RENDERED: September 18, 1998; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-000780-MR

UNION UNDERWEAR COMPANY, INC., D/B/A FRUIT OF THE LOOM — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 95-CI-420

JOEL O. BARNHART
ZACK N. WOMACK, et al. — APPELLEE

OPINION
AFFIRMING

* * * * * * *

BEFORE: ABRAMSON, BUCKINGHAM, and JOHNSON, Judges.

ABRAMSON, JUDGE: Union Underwear Company, Inc., doing business as Fruit of the Loom ("FOL" or "the company"), appeals from a Warren Circuit Court judgment, based on a jury verdict, deeming it liable for age discrimination in violation of KRS 344.040(1). The company was found to have unlawfully discharged the appellee, Joel Barnhart, from his managerial position at a company facility in Lexington, South Carolina. At all times relevant to this case Barnhart resided and was employed outside Kentucky. For this reason, the company, which is incorporated in New York and maintains its headquarters in Bowling Green, Kentucky, contends

that Warren Circuit Court lacked subject matter jurisdiction over Barnhart's claim. It also contends that the judgment was not adequately supported by the evidence and was otherwise tainted by erroneous evidentiary rulings, by inaccurate jury instructions, and by opposing counsel's improper closing remarks. For the reasons that follow, we affirm the judgment against FOL.

Background Facts and Proceedings in the Trial Court

Barnhart began working for FOL in 1978, when he was hired as assistant manager at a factory in Aliceville, Alabama. In 1986 he was promoted to manager of the facility in Lexington, South Carolina. That plant is known as Jay Products and is FOL's sole elastic manufacturing facility. Later in 1986 Barnhart was promoted to Vice President of Elastic Technology. Mike Morse, who served as FOL's representative in this action, was promoted to Senior Vice President at the beginning of 1994 and since then has been employed at the company's headquarters in Bowling Green, Kentucky. Upon Morse's promotion he became Barnhart's immediate supervisor, and in October 1994 he demoted Barnhart from Vice President to a newly created manager's position.[1] Barnhart then came under the supervision of Willie Turner, whom Morse had

[1]At trial witnesses applied various titles to this position (all along the lines of "manager of elastic technology"), but there is no dispute that it represented a demotion from Vice President and that it was a new position outside the company's management structure.

recently promoted to Vice President. In March 1995, Turner discharged Barnhart, who was then 54 years of age.

Morse's promotion to Senior Vice President and his promotion of Willie Turner to Vice President appear to have been part of a substantial reorganization of FOL's technology division. Shortly prior to Morse's promotion, Stan Vinson replaced Jack Moore as Executive Vice President of Technology. Vinson too is stationed at the company's Bowling Green headquarters. He promoted Morse, and Morse, in addition to promoting Willie Turner, also promoted Mike Bridgeman to Vice President. Soon after Morse assumed responsibility for the Jay Products plant, the plant manager, Darrel Bustle, was discharged, and, as noted, Barnhart was demoted. Also, in conjunction with these personnel changes at Jay Products, management of the facility was revised. Apparently Barnhart's old position of Vice President of Elastic Technology was discontinued. Willie Turner, who oversaw three or four other factories, assumed general oversight of that plant, and Barnhart's and Bustle's responsibilities for day-to-day management of the elastic operation were assigned to a new plant manager, Ward Hall, and an assistant plant manager, Bill Maudlin. At the time of these changes Willie Turner was approximately 50 years old, Ward Hall was approximately 47, and Bill Maudlin was in his early to mid-forties.

Barnhart's new assignment as manager lasted from October 1994 until March 1995. During that period he was removed

to an office at the back of the Jay Products building and was asked to study the feasibility of FOL's opening a second elastic manufacturing plant. He visited several potential factory sites, in particular one in Jena, Louisiana, and some equipment manufacturers, but, as he was given no other job duties, he eventually found himself with nothing to do. Willie Turner came to South Carolina in March 1995 to tell Barnhart that FOL had decided against an additional elastic facility and, as a result, that it was necessary to discharge him. Barnhart testified that he asked Turner to find some other position for him, even if it meant a pay reduction, but Turner insisted that no suitable position existed. At that time, Barnhart's pension rights had vested; he would become eligible to receive retirement payments at age 55. But because he did not remain employed with the company until age 62, Barnhart was denied the opportunity to receive his retirement benefit as a lump sum.

Barnhart filed his complaint in this matter in April 1995, and an amended complaint that May, alleging that he had been illegally discharged because of his age. In December 1995 the circuit court conducted a jury trial. Barnhart, through his own testimony and by questioning company officers, sought to show that he had been a productive employee, one who had merited promotions and raises and whose dismissal was most plausibly explained as stemming from the company's desire to shed an older manager to make room for one of the younger persons seeking advancement.

FOL countered by presenting a less favorable assessment of Barnhart's work record, arguing in particular that Barnhart had been unable or unwilling to address a serious morale problem at his plant. Morse testified that as soon as he had assumed his new position over Jay Products he had begun to receive complaints from Barnhart's workers. Concerned, he had visited Jay Products to consult Barnhart and to investigate the complaints. Barnhart tried to assure him that the complaints came from a small number of chronic complainers, employees and former employees, but Morse's investigation purportedly led him to believe that the problems were more widespread. He arranged for the employees to be surveyed. There were two or three surveys, but the company introduced results only from the last, a survey conducted by a business consulting firm known as Carolina Consultants. The survey showed, FOL maintained, that Barnhart had demoralized many of his workers by countenancing a romance between two supervisors. The romance had allegedly led to unfair hiring decisions and work assignments. Purportedly the survey showed that Barnhart had failed to address complaints about this situation and others. FOL also charged that in 1993 and 1994 Barnhart had provided inaccurate estimates of Jay Products' production costs and had allowed those costs to become excessive.

