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THE LAW OF AFTER-ACQUIRED EVIDENCE IN EMPLOYMENT DISCRIMINATION CASES: CLARIFICATION OF THE EMPLOYER'S BURDEN, REMEDIAL GUIDANCE, AND THE ENIGMA OF POST-TERMINATION MISCONDUCT

Christine Neylon O'Brien*

I. INTRODUCTION

In *McKennon v. Nashville Banner Publishing Co.*, the United States Supreme Court held that after-acquired evidence of employee wrongdoing may not bar liability for employment discrimination.[1] Such information may affect a plaintiff's remedy where the defendant establishes that the later-discovered misconduct would have resulted in plaintiff's termination anyway.[2] This article discusses a number of recent developments in the law of after-acquired evidence. Three specific areas will be considered. First, the employer's burden of proof in order to curtail a plaintiff's remedy has been defined as a preponderance of the evidence by the Court of Appeals for the Ninth Circuit.[3] Secondly, the Equal Employment Opportunity Commission (EEOC) issued enforcement guidance on after-acquired evidence delineating the agency's position on remedies after *McKennon*.[4] Finally, the implications of several federal district court decisions that found *McKennon's* rule inapplicable to after-acquired evidence of post-termination misconduct will be assessed.[5]

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1. McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 883-85 (1995). *See also* Christine Neylon O'Brien, *Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing*, 23 PEPP. L. REV. 65 (1995) (discussing conflict among the circuits on issue of after-acquired evidence in employment discrimination cases and its resolution by the United States Supreme Court in *McKennon*).

2. *See McKennon*, 115 S. Ct. at 885-87. *See also* Christine Neylon O'Brien, *The Impact of After-Acquired Evidence in Employment Discrimination Cases After* McKennon v. Nashville Banner Publishing Company, 29 CREIGHTON L. REV. 675 (1996), *reprinted in* 47 LAB. L.J. 3 (1996) (discussing how remedies for employment discrimination will be affected by after-acquired evidence).

3. O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 761 (9th Cir. 1996).

4. EEOC Guidance on After-Acquired Evidence, EEOC Notice No. 915.002 (Dec. 14, 1995), DAILY LAB. REP. (BNA) No. 241, at E-6 to E-9 (Dec. 15, 1995) [hereinafter EEOC Guidance].

5. *See News, Employment Discrimination: Court Finds After-Acquired Evidence Rule Doesn't*

As a preface to discussion of the above issues, it should be noted that while the *McKennon* case involved allegations of age discrimination that the employer sought to rebuff with after-acquired evidence of on-the-job misconduct, both the courts and the EEOC have interpreted the rule in *McKennon* more broadly. Thus, cases involving after-acquired evidence of pre-hire misconduct, as well as claims brought pursuant to other federal antidiscrimination statutes are also subject to the *McKennon* framework.[6]

II. THE EMPLOYER'S BURDEN OF PROOF

While the Supreme Court in *McKennon* did not specify the standard of proof that an employer must satisfy in order to curtail backpay and other remedies, a decision from the Ninth Circuit has now addressed this issue.[7] Circuit Judge Alex Kozinski

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Cover Post-Discharge Misconduct, DAILY LAB. REP. (BNA) No. 244, at A-7 to A-8 (Dec. 20, 1995); Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 626-27 (N.D. Iowa 1995) (finding after-acquired evidence of former employee's post-employment marijuana use inadmissible in employment discrimination case and categorizing such cases as involving "after after-acquired evidence"); Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 682-83 (S.D.N.Y. 1995) (involving post-termination misconduct of attorney where district court found the *McKennon* rule inapplicable to the post-employment misconduct); Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534, 537 (W.D. Pa. 1995) (ruling *McKennon* inapplicable to former employee's conduct occurring after termination); Calhoun v. Ball Corp., 866 F. Supp. 473, 477 (D. Colo. 1994) (a pre-*McKennon* decision precluding defendant's motion for summary judgment on plaintiff's Title VII claim because the after-acquired evidence doctrine not applicable to misconduct occurring after termination).

6. The Supreme Court's *McKennon* opinion does not distinguish between pre-hire and on-the-job misconduct. 115 S. Ct. at 882. *See also* EEOC Guidance, *supra* note 4, at E-7 to E-8 (essentially applying *McKennon's* rule to pre-hire and on-the-job wrongdoing). *McKennon's* rule has been applied to pre-hire misconduct in numerous decisions. *See* Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072, 1074 n.4 (3d Cir. 1995) (explaining that *McKennon's* "wrongdoing" does not distinguish between on- and off-the-job misconduct and applying *McKennon* rule to case of application fraud); Junot v. Maricopa County, No. 92-15712, 1995 U.S. App. LEXIS 28344, at *3 (9th Cir. Oct. 2, 1995) (*McKennon's* after-acquired evidence rule applies to pre-hire misstatements and omissions in case brought under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994)); Moos v. Square D Co., 72 F.3d 39 (6th Cir. 1995) (pre-hire application fraud bars later entitlement to ERISA benefits); Russell v. Microdyne Corp., 65 F.3d 1229, 1240-41 (4th Cir. 1995) (after-acquired evidence of plaintiff's pre-hire application misrepresentations may be subject to *McKennon* rule but defendant must establish the severity of the wrongdoing to permit limitation of Title VII remedies). The EEOC Guidance, *supra* note 4, at E-6 to E-9 & n.1, also outlines the agency's position and cites judicial authority for the proposition that *McKennon's* doctrine applies beyond the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994), to Title VII, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994), the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1994), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1988 & Supp. V) claims.

The United States Court of Appeals for the District of Columbia Circuit recently held that remedies can be limited by after-acquired evidence in federal employee discrimination cases pursuant to the rule in *McKennon*. Castle v. Rubin, 78 F.3d 654, 657-58 (D.C. Cir. 1996) (involving Title VII claims of sex discrimination brought by a terminated probationary federal employee and after-acquired evidence that she plagiarized from copyrighted works in her preparation of training materials). *See also News, Discrimination, Appeals Court extends McKennon Rule to Federal Job Discrimination Cases*, DAILY LAB. REP. (BNA) No. 60, at A-11 (Mar. 28, 1996).

