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NOTES

TONACK V. MONTANA BANK: PREEMPTION, INTERPRETATION, AND OLDER EMPLOYEES UNDER MONTANA'S WRONGFUL DISCHARGE FROM EMPLOYMENT ACT

M. Scott Regan

I. INTRODUCTION

In 1987, the Montana Legislature enacted the Wrongful Discharge From Employment Act (WDFEA) primarily as a response to two forces: First, employers and insurance companies sought to "reduce the pot of gold at the end of the rainbow" in order to eliminate unreasonably large wrongful discharge awards and marginal wrongful discharge claims.[1] Second, due to the Montana Supreme Court's unpredictable interpretation of the implied covenant of good faith and fair dealing, the drafters of WDFEA sought to provide certainty to employment discharge law in Montana.[2]

To effectuate its objective of reducing wrongful discharge claims and awards, the legislature made the WDFEA the exclu-

1. *Summary of H.B. 241*, 50th Mont. Leg. (Mar. 10, 1987); *Statement of Legislative Intent Concerning the Damage Limitation Contained in Section (5) of H.B. 241, Senate Judiciary Comm.*, 50th Mont. Leg. (Mar. 10, 1987) [hereinafter *Legislative Intent*]; *Montana State Senate Judiciary Comm. Minutes of the Meeting*, 50th Mont. Leg. (Mar. 10, 1987) (statement of Rep. Spaeth); LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 108-09 (1990); Telephone Interview with LeRoy Schramm, Chief Legal Counsel for the Montana University System (Oct. 13, 1994).

2. *See* Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge From Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53, 56 (1992); Schramm, *supra* note 1, at 106-09.

sive remedy for wrongful discharge[3] and capped the amount recoverable for a wrongful discharge at four years of lost wages and fringe benefits.[4] The drafters of the WDFEA intended the four-year damage limitation to represent a reasonable compromise between the competing interests of the employer and the discharged employee.[5] That compromise was to protect employers from unreasonably large damage awards and adequately compensate discharged employees during their search for new employment. Further, in order to ensure that the WDFEA provides the exclusive remedy for wrongful discharge, the legislature created a preemption provision. The preemption provision prevents discharge claimants from pursuing a WDFEA remedy when another state or federal statute provides a remedy or procedure for contesting the dispute.[6]

Prior to the recent case of *Tonack v. Montana Bank*,[7] Montana courts inconsistently applied the preemption provision,[8] and employers and employees did not yet know how the four-year damage limitation would affect wrongfully discharged employees.[9] In *Tonack*, the Montana Supreme Court provided a procedure for courts to follow when plaintiffs file concurrent claims under the WDFEA and another state or federal statute. Moreover, the holding in *Tonack* illustrated a fear shared by many drafters of the WDFEA—that the four-year damage limitation of the WDFEA does not represent a reasonable compromise between the competing interests of the employer and the wrongfully discharged older employee.

This Note discusses the *Tonack* court's interpretation of the preemption provision and how that decision and the four-year damage limitation affect wrongfully discharged older employees. Part II of this Note discusses the historical and legislative background of the WDFEA and preemption provision. Part III describes *Tonack's* facts, procedure, and holding. Part IV analyzes the holding of *Tonack* and how the preemption provision of the WDFEA might be interpreted in the future. Lastly, Part V concludes by suggesting that the WDFEA does not provide a reason-

3. MONT. CODE ANN. § 39-2-902 (1993).
4. MONT. CODE ANN. § 39-2-905(1) (1993).
5. *See Legislative Intent*, *supra* note 1.
6. MONT. CODE ANN. § 39-2-912(1) (1993).
7. 258 Mont. 247, 854 P.2d 326 (1993).
8. *Compare* Vance v. ANR Freight Systems, Inc., 9 Mont. Fed. Rpts. 36 (D. Mont. 1991); Higgins v. Food Servs. of Am., 9 Mont. Fed. Rpts. 529 (D. Mont. 1991) *with* Deeds v. Decker Coal Co., 246 Mont. 220, 805 P.2d 1270 (1990).
9. *See infra* part V.

able compromise for wrongfully discharged older employees and calls for legislative reform.

II. HISTORY

A. *Enactment of the WDFEA*

The Montana Legislature enacted the WDFEA partially in response to the Montana Supreme Court's unpredictable interpretation of the implied covenant of good faith and fair dealing.[10] The WDFEA was enacted to provide certainty to employers and employees by specifically delineating the elements of a wrongful discharge.[11]

The WDFEA provides that a discharge is wrongful if it was not for good cause or in retaliation for an employee's refusal to violate public policy.[12] The WDFEA also codified the principle that a discharge is wrongful if it violates the express provisions of the employer's written personnel policies.[13] In adopting the written personnel policy provision, the Montana Legislature sought to discourage wrongful termination suits "by establishing clear policies and guidelines for employment and discharge."[14] Employee actions for wrongful discharge based on an employer's violation of written personnel policies were carried over from the common law in *Nye v. Department of Livestock*.[15] In *Nye*, the Montana Supreme Court held that an employer's violation of written personnel policies may provide a basis for a wrongful termination claim.[16] Prior to the enactment of the WDFEA, the court in *Gates v. Life of Montana Insurance Co.*[17] allowed a plaintiff to recover for an employment termination in violation of the implied covenant of good faith and fair dealing.[18] In *Gates*, the Montana Supreme Court applied the covenant of good faith and fair dealing to written personnel policies and stated:

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10. *See* Schramm, *supra* note 1, at 95, 108.