Barnhart replied by showing that Morse had had the Jay Products employees surveyed three times during the months leading up to his demotion: an in-house survey by Barnhart's staff, a survey conducted by the manager of another FOL plant, and the

Carolina Consultants survey, which was performed by Chip Long, an acquaintance of Morse. According to FOL's officers on cross-examination, no records of the two earlier surveys had been preserved. Barnhart claimed that those surveys did not suggest any unusual employee dissatisfaction. Barnhart also offered expert testimony by a vocational psychologist who criticized the consultant's survey as biased; it tended, he thought, to elicit negative appraisals of management. He also thought an employee opinion survey a poor basis for judging either employee morale or managerial performance. Other factors, such as plant safety, attendance, and turn-over statistics as well as plant performance records were crucial considerations for those assessments. Barnhart's plant had consistently received good, even outstanding, ratings for safety, attendance, turn-over, and production.

With respect to FOL's stated concern that in 1993 and 1994 Barnhart had submitted inaccurate budgets for his plant, Barnhart testified that in 1994 he had requested approval for an exceptionally high budget because equipment changes were temporarily raising costs, but Morse and another officer, Jim Shay, had overridden his request and insisted upon submitting a budget no higher than recent ones. Barnhart pointed out that in 1995, after his demotion, the company had approved a Jay Products' budget significantly higher than that for 1994 and one in line with his former request.

The jury found in favor of Barnhart and recommended compensatory damages of approximately $250,000 and punitive damages of $750,000. With minor modifications this is the judgment the court awarded and from which FOL appeals.

Subject Matter Jurisdiction

FOL first contends that Warren Circuit Court did not have subject matter jurisdiction over Barnhart's claim because he worked and resided outside Kentucky. Citing KRS 344.020, "Purposes and Construction of Chapter," FOL maintains that the General Assembly did not intend KRS Chapter 344 to apply to non-residents employed outside the state. Relying on two decisions by the United States Supreme Court, BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), and Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991), FOL further maintains that Kentucky's assertion of jurisdiction over Barnhart's claim contravenes fundamental principles of federalism by imposing Kentucky's public policy on conduct outside Kentucky. We find neither of these contentions persuasive.

Subject matter jurisdiction, which derives either from the Constitution or from legislation, is a court's authority to decide the type of claim presented, and lack of that authority may be objected to at any time. Gordon v. NKC Hospitals, Inc.,

Ky., 887 S.W.2d 360 (1994). Although there is no dispute that circuit court has original subject matter jurisdiction over Kentucky employment discrimination claims, both as the trial court of general jurisdiction under our Constitution (Ky. Const. §§ 109 and 112; see also KRS 23A.010) and specifically pursuant to KRS 344.450, FOL maintains that KRS Chapter 344 provides remedies only for Kentucky residents or people employed within Kentucky. FOL insists, therefore, that the circuit court has not been vested with the authority to entertain the employment discrimination claims of nonresidents, such as Barnhart, who were employed outside the Commonwealth. Otherwise, FOL argues, Kentucky would risk the improper imposition of its law beyond the Commonwealth's territorial boundaries. We disagree.

KRS 344.040 makes it an unlawful practice for an employer

> (1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking; . . .

An "employer," according to KRS 344.030(2),

> means a person who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year and an agent of such a person, . . .

The term "individual" is not defined within Chapter 344, but KRS 344.030(5) defines "employee" as

> an individual employed by an employer, but does not include an individual employed by his parents, spouse, or child, or an individual employed to render services as a domestic in the home of the employer.

And KRS 344.010(1) defines "person" as including

> one (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, fiduciaries, receivers, or other legal or commercial entity; the state, any of its political or civil subdivisions or agencies.

Finally, KRS 344.450 provides that

> [a]ny person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.

FOL is an employer under these provisions and Barnhart is an employee. By referring to <u>any</u> person injured by an employer's unlawful act, KRS 344.450 would appear to encompass Barnhart's claim despite his residence and employment outside Kentucky. FOL contends, however, that the broadly stated cause of action created by the statutory sections quoted above is limited by the chapter's purpose section, KRS 344.020, which provides in part as follows (emphasis added):

(1) The general purposes of this chapter are:

(a) To provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended (78 Stat. 241), Title VIII of the Federal Civil Rights Act of 1968 (82 Stat. 81), the Fair Housing Act as amended (42 U.S.C. 360), the Federal Age Discrimination in Employment Act of 1967 (81 Stat. 602), the Americans with Disabilities Act of 1990 (P.L. 101-336), and the Civil Rights Act of 1991 as amended (P.L. 102-166, amended by P.L. 102-392);

(b) To safeguard all individuals within the state from discrimination because of familial status, race, color, religion, national origin, sex, age forty (40) and over, or because of the person's status as a qualified individual with a disability as defined in KRS 344.010 and KRS 344.030; thereby to protect their interest in personal dignity and freedom from humiliation, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest which would menace its democratic institutions, to preserve the public safety, health, and general welfare, and to further the interest, rights, and privileges of individuals within the state; . . .

By reiterating in this way its desire to protect "individuals within the state" from invidious discrimination, the General Assembly, FOL maintains, intended to exclude nonresidents such as Barnhart from like protection. The trial court rejected this contention. This Court reviews a trial court's statutory interpretations de novo. Keeton v. City of Ashland, Ky. App., 883 S.W.2d 894 (1994).

The fundamental aim of statutory construction is to determine and give effect to the legislature's intent. Courts attempt to do this by relying as much as possible on the plain meaning of the legislative language, by reconciling and harmonizing related statutory provisions, and by "considering the evil the law was intended to remedy." Beach v. Commonwealth, Ky., 927 S.W.2d 826, 828 (1996); Mitchell v. Kentucky Farm Bureau Mut. Ins., Ky., 927 S.W.2d 343 (1996). Generally, courts are not to read exceptions into the positive, unqualified terms of a statute. Comm. ex rel. Cowan v. Wilkinson, Ky., 828 S.W.2d 610 (1992). Nor are courts to infer exclusions from mere assertions, according to the maxim "expressio unius est exclusio alterius," unless the legislature's intent to exclude whatever is not asserted is clear:

> "This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment."