7. O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 760 (9th Cir. 1996); *see News, Age Discrimination, Ninth Circuit Sets Preponderance Test for After-Acquired Evidence Bias Cases*, DAILY LAB. REP. (BNA) No. 72, at A-11 to A-12 (April 15, 1996) (noting *McKennon* left issue of employer standard of proof open).

authored the majority opinion in *O'Day v. McDonnell Douglas Helicopter Co.*, setting the defendant's burden of proving that it would have terminated the plaintiff anyway (once it discovered the damaging after-acquired evidence) at a preponderance level.[8]

Circuit Judge Fletcher authored a separate opinion in which she concurred with the majority regarding reversal of the district court's summary judgment in light of the Supreme Court's *McKennon* decision.[9] However, Justice Fletcher dissented with the majority's "advisory" opinion concerning numerous issues prematurely reached by the appeals court.[10] In her opinion, considering the standard of proof for the remedy stage was precipitate where the defendant's liability for discrimination had yet to be established.[11]

The partial dissent took issue with the majority's departure from the burden of proof previously established for after-acquired evidence within the circuit.[12] Justice Fletcher supports the perpetuation of a clear and convincing evidence requirement for the defendant's rebuttal.[13] This heavier burden is justified because the employer's own discrimination creates the difficulty of reinventing a fictional scenario, one that ignores the defendant's discriminatory reason(s) and introduces an after-discovered rationale to limit the plaintiff's relief.[14]

Several potentially relevant legal events occurring after the 1981 "governing precedent" to which Justice Fletcher demands adherence were discounted in her opinion.[15] First, the Supreme Court's decision in *Price Waterhouse v. Hopkins* set a preponderance burden of proof for the defendant to avoid a finding of liability once a plaintiff proves a discriminatory motivation in an employment decision.[16] Justice Fletcher distinguished *O'Day* from *Price Waterhouse* on the basis that the latter was a mixed-motive rather than an after-acquired evidence case.[17] When Congress enacted

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8. *O'Day*, 79 F.3d at 760.

9. *Id.* at 764-69 (Fletcher, J., concurring in part, dissenting in part).

10. *Id.* at 764.

11. *Id.* at 765.

12. O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 765 (9th Cir. 1996) (citing Nanty v. Barrows, Co., 660 F.2d 1327 (9th Cir. 1981)).

13. *Id.* at 765, 768. Numerous commentators support the use of the clear and convincing evidence standard for employers seeking to limit plaintiff's remedy with after-acquired evidence. *See* Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 157-61 (1995); Carolyn L. Whitford, Note, *While the United States Supreme Court Waves Goodbye to the After-Acquired Evidence Doctrine, It May Allow the Employer to Hold a Card Up Its Sleeve in* McKennon v. Nashville Publishing Co., 115 S. Ct. 879 (1995), 74 NEB. L. REV. 374, 399-402 (1995); Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 209-11 (1993). *But see* Merritt B. Chastain III, *The Guiding Light or Simply More Disarray?: A Principled Analysis of the After-Acquired Evidence Doctrine After* McKennon v. Nashville Banner Publishing Co., 36 S. TEX. L. REV. 1108, 1155 (1995) (disputing the argument that the clear and convincing proof standard must be met by the employer in these cases).

14. *See O'Day*, 79 F.3d at 766-67.

15. *Id.* at 766 (citing Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981)).

16. *Id.* at 756 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (Brennan, J., plurality opinion)); *see also* Gerald A. Madek & Christine Neylon O'Brien, *Women Denied Partnerships: From* Hishon *to* Price Waterhouse v. Hopkins, 7 HOFSTRA LAB. L.J. 257, 282-302 (1990) (discussing burden of proof in *Price Waterhouse* case).

17. *O'Day*, 79 F.3d at 766-67 (quoting *McKennon*, 115 S. Ct. at 885 (distinguishing the two types of cases)).

the Civil Rights Act of 1991,[18] it modified the *Price Waterhouse* analytical framework so that defendant's preponderant proof that it would have made the same decision even absent the discriminatory motivation may only limit plaintiff's remedy and not absolve the employer of liability.[19] According to the *O'Day* dissent, where the issue is one of remedy in an after-acquired evidence case, the clear and convincing standard of proof should still pertain.[20]

The majority in *O'Day* draws the employer's burden of proof from *McKennon*, characterizing it as proof "by a preponderance that it would have discharged the employee (or taken whatever adverse action is at issue) regardless of its discriminatory motive."[21] While *McKennon* did not specifically equate the burden in mixed-motive cases to that in after-acquired evidence cases, neither did it suggest a heavier burden for employers in the after-acquired evidence context, according to Justice Kozinski.[22]

The Supreme Court's decision in *Price Waterhouse* "thoroughly rejected" the clear and convincing evidence standard for defendant employers.[23] The 1991 Civil Rights Act only partially overruled *Price Waterhouse* because the Act provides that where an employer shows (by a preponderance) that it would have made the same decision even without the discriminatory reason, this showing merely limits the remedy.[24] The majority conclude that between the *Price Waterhouse* decision and the 1991 Civil Rights Act, the standard of proof from the earlier circuit precedent of *Nanty v. Barrows Co.* has been overruled.[25] *McKennon* "gives not the slightest indication that *Price Waterhouse* is inapplicable to the issue of the employer's standard of proof at the remedy stage of an after-acquired evidence case."[26] The majority sees a close analogy between mixed-motive and after-acquired evidence cases in that both types of cases permit an employer to defend itself at the remedy stage.[27] Justice Kozinski perceived no reason why a higher hurdle should be set for the after-acquired evidence employer than for the mixed-motive employer.[28]

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18. *Id.* at 766 (citing Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (codified at 42 U.S.C. § 2000e-2 (Supp. V 1993)).

19. *Id.* at 766-67 (citing *Price Waterhouse*, 490 U.S. at 253-54 (Brennan, J., plurality opinion) (distinguishing the standards for establishing liability and remedies)).

20. *Id.* at 767-68 (citing H.R. REP. NO. 102-40(1), 102d Cong., 2d Sess., at 45 n.39 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 n.39). Judge Fletcher notes that the legislative history of the Civil Rights Act of 1991 reflects Congressional intent "'to restore the decisional law in effect in many of the federal circuits prior to the decision in *Price Waterhouse*,' and one of the decisions cited in the report is *Nanty* . . . ." H.R. Rep. No. 102-40(1) at 46 n.41, 48, *reprinted in* 1991 U.S.C.C.A.N. at 584 n.41, 586. Judge Fletcher also references two other Ninth Circuit cases decided after *Nanty*: *O'Day*, 79 F.3d at 766 n.3 (citing Jauregui v. City of Glendale, 852 F.2d 1128, 1136-37 (9th Cir. 1988) and *Ostroff v. Employment Exchange, Inc.*, 683 F.2d 302, 304 (9th Cir. 1982)).

21. O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 759 (9th Cir. 1996) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (Brennan, J., plurality opinion)).

22. *Id.* at 760.

