationship.⁹³ This broad view of the public policy exception is best articulated in *Palmateer v. International Harvester Co.*,⁹⁴ in which the Illinois Supreme Court wrote that "[i]n general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. Public policy is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions."⁹⁵ Some courts, not wanting to confine public policy though wary of giving courts free rein, have only marginally expanded the public policy exception to include clear legislative mandates or judicial decisions.⁹⁶

Though these differing views of public policy add to its amorphous nature, there are a few shared themes. First, courts agree that a public policy exception should not be applied in cases that only concern an individual right and do not affect society as a whole. This is difficult because the analysis of the individual is usually intertwined with the analysis of the group. Second, when an employee is terminated for reasons contrary to the purpose of a statute, it is appropriate to perform a public policy analysis. Third, courts have to be cautious in granting a public policy exception. The public policy exception is "notoriously resistant to precise definition, and that courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, 'lest they mistake their own predilections for public policy which deserves recognition at law.'"⁹⁷ Thus, courts should carefully scrutinize every claim based on public policy arguments.

B. How Erring on the Side of Caution Led to Inconsistent Case Law

The court in *Weissman*⁹⁸ based its decision on previously constructed criteria that an employee must prove that "the action[s] directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's rights as a worker."⁹⁹ The court found for Crawford Rehabilitation because it determined that Weissman was not able to show that there was any "clearly expressed

93. *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980).

94. *Palmateer v. International Harvester Co.*, 421 N.E. 2d 876 (Ill. 1981).

95. *Id.* at 878.

96. *See Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 593 (Minn. Ct. App. 1986).

97. *Sentry Ins.*, 824 P.2d at 687 (quoting *Hentzel v. Singer Co.*, 188 Cal. Rptr. 159 (Cal. 1992)) *See also* *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1034 (Ariz. 1985).

98. *Weissman*, 938 P.2d at 552.

99. *Id.* at 553 (quoting *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 524 (Colo. 1996) (citing *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992))).

public policy relating to an employee's basic rights or duties."¹⁰⁰ The court was not able to discern any clearly expressed public policy because it was too anxious to follow other courts. The court failed to see that Weissman's claims would pass both the strict statutorily-based public policy exception requirements and the broad public policy requirements that have been laid out by other courts.

The court's failure to acknowledge Weissman's public policy arguments is especially apparent when it held that no public policy concern was implicated when an employee was terminated for inquiring about her rights in the workplace.¹⁰¹ The court failed to implement the proper public policy analysis in coming to its decision. This issue was not just a private matter between Weissman and Crawford, but a public matter that concerned the general relationship between employers and employees. This public policy concern is evidenced by legislative purpose as well as general notions of public welfare.

C. The Public Policy Reasoning for Employee Inquiries

The court erred when it decided that Weissman's claim for wrongful discharge was not based on public policy concerns. The wrongful discharge claims were based on Weissman's allegations that she was fired because she contacted the Department of Labor to inquire about her right to take rest breaks.¹⁰² Instead of focusing its public policy analysis on Weissman's rights to rest breaks, the court should have focused its analysis on Weissman's right to inquire about her rights.¹⁰³ The real issue was whether it was acceptable for employers to terminate employees for securing information about employees' rights at work. Analyzed under this light, the cause of action would pass both the narrow legislation-based public policy test and the less constrained test of public policy.

The freedom of an employee to inquire about workplace rights passes the public policy test because it falls under one of the four situations in which courts have generally found a public policy violation. Crawford's termination of Weissman for inquiring about her rights violates the rule that an employer cannot prevent an employee from exercising a statutory right or privilege. Although legislation specifically prohibiting employers from terminating employees for inquiring about their rights does not exist, it is implied in most employee rights legisla-

100. See *Weissman*, 938 P.2d at 553.

101. *Id.* at 541.

102. See *id.* at 543.

103. See *id.* at 551.

tion. It would be illogical to construct laws that protect employees and then allow employers to restrict employee access to these laws.

If an employer is allowed to terminate an employee for inquiring about workplace rights, then an employer can, in effect, bypass its legal obligations. The employer could keep working conditions below legal standards and the risk of being terminated would deter employees from inquiring about their rights. Employers would also have incentives to terminate those employees who know their rights. Thus, legislation designed to protect employees from poor working conditions would be frustrated. The court's analysis in *Weissman* is faulty because Weissman's cause of action was based not on her right to take breaks, but on her right to ask about her rights at work. The court erroneously determined that the main issue in *Weissman* was a private matter and not of public concern.

Since this issue centers on the ability of all employees to inquire about their employment rights and not just on Weissman's individual rights, the issue lies in the public policy sphere. As previously discussed, not only does this decision create incentives for employers to terminate employees for inquiring about their rights, it encourages the termination of employees who uncover deficiencies in the workplace.

V. CONCLUSION

The use of after-acquired evidence in employment situations has developed in a slow, confusing manner. The *McKennon* decision clarified much of this confusion and established firm rules for the use of after-acquired evidence. However, as seen in *Weissman*, the application of these ideas remains difficult. This difficulty comes from the reluctance of courts to determine which employment situations rise to the public policy level. The court in *Weissman* erroneously ignored the rules formulated in *McKennon*, stating that the claims of the plaintiff were not a matter of public policy. The court in *Weissman* should have viewed the situation as involving a public policy concern because the situation fell into one of the four instances where courts typically find a public policy issue in the employment relationship. This also shows that a rule on how to identify a public policy matter in relation to employment situations must be established in order for the *McKennon* rule to be applied effectively.

Weissman is a prime example of how courts can still complicate the after-acquired evidence issue by not correctly categorizing a claim as a public policy matter. The court was overly cautious in its application of the rule and failed to broaden its focus. It failed to consider the broad effects of its ruling on the employment relationship in Colorado. In

finding that an employee, who entered into the employment relationship under false pretenses, has no cause of action when an employer does not follow termination procedures in an employee manual, the court absolves employers of their bad acts. This is contrary to *Weissman's* conclusion that an employer should not be allowed to get away with discharging an employee in a manner that the public would not tolerate. The Court's decision also ran contrary to *McKennon's* findings when it decided that employees inquiring about their rights at work is not a matter of public policy. The decision allows employers to get away with keeping their workforce ignorant as to their rights, thus possibly creating dangerous working conditions. The court also contradicted itself when it failed to see that an employee may be granted a cause of action based on statements made by an employer in an employee manual.

The court in *Weissman* did not answer the questions left in the wake of *McKennon* because it failed to properly apply the public policy analysis. The findings in *Weissman* run contrary to *McKennon's* ideas of punishing the employer even though the employee was also at fault. This should serve as an illustration of the inconsistent case law in after-acquired evidence that still exists after *McKennon*.

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