Wade v. Commonwealth, Ky., 303 S.W.2d 905, 907 (1957) (quoting Ford v. United States, 273 U.S. 593, 47 S. Ct. 531, 537, 71 L. Ed. 793 (1927).

Applying these principles to the sections of KRS Chapter 344 set out above, we recognize a primary intention by the General Assembly to make Kentucky a full participant in the national effort both to remedy instances of invidious

discrimination and to deter them. Meyers v. Chapman Printing Co., Ky., 840 S.W.2d 814 (1992). To address anti-discrimination legislation principally to "individuals within the state" reflects, we believe, merely the ordinary purview of the General Assembly and does not imply that Kentucky's courts are closed to nonresidents unlawfully discriminated against by Kentucky employers. Such an implication is not strongly suggested by the quoted phrase when read in context, and had such a preclusion of nonresidents' claims been intended, the General Assembly could easily have stated that intent directly. The most obvious means of achieving that end would be a restrictive definition of "employee" or "person" or use of substantive limiting language in KRS 344.450. Our General Assembly chose none of these obvious options. Furthermore, not only would the limitation urged by FOL conflict with the inclusive "any person" of KRS 344.450, but it would also tend to undermine the stated aim of furthering national cooperation in this area of the law.

The United States Supreme Court has frequently noted that the overriding purpose of the civil rights laws is "to eliminate, so far as possible, the last vestiges of discrimination." McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852, 861 (1995) (internal quotation marks and citation omitted). In McKennon, a case construing the Age Discrimination in Employment Act and discussing other of the civil rights acts, the Court explained that

> Congress designed the remedial measures in these statutes to serve as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices . . . Deterrence is one object of these statutes. Compensation for injuries caused by the prohibited discrimination is another . . . . The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives . . .

513 U.S. at 358, 115 S. Ct. at 884, 130 L. Ed. 2d at 861 (internal quotation marks and citations omitted). FOL's reading of KRS Chapter 344 ignores the important deterrent our civil rights act is meant to provide. Interstate cooperation in the national effort to eradicate invidious discrimination is hindered if the Commonwealth turns a blind eye to the unlawful acts of Kentucky employers against employees who are residents of other states. See Burnside v. Simpson Paper Co., 864 P.2d 937 (Wash. 1994) (upholding California resident/employee's right to bring age discrimination claim against Washington employer in Washington).

Contrary to FOL's assertions, this application of KRS Chapter 344 does not violate the Commerce Clause or more general principles of federalism by imposing Kentucky law and policy beyond the boundaries of the Commonwealth. Barnhart's complaint is that company officials in Bowling Green, Kentucky, made an unlawful decision to terminate his employment because of his age. Although that decision was implemented outside Kentucky, Kentucky law applies to the decision making and so may extend to its effects. The fact that the alleged discrimination included

conduct in South Carolina does not render Kentucky's regulation of the corporate decision makers violative of the Commerce Clause. Colorado Anti-Discrimination Comm. v. Continental Air Lines, Inc., 372 U.S. 714, 83 S. Ct. 1022, 10 L. Ed. 2d 84 (1963).

As for the federalism concerns addressed by the United States Supreme Court in BMW of North America, Inc. v. Gore, supra, they simply are not present here. In that case, the purchaser of a new vehicle which had been slightly damaged and repainted without any disclosure received $4,000 in compensatory damages and $4 million in punitive damages. In setting aside the punitive damage award as excessive, the Supreme Court held that Alabama was infringing on the policy choices of other states when it allowed a damage award "to punish BMW for conduct that was lawful where it occurred and had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." 517 U.S. at 573, 116 S. Ct. at 1597-98, 134 L. Ed. 2d at 825. Here, FOL's conduct has impact on Kentucky, its home state, and there is no plausible argument that age discrimination is lawful in South Carolina.[2] The "federalism" question, moreover, as to which

[2]Nor is FOL's reliance on Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991), well-founded, for in that case the Supreme Court held that Title VII of the Civil Rights Act of 1964 did not apply to U.S. employers operating outside the United States. The Court relied on the language of the statute, applied the strong presumption against extraterritorial application of United States statutes, and avoided difficult international law (continued...)

state's law and policy is more seriously implicated by Barnhart's allegations, is properly addressed as a choice of law problem, not one of jurisdiction. See Burnside v. Simpson Paper Co., supra. FOL did not preserve the choice of law issue and cannot raise it indirectly under a jurisdictional guise.

Finally, we note that the Privileges and Immunities Clause of Article IV of the United States Constitution restricts the power of the states to withdraw their courts' jurisdiction from the claims of nonresidents. Hicklin v. Orbeck, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978); Angel v. Bullington, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947). The construction of KRS 344.020 which FOL urges would thus raise significant doubts as to the constitutionality of the statutory provisions at issue. Courts, however, must strive to interpret statutes so as to preserve their validity. Commonwealth v. Halsell, Ky., 934 S.W.2d 552 (1996). As KRS 344.020 does not clearly forbid Barnhart's claim, "comity would seem to require that [it] be entertained." Bertram v. Jones, 205 Ky. 691, 266 S.W. 385, 387 (1924) (invoking the federal Privileges and Immunities Clause in recognizing the right of an Ohio creditor to sue Kentucky administrator of Indiana decedent's estate in Kentucky.)

Denial of a Directed Verdict

[2](...continued)
questions in so construing the statute.

FOL next contends that the trial court erred by denying its motions for a directed verdict. It maintains that Barnhart failed to prove the elements of a prima facie case, failed to rebut FOL's explanation of the discharge, and failed, ultimately, to prove facts from which age discrimination could reasonably be inferred. We review the trial court's rulings on motions for a directed verdict deferentially, ascribing to the evidence "all reasonable inferences and deductions which support the claim of the prevailing party." Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 821 (1992). We may reverse the trial court's decision and the jury verdict only if it appears that "the verdict rendered is palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." Lewis v. Bledsoe Surface Mining Company, Ky., 798 S.W.2d 459, 462 (1990).