23. *Id.*

24. *Id.* (citing 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)). The Supreme Court, in *Price Waterhouse*, would have allowed this showing to defeat liability. *See Price Waterhouse*, 490 U.S. at 258.

25. *O'Day*, 79 F.3d at 760 (*distinguishing Nanty*, 660 F.2d 1327 (9th Cir. 1981) (requiring the clear and convincing standard)).

26. *Id.* at 760 (9th Cir. 1996).

27. O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 760-61 (9th Cir. 1996).

28. *Id.* at 761. Neither the legislative history nor the Civil Rights Act of 1991 itself provide support

Indeed, the dissent's theory of a heavier burden for the after-acquired evidence employer does have some appeal. An after-acquired evidence employer is, after all, unaware of any legitimate nondiscriminatory reason at the time that the challenged employment decision is made. In contrast, the mixed-motive employer at least timely possesses a legitimate reason or reasons supporting its decision about the plaintiff. But, should this difference provide such a significant evidentiary advantage to the mixed-motive employer over the after-acquired evidence employer? The possession of information prior to the challenged decision makes no critical difference in terms of liability unless it is an efficient cause of the employer's action.[29] Once the defendant's liability is established, evidence damaging to the plaintiff bears upon the remedy in similar fashion whether the information was known to the defendant prior to the decision or discovered thereafter. However, with after-acquired evidence, *McKennon* instructs that the date when information is discovered generally curtails backpay.[30]

This clear directive from *McKennon* is subject to some criticism because it allows the employer to limit the remedy by producing information that may never have been discovered absent the lawsuit.[31] Of course, no lawsuit need have been filed but for the employer's discriminatory conduct. Yet, the risk that damaging information may be discovered is one that a plaintiff assumes when bringing an employment discrimination action.[32] There is merit in allowing the after-acquired evidence to balance the interests of the parties and to address the wrongs committed by each party. Clearly, absent compelling reasons to the contrary, the trial courts will follow *McKennon's* general rule that backpay terminates upon discovery of the after-acquired information.[33] The next

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for the clear and convincing evidence standard according to the majority. *Id.* at 760-61 & n.4.

29. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (Brennan, J., plurality opinion) (requiring the legitimate reason be the actual motivating factor at the time).

30. *See* McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 886 (1995).

31. *See* O'Brien, *supra* note 1, at 106, 110, 113, 120-24 (discussing the merits of requiring the employer to establish that it would have discovered the damaging evidence independent of the discrimination lawsuit in order to make plaintiff whole in some cases); Sprang, *supra* note 13, at 152-57 (maintaining that after-acquired evidence should be excluded when discovered solely as a result of an employee's discrimination lawsuit unless employee misconduct threatens harm to the employer or the public); Maureen A. Shannon, *Employment Discrimination—Age Discrimination in Employment Act of 1967-After-Acquired Evidence—Availability of Damages*, 34 DUQ. L. REV. 215, 228-29 (1995) (raising the issue that *McKennon* rule does not require employer to show it would have discovered the employee's misconduct on its own and that rule "sacrifices a thorough examination of the extent of the plaintiff's injury and misconduct for the sake of a clear and simple rule"); Whitford, *supra* note 13, at 402 (recommending that employer "be able to limit backpay to date it *would have found* the hidden information") (emphasis added).

32. *See* Rebecca Hanner White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 84 (1993) (arguing that "[t]here is nothing inherently illegitimate about an employer's acquisition of such information through pretrial discovery or through its pretrial investigation.").

33. *See McKennon*, 115 S. Ct. at 886 (noting that reinstatement and front pay generally are not appropriate remedies in cases where the employee would have been terminated anyway, and backpay from termination to date of discovery of information is a beginning point in remedy formulation); *cf.* Whitford, *supra* note 13, at 403-04 (asserting that front pay should be considered a viable substitute for reinstatement, where reinstatement is unavailable, and depending upon the facts and equities of a case; also recommending a formula that would provide pay through the time the employer would have discovered the damaging information anyway).

section discusses the EEOC's present position on remedies in after-acquired evidence cases.

III. EEOC GUIDANCE ON AFTER-ACQUIRED EVIDENCE

The EEOC has analyzed the impact of the Supreme Court's *McKennon* decision on its enforcement and charge processing of after-acquired evidence cases.[34] Such evidence was not deemed relevant to liability by the *McKennon* Court,[35] just as the EEOC had instructed in earlier guidance,[36] and advocated in its brief in *McKennon*.[37] In the internal guidance to commission personnel, the agency both interprets the Supreme Court's decision and outlines what remedies will be available in various situations.[38]

In order for after-acquired evidence to limit a plaintiff's relief, an employer must prove that the misconduct was serious enough that the employer would have discharged the employee anyway.[39] EEOC investigators are advised to ascertain the outcome of other similar incidents of misconduct of the defendant employer.[40] Absent this internal comparative data, other indicia of severity must be used. For example, if the misconduct is criminal in nature,[41] or the misconduct imperils the integrity of the business,[42] or the nature of the misconduct would reasonably result in the employer's adverse action against the employee, such inquiries will assist an investigator in weighing whether the later-discovered misconduct would have resulted in the same employer sanction anyway.[43] If the outcome would have been the same or harsher even

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34. EEOC Guidance, *supra* note 4.

35. *See id.* at E-6 to E-7 (citing *McKennon*, 115 S. Ct. at 884).

36. *See* EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory [hereinafter 1992 Guidance], *reprinted in* 8 FAIR EMPL. PRAC. MAN. (BNA) 405: 6925-28 (July 7, 1992); EEOC Office of General Counsel, Revised EEOC General Counsel's Memo on Civil Rights Act of 1991 [hereinafter General Counsel's Memo], *reprinted in* DAILY LAB. REP. (BNA) F-1 (Mar. 4, 1993).

37. *See* Brief for the United States and EEOC, McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879 (1995), No. 93-1543, DAILY LAB. REP. (BNA) No. 140, D-1, D-7 (July 25, 1994).

38. *See Leading The News, Discrimination, EEOC Guidance on "McKennon" Says Broad Relief Available to Plaintiffs,* DAILY LAB. REP. (BNA) No. 241, at AA-1 (Dec. 15, 1995).

39. EEOC Guidance, *supra* note 4, at E-7 (citing Ricky v. Mapco, Inc., 50 F.3d 874, 876 (10th Cir. 1995)). In *Ricky*, the plaintiff successfully established age discrimination, but the case was remanded to determine whether plaintiff's alleged sexual harassment of a secretary was actually after-acquired evidence since the employer admitted knowledge of the initial incident. *Id.* & n.2. If the evidence of misconduct is deemed after-acquired, the employer must demonstrate to the jury that such would justify discharge. Thereafter, the "jury must then determine the precise date on which Mapco would have terminated Ricky so that backpay may be calculated to that date." *Id.* at 876.