11. MONT. CODE ANN. § 39-2-905(1) (1993); Meech v. Hillhaven W., Inc., 238 Mont. 21, 51, 776 P.2d 488, 506 (1989); Bierman & Youngblood, *supra* note 2, at 56.

12. MONT. CODE ANN. § 39-2-904(1)-(2) (1993).

13. *See* MONT. CODE ANN. § 39-2-904(3) (1993).

14. *Rationale of Proposed Amends. to H.B. 241, Senate Judiciary Comm.*, Proposed Amend. No. 7, First Reading, 50th Mont. Leg., at 3 (Mar. 10, 1987). This was the purpose of the provision, at least according to the *ad hoc* committee.

15. 196 Mont. 222, 639 P.2d 498 (1982); *see also* Schramm, *supra* note 1, at 109-10.

16. *Nye*, 196 Mont. at 228, 639 P.2d at 502.

17. 196 Mont. 178, 638 P.2d 1063 (1982).

18. *Id.* at 184, 638 P.2d at 1067.

> The employer later promulgated a handbook of personnel policies establishing certain procedures with regard to terminations. . . . The employee, having faith she would be treated fairly, then developed a peace of mind associated with job security. If the employer has failed to follow its own policies, the peace of mind of its employee is shattered and injustice is done.[19]

The court applied the covenant of good faith and fair dealing "upon objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly."[20] Therefore, an employee had a cause of action when her reasonable expectations of job security or fair treatment were violated. Often, the employee's expectations were based on the employer's written personnel policies.

After *Gates*, the Montana Supreme Court expanded the scope of remedies and persons protected under the covenant of good faith and fair dealing.[21] Then, beginning in 1985, the court began to "refine" and "moderate" its former decisions premised on the holding in *Gates*. The court's expansion and contraction of the covenant of good faith and fair dealing created unpredictability in the employment discharge law in Montana.[22] This unpredictability, coupled with what employers perceived as unreasonably large awards to wrongful discharge claimants, led Montana employers and insurance companies (who paid the employment discharge awards) to seek legislative reform.[23] The Montana Legislature responded with the WDFEA. By enacting the WDFEA, the legislature was able to significantly limit the scope of remedies previously available under the covenant of good faith and fair dealing.[24]

B. The Section 912(1) Preemption Provision

Section 912(1) of the WDFEA preemption provision provides that the WDFEA will not apply when a discharge is subject to any state or federal statute that provides a procedure or remedy

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19. *Id.*
20. Dare v. Montana Petroleum Mktg., 212 Mont. 274, 282, 687 P.2d 1015, 1020 (1984).
21. Schramm, *supra* note 1, at 95.
22. Schramm, *supra* note 1, at 95.
23. Schramm, *supra* note 1, at 108; *Legislative Intent*, *supra* note 1.
24. Schramm, *supra* note 1, at 95.

for contesting the dispute.[25] The WDFEA was designed to give statutory protection to those wrongfully discharged employees who otherwise would not have protection under a contract or other statutory scheme.[26] The legislature did not intend to provide a discharged employee with a WDFEA cause of action when the employee had a remedy under another federal or state statute.[27] Similarly, the WDFEA will not apply when a discharged employee is covered by a collective bargaining agreement or a written contract for a specific term.[28] Thus, in addition to limiting the amount recoverable for a wrongful discharge, the legislature also limited the scope of persons protected by the WDFEA.

Despite the language of the preemption provision, in 1991, two federal district courts in *Vance v. ANR Freight Systems, Inc.*[29] and *Higgins v. Food Services of America, Inc.*,[30] held that when the facts of a discrimination claim were separate and distinct from those of a wrongful discharge claim, the WDFEA preemption provision would not apply. Thus, under *Vance* and *Higgins*, discharged employees were not foreclosed from pursuing a remedy under both a federal discrimination statute and the WDFEA.[31] However, two years later in *Tonack v. Montana Bank*, the Montana Supreme Court declined to follow *Vance* and *Higgins* and held that the section 912(1) preemption provision prevented the plaintiff from maintaining a concurrent age discrimination and wrongful discharge claim.[32] The holding in *Tonack* resumed a course true to the language of the section 912(1) preemption provision, and demonstrated the WDFEA's impact upon wrongfully discharged older employees.

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25. MONT. CODE ANN. § 39-2-912(1) (1993).

26. *See* MONT. CODE ANN. § 39-2-912(1)-(2) (1993).

27. *See* MONT. CODE ANN. § 39-2-912 (1993); *see also* Meech v. Hillhaven W., Inc., 238 Mont. 21, 776 P.2d 488 (1989). The court in *Meech* stated:

> The Act exempts from its provisions causes of action for discharge governed by other state or federal statutory procedures for contesting discharge disputes. For example, the Act exempts from its provisions, discriminatory discharges, and actions for wrongful discharge from employment covered by written collective bargaining agreements or controlled by a written contract for a specific term.

Id. at 25, 776 P.2d at 490.

28. *See* Irving v. Sch. Dist. No. 1-1A, 248 Mont. 460, 813 P.2d 417 (1991); Fellows v. Sears, Roebuck & Co., 244 Mont. 7, 795 P.2d 484 (1990).