KRS Chapter 344 incorporates federal anti-discrimination policies and, accordingly, federal case law in this area has provided our courts with guidance. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the Supreme Court established a procedure for the presentation of proof in Title VII discriminatory treatment cases which our courts have adopted and which the circuit court followed in this case. Under the McDonnell Douglas procedure, a discharged or otherwise injured employee alleging age discrimination must first establish a prima facie case.

> The concept of a "prima facie" case is . . . intended to measure how much the plaintiff must show before the employer will be forced to assume the burden of an active defense. Since information concerning the employer's motivation is normally not readily available to the employee, this threshold requirement is not a stringent one.
>
> All that the plaintiff must show is that he (1) belongs to the protected class, (2) was qualified for the position involved, and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent was present.

Turner v. Schering-Plough Corp., 901 F.2d 335, 347 (3rd. Cir 1990).

If the employee establishes this prima facie case, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer who must show that it took the adverse action for a non-discriminatory reason. Finally, if the presumption of discrimination is thus rebutted, the employee has an opportunity to counter the employer's explanation by offering proof that the explanation is a pretext disguising the real, discriminatory, intent. Although the burden of production shifts during this procedure from one party to the other, the burden of persuasion is always on the employee. Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226 (1984). We look first, then, at Barnhart's prima facie case.

FOL concedes that Barnhart is in the protected class and was demoted and discharged. Furthermore, it does not seriously dispute that Barnhart's long record of employment in

the position from which he was demoted is at least prima facie proof of satisfactory job performance. It insists, however, that, because Barnhart's position of Vice President of Elastic Technology was discontinued, he was not replaced by anyone, younger or otherwise, and thus did not establish the last element of his prima facie case because the circumstances of his discharge do not suggest discriminatory intent. We disagree.

A recent Supreme Court decision, O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), cautions courts against too mechanical or too formalistic an application of the McDonnell Douglas procedure. In particular it emphasizes that, rather than proof of irrelevant, hyper-technical details, "the prima facie case requires 'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . .'" 517 U.S. at 312, 116 S. Ct. at 1310, 134 L. Ed. 2d at 439 (emphasis and bracketed material in original; citation omitted). Moreover, "[w]here the employer alleges that the discharged employee's position has been eliminated and that the employee is therefore not replaced, the plaintiff 'need only show that he was laid off from a job for which he was qualified while other workers not in the protected class[3] were retained.'"

[3]Consol. Coin Caterers, supra, held that the worker or workers who allegedly replaced the plaintiff need not have been outside the protected class, but need only have been sufficiently younger than the plaintiff to raise a reasonable inference of discrimination.

Ryder v. Westinghouse Electric Corporation, 879 F. Supp. 534, 536 (W.D. Penn. 1995) (citing Turner v. Schering-Plough Corp., 901 F.2d 335, 342 (3rd Cir. 1990)).

FOL's argument seems to us overly formalistic. Although it may be true that no one succeeded to Barnhart's former title, Barnhart showed that his responsibilities were divided principally between Willie Turner, the new Vice President over the Jay Products plant, and Ward Hall, the new plant manager. Hall assumed the lion's share of Barnhart's job; at the time he was 47 years old, approximately seven years Barnhart's junior. These circumstances do not give rise to a strong inference of age discrimination. Nevertheless, under our standard of review, we cannot say the circuit court clearly erred by ruling that Barnhart established his prima facie case and by requiring FOL to proceed with an explanation of its decisions to demote and discharge him.

FOL claims that it demoted Barnhart only after his new supervisor, Morse, received numerous complaints from Barnhart's employees. Morse testified that he visited Jay Products and confirmed that these complaints came not from a small number of discontented workers but from many workers representing most of the plant's departments. These concerns were confirmed, the company claimed, by the Carolina Consultant's survey, which indicated widespread employee morale problems. Company officials also testified that they had been dissatisfied with inaccuracies in Barnhart's recent budgets. Morse testified that he demoted

Barnhart because of these job deficiencies and that Barnhart was discharged when the company later decided not to open a second elastic manufacturing plant and thus had no position Barnhart might fill.

At this stage of the McDonnell Douglas procedure Barnhart was obliged to produce specific evidence showing that the company's explanation was a pretext. Harker, 679 S.W.2d at 230. He countered by denying that there had been a serious morale problem at his plant and citing the plant's consistently good safety, attendance, and turn-over records. He identified a small number of individuals with axes to grind who, he said, complained repeatedly. He noted that equipment changes and air-conditioning problems during this period had disrupted the plant's routine and worried some of the workers. He testified that he had responded promptly to all of Morse's instructions and suggestions, including the suggestion to dismiss the two supervisors whose romance had interfered with their jobs. He testified and introduced other testimony, including expert testimony, to the effect that two opinion surveys at Jay Products prior to the Carolina Consultant's survey had failed to indicate any serious problems, that such surveys were inappropriate responses to the company's alleged concerns, that FOL had suppressed the prior results, and that the consultant's survey had been biased against him (Barnhart) and his staff. Finally, he testified and elicited testimony on cross-examination tending to show that executive managers were more involved in the

budgeting process than the company's evidence suggested, that he had anticipated higher costs at the plant and had requested a suitable budget, but had been refused, and that the next year his successor had been granted a budget in line with the budget Barnhart had requested.

Circumstantial as it is, we believe Barnhart's evidence adequately supports an inference of "invidious intent behind [his] termination." See Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d. 1078, 1081-1084 (6th Cir. 1994) (discussing the ways in which pretext may be shown). Barnhart's evidence can reasonably be thought to show that the proffered reasons for his demotion and discharge were not the real reasons, but were either arrived at after the fact or were contrived to justify a pre-determined decision.

A harder question is whether Barnhart satisfied his burden of proving that he was demoted and discharged because of his age. Relying on Harker, supra, FOL maintains that Barnhart was obliged to produce "cold hard facts" showing discriminatory intent and suggests that these must be facts directly showing the employer's age-related animus. Since Barnhart produced no such evidence, FOL insists it was entitled to a directed verdict.