This last requirement is of interest because it infers that the date of discovery of the information need not terminate backpay in the case. The EEOC's 1992 Guidance, *supra* note 36, at 405: 6925-26 also discussed using the date of discovery to terminate backpay and a portion of compensatory damages where applicable. In the absence of a discovery date, the 1992 Guidance advocates assessing an approximate date. *Id.* & n.27.

40. EEOC Guidance, *supra* note 4, at E-7.

41. *Id.* The EEOC Guidance gives the examples of embezzlement, fraud, assault, and theft.

42. *Id.* (referring to examples such as divulgence of trade secret, security or confidential information).

43. *See id.*

without the discrimination, the backpay generally will be limited to the date when the information was discovered.[44]

The EEOC Guidance emphasizes that *McKennon* characterized its guideline on backpay as a "beginning point" and that "extraordinary equitable circumstances . . . [would] . . . warrant additional relief."[45] Where an employer conducts a retaliatory investigation, the purpose of which is to uncover derogatory information about the complainant or to discourage other charges or opposition, this independent violation of federal employment discrimination law meets the level of extraordinary equitable circumstances in the Commission's view.[46] Such employer malintent will trigger backpay to the date the complaint is resolved, rather than to the date of discovery.[47]

McKennon largely confirmed the EEOC's position that employer liability for discrimination exists even if evidence of employee misconduct later comes to light, and the Court reflected that similar principles apply to Title VII and Americans with Disabilities Act cases as to an age discrimination case like *McKennon*.[48] Therefore, the Commission primarily outlined *McKennon's* remedial implications for these statutes.[49]

A. Compensatory Damages

Compensatory damages are intended "to restore the employee to the position he or she would have been in absent the discrimination."[50] Compensatory damages must be determined from case to case, but ordinarily most pecuniary damages will be treated analogously to backpay, terminating as of the date the evidence is discovered.[51] Once again, the Commission will vary from this general rule in cases of retaliatory discharge.[52] Also, compensatory damages for emotional harm will not be time limited.[53] The Guidance illustrates this principle with a hypothetical charging party

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44. *Id.* at E-7.

45. *Id.*

46. EEOC Guidance, *supra* note 4, at E-7 to E-8.

47. *See id.* at E-8. The Commission notes that employers who "wage a retaliatory investigation must lose the advantage of equities that would, absent the retaliation, favor that employer." *Id. But see* Arthur F. Silbergeld, *Evidence of Fraud Helps Counter Employee Suits*, NAT'L L. J., Mar. 18, 1996, at B5. Mr. Silbergeld criticizes the EEOC's guidance that backpay should extend to the date of the complaint's resolution in these retaliation cases as an extraordinary result "since the employer would have been free to discover the same fraud in the course of post-termination litigation". *Id.*

48. *See* EEOC Guidance, *supra* note 4, at E-8.

49. *See id.* The EEOC Guidance also refers to the awardability of liquidated damages under the Equal Pay Act and the ADEA. *Id.*

50. *Id.* (citing McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 886 (1995)). *McKennon* cites to *Franks v. Bowman Transportation*, 424 U.S. 747, 764 (1976), for this concept.

51. EEOC Guidance, *supra* note 4, at E-8. The EEOC Guidance specifies job search and moving expenses as examples of pecuniary or out-of-pocket losses.

52. *Id.; see also supra* notes 46-47 and accompanying text (discussing similar recommendation regarding backpay where damaging information discovered by unlawful retaliatory investigation).

53. EEOC Guidance, *supra* note 4, at E-8. The EEOC Guidance notes that "[n]othing in *McKennon* suggests that [these damages] should be time limited" and "no legitimate business prerogatives are served by exonerating a proven discriminator from paying the full cost of the emotional damage caused by the discrimination." *Id.* The EEOC Guidance expressly rejects the outcome in *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4th Cir. 1995), where the Fourth Circuit assumed without discussion that the date of discovery would limit both the amount of the damages award and backpay in the same manner. *Id.* at

who suffers from severe depression and traumatic stress disorder resulting from discrimination.[54] Despite résumé fraud that would have resulted in her termination anyway, the charging party may collect for the future effects of emotional harm and future medical expenses caused by the discrimination.[55] Job search expenses would not normally be recovered in this example unless incurred before the discovery of the damaging information.[56]

B. Punitive Damages

Since after-acquired evidence did not motivate the employer's adverse action, such evidence does not affect punitive damages which the Commission views as "virtually always appropriate where retaliation has been established."[57] Once again, the EEOC stresses the grave consequences of employer retaliation.[58]

C. Liquidated Damages

The Guidance instructs that despite after-acquired evidence of employee misconduct, damages remain available in Equal Pay Act and ADEA cases.[59]

In summary thus far, the EEOC Guidance contains a useful outline on remedies in after-acquired evidence cases in light of *McKennon*. Once an employer's liability for employment discrimination is established, *McKennon's* threshold for limiting remedies is proof that the plaintiff's later-discovered wrongdoing would have resulted in termination anyway.[60] Absent that proof, *McKennon* offers little respite from the full panoply of remedies. Unfortunately, the EEOC apparently did not foresee and thus did not address the standard of proof required of the employer in this regard. The Court of Appeals for the Ninth Circuit has set the employer's burden at the preponderance level, but, as has been discussed, the *O'Day* opinion involved a divided panel.[61] The partial dissent was strongly worded and may draw support for a clear and convincing evidence standard in other circuits.

If the EEOC had provided some constructive advice on this issue, it might have assisted the Ninth Circuit to reach unanimity, and encouraged other appellate courts to follow the Guidance and the Ninth Circuit's interpretation of the employer's burden of

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E-8 to E-9 & n.7. *See supra* note 6 discussing the *Russell* case.

54. EEOC Guidance, *supra note* 4, at E-8.

55. *Id.* at E-8 to E-9 & n.8 (noting that amount of compensatory damages affected if harm not entirely attributable to discrimination).

56. *Id.* at E-8.

57. *Id.* (citing Enforcement Guidance: Compensatory and Punitive Damages, July 14, 1992, at 17-18).

58. *See supra* notes 46-47, 52 and accompanying text discussing other examples of the EEOC's remedial response to retaliation.