29. 9 Mont. Fed. Rpts. 36 (D. Mont. 1991).

30. 9 Mont. Fed. Rpts. 529 (D. Mont. 1991).

31. *See Vance*, 9 Mont. Fed. Rpts. at 39-40; *Higgins*, 9 Mont. Fed. Rpts. at 530.

32. *Tonack*, 258 Mont. at 254-55, 854 P.2d at 331.

III. *TONACK V. MONTANA BANK*

A. The Facts

The Montana Bank of Sidney hired Betty Tonack (Tonack) as a bank teller in 1981.[33] The Sidney bank promoted Tonack to teller supervisor[34] and, in 1988, Tonack learned of an opening with an affiliated bank in Billings—the Montana Bank of Billings (Bank).[35] The Bank interviewed Tonack and offered her the position of Financial Services Representative (FSR).[36] Tonack accepted the position with the Bank as FSR,[37] moved to Billings, and began work in October of 1988.[38]

In January 1990, Tonack's supervisors evaluated Tonack's performance as FSR "as fully satisfactory [and] 'more toward the excellent side.'"[39] Due to Tonack's favorable evaluation for her performance as FSR, the Bank gave her a pay raise and the additional responsibilities of "Customer Service Representative" and "Teller Supervisor" (CSR/Teller Supervisor).[40]

On May 1, 1990, Lynette Kiedrowski became president of the Bank and Tonack's direct supervisor.[41] Ten days later, Kiedrowski evaluated Tonack's performance and concluded that Tonack was an "Employee Progressing at Standard."[42] Soon however, a series of events compromised Tonack's assent at the Bank[43] and eventually lead to her termination. Tonack's trou-

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33. *Id.* at 250, 854 P.2d at 328.

34. *Id.*

35. Respondent's Brief at 5, Tonack v. Montana Bank, 258 Mont. 247, 854 P.2d 326 (1993) (No. 92-343).

36. *Id.*

37. In district court, Judge Filner concluded that "Tonack was given a job description for her position as FSR which specifically set forth her duties and responsibilities, as well as the performance expectations of Defendant Bank." Tonack v. Montana Bank, No. DV 91-070, Findings of Fact and Conclusions of Law (June 3, 1992), Finding of Fact No. 7, at 3 [hereinafter Findings of Fact].

38. *Tonack*, 258 Mont. at 250, 854 P.2d at 326.

39. *Id.*

40. *See id.* at 250, 854 P.2d at 328. *See also* Findings of Fact, *supra* note 37, No. 10, at 4. Incidentally, the Bank did not give Tonack "a job description outlining her new job duties and responsibilities or the performance expectations of the Defendant Bank (as was done when Tonack began her job in 1988 as FSR)." Findings of Fact, *supra* note 37, No. 10, at 4.

41. *Tonack*, 258 Mont. at 250, 854 P.2d at 328; *see also* Findings of Fact, *supra* note 37, No. 16, at 6.

42. Findings of Fact, *supra* note 37, No. 17, at 6.

43. During Kiedrowski's review of Tonack on May 10, 1990, Kiedrowski noted: "[Tonack's] next opportunity is to Financial Services Executive. Once CSR and FSR are consistently at satisfactory levels that option can be explored." Respondent's Brief

bles began in August of 1990 when the Bank conducted an internal audit and discovered two discrepancies: Someone within the Bank had embezzled five hundred dollars in travelers checks and improperly issued a certificate of deposit without obtaining payment from the customer.[44] Despite the fact that Tonack was not responsible for auditing travelers checks and was away on vacation when the thefts occurred,[45] Kiedrowski blamed Tonack for the discrepancies.[46] As a result, Kiedrowski, in violation of the Bank's written personnel policies, placed Tonack on thirty days probation and stripped Tonack of all her duties except those of FSR.[47]

During Tonack's probationary period, Kiedrowski instructed Tonack to cross-train Rhonda Kreamer, a substantially younger Bank employee, as a "backup" FSR.[48] Tonack discovered that the Bank had ordered business cards bearing the name Rhonda Kreamer with the title of FSR, despite the fact that the Bank only had one FSR position—that occupied by Tonack.[49] During

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at 8, *Tonack* (No. 92-343).

44. Appellant's Brief at 5, Tonack v. Montana Bank, 258 Mont. 247, 854 P.2d 326 (1994) (No. 92-343).

45. Judge Filner found that the "defalcation" discovered during the audit was not Tonack's fault because of the lack of an "approved job description" that would sufficiently hold a CSR/Teller Supervisor responsible for deficiencies in the "Travelers Check area." Findings of Fact, *supra* note 37, No. 22, at 7-8. The position of CSR/Teller Supervisor had not existed for an extended period of time before Tonack was given the position. Findings of Fact, *supra* note 37, No. 12, at 4-5. After the Bank gave Tonack the job, Kiedrowski requested Tonack to draft her own job description. Tonack drafted the job description (which excluded auditing responsibilities in general and in the traveler checks area) and delivered it to Kiedrowski; Kiedrowski apparently did not find any deficiencies with the job description because she indicated no intent to alter the document as drafted by Tonack. *See* Findings of Fact, *supra* note 37, No. 19, at 6-7.

