The impact of after-acquired evidence in employment discrimination cases after McKennon v. Nashville Banner Publishing Company

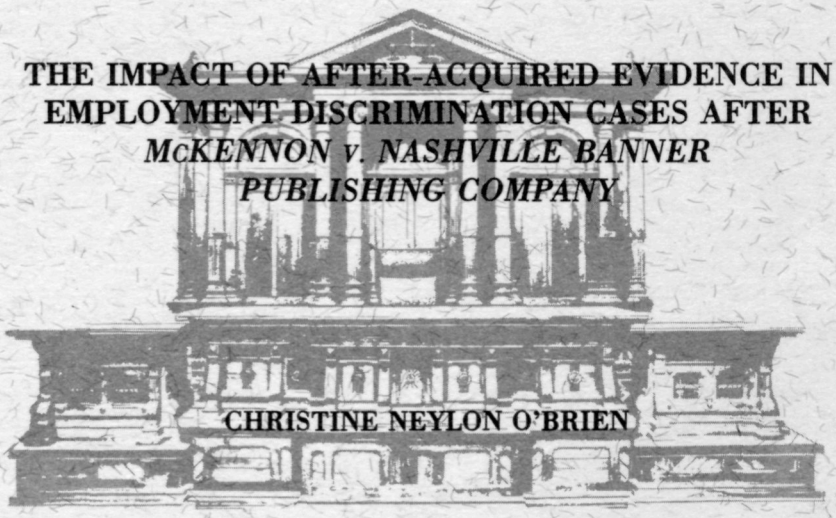
Author: Christine Neylon O'Brien

Published in *Creighton Law Review*, vol. 29, no. 2, pp. 675-689, February 1996

VOLUME 29, NO. 2 FEBRUARY 1996

CREIGHTON LAW REVIEW

THE IMPACT OF AFTER-ACQUIRED EVIDENCE IN EMPLOYMENT DISCRIMINATION CASES AFTER *McKENNON v. NASHVILLE BANNER PUBLISHING COMPANY*



CHRISTINE NEYLON O'BRIEN

CREIGHTON UNIVERSITY SCHOOL OF LAW

THE IMPACT OF AFTER-ACQUIRED EVIDENCE IN EMPLOYMENT DISCRIMINATION CASES AFTER *McKENNON v. NASHVILLE BANNER PUBLISHING COMPANY*

CHRISTINE NEYLON O'BRIEN†

INTRODUCTION

The United States Supreme Court recently resolved a conflict among the circuits as to the appropriate use of after-acquired evidence in employment discrimination cases.[1] In *McKennon v. Nashville Banner Publishing Co.*,[2] a unanimous Supreme Court upheld the plaintiff's right to her day in court on the issue of age discrimination.[3] The Court's decision reversed a grant of summary judgment from the United States Court of Appeals for the Sixth Circuit for the defendant employer that relied upon after-acquired evidence of the plaintiff's own job-related wrongdoing.[4] In so doing, the Court stated that, upon its discovery, the employee's misconduct would have resulted in her

† Associate Professor of Business Law, Wallace E. Carroll School of Management, Boston College; A.B. Boston College, 1975; J.D. Boston College Law School, 1978. Professor O'Brien served as Professor of Law at Bentley College and as Visiting Professor of Business Law and also Associate Dean of the Carroll School of Management. The author wishes to thank Kathy Kyratzoglou for her assistance on this project.

1. For a thorough examination of the conflict among the circuits on this issue, *see* Christine Neylon O'Brien, "Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing," 23 PEPP. L. REV. 65, 65-124 (1995); McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885-87 (1995) (addressing the conflict among circuit courts as to the effect of after-acquired evidence); Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1404-05 (8th Cir. 1994) (stating that after-acquired evidence will bar the plaintiff's cause of action); Washington v. Lake County, Ill., 969 F.2d 250, 255 (7th Cir. 1992) (holding that after-acquired evidence bars employee's cause of action); Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409, 410-11 (6th Cir. 1992) (holding that after-acquired evidence is a defense); Kristufek v. Hussman Foodservice Co., Toastmaster Division, 985 F.2d 364, 369 (7th Cir. 1993) (stating that after-acquired evidence is irrelevant and that the only issue is the lawfulness of the employer's discharge); Wallace v. Dunn Constr. Co., Inc., 968 F.2d 1174, 1178 (11th Cir. 1992), *vacated* 32 F.3d 1489 (11th Cir. 1994) *aff'd in part, rev'd in part* 62 F.3d 374 (11th Cir. 1995) (en banc) (stating that employee's cause of action should not be barred in light of after-acquired evidence).

2. 115 S. Ct. 879 (1995).

3. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 882, 885-86 (1995).

4. McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 543 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879, 887 (1995).

termination.[5] Based on these same findings, however, the district court and the Sixth Circuit allowed the after-acquired evidence to bar the plaintiff's opportunity to prove that she was terminated because of her age.[6]

This Article analyzes the facts of the *McKennon* case and the Court's resolution of the issues therein.[7] Next, this Article outlines the remedial discretion and parameters afforded the trial courts and sets forth the boundaries set for the courts of appeal by the *McKennon* decision.[8]

FACTS AND HOLDING

In *McKennon v. Nashville Banner Publishing Co.*[9], Christine McKennon, a secretary, was terminated by Nashville Banner Publishing Co. ("Banner") at the age of sixty-two, after thirty-nine years of service.[10] The Banner claimed that the discharge was part of a "workforce reduction plan."[11] Yet, two days prior to McKennon's dismissal, the Banner hired a twenty-six year old secretary.[12]

During her tenure at the Banner, McKennon's work performance evaluations were consistently excellent.[13] In 1989, after working seven years as a secretary to an executive vice-president, McKennon was reassigned to serve as secretary to the comptroller.[14] While working in this position, McKennon had access to confidential information and files.[15] During the year preceding her termination, McKennon copied several confidential documents and took the copies home to show to her husband.[16]

After McKennon was terminated, she filed suit against the Banner, alleging that her discharge violated both the Age Discrimination in Employment Act ("ADEA") and the Tennessee Human Rights Act

---

5. *McKennon*, 115 S. Ct. at 883.
6. *McKennon*, 797 F. Supp. at 608; *McKennon*, 9 F.3d at 540.
7. *See infra* notes 9-19, 44-61 and accompanying text.
8. *See infra* notes 20-43 and accompanying text.
9. 115 S. Ct. 879 (1995).
10. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 882 (1995). The United States Supreme Court gauged McKennon's duration of employment as "some 30 years." *Id.* She was employed from May, 1951, to October 31, 1990. *McKennon*, 9 F.3d at 540.
11. *McKennon*, 115 S. Ct. at 882.
12. Linda Greenhouse, *Justices Appear to Favor Employees on a Job Discrimination Issue*, N.Y. TIMES, Nov. 3, 1994, at A22; Ann Puga, *Supreme Court will hear an age bias case with a twist*, BOSTON GLOBE, Nov. 2, 1994, at 7.
13. *McKennon*, 9 F.3d at 540.
14. *McKennon*, 797 F. Supp. at 605.
15. *Id.* at 605-06; *McKennon*, 9 F.3d at 540.
16. *McKennon*, 115 S. Ct. at 883. McKennon claimed that she was concerned about her job and did this for "protection." *Id.* (citations omitted).

("THRA").[17] After McKennon admitted that she had copied and removed some confidential documents, the Banner sent her a letter declaring that her acts were a violation of her job responsibilities.[18] The letter indicated that, if the Banner had known of her misconduct, McKennon would have been discharged immediately.[19]

The United States District Court for the Middle District of Tennessee granted summary judgment to the Banner, finding that McKennon's copying and removal of confidential documents violated her obligations as a confidential secretary.[20] Based upon the nature and materiality of McKennon's misconduct along with the Banner's statement that it would have terminated McKennon if it had known of the misconduct, the district court concluded that McKennon's actions amounted to "adequate and just cause for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge."[21]

McKennon appealed, and the United States Court of Appeals for the Sixth Circuit affirmed the summary judgment, stating that the "sole issue in after-acquired evidence cases is whether the employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct."[22] The Sixth Circuit relied upon the undisputed evidence from Banner executives that McKennon would have been discharged for her misconduct if the Banner had known that she copied and removed confidential documents.[23]

In so holding, the Sixth Circuit cited *Summers v. State Farm Mutual Automobile Insurance Co.*,[24] the seminal case from the United States Court of Appeals for the Tenth Circuit that established the after-acquired evidence doctrine in employment discrimination cases.[25] In *Summers*, a field claims representative alleged that he was unlawfully terminated because of his age and religion.[26] The employer, State Farm Mutual Automobile Insurance Co. ("State Farm"), however, argued that Summers had first been sanctioned for submitting

17. *McKennon*, 115 S. Ct. at 883 (citing 29 U.S.C. §§ 621 *et. seq.* (1988 & Supp. V); *see* TENN. CODE ANN. § 4-21-101, *et. seq.* (1991).

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

19. *Id.*

20. *McKennon*, 797 F. Supp. at 606.

21. *Id.* at 607-08.

22. *McKennon*, 9 F.3d at 543 (citing Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 304-05 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993)).

23. *McKennon*, 9 F.3d at 540.

24. 864 F.2d 700 (10th Cir. 1988), *overruled by*, 115 S. Ct. 879 (1995).

25. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988), *overruled by*, 115 S. Ct. 879 (1995); *McKennon*, 9 F.3d at 541.