59. EEOC Guidance, *supra* note 4, at E-8, *referencing* McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879 (1995). *See also* EEOC Guidance, *supra* note 4, at E-9 n.4. Liquidated damages are available where a willful violation of the ADEA is established. The Supreme Court interpreted willfulness as requiring a showing that an employer knew, or showed reckless disregard for whether its conduct was in violation of the ADEA. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993).

60. *See McKennon*, 115 S. Ct. at 883-86.

61. *See* O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996). *See supra* notes 7-28 and accompanying text.

proof. It would be helpful if the EEOC issued a revised guidance that responds to *O'Day* in order to clarify the agency's position on the employer's burden of proof.

IV. AFTER-ACQUIRED EVIDENCE OF POST-TERMINATION MISCONDUCT

This section analyzes another issue of significance to the law of after-acquired evidence in employment discrimination cases. Should after-acquired evidence of post-discharge misconduct be governed by *McKennon's* analytical framework? As with the burden of proof issue, the present EEOC Guidance on After-Acquired Evidence does not address this question.[62] Seemingly, the judiciary would benefit from the agency's perspective on this point in a revised guidance.[63] In the next part, several trial court decisions involving after-acquired evidence of post-termination misconduct are analyzed and compared to the treatment of post-termination misconduct in other discharge cases not involving after-acquired evidence. Also, the treatment of after-acquired evidence of post-termination misconduct presented in an arbitral forum will be discussed.

Since the *McKennon* decision, three federal district courts have excluded after-acquired evidence of post-discharge misconduct, finding *McKennon's* rule inapplicable.[64] In the most recent case, *Carr v. Woodbury County Juvenile Detention Center*, the U.S. District Court for the Northern District of Iowa ruled that after-acquired evidence of post-employment marijuana use was inadmissible pursuant to a pretrial *motion in limine*.[65] The employer's policy prohibiting the use of drugs could not be imposed upon a person when she was no longer employed, and the introduction of the evidence would unduly prejudice the plaintiff's discrimination claim, the court found.[66] And yet, it seems that plaintiff's repetitive marijuana use should be relevant to a reinstatement order.

In *Carr*, the plaintiff was a youth worker at a juvenile detention center, and the employer's policy was clearly stated that employees "found guilty of indulgence in a controlled substance without seeking treatment will be discharged."[67] While the employer had not yet established that the after-discovered wrongdoing would have resulted in Carr's termination anyway,[68] this is not an inconceivable premise. In the

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62. *See* EEOC Guidance, *supra* note 4. It is interesting to note that the Guidance was issued on December 14, 1995, subsequent to the three post-*McKennon* decisions on post-termination misconduct discussed in this section.

63. This seems a mild prescription in comparison with one commentator's recommendation that *McKennon* may prompt a legislative response. *See* Elissa J. Preheim, *Discrimination, Deceit, and Legal Decoys: The Diversion of After-Acquired Evidence and the Focus Restored by* McKennon v. Nashville Publishing Company, 71 IND. L.J. 235, 269 (1995).

64. *See supra* note 5 and cases cited therein. The *Carr* opinion notes that decisions regarding after-acquired evidence of post-employment wrongdoing are rare. Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 626 n.5 (N.D. Iowa 1995).

65. *See Carr*, 905 F. Supp. at 620, 629, 631. A *motion in limine* is a pretrial motion that requests a court to prohibit opposing counsel from referring to or offering evidence on highly prejudicial matters. *See* BLACK'S LAW DICTIONARY 1012-13 (6th ed. 1990).

66. *Carr*, 905 F. Supp. at 631. The court noted that it would be "grossly inequitable" to hold Carr to county policies when she was not receiving any of the benefits. *Id.* at 629.

67. *Id.* at 621.

68. *Id.* at 631. The *Carr* court offers this aside essentially as dicta since it determines that the case

context of a pretrial motion to exclude evidence, the district court concluded that Carr's marijuana use was "irrelevant to any of the issues in the case" largely because the evidence involved post-employment misconduct, but also because "its admission *here* would be unfairly prejudicial."[69] The reference to "here" may indicate that the court could find the evidence relevant later, after liability is established. For, it is one thing to exclude highly prejudicial evidence at the liability phase, but quite another matter to suppress evidence of criminal misconduct that directly relates to the plaintiff's ability or qualifications to perform the job when determining the scope of the remedy.[70] This is so because reinstatement would be "pointless" if the employer has an independent, nondiscriminatory basis to terminate plaintiff.[71]

The *McKennon* court dismissed the notion that after-acquired evidence of employee wrongdoing may operate *in limine* to bar the plaintiff from seeking equitable relief in a discrimination case because of the "important public purposes" served by these private suits.[72] Nonetheless, the evidence of employee misconduct *is* deemed relevant at the remedial stage.[73]

Should after-acquired evidence of post-termination wrongdoing be treated so differently from pre-termination wrongdoing? In the arbitral sphere, some arbitrators have considered post-discharge *or* pre-discharge misconduct relevant to modification of a penalty, but not to justify the discharge.[74] This treatment is analogous to the bifurcation of liability from remedy in *McKennon*.[75] The arbitral usage is especially instructive because it equates pre-hire to post-termination misconduct, a logical equation in one respect in that no present employment relationship exists in either of these situations.[76] However, no after-acquired evidence employment discrimination cases have yet made the same analogy of pre-hire to post-termination misconduct. As discussed earlier, the courts and the EEOC have interpreted *McKennon's* rule as applying to pre-hire as well as to on-the-job misconduct.[77] The few cases that have explicitly dealt with after-acquired evidence of post-termination misconduct in employment discrimination cases have found *McKennon's* rule inapplicable.[78]

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falls outside the scope of *McKennon*. Thus, the employer's failure to achieve *McKennon's* threshold for remedial abatement appears to bolster the equity of the outcome. *Id.*

69. *Id.* (emphasis added).

70. *See* EEOC Guidance, *supra* note 4, at E-7 (instructing agency investigators that if the after-acquired evidence involves criminal misconduct of the plaintiff, this is one way to ascertain whether the employer would have terminated the employee anyway due to the severity of the wrongdoing).

71. *See* McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 886 (1995).

72. *Id.* at 885.

73. *Id.* at 886.

74. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 675-76 (4th ed. 1985) and 181 (Supp. 1989). Such after-discovered information or evidence of post-discharge actions may also be considered in the grievant's favor. *Id.*

75. *See generally McKennon*, 115 S. Ct. at 879.

76. And yet, applicants for employment enjoy protection from discrimination in numerous situations. *See, e.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (holding applicants also protected from discrimination based upon union affiliation). Applicants for employment are specifically protected under statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994) and the Americans with Disabilities Act, 42 U.S.C. §§12101, 12112 (1988 & Supp. V).