46. The Bank maintained that the discrepancies occurred in areas under the supervision of Tonack and "the embezzlement was made possible because tellers supervised by Tonack did not keep an accurate inventory of travelers checks." Appellant's Brief at 5, *Tonack* (No. 92-343). However, the district court found that the discrepancy was not Tonack's responsibility because of the absence of a job description for CSR/Teller Supervisor and the fact that the Bank had specifically retained auditing responsibilities in the operations department of the Bank. Findings of Fact, *supra* note 37, No. 22, at 7-8.

47. *Tonack*, 258 P.2d at 250, 854 P.2d at 328. The Bank's written personnel manual explicitly stated: "[p]robation is usually for a period of [90] days and the employee should be carefully observed for improvement during this period." Findings of Fact, *supra* note 37, No. 23, at 8. During Tonack's 30 day probationary period, an employee in the operations area of the Bank confessed to the "theft" of the travelers checks, and yet, Tonack still remained on probation. Findings of Fact, *supra* note 37, No. 25, at 8-9.

48. *Tonack*, 258 Mont. at 251, 854 P.2d at 328.

49. *Id.*

the week Tonack was supposed to cross-train Kreamer, the individual who was scheduled to replace Kreamer during the training failed to show up for work.[50] Kiedrowski was out of town for the week and, because the replacement had not shown up, Tonack decided to postpone the cross-training of Kreamer.[51] Kiedrowski returned from vacation and promptly fired Tonack "as a result of her failure to correct deficiencies in the CSR/Teller Supervision area and her inability to work with others."[52] At the time of her termination, Tonack was forty-nine years old and had worked for the Bank for almost ten years.[53]

B. Procedure & Holding

Tonack filed a wrongful discharge action against the Bank under the WDFEA. Shortly after filing the complaint in district court, Tonack's counsel contacted Gary Nichols, Tonack's supervisor before Kiedrowski and vice president of the Bank. Tonack's counsel discovered age discrimination to be the underlying reason for Tonack's termination.[54] Nichols told Tonack's counsel that George Balback, president of the holding company for the Bank, "wanted Ms. Tonack terminated because of her age and background."[55] Balback expressed discontent that the former and current presidents of the bank could not manage to terminate Tonack, but was confident Kiedrowski could "get it handled."[56]

As a result of Nichols' information, Tonack filed an age discrimination claim with the Montana Human Rights Commission and the Equal Employment Opportunity Commission. She also amended her district court action to include violations under the ADEA.[57] At trial, the court found that the Bank violated both the ADEA and the WDFEA in terminating Tonack.[58] The court awarded Tonack four years of future lost wages and benefits—the maximum allowed under the WDFEA—and also awarded damages under the ADEA (calculated from the last date of

50. *Id.* at 251, 854 P.2d at 329.
51. *Id.*
52. Findings of Fact, *supra* note 37, No. 29, at 10; *see also Tonack*, 258 Mont. at 251, 854 P.2d at 329.
53. *Tonack*, 258 Mont. at 250-51, 854 P.2d at 328-29.
54. Respondent's Brief at 14, *Tonack* (No. 92-342).
55. Findings of Fact, *supra* note 37, No. 14, at 5.
56. *Tonack*, 258 Mont. at 252, 854 P.2d at 329-30.
57. Respondent's Brief at 15-16, *Tonack* (No. 92-343).
58. *Tonack*, 258 Mont. at 251, 854 P.2d at 329.

damages under the WDFEA until Tonack's expected date of retirement).[59]

On appeal, the Bank claimed that the district court incorrectly interpreted or misapplied the provisions of the WDFEA.[60] The Bank contended that the WDFEA preemption provision prevented Tonack from pursuing both the ADEA and WDFEA claim. The Montana Supreme Court, with one dissent,[61] agreed with the Bank and held that the WDFEA preemption provision precluded Tonack from recovering damages under the WDFEA.[62]

IV. ANALYSIS

A. Tonack & Concurrent Claims Under the WDFEA

The issues raised by Tonack's complaint created a quandary for the Montana Supreme Court. On one hand, the district court found that Tonack's employer violated the WDFEA by breaching its personnel policies and terminating Tonack without good cause.[63] On the other hand, the district court concluded that Tonack's employer also engaged in age discrimination.[64] However, despite the discharge without good cause and the importance of the personnel policy provision of the WDFEA,[65] the preemp-

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59. *Id.*

60. *Id.* at 250, 854 P.2d at 328.

61. Justice Trieweiler agreed with the holdings in *Vance* and *Higgins*, arguing that the preemption provision should not apply to Tonack because she alleged "separate and independent reasons why her termination from employment was unlawful." *Id.* at 256, 854 P.2d at 332 (Trieweiler, J., concurring in part and dissenting in part). Justice Trieweiler also argued that the preemption provision should not apply because no other statute provided a remedy for Tonack's written personnel policy claim. *Id.*

62. *Tonack*, 258 Mont. at 254-55, 854 P.2d at 331.

63. The Bank violated its written personnel policy by failing to give Tonack a warning prior to being on placed on probation; furthermore, the written policy stated that the usual probationary period was 90 days. Kiedrowski placed Tonack on a 30 day probationary period. Findings of Fact, *supra* note 37, No. 23, at 8. The Bank terminated Tonack without good cause by failing to provide evidence of Tonack's deficient performance. Findings of Fact, *supra* note 37, No. 36, at 11.