We agree that Barnhart was obliged to produce specific evidence that age discrimination was a determining factor in his demotion and discharge. O'Connor v. Consol. Coin Caterers, supra. Manzer, supra. Discrimination cases should not become "disputes over job performance" or "provide a vehicle for

judicial review of business decisions regarding terminations." Harker, 679 S.W.2d at 231. We do not agree, however, that circumstantial evidence cannot suffice to establish discrimination or that Harker supports that proposition. On the contrary, direct evidence of an employer's discriminatory intent will seldom be available. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983). What is required is "hard proof creating an inference [that] age discrimination was a determining factor in [the] discharge." Harker, 679 S.W.2d at 231(emphasis added).

The evidence clearly established that Barnhart was discharged in conjunction with other management changes at FOL, that the alleged dissatisfaction with his performance focused on employee complaints to corporate headquarters, a factor Barnhart could not control, and that he was afforded little warning of so drastic a change in his status, not even a general performance review. The evidence of three surveys (with the results of the first two no longer available) permits an inference that FOL sought not to identify problems, as it claimed, but to obtain justification for a decision it had already reached. Most of Barnhart's responsibilities were assumed by Ward Hall who is seven years younger than Barnhart. Finally, Barnhart's request to be assigned to a new position at less pay was rejected without serious consideration.

This is a close case. There was no evidence of a general company policy to dismiss managers simply because of age,

and, although Barnhart testified that under Morse several younger managers were promoted or brought into the company, the specific reorganization in which Barnhart was caught up does not seem generally to have been age directed. We believe, nevertheless, that it was not unreasonable to infer from the scenario described above that Barnhart's demotion and dismissal were not because of his inability to perform his job and not primarily for any other legitimate reason, but were arbitrary, carried out in order to make room for a younger person. The circuit court did not err, therefore, by denying FOL's motions for a directed verdict.

Exclusion of Evidence Regarding Employees' Comments

FOL also contends that the trial was rendered unfair by the circuit court's erroneous ruling that two of its witnesses, Morse and Chip Long of Carolina Consultants, could not repeat employee comments they had heard at Jay Products which were critical of Barnhart, including allegations that workers had been threatened with reprisals if they complained to corporate headquarters. FOL also contends that Long should have been allowed to introduce some 57 typed, single-spaced pages of negative survey responses allegedly transcribed from the employees' handwritten originals. The trial court, sustaining Barnhart's hearsay objections, seems to have accepted the hearsay characterization and to have viewed the evidence as cumulative, somewhat extraneous and apt to arouse the jury's passions and biases.

As FOL points out, the rule against hearsay evidence excludes only out-of-court assertions offered to prove the truth of the matter asserted. KRE 801. One non-hearsay use of such out-of-court assertions is to prove the hearer's state of mind. Lawson, The Kentucky Evidence Law Handbook § 8.05 (3rd ed. 1993). FOL contends that the employee comment evidence excluded by the trial court was offered to prove, not the truth or accuracy of the employees' remarks, but the state of mind of Morse and other FOL officers when they decided to demote and then to discharge Barnhart. Because these individuals' state of mind, their intent, was the central issue in this case, we agree with FOL that in these circumstances the employee comment evidence was not hearsay. Meyers v. Chapman Printing Co., Ky., 840 S.W.2d 814, 823 (1992); Illinois Central Railroad Co. v. Evans, 170 Ky. 536, 186 S.W. 173 (1906).

Nevertheless, KRE 403 permits the trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence." Although the trial court erroneously deemed this evidence hearsay, it also believed it to be cumulative and unduly prejudicial and expressed concern that the lengthy 57-page transcript would make the jury's deliberations needlessly complicated and time consuming. Our review of these

rulings is deferential. Hall v. Transit Authority, Ky. App., 883 S.W.2d 884 (1994).

We are not persuaded that the trial court abused its discretion. Morse and Long testified to wide-spread employee dissatisfaction with Barnhart. Morse recounted complaints regarding a romance between two supervisors and Long testified that the survey results reflected the worst overall employee attitudes toward management he had ever seen. Long also presented survey results challenging Barnhart's claim that a malfunctioning air conditioner and new, intimidating equipment were significant factors in the discontent. The introduction into evidence of employee comments criticizing Barnhart would not have added much to the substance of FOL's case, but would have posed a serious risk of unfairly prejudicing Barnhart. Critical comments, for example, or exaggerated descriptions of work-place abuses would doubtless impress the jury, and Barnhart's ability to respond to such evidence would have been severely limited due to his inability to question the employees. The trial court, therefore, did not abuse its discretion under KRE 403 by excluding this evidence.

The Liability Instruction

Next, FOL contends that the trial court misinstructed the jury by improperly framing the liability issue. The

challenged instruction charged the jury as follows: "Are you satisfied from the evidence that Joel O. Barnhart was discharged by Union Underwear Company because of his age." FOL had tendered, as an alternative instruction, special interrogatories requiring the jury to decide whether Barnhart had established a prima facie case and, if so, whether he had then proved that the company's stated reasons for the demotion and discharge were pretexts. Its objection to the court's instruction reiterated this idea that the instruction was not sufficiently detailed. On appeal, however, FOL asserts that the court's "because of age" instruction understates Barnhart's burden of proof. FOL maintains that Barnhart had to prove that age was "a substantial and motivating factor but for which [he] would not have been discharged." See First Property Management v. Zarebidaki, Ky., 867 S.W.2d 185, 188 (1993) (urging use of this formulation instead of the phrase "because of").

Although we agree with FOL that under Zarebidaki the court's phrasing of Barnhart's burden of proof may be said to have been erroneous, we do not believe that FOL preserved this objection. FOL's proposed liability instructions described the four basic elements of a prima facie case and specifically employed the "because of his age" language. At no point did FOL proffer the "substantial and motivating factor" instruction now urged on appeal. Zarebidaki, 867 S.W.2d at 187. Nor do we believe that the error was so palpably prejudicial as to justify

relief absent preservation. See Zarebidaki (upholding judgment despite criticism of the "because of" instruction).