77. *See supra* note 6 and accompanying text.

78. *See* Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 626-27 (N.D. Iowa 1995); Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 682-83 (S.D.N.Y. 1995); Ryder v.

In a related context, however, the Supreme Court, in *ABF Freight System, Inc. v. NLRB*, upheld a National Labor Relations Board order to reinstate and provide backpay to a former employee whose termination was an unfair labor practice.[79] This remedy persisted despite the complainant's false testimony under oath.[80] Notably, this testimony occurred *after* termination.[81] *ABF Freight's* precedential value for after-acquired evidence cases is limited, however, because *ABF Freight* is classified as a pretext case, one where the employer offers a nondiscriminatory reason to justify the discharge, but the Board determines that the reason was not a motivating factor.[82] Such a case is more closely aligned with a mixed-motive case than to an after-acquired evidence case. This is so because both pretext and mixed-motive cases involve reasons known to the employer at the time it made the challenged decision regarding the plaintiff. The difference between pretext and mixed-motive cases lies in the credibility or weight granted the employer's proffered legitimate reason. In a pretext case, the reason is substantially discounted by the adjudicating body whereas in a mixed-motive case, the proffered legitimate reason is credited as a motivating factor.[83]

An after-acquired evidence case is distinguishable from pretext and mixed-motive cases because, by definition, after-acquired evidence involves information previously unknown to the employer, evidence damaging to the plaintiff that is discovered after the employer's decision was already made.[84] Also, because *ABF Freight* is an unfair labor practice case, it is intrinsically somewhat different from cases brought pursuant to equal employment opportunity statutes, further diminishing its precedential consideration here.

Before *Carr* defined the impact of "after after-acquired evidence" in an employment discrimination case,[85] a United States District Court from the Southern District Court of New York decided a Title VII case, *Sigmon v. Parker Chapin Flattau & Klimpl*, involving an attorney who was laid off shortly after she returned from maternity leave.[86] In the aftermath of her layoff, Ms. Sigmon was provided office space at the firm from which to conduct a job search.[87] Within her assigned office, she found and copied evaluations of her professional performance and those of twenty other associates.[88] The federal district court in New York found similarly to *Carr*, that the

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Westinghouse Elec. Corp., 879 F. Supp. 534, 537 (W.D. Pa. 1995); *see also supra* note 5 containing explanatory parentheticals to each of these three decisions.

79. ABF Freight Sys., Inc. v. NLRB, 114 S. Ct. 835 (1994).

80. *Id.* at 837-38.

81. *Id.* In summarizing the facts, the Court highlights the Board's emphasis that ABF did not discharge the complainant because he lied about the reason for his tardiness, rather his "car trouble" excuse for lateness was "seized upon" as a pretext for the discharge. *Id.* (citations omitted).

82. *See id.* at 836, 838.

83. *See generally id.*; *see also* THE DEVELOPING LABOR LAW 191-95 (Charles J. Morris ed., 2d ed. 1983) and 106-11 (Supp. 1989) (discussing mixed-motive and pretext cases under section 8(a)(3) of the NLRA).

84. *See* McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 885 (1995) (deeming mixed-motive cases inapposite to instant case involving after-acquired evidence).

85. Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 626 (N.D. Iowa 1995). This term refers to after-acquired evidence of post-employment wrongdoing.

86. Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667 (S.D.N.Y. 1995).

87. *Id.* at 674.

88. *Id; see also Leading the News, Pregnancy Discrimination, Attorney Laid Off After Maternity Leave May Proceed With Pregnancy Bias Claims*, DAILY LAB. REP. (BNA) No. 211, at A-7 to A-8 (Nov.

after-acquired evidence of Sigmon's post-termination misconduct was not governed by the *McKennon* rule.[89]

The firm argued that Sigmon's damages should be limited to backpay because she misappropriated firm documents, but the court disagreed.[90] While the court questioned the plaintiff's judgment in copying the material, the court referred to the fact that Sigmon found the file with her name on it within the space that she was authorized to use, and that all of the materials would have been available through discovery, as ameliorating the severity of her misconduct.[91] Because "plaintiff and defendant were not in an employer-employee relationship at the time of the alleged incident . . . any complaint defendant has against plaintiff for her post-employment conduct falls outside of the *McKennon* rule, and outside of Title VII."[92] In *Sigmon,* interestingly, *no* limitation on remedies was deemed appropriate based upon the after-acquired evidence of post-employment misconduct.[93]

The third employment discrimination case involving after-acquired evidence of post-termination misconduct herein considered was decided just days after *McKennon.*[94] In *Ryder v. Westinghouse Electric Corp.,* defendant was denied summary judgment on plaintiff's age discrimination claim despite after-acquired evidence that the plaintiff allegedly divulged confidential information to an individual who was engaged in a dispute and arbitration with Westinghouse.[95] The United States District Court for the Western District of Pennsylvania appears to be the first court to interpret *McKennon's* doctrine as applying only to situations where an employer-employee relationship existed at the time the misconduct occurred.[96] The *Ryder* opinion also referred to a definition of after-acquired evidence that includes applicants as well as employees from the Third Circuit's decision in *Mardell v. Harleysville Life Insurance Co.,* a decision that was later vacated in light of *McKennon,* but *Mardell* was affirmed in relevant part upon remand.[97] The *Ryder* court noted that "there cannot be misconduct that the employer did not know about prior to making its adverse decision if the misconduct did not even occur until after the adverse decision was made."[98] The court refused to allow the after-acquired evidence doctrine

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1, 1995).

89. *Sigmon,* 901 F. Supp. at 682-83.

90. *Id.*

91. *See id.* at 683.

92. *Id.* The *Sigmon* court cited no precedent for their conclusion that post-employment conduct falls outside of the *McKennon* rule. *Id.*

93. *Id.* The court distinguished *Lipin v. Bender,* 644 N.E.2d 1300 (1994) (involving a grant of motion to dismiss a plaintiff's case where she removed privileged work products from defendant's attorneys' bags at a discovery conference, thus irreparably damaging defendant's defense).

94. Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534 (W.D. Pa. 1995). The *Ryder* decision was rendered on February 6, 1995. *McKennon* was decided January 23, 1995. McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879 (1995).

95. *Ryder,* 879 F. Supp. at 536-38.

96. *Id.* at 537.

97. *Id.* (citing Mardell v. Harleysville Life Ins. Co., 91 F.3d 1221 (3d Cir. 1994), *vacated and remanded,* 115 S. Ct. 1397 (1995), *aff'd in part, rev'd in part,* 65 F.3d 1072 (3d Cir. 1995) (remedial provisions revised in light of *McKennon*)).