64. Findings of Fact, *supra* note 37, No. 38, at 12.

65. *See supra* part II.A. Two recent decisions by the Montana Supreme Court illustrate the importance of the written personnel policy provision of the WDFEA: Miller v. Citizens State Bank, 252 Mont. 472, 830 P.2d 550 (1992), and Kearney v. KXLF Communications, Inc., 263 Mont. 407, 869 P.2d 772 (1994). In *Kearney* (decided after *Tonack*), the court held that an express written personnel policy may exist despite its absence from an employee handbook. In *Kearney*, the plaintiff argued that his employer's express written personnel policy existed in the form of pre-printed evaluation forms used to evaluate all employees and a memo from a supervisor stat-

tion provision prevented Tonack from maintaining concurrent claims under the ADEA and WDFEA.[66]

The Montana Supreme Court reversed the district court's award to Tonack under both the ADEA and WDFEA and outlined the following procedure to be utilized when a plaintiff files concurrent claims under the WDFEA and another state or federal statute:

> Whether a discharge will ultimately be "subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute" is not immediately known when a claim is filed. This must be determined before it is known whether the Wrongful Discharge Act may be applied. It is established only when a finder of fact has made that determination or when judgment on the claim has otherwise been entered. Therefore, we conclude that claims may be filed concurrently under the Wrongful Discharge Act . . . but if an affirmative

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ing that "[e]ach person should get an evaluation of their performance at least one time per year." 263 Mont. at 418, 869 P.2d at 778. By allowing express written personnel policies to exist in forms other than the employer's handbook, the *Kearney* court seems to be broadly interpreting the scope of the written personnel policy provision. This broad interpretation of the provision is consistent with prior Montana Supreme Court decisions on the issue. *See, e.g.*, Buck v. Billings Mont. Chevrolet, Inc., 248 Mont. 276, 284-85, 811 P.2d 537, 542 (1991) (holding that a termination in light of a written personnel policy that "assured [the plaintiff's] continued employment if his job performance and economic circumstances remained satisfactory" may be actionable when the plaintiff continued to produce for his financially stable employer); *see also* Bierman & Youngblood, *supra* note 2, at 71-73 ("The Montana Supreme Court in *Buck* appears to be giving a fairly wide range of latitude to the language contained in section 904(3) of the WDFEA.").

In *Miller*, the plaintiff sued under the WDFEA, alleging her employer terminated her without "good cause" and in violation of its written personnel policies. The plaintiff alleged that her employer violated its personnel policies by failing to provide her with a "formal" warning that "her continued substandard performance would result in dismissal." *Miller*, 252 Mont. at 475, 830 P.2d at 552. In a rather brief opinion, the Montana Supreme Court held that in addition to an unfavorable written evaluation, the employer warned the plaintiff on at least three occasions that her poor performance would result in termination. *Id.* at 475, 830 P.2d at 551-52. The court held that the plaintiff was unable to prove a wrongful discharge because the employer carefully followed its own written personnel policies. *Id.* at 475, 830 P.2d at 552. The court did not, however, state whether an unwritten oral warning would constitute a "formal" warning consistent with the employer's written personnel policies. The decision in *Miller* nonetheless demonstrates the court's dedication to the legislative and historical directive to encourage employers to follow their own express written personnel policies. Therefore, as demonstrated by *Kearney* and *Miller*, the Montana Supreme Court broadly determines what constitutes an employer's express written personnel policies; however, once it finds those policies, the court—consistent with the legislative intent and pre-WDFEA case law—is stringently holding both the employer and the employee to the terms of those policies.

66. *Tonack*, 258 Mont. at 254-55, 854 P.2d at 331.

determination of the claim is obtained under such other statutes, the Wrongful Discharge Act may no longer be applied.[67]

B. Modification of Deeds v. Decker Coal Co.

The *Tonack* court held that since the district court made the factual determination that the ADEA "applied" to Tonack's discharge, Tonack was not able to recover under the WDFEA.[68] The court departed from its previous interpretation of the preemption provision in *Deeds v. Decker Coal Co.*[69]

In *Deeds*, the Montana Supreme Court held that the National Labor Relations Act (NLRA), a federal statute, did not preempt the WDFEA because the National Labor Relations Board (NLRB) had not yet filed a formal complaint under the NLRA.[70] In *Deeds*, employees working for the Decker Coal Company (Decker) went on strike after their collective bargaining agreement had expired.[71] Decker allowed 80 employees to return to work, but discharged the remaining 152 due to allegations of "serious strike misconduct."[72] As a result, the discharged employees filed unfair labor charges with the NLRB, alleging that they were terminated in retaliation for protected union activities.[73]

The discharged employees then filed a claim under the WDFEA. The district court granted Decker's motion for summary judgment, holding that the preemption provision of the WDFEA preempted the plaintiffs state claim.[74] The Montana Supreme Court reversed, holding "[s]hould the NLRB eventually decide to enter into the dispute by filing a complaint on behalf of the discharged employees, a 'procedure or remedy for contesting the dispute' would be set in motion, and the statutory [preemption provision] would apply."[75] Thus, if the NLRB had filed a formal

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67. *Id.* at 255, 854 P.2d at 331.

68. *Id.*; *see* Meech v. Hillhaven W., Inc., 238 Mont. 21, 25, 776 P.2d 488, 490 (1989) (stating that the WDFEA "exempts from its provisions causes of actions for . . . discriminatory discharges").