Otherwise, FOL's requested interrogatories were properly rejected under Kentucky's "bare bones" approach to jury instructions. That approach requires the trial court, in its directed verdict rulings, to assess the effect of evidentiary presumptions and to decide whether burdens of production have been met. If so, the jury is asked to decide only ultimate questions of liability after the parties have had an opportunity in their closing arguments to explain the legal bases for the decision. Meyers v. Chapman Printing Co., Inc., supra, 840 S.W.2d at 824. Here the court's instruction together with the parties' closing arguments adequately informed the jury that FOL should not be found liable unless Barnhart's age had been a decisive factor in the decisions to demote and discharge him.

Barnhart's Counsel's Improprieties During Closing Argument

Finally, FOL contends that the jury's liability determination was tainted by Barnhart's counsel's two improprieties during closing argument. Counsel's reference to FOL's growth in foreign countries, the company insists, was an improper appeal to the jury's anger and fear that jobs had been or might be moved from their community. Additionally, counsel's reading from a deposition that had not been introduced into

evidence breached his duty to confine his remarks to the evidence properly of record.

Counsel remarked about FOL's foreign expansion while arguing that Barnhart's post-demotion assignment to study the feasibility of a second elastic manufacturing facility in Louisiana had been pretextual. FOL could not have been sincere, he suggested, because most of its recent expansion had been outside the United States. Because there had been no evidence to support this assertion, FOL maintains, counsel's remark was improper and was unduly prejudicial. However, FOL did not object to this comment at the time it was made. Because the trial court was not given an opportunity to rule, and because the alleged misconduct was not so egregious as to implicate the trial court in a palpable error, this issue is not subject to our review. CR 59.06; Triplett v. Napier, Ky., 286 S.W.2d 87 (1955); Betzing v. Wynn, Ky., 248 S.W.2d 727 (1952).

FOL did object to counsel's reading during closing argument from Barnhart's unintroduced deposition, and we agree that the alleged misconduct is not to be lightly disregarded. In Smith v. McMillan, Ky., 841 S.W.2d 172 (1992), our Supreme Court reiterated the rule that

> "[W]hen counsel deliberately go outside the record in the jury argument and make statements, directly or inferentially, which are calculated to improperly influence the jury, this court will reverse the judgment . . . ."

841 S.W.2d at 175 (quoting from Louisville & N.R. Co. v. Gregory, 284 Ky. 297, 144 S.W.2d 519 (1940)). Therefore, we consider in some detail the circumstances giving rise to this issue.

In the course of his testimony, Barnhart claimed that when Turner gave him the news that he had been terminated, he, Barnhart, had asked what effect the termination would have on his retirement benefits, and in particular had asked whether he might not be given some other position within the company so that he would have a chance to continue working until age 62 when he could receive his retirement as a lump sum. Counsel for FOL challenged this testimony by asking Barnhart whether he had not described the conversation with Turner differently at his deposition. Counsel for FOL asserted that in his deposition Barnhart had made no mention of wanting to stay with the company for the sake of his retirement. Barnhart replied that he could not remember exactly what he had said at his deposition and asked to see a transcript. Counsel thereupon asked Barnhart if instead he would take counsel's word for it that the deposition was different. Barnhart's counsel did not object to this questioning, nor on reexamination did he seek to introduce the transcript of Barnhart's deposition testimony. During closing argument, however, Barnhart's counsel referred to Barnhart's testimony concerning the conversation with Turner and, in a belated attempt to set the record straight, read a similar account of that conversation from Barnhart's deposition. FOL

promptly objected to the use of the deposition because it was not in evidence, but the trial court overruled the objection.

As noted above, and as Barnhart's counsel surely knows, it is improper during closing argument to go outside the record. Counsel's reading from Barnhart's not-of-record deposition was a flagrant violation of that rule. As our highest Court has observed, however,

> [g]ranted that an argument was improper, the difficult question nearly always is whether the probability of real prejudice from it is sufficient to warrant a reversal, and in this respect each case must be judged on its unique facts. An isolated instance of improper argument, for example, will seldom be found prejudicial. . . . But when it is repeated and reiterated . . . its deadly effect cannot be ignored.

Stanley v. Ellegood, Ky., 382 S.W.2d 572, 575 (1964).

As bad as it may have been, we are not persuaded that counsel's breach was so egregious, nor are we persuaded that the likelihood of undue prejudice flowing from the breach is great enough, to warrant a reversal. In Stanley, supra, and in the other cases relied upon by FOL, counsel either referred in closing argument to matters which had been expressly excluded from evidence, or persisted in making an improper reference after having been advised by the court of the impropriety. Neither of these situations is before us. As the trial court noted, moreover, aside from its refutation of the assertion during trial of FOL's counsel, the passage read from Barnhart's deposition merely repeated evidence that had been properly introduced. We

are not unmindful that the refutation of FOL's counsel is apt to have had a certain prejudicial effect, but this was an isolated instance in the middle of a fairly long closing argument. Whatever the prejudicial effect, it is not apt to have been more than minimal.

The After-Acquired Evidence Affirmative Defense

Next, FOL maintains, the trial court erroneously precluded it from presenting an affirmative defense to much of Barnhart's claim for damages. FOL alleges that immediately following his termination Barnhart removed from his office a large box filled with sensitive company documents. Only through discovery for this litigation did the company become aware of his alleged theft, but since it legitimately could have and allegedly would have discharged Barnhart for this misconduct, it contends that Barnhart is not entitled to any damages stemming from his dismissal beyond the time his misconduct came to light. Prior to trial FOL apprised the court that it intended to raise this so called "after-acquired evidence" defense, and sought guidance as to when the pertinent evidence might best be introduced. The trial court, apparently unfamiliar with this defense, declined FOL's suggestion to bifurcate the trial and indicated that it would not exclude theft-related evidence from the liability proceedings. Somewhat inconsistently, however, the trial court then deferred a more definitive ruling on the matter until

liability should be found and the potential issue with respect to damages should become actual.