98. *Id.* at 537. The court reflected that the employer did not point to "a single decision" to support applying the after-acquired evidence doctrine to post-termination "misconduct". *Id.* The court placed "misconduct" in quotation marks, thus categorizing post-termination misconduct separately.

to be expanded to that extent (i.e., to include post-termination misconduct).[99] Discovery was re-opened to give Westinghouse a chance to investigate fresh evidence of *pre*-termination misconduct to which the after-acquired evidence doctrine would apply.[100]

What is interesting about *Ryder* is its adoption of the treatment afforded post-termination misconduct from a 1994 decision, *Calhoun v. Ball.*[101] *Calhoun* followed *Summers v. State Farm Mutual Automobile Insurance Co.*,[102] the Tenth Circuit case that *McKennon* later overruled.[103] In *Calhoun*, the plaintiff misappropriated 5,200 work-related documents when he cleaned out his work area upon termination.[104] The Ball Corporation moved for summary judgment on Calhoun's Title VII claim based upon the *Summers* after-acquired evidence doctrine.[105] The company relied upon Calhoun's retention of engineering drawings that he had created during an earlier stint with the company, as well as upon his retention of many documents at his final termination.[106] The trial court found that the company did not meet its burden of showing that Calhoun knew it was against company policy to retain the initial drawings.[107]

The parties agreed that Calhoun's later extensive post-termination misappropriation made him ineligible for rehire, but the court found that the *Summers* defense did not apply since the defense requires that the misconduct occurred *before* termination.[108] The *Calhoun* court saw *Summers* as a "judge-made narrow exception to the broad statutory proscriptions against discriminatory animus."[109] The doctrine "should be read strictly and applied narrowly" as it is "harsh in that it is an absolute defense and runs counter to Congressional prohibition of discrimination in the workplace."[110] The employer has other civil remedies and criminal sanctions with which to respond to post-termination misconduct, the *Calhoun* opinion noted.[111] Also, because the impact of *Calhoun's* alleged post-termination misconduct upon his Title VII remedy was not briefed or argued, the court left that for another day . . . presumably awaiting the plaintiff's success on the merits of his discrimination claim.[112]

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99. *Id.* at 537-38 (citing *Mardell*, 31 F.3d at 1221; McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879 (1995)). *See also* Calhoun v. Ball Corp., 866 F. Supp. 473, 477 (D. Colo. 1994) (involving after-acquired evidence of post-termination removal of company documents where court found the *Summers* doctrine inapplicable to post-employment misconduct due to absence of employment relationship).

100. Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534, 538 (W.D. Pa. 1995).

101. *Id.* (citing Calhoun v. Ball, 866 F. Supp. 473, 477 (D. Colo. 1994)).

102. 864 F.2d 700 (10th Cir. 1988).

103. *McKennon*, 115 S. Ct. at 879; *Calhoun*, 866 F. Supp. at 473; Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988).

104. *Calhoun*, 866 F. Supp. at 475. One cannot help but compare the facts in *McKennon* where the plaintiff's copying of confidential documents *prior* to termination was far less extensive, and yet, that misconduct would generally preclude reinstatement and front pay. *See McKennon*, 115 S. Ct. at 885-86.

105. *Calhoun*, 866 F. Supp. at 475.

106. *Id.* at 476. The earlier stint was as a jobber.

107. *Id.*

108. *Id.* at 476-77.

109. *Id.* at 477.

110. *Id.*

111. Calhoun v. Ball, 866 F. Supp. 473, 477 (D. Colo. 1994).

112. *See id.*

The outcome in *Calhoun* appears quite close to that which would pertain even after *McKennon*, and yet, because *McKennon* did not speak to the issue of post-termination misconduct, questions remain as to how after-acquired evidence of such should be treated.[113]

The *Ryder* opinion refers to the after-acquired evidence doctrine from *McKennon* and from *Mardell*, a pre-*McKennon* case that also refused to allow after-acquired evidence to bar defendant's liability for employment discrimination.[114] But *Ryder* also relies upon *Calhoun v. Ball Corp.* where the "doctrine" referred to is the now-defunct *Summers* doctrine.[115] While *Calhoun* brought about a result that is harmonious with *McKennon*, *Calhoun's* definition of the after-acquired evidence doctrine was narrow because the "doctrine" *Calhoun* defined was the harsh *Summers* defense.[116] In order to effectuate the important public policies served by federal antidiscrimination statutes, *Calhoun* sought to restrict the operation of a defense that barred all liability.[117]

Since *Ryder* derived the scope of "the" after-acquired evidence doctrine from a *Summers*-genre decision, its complete exclusion of post-termination misconduct should not be taken too literally.[118] In fact, the *Ryder* court itself stated that "it is not clear that the after-acquired evidence doctrine has any application at all in this case . . . where the misconduct occurred after the employee had been terminated, . . . *we believe* that the doctrine would not apply."[119] The *Ryder* court also noted that the employer "presented no authority supporting its proposition that the after-acquired evidence doctrine applies [to post-termination misconduct]."[120]

In *Sigmon*, decided six months after *Ryder*, the United States District Court for the Southern District of New York arrived at a similar conclusion, again citing no precedent on after-acquired evidence of post-employment misconduct.[121] It is particularly problematic that *Sigmon* indicated such evidence would not result in limitation of damages.[122] In some instances, after-acquired evidence of egregious and/or criminal post-employment misconduct should prevent reinstatement and limit front pay.[123] For example, the facts in *Carr*, the most recent of the post-termination after-acquired evidence cases, indicate that the plaintiff admitted to using marijuana three to four times a month.[124] Reinstating the plaintiff as a youth worker in a county juvenile detention center may not be a practical remedy if her use of illegal substances relates to her ability to effectively and safely perform her job. Clearly, if Carr had lied

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113. McKennon v. Nashville Banner Publ'g Co., 115 S.Ct. 879 (1995).

114. Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534, 537-38 (W.D. Pa. 1995) (citing Mardell v. Harleyville Life Ins. Co., 31 F.3d 1221, 1222 (3rd Cir. 1994)). *See also supra* note 97 and accompanying text discussing *Mardell.*

115. *Id.* at 538.

116. *Calhoun*, 866 F. Supp. at 476-77 (D. Colo. 1994) (citing Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988)).

117. *See id.*

118. *Ryder*, 879 F. Supp. at 538 (citing *Calhoun*, 866 F. Supp at 477).

119. *Id.* at 537 (emphasis added).