69. 246 Mont. 220, 805 P.2d 1270 (1990). The court in *Tonack* stated: "To the extent that this conclusion modifies our holding in Deeds, that opinion is so modified." *Tonack*, 258 Mont. at 255, 854 P.2d at 331.

70. *Deeds*, 246 Mont. at 223, 805 P.2d at 1271-72.

71. *Id.* at 222, 805 P.2d at 1271.

72. *Id.*

73. *Id.*

74. *Id.* at 222, 805 P.2d at 1271.

75. *Deeds*, 246 Mont. at 223, 805 P.2d at 1271.

complaint on behalf of the employees, the federal law would have preempted the WDFEA claim. However, since the NLRB had not filed a formal complaint, the *Deeds* court determined that, in order to ensure the plaintiffs a forum, proceedings had to be stayed at the district court level pending NLRB action.

The readily distinguishable facts of the two cases raise questions as to how *Tonack* actually modified *Deeds*. *Deeds* involved potential conflicting statutes: the plaintiffs filed a wrongful discharge claim while the NLRB investigated the unfair labor practices charge.[76] In *Tonack*, however, the plaintiff filed two actions—one federal, one state—which, although allegedly distinct in nature, related to the same discharge.[77] The *Tonack* decision suggests that a court[78] will be charged with the responsibility of determining whether another state or federal statute applies (and thus whether that statute preempts the WDFEA) only when a plaintiff files concurrent claims under the WDFEA and another state or federal statute.[79] The holding in *Deeds* complicates the issues and permits alternative conclusions based on two plausible interpretations of *Tonack*.

Under the first interpretation of *Tonack*, a court would ignore the number of formal claims filed; it would apply the literal language of *Tonack* by factually determining in every WDFEA claim if the discharge is subject to any other state or federal statute providing a remedy or procedure for contesting the dispute. The WDFEA would no longer apply if a wrongfully discharged employee filed only a WDFEA claim, but a court nonetheless determined that the discharge applied to another state or federal statute. Therefore, if the holding in *Tonack* was applied

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76. *Id.* at 222, 805 P.2d at 1271.

77. *Tonack*, 258 P.2d at 247, 854 P.2d at 331.

78. The use of the word "court" in this context means the finder of fact *or* the trial judge. The *Tonack* court held that a plaintiff will be entitled to a WDFEA remedy "only when a finder of fact has made that determination or when judgement on the claim has otherwise been entered." *Id.* at 255, 854 P.2d at 331. Thus, the court seems to be inviting motions for summary judgment and jury instructions to determine whether the WDFEA will apply when a plaintiff files concurrent claims.

79. This conclusion is supported by the facts of *Tonack* and the language of the decision: "[The court] conclude[s] that claims may be filed concurrently under the Wrongful Discharge Act and other state or federal statutes described in § 39-2-912, MCA, but if an affirmative determination of the claim is obtained under such other statutes, the Wrongful Discharge Act *may no longer be applied*." *Tonack*, 258 Mont. at 255, 854 P.2d at 331 (emphasis added). The court's use of the word "may" is troubling. By definition, "may" means permissive, although the court does not seem to be permitting a choice when another statute applies to the WDFEA. Certainly, the ultimate holding in *Tonack* or the plain language of the § 912(1) preemption provision does not suggest a choice.

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to the factual situation in *Deeds*, the result in *Deeds* would be different, the NLRA would preempt the state wrongful discharge claim, and the plaintiffs would not be guaranteed a forum.

Under the second interpretation, *Tonack* would modify *Deeds*, the result in *Deeds* would not change, and the plaintiffs would still be guaranteed a forum. A court utilizing this interpretation would determine if another state or federal statute applied to the discharge *only* when a plaintiff filed *concurrent* claims under the WDFEA and another state or federal statute.[80] Then, if a court determined that the federal or state statute applied to the plaintiff's discharge, the WDFEA claim would be preempted.

The facts of *Tonack* illustrate why the second interpretation is the more logical of the two. If Nichols, the former vice president of the Bank, had not told Tonack's attorney that the Bank's termination of Tonack was based on considerations of age, Tonack would never have filed an ADEA claim. If Tonack had no knowledge that her termination was age-motivated, her ADEA claim would exist only in theory. However, under the first interpretation, the Bank could assert that the ADEA preempted Tonack's WDFEA claim, even if she did not file an ADEA claim. Certainly, the drafters of the WDFEA did not envision such a narrow interpretation of the preemption provision.[81]

The second interpretation would modify *Deeds* only to the extent that *Tonack* established a procedure to be followed when a plaintiff files concurrent claims under the WDFEA and another state or federal statute. If the Montana Supreme Court applied the second interpretation of *Tonack* to the factual situation in *Deeds*, the result in *Deeds* would not change and the proceedings would be stayed at the district court level pending NLRB action.

Future Interpretation of the Preemption Provision

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80. *See supra* text accompanying note 67.

81. If, however, the wrongfully discharged employee's complaint clearly suggests that the proper remedy was under another state or federal statute, then the WDFEA would no longer apply. *See, e.g.*, Harrison v. Chance, 244 Mont. 215, 797 P.2d 200 (1990). In *Harrison*, after the plaintiff's employer made several unwanted sexual advances and demanded that the plaintiff either "put out or get out," the plaintiff resigned and filed a claim alleging tortious battery, intentional infliction of emotional distress, wrongful discharge, the tort of outrage, and breach of the implied covenant of good faith and fair dealing. *Id.* at 218, 223, 797 P.2d at 202, 205. The defendant employer asserted that the plaintiff's proper remedy was the Human Rights Act, which provided the exclusive remedy for sexual harassment. *Id.* at 219, 797 P.2d at 202. The Montana Supreme Court agreed, holding that since the plaintiff's tort theories were "based" upon and "ar[o]se" from sexual harassment, her tort claims were preempted by the Human Rights Act. *Id.* at 223, 797 P.2d at 205.