During the trial, both sides elicited testimony about the allegedly stolen documents. FOL emphasized its ownership of the records and attempted to characterize them as potentially valuable to its competitors. Barnhart, on the other hand, downplayed the documents' significance and maintained that he had taken them inadvertently following the company's demand that he clear his office. Exactly how this evidence related to Barnhart's claim could not possibly have been clear to the jury. Nevertheless, FOL did not seek an instruction presenting its defense, which would have enabled it to explain this evidence. Instead, presumably relying on the court's pre-trial ruling that its defense would be addressed only following a verdict on liability, it sought to preserve the issue by requesting an instruction requiring the jury to specify which of Barnhart's damages, if any, represented his injuries prior to the discovery of his theft and which those after the discovery. The trial court refused to give such an instruction and thereby, FOL contends, effectively and erroneously eliminated FOL's defense from the case. For the reasons that follow, we disagree.

As it has been developed by judicial decisions, the after-acquired evidence doctrine

> allows an employer to be relieved of liability in a wrongful discharge lawsuit where it is discovered, normally during litigation, that the employee was guilty of pre-discharge misconduct sufficient for

> termination that the employer was unaware of and was not relying upon for discharge. . . . The after-acquired evidence doctrine has its foundation in the logic that an employee cannot complain about being wrongfully discharged because the individual is no worse off than he or she would have been had the truth of his or her misconduct been presented at the outset.

Gassman v. Evangelical Lutheran Good Samaritan Society, Inc., 921 P.2d 224, 226 (Kan. 1996) (citations omitted).

In McKennon v. Nashville Banner Pub. Co., supra, 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852, the United States Supreme Court addressed the applicability of this doctrine to discriminatory discharge claims brought pursuant to the Age Discrimination In Employment Act (ADEA), 29 U.S.C. § 621 et seq. Cristine McKennon, a 62 year-old woman who had worked for a publishing company for 30 years, was discharged from her job in what the company termed a work-force reduction plan. McKennon sued, claiming age discrimination. In the course of discovery, the company learned that prior to her discharge McKennon had learned of the company's plan and to "protect" herself had "copied several confidential documents bearing upon the company's financial condition." 513 U.S. at 355, 115 S. Ct. at 883, 130 L. Ed. 2d at 859. Armed with this information, the company invoked the after-acquired evidence doctrine and successfully moved for summary judgment. The Sixth Circuit Court of Appeals affirmed, but the Supreme Court reversed. Emphasizing the important national objectives embodied in the anti-discrimination laws, the Court observed that full application of the after-acquired

evidence doctrine would be apt to undermine those objectives and thus would run counter to Congress's anti-discrimination policy. Accordingly, the Court held that after-acquired evidence of an employee's misconduct could not shield an employer from liability for violation of the civil rights laws. On the other hand,

> [t]hat does not mean . . . the employee's own misconduct is irrelevant to all the remedies otherwise available under the statute [the ADEA]. . . . The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees. . . . In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern "for the relative moral worth of the parties," . . . but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing. . . . We . . . conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It 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.
>
> The proper measure of backpay presents a more difficult problem. . . . 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. The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was

> discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that effect the legitimate interests of either party. An absolute rule barring any recovery of backpay, however, would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.

513 U.S. at 360-62, 115 S. Ct. at 886, 130 L. Ed. 2d at 863-64 (citations omitted). In Toyota Motor v. Epperson, Ky., 945 S.W.2d 413, 416 (1996), our Supreme Court acknowledged McKennon and recognized a similarly limited application of the after-acquired evidence doctrine to discrimination suits brought pursuant to KRS Chapter 344. The Court expressly referred "counsel and the trial court to the McKennon case for guidance as to the admission and use of the evidence in the determination of damages and appropriate instructions." Id.

Barnhart contends that the after-acquired evidence doctrine should not apply in this case because the misconduct of which FOL complains did not take place until after his termination (albeit immediately thereafter). At least two courts have held that the limited after-acquired evidence defense recognized in McKennon is not available in this situation. In Sigmon v. Parker Chapin Flattau & Klimpl, 901 F.Supp. 667 (S.D.N.Y. 1995), the court refused to allow the defense in a sex discrimination case where, not long after her discharge, the employee photo-copied some of the employer's personnel files, including her own which she was entitled to in discovery in any

event. The court understood McKennon as applying only to misconduct that took place while the employment contract was in effect. Similarly, in Carr v. Woodbury County Juvenile Detention Center, 905 F.Supp. 619 (N.D. Iowa, 1995), a race and sex discrimination case, the court excluded evidence of the employee's marijuana use two weeks post-termination. Finding McKennon inapplicable in the circumstances presented, the court said: "The evidence here is 'after after-acquired' evidence of misconduct, because it does not involve the discovery of misconduct, either on or off the job, that occurred during Carr's employment with the County." 905 F.Supp. at 627.[4]

Although the employer's interests, recognized in McKennon, in maintaining control of its workforce and in protecting its property arise before employment officially begins[5] and do not cease abruptly upon termination, we are persuaded, in light of the cases just cited, that post-termination misconduct such as that alleged against Barnhart is not appropriately addressed by a McKennon-type defense. The after-acquired evidence doctrine has developed exclusively in the context of pre-termination misconduct and makes most sense in

---

[4]See also Ryder v. Westinghouse Electrical Corp., 879 F.Supp. 534 (W.D. Penn. 1995), and Calhoun v. Ball Corporation, 866 F.Supp. 473 (D.Colo. 1994) (both expressing skepticism about the applicability of the after-acquired evidence doctrine to post-termination misconduct cases).