120. *Id.*

121. Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 683 (S.D.N.Y. 1995).

122. *Id.* at 682-83.

123. For an excellent discussion of other remedies, see White & Brussack, *supra* note 32, at 80-94; and Preheim, *supra* note 63, at 256-67. The EEOC Guidance, *supra* note 4, at E-7, uses the criminal nature of misconduct as one measure of its severity.

124. Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 621 (N.D. Iowa 1995).

about a drug offense on her job application, and the defendant met *McKennon's* burden of proving that the plaintiff would have been discharged upon discovery of this after-acquired information anyway, the case would generally not give rise to reinstatement or front pay.[125]

Should such a distinction pertain for post-employment misconduct? *Carr* finds that post-employment misconduct "is even more distant from the employer's decision-making process [than other after-acquired evidence of employment misconduct] because the misconduct is not temporally related to the decision."[126] However, pre-hire or on-the-job misconduct might be further removed in time from the termination decision than misconduct that occurs right after termination. For example, in *Sigmon*, plaintiff's misconduct occurred in the weeks just following her termination.[127] The on-the-job misconduct in *McKennon* stretched over the final year of her employment.[128] In some pre-hire cases, the time between the misconduct and the discriminatory decision may be far longer than in the post-employment misconduct situation, so the temporal relationship should not be the defining measure.[129]

Carr relies upon the absence of temporal propinquity, noting that the distance between Carr's misconduct and the employment relationship was greater than in either *Sigmon* or *Ryder*.[130] The court also states that unlike *Sigmon* and *Ryder*, where the employer could mount a separate claim against the employee, the alleged post-employment marijuana use "simply had nothing to do with and did not occur during her employment and caused her employer absolutely no detriment."[131] The court holds that "*McKennon* does not *require* the admission in this case of the evidence of post-employment marijuana use."[132] They also note that the County did not prove that had Carr remained employed, she would have violated the County's drug policy.[133] Further, the court stated that *even if McKennon* were deemed applicable to the case, which they argued it was not, the "general rule" on backpay should not apply; rather, the "extraordinary equitable circumstances" exception should govern.[134]

In summary, the federal district courts that have ruled upon after-acquired evidence of post-termination misconduct to date have separated such wrongdoing from after-acquired evidence of pre-hire and on-the-job misconduct. Post-termination

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125. *See* McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879 (1995); Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072, 1074 n.4 (3d Cir. 1995) (interpreting *McKennon* as not distinguishing between on- and off-the-job misconduct, such as application fraud).

126. *Carr*, 905 F. Supp. at 628.

127. Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 674 (S.D.N.Y. 1995).

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

129. *See* Russell v. Microdyne Corp., 65 F.3d 1229 (4th Cir. 1995) (involving purported pre-hire misrepresentations in September, 1990, an overall atmosphere of sexual harassment, a 1992 failure to promote, and filing a Title VII claim in February 1993). The pre-hire misconduct may be even further removed from the employer's adverse decision than post-employment misconduct and thus the logic of measuring a temporal connection fails.

130. Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 628 (N.D. Iowa 1995).

131. *Id.* at 628-29.

132. *Id.* at 629 (emphasis added).

133. *Id.* The court concluded that the county failed to establish the prerequisites for invoking *McKennon*. *Id.*

134. *Id.* at 629-30 n.7. Discovery of the "new information does not justify ending the employer's backpay obligation." *Id.*

misconduct falls outside of the *McKennon* framework, according to these decisions.[135] While district court cases carry little precedential weight, these decisions seem to represent a trend, and in the absence of appellate review, they represent the sole judicial interpretation of the question. It would be helpful if the EEOC revised its Guidance on After-Acquired Evidence to recommend the appropriate treatment of post-employment misconduct.[136] While it would make sense to exclude highly prejudicial after-acquired evidence of post-termination wrongdoing at the liability phase of a discrimination lawsuit, when determining the remedy, *McKennon's* "would have been terminated anyway" framework is a logical threshold for the employer to meet in order to permit after-acquired evidence of pre-, on-the-job, or post-employment misconduct to limit plaintiff's remedy.[137]

Perhaps in some respects *Carr* is correct, that absent the employment relationship and the benefits that flow with it, a plaintiff should not be bound by the same burdens as an employee.[138] And yet, there are both civil and criminal restrictions placed upon individuals even during periods of unemployment, that if exceeded, will result in diminished employment opportunities. Certainly, the trial courts are vested with discretion to balance the equities in these cases.

When an employer terminates an employee for a discriminatory reason, thereafter, after-acquired evidence of a legitimate nondiscriminatory reason to support the discharge may be discovered. The latter cannot be categorized as a motivating factor due to the employer's ignorance of the misconduct at the time the decision was made. Where the employer establishes that the after-acquired evidence of plaintiff's misconduct independently would have resulted in the same decision, *McKennon* permits limitation of plaintiff's remedy, again depending upon the equities apparent to the trial court. If the after-acquired evidence is of post-termination misconduct, this evidence clearly cannot affect the employer's liability. However, where post-termination misconduct is egregious, such conduct should bar reinstatement and curtail backpay, absent strong indications to the contrary.[139]

V. CONCLUSION

Since the Supreme Court's 1995 *McKennon* decision, the law of after-acquired evidence in employment discrimination cases has continued to evolve. The employer's burden of proof to limit plaintiff's remedy has been interpreted as a preponderance level by the Ninth Circuit in *O'Day v. McDonnell Douglas*.[140] The EEOC's recent Guidance on After-Acquired Evidence instructs on that agency's post-*McKennon* enforcement strategy. The Guidance does not address the employer's specific burden of proof to establish that the after-acquired evidence would have resulted in the same decision even absent the discrimination. Neither does the Guidance advise the courts

135. *Carr*, 905 F. Supp. at 619; Sigmon v. Parker Chapin Flattau & Kimpl, 901 F. Supp. 667 (S.D.N.Y. 1995); Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534 (W.D. Pa. 1995).

136. *See supra* notes 62-63 and accompanying text.

137. *See* McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 886 (1995).

138. Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 629 (N.D. Iowa 1995).

139. Hypothetically, if several psychiatrists testify that plaintiff suffered significant loss of self-esteem, etc., due to defendant's discrimination, and this resulted in relapse of alcohol abuse, shouldn't plaintiff be permitted an opportunity for treatment before denial of reinstatement or even curtailment of backpay?

140. 79 F.3d 756 (9th Cir. 1996).

on after-acquired evidence of post-termination wrongdoing. So far, the federal district courts have excluded such evidence, but in some instances, evidence of post-termination misconduct should impact the remedy.