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Arguments over the two interpretations of *Tonack* may be less important than how the Montana Supreme Court will interpret the preemption provision in the future. Since the facts before the *Tonack* court involved concurrent claims—and not the dilemma raised in *Deeds*—the proper question may be how the court will interpret the preemption provision when plaintiffs file concurrent claims. The holding in *Tonack* will make it extremely difficult, if not impossible, for wrongful discharge claimants to maintain concurrent WDFEA and discrimination claims.

The *Tonack* court declined to "completely follow" the decisions in *Vance v. ANR Freight Systems, Inc.*[82] and *Higgins v. Food Services of America, Inc.*,[83] holding that Tonack's wrongful discharge and age discrimination claims "relate[d] to one discharge from employment at the bank."[84] The court held that the ADEA preempted Tonack's wrongful discharge claim because the district court found that the ADEA "applied" to Tonack's discharge from employment.[85] Apparently, the Montana Supreme Court presumed that because the district court found that the Bank had a discriminatory motive for discharging Tonack, the ADEA "applied" to Tonack's discharge.[86] Thus, the court suggests that any time a trial court determines that an employer had a discriminatory motive for discharging an employee, the discrimination statute will "apply." As a result, *Tonack* will make it very difficult for future wrongful discharge claimants to establish a separate and distinct factual predicate for a wrongful discharge and discrimination claim. In other words, wrongful discharge claimants will likely be unable to successfully make future *Vance* and *Higgins* arguments.

The Montana Supreme Court's refusal to follow *Vance* and *Higgins* is consistent with the legislature's attempt to provide discharged employees with only one statutory remedy.[87] Moreover, the court's holding may have the practical effect of compelling wrongful discharge claimants to choose between the WDFEA and the applicable discrimination statute when faced with multiple claims. Those claimants who do choose to file concurrent claims under the WDFEA and another state or federal statute risk losing their WDFEA claim. Consequently, if a wrongfully

82. 9 Mont. Fed. Rpts. 36 (D. Mont. 1991).
83. 9 Mont. Fed. Rpts. 529 (D. Mont. 1991).
84. *See Tonack*, 258 Mont. at 254, 854 P.2d at 331.
85. *Id.* at 255, 854 P.2d at 330.
86. *See* Findings of Fact, *supra* note 37, Nos. 37-38, at 12.
87. *See supra* note 27 and accompanying text.

discharged employee does choose to pursue only a WDFEA claim,[88] the employee will be able only to recover four years of lost wages and fringe benefits—a limitation particularly significant for the wrongfully discharged older employee.[89]

V. WRONGFULLY DISCHARGED OLDER EMPLOYEES AND THE FOUR-YEAR DAMAGE LIMITATION

The drafters of the WDFEA recognized that the four-year damage limitation might be insufficient for wrongfully discharged older employees and attempted to exempt them from the limitation.[90] The legislature adopted the exemption in the Committee of the Whole but killed it late in the amendment process in Conference Committee.[91] The failure of the legislature to exempt wrongfully discharged employees from the four-year damage limitation illustrates that the legislature disregarded the fact that, for wrongfully discharged older employees, the WDFEA does not represent a reasonable compromise between the competing interests of the employer and employee.[92]

The four-year damage limitation within the WDFEA seems logical when applied to most employees, but the limitation does not properly account for the significant barriers faced by older workers in the job market. When the drafters of the WDFEA created the four-year limitation for lost wages and fringe benefits, they rationalized that the limitation was a "reasonable period of time for a discharged employee to become resituated in the labor market."[93] The legislature further stated that the four-year limitation "will act as an incentive for a discharged employee to find alternate employment that puts the employee's talents

88. A wrongfully discharged older employee may choose not to sue under a discrimination statute because the employee may not be aware of or have sufficient evidence to pursue such claim. Recall that Tonack did not know of her ADEA claim until after she filed her WDFEA claim when the former vice-president of the Bank told her she was terminated because of her age.

89. *See* discussion *infra* part V.

90. *See infra* pp. 16-17 and note 103.

91. *See Committee of the Whole Amend.*, 50th Mont. Leg. (Mar. 27, 1987); *Conference Committee Report*, 50th Mont. Leg. (Mar. 20, 1987).

92. *See Legislative Intent*, *supra* note 1; *see also* Meech v. Hillhaven W., Inc., 238 Mont. 21, 50, 776 P.2d 488, 506 (1989) (upholding the constitutionality of the WDFEA, and holding that classifications created by WDFEA are rationally related to a legitimate state interest because the statute creates greater certainty to both employers and employees and "provide[s] 'a reasonably just substitute for the common law causes it abrogate[s]'").

93. *Legislative Intent*, *supra* note 1.

to best use."[94] The reasoning used to support the limitation makes sense for most younger discharged employees who are able to re-train and find other employment; however, the same reasoning is not persuasive when applied to older workers simply because older workers, once unemployed, remain unemployed longer than any other age group.[95] Furthermore, wrongfully discharged older employees generally have very little time to become "resituated in the labor market."