[5]Job application or resume fraud is a common ground of complaint in after-acquired evidence cases. Wallace v. Dunn Const. Co., Inc., 62 F.3d 374 (11th Cir. 1995); Toyota Motor v. Epperson, supra.

that context, where there has been employee wrongdoing unrelated to the alleged discrimination which, if known earlier, would have resulted in a legitimate termination. Although we are unwilling to extend McKennon (via Toyota Motor v. Epperson) to the situation presented here, our rejection of this new application of the after-acquired evidence defense should not be understood as devaluing the employer's interest in maintaining its workplace nor as condoning the sort of employee misconduct alleged by FOL. Rather than straining the after-acquired evidence doctrine to include the sort of post-termination misconduct at issue here, employers must look to tort and criminal law. The employer's remedy, in appropriate cases, will be a civil action, a counterclaim, or even criminal prosecution.[6] See Calhoun v. Ball Corporation, 866 F.Supp. 473 (D. Colo. 1994) (noting that both tort liability and criminal sanctions may attend an employee's misappropriation of the employer's proprietary information). This approach, we believe, will best further the General Assembly's purpose of deterring discriminatory employment practices while at the same time recognizing redress for employers harmed by the wrongdoing of former employees. We conclude, accordingly, that the trial court did not err by

[6]In light of the uncertainty in this area of the law at the time of trial and the fact that FOL's defense/counterclaim was never addressed, we recognize that FOL may attempt to employ CR 8.03 and pursue its claim as a counterclaim, which was mistakenly designated a defense, or attempt to pursue its claim in a separate civil action. As the validity of such actions is not before this Court, we offer no opinion as to their propriety.

refusing to instruct the jury on FOL's after-acquired evidence defense.

Punitive Damages

FOL further contends that the trial court erred by submitting the question of punitive damages to the jury. It bases its contention on KRS 411.184(2) which provides that

> [a] plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

FOL maintains that the evidence does not support a finding that it acted toward Barnhart with oppression, fraud, or malice,[7] and

---

[7]At KRS 411.184(1) these terms are defined as follows:

(a) "Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.
(b) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.
(c) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

Our Supreme Court has recently declared KRS 411.184(1)(c) unconstitutional to the extent that it imposes a standard of "subjective awareness" in the definition of "malice." Williams v. Wilson, ____ S.W.2d ____ (rendered 4/16/98). FOL's argument, however, and our analysis focus not on that aspect of the statute, but on those portions of the definitions of "oppression" and "malice" which limit the recovery of punitive damages to cases wherein the defendant's conduct may be characterized as intentionally cruel and unjust or intentionally injurious.

that the court erred by permitting the jury to consider the matter.[8]

Punitive damages are those, "other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future." KRS 411.184(1)(f). The punishment and deterrence provided by punitive damages is in addition to that provided by compensatory damages and is limited, accordingly, to conduct which may be deemed an egregious or aggravated breach of the plaintiff's rights. Ordinarily, such a breach will involve intentional conduct that can be characterized as oppressive, fraudulent, or malicious, but reckless conduct, too, may also give rise to liability for punitive damages if the circumstances indicate an abuse of power or outrageous disregard of a risk of bodily injury. Wittmer v. Jones, Ky., 864 S.W.2d 885 (1993); Horton v. Union Light, Heat & Power Co., Ky., 690 S.W.2d 382 (1985). Where intent is an element of the plaintiff's cause of action, as it is here, punitive damages need not be available unless the defendant's conduct is exceptionally reprehensible, Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 56 F.3d 726 (6th Cir. 1995), or unless the cause of action itself requires proof of

[8]FOL does not challenge the availability of a punitive damage award for a violation of KRS 344.040. We note that the federal Civil Rights Act of 1991, 42 U.S.C. §§ 1981-2000, expressly makes punitive damages available to remedy violations of the federal anti-discrimination laws. Kentucky courts have recognized the availability of punitive damages under KRS 336.130 which prohibits anti-union discrimination but does not expressly provide for punitive damages. Simpson County Steeplechase Assn. v. Roberts, Ky. App., 898 S.W.2d 523 (1995).

"bad faith sufficient to justify punitive damages." Wittmer v. Jones, 864 S.W.2d at 890. We believe the civil rights statute provides a cause of action of this latter type. As repeatedly noted, our civil rights statute embodies a determined public policy to abolish the most damaging expressions of invidious discrimination. Typically such discrimination involves a specific intention[9] to deprive the plaintiff of something fundamental, such as housing, education, or, as in this case, employment. Proof of discrimination of this sort sufficiently evidences "malice" and "oppression" to require that punitive damages at least be considered.[10] The trial court did not err by submitting the question of punitive damages to the jury.

Attorney Fees

Finally, FOL contends that the trial court abused its discretion by awarding attorney fees to Barnhart's counsel without permitting FOL to contest the amount of those fees at a

[9]This is not to suggest that unlawful discrimination can never be in good faith. The civil rights laws leave open the possibility that discrimination will in some instances be justified by legitimate employment (or educational etc.) purposes. An employer who in good faith, but incorrectly, relies on this narrow exception to the civil rights laws is likely not to be subject to punitive damages. Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).

[10]This, of course, does not mean that a punitive damage award must be made. "The jury's decision as to whether to award punitive damages remains discretionary because the nature of punitive damages is such that the decision is always a matter within the jury's discretion." Wittmer v. Jones, 864 S.W.2d at 890.

hearing and without making findings to account for the award. We believe that the better practice would have been to entertain FOL's objections at a hearing and to respond to them in an order specifying the basis for the fee award. However, these are matters left to the trial court's discretion. Dingus v. FADA Services Co., Inc., Ky. App., 856 S.W.2d 45 (1993). The record indicates that FOL's written objections to the attorney fees request adequately presented its concerns and further indicates that Barnhart's fee request was not clearly unreasonable. We cannot say, therefore, that the trial court abused its discretion.

In sum, for the reasons discussed above, we affirm the December 19, 1995, judgment of Warren Circuit Court and further affirm the February 21, 1996, order awarding attorney fees to Barnhart's counsel.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Norman E. Harned
HARNED, BACHERT, & DENTON
Bowling Green, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Zack N. Womack
DEEP & WOMACK
Henderson, Kentucky