Older workers are unable to re-enter the work-force as quickly as younger workers; they are often unprepared for personnel interviews, employment tests, and competition with younger workers.[96] Additionally, older individuals are often unable to work at a pay level equal to that of their former employment.[97] "Once out of work, [the] older worker will confront greater difficulties than younger counterparts in finding new employment."[98] In a recent congressional hearing entitled "Age Discrimination in the Workplace: A Continuing Problem for Older Workers," Congress found that despite the ADEA, employers still turn away older workers in favor of younger workers due to incorrect assumptions about age and job performance.[99]

During legislative consideration of the WDFEA, an *ad hoc* committee, comprised of attorneys who practiced in employment termination law,[100] recognized the potential inadequacy of the four-year damage limitation as applied to wrongfully discharged older employees. The committee proposed an amendment to the statute that excluded from the damage limitation persons within the protected age class[101] who had been employed for ten or more years with their employer.[102] The committee gave the following rationale for the exclusion:

> This amendment, while recognizing the [four year] limitation

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94. *Legislative Intent*, *supra* note 1.

95. *Age Discrimination in the Workplace: A Continuing Problem for Older Workers: Hearing Before the House Select Comm. on Aging*, 102d Cong., 1st Sess. 11 (1991) [hereinafter *Hearing*] (statement of The Honorable William J. Hughes).

96. ANDREW W. RUZICHO & LOUIS A. JACOBS, LITIGATING AGE DISCRIMINATION CASES 41 (1991).

97. RUZICHO & JACOBS, *supra* note 96, at 41; *Hearing*, *supra* note 95, at 66-70.

98. *Hearing*, *supra* note 95, at 69.

99. *Hearing*, *supra* note 95, at 68.

100. *Proposed Amends. to H.B. 241, Senate Judiciary Comm.*, Proposed Amend. No. 8, First Reading, 50th Mont. Leg. (Mar. 10, 1987).

101. The ADEA sets the protected age class at 40. 29 U.S.C § 631 (Supp. IV 1992).

102. *Proposed Amends. to H.B. 241, Senate Judiciary Comm.*, Proposed Amend. No. 8, First Reading, 50th Mont. Leg. (Mar. 10, 1987).

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> on back-pay for younger employees who have better ability to become re-employed following a wrongful discharge, allows for recognition of employees who are [forty] years or more of age and who have been employed for more than [ten] years. The example situation is an employee [fifty-seven] years of age who has worked for the employer for [thirty] years. An employee who has reached that age, and has limited his employment to the specialized needs of his employer, should be allowed to show that is unlikely that he can become re-employed at age [fifty-seven] in a similar job, if that is the evidence presented. The amendment would still allow the jury to consider whether that is a legitimate claim, and to offset other earnings. However, the legislation as written is patently unfair to older and more vulnerable employees who frequently are unable to re-enter the job force on the pay level previously earned. They should at least have the opportunity to present a legitimate claim for economic losses that extend beyond the [three]-year period.[103]

The Committee of the Whole adopted the exemption for older employees but, without explanation in the legislative history, killed it in Conference Committee.[104] One possible reason the Conference Committee killed the amendment is the same reason employers, insurance companies, and legislators desired the WDFEA in the first place: to eliminate high damage awards and marginal wrongful discharge claims.[105] In the eyes of the insurance companies and employers who sought statutory protection from increasing wrongful discharge actions and large monetary awards, the older person amendment was merely a back door to the undesired and unpredictable status of the Montana employment discharge climate that existed prior to enactment of the WDFEA.[106] Nevertheless, by refusing to adopt the older person amendment, the legislature did not follow its own legislative commitment to balance the competing interests of the employer and the discharged employee. The legislature ultimately chose to disregard the fact that older workers face greater difficulties in finding new employment than younger workers.[107] To

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103. *Rationale of Proposed Amends. to H.B. 241, Senate Judiciary Comm.*, Proposed Amend. No. 8, First Reading, 50th Mont. Leg. (Mar. 10, 1987).

104. The legislative history does not reveal what compelled the legislature to adopt the amendment so late in the process and what compelled the Conference Committee to kill the amendment.

105. *See supra* part II.A.

106. *See supra* part II.A.

107. *See supra* notes 95-99 and accompanying text.

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remedy the situation, the Montana Legislature should do as the *ad hoc* committee recommended and pass legislation relieving wrongfully discharged older employees from the four-year damage limitation of the WDFEA.

VI. CONCLUSION

The Montana Supreme Court's holding in *Tonack v. Montana Bank* raises questions of exactly how the court modified *Deeds* and how the preemption provision might be interpreted in the future. The court should adopt the second interpretation of *Tonack* and determine that the section 912(1) preemption provision applies only when a wrongfully discharged employee files concurrent claims under the WDFEA and another state or federal statute.

The potentially adverse impact the WDFEA damage limitation has upon wrongfully discharged older employees was first recognized by the drafters of the WDFEA and was recently illuminated by the *Tonack* court's refusal to follow the reasoning in *Vance* and *Higgins*. If the WDFEA is truly a balancing of interests, as it has been suggested to be, then the Montana Legislature should, as a matter of public policy, enact legislation that recognizes the unique difficulties faced by wrongfully discharged older employees in the labor market.