26. *Summers*, 864 F.2d at 701-02. "Summers was a 56-year-old member of the Mormon Church at the time of his discharge." *Id.* at 702.

falsified records and misrecording documents.[27] After discovering more evidence of record falsification, Summers was again warned.[28] Then, in September of 1981, Summers was placed on probation without pay for two weeks.[29] Upon his return, Summers continued to turn in erroneous claims.[30]

State Farm discharged Summers approximately seven months later and cited as reasons for the termination his "poor attitude, inability to get along with fellow employees and customers, and similar problems in dealing with the public. . . ."[31] Approximately four years later, State Farm discovered over 150 instances of record falsification attributable to Summers with eighteen infractions occurring after his warning and probation.[32]

State Farm argued that this evidence should bar Summers from all relief, regardless of the fact that the evidence was acquired after the alleged discriminatory discharge.[33] The Tenth Circuit agreed with State Farm and barred Summers' claim in light of the after-acquired evidence doctrine.[34] The Tenth Circuit stated that the doctrine of after-acquired evidence permitted later discovered evidence to be introduced as relevant to the plaintiff's claim of injury.[35] The Tenth Circuit also noted that the doctrine precluded any remedy or relief that might otherwise have been available to Summers.[36]

In *McKennon*, the Sixth Circuit also cited *O'Day v. McDonnell Douglas Helicopter Co.*,[37] a district court case from the Ninth Circuit.[38] Like *McKennon*, *O'Day* also involved an allegation of age discrimination.[39] In *O'Day*, the plaintiff removed his own confidential personnel file from his supervisor's desk, copied portions, and showed them to a co-worker.[40] In *O'Day*, the district court referred to relevant sections of an employee handbook and found that "no reasonable jury

27. *Summers*, 864 F.2d at 701.
28. *Id.* at 702-03.
29. *Id.*
30. *Id.* at 703. The evidence was discovered after the discharge. *Id.*
31. *Id.* at 703.
32. *Id.* at 703.
33. *Id.* at 704.
34. *Id.*
35. *Id.* at 708.
36. *Id.*
37. 784 F. Supp. 1466 (D. Ariz. 1992).
38. *McKennon*, 9 F.3d at 542 (citing O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992)).
39. *Id.* at 542-43 (citing *O'Day*, 784 F. Supp. at 1467).
40. *O'Day*, 784 F. Supp. at 1467. O'Day's file contained rankings of himself and other engineers. *Id.* The managerial implications of sharing this information with another affected employee were serious because such information was "used for layoffs, assignments, and promotions." *Id.* O'Day claimed that he was gathering this information to prepare his E.E.O.C. charge against McDonnell Douglas. *Id.*

would find that O'Day's conduct . . . was reasonable in light of the circumstances."[41] The district court held that, because McDonnell would have fired O'Day as a result of this misconduct, the summary judgment granted in favor of McDonnell was correct.[42] After discussing *O'Day*, the Sixth Circuit in *McKennon* disposed of McKennon's argument that her actions were justified because she was opposing the employer's unlawful practices, stating that "[c]opying and removing confidential documents is clearly not protected conduct."[43]

McKennon again appealed, and the United States Supreme Court granted certiorari.[44] Justice Anthony M. Kennedy authored the opinion for a unanimous Supreme Court.[45] The Court determined that plaintiff employees filing suit under the ADEA were not completely barred from relief when the defendant employer uncovered after-acquired evidence of wrongdoing that "would have led to the employee's termination on lawful and legitimate grounds."[46] The Court held that after-acquired evidence is admissible to alter the remedy when the employer establishes that the misconduct was so severe that the employee "in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."[47]

While the facts in *McKennon* involved an age discrimination complaint, the Court linked the ADEA to the "ongoing congressional effort to eradicate discrimination in the workplace," deeming the ADEA as "part of a wider statutory scheme to protect employees in the workplace nationwide."[48] The Court also discussed the "common substantive features and . . . common purpose" of the ADEA and Title VII, stating 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. . . ."[49] Given the issue in this case and the Court's analysis, it appears that the ruling in *McKennon* applies to situations involving other statutorily protected characteristics, not just age discrimination.[50]

---

41. *O'Day*, 784 F. Supp. at 1470.
42. *Id.* at 1468-70.
43. *McKennon*, 9 F.3d at 543 n.7.
44. 115 S. Ct. 879 (1995).
45. McKennon v. Nashville Banner Publishing Co., 115 S. Ct., 879, 882 (1995).
46. *McKennon*, 115 S. Ct. at 882-83, 886-87.
47. *Id.* at 886-87.
48. *Id.* at 884 (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988 & Supp. V); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (1988 & Supp. V); the National Labor Relations Act, 29 U.S.C. § 158(a) (1988); and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988)).
49. *McKennon*, 115 S. Ct. at 884 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).
50. *Id.*; *see* Linda Greenhouse, *Justices Rule for Employee in a Bias Suit, Reject Employers' Use of Belated Evidence*, N.Y. TIMES, Jan. 24, 1995, at 1 & A13; Susan R.

The Court in *McKennon* discussed the important purposes underlying the "remedial measures in these statutes," noting particularly the objective of deterring discrimination and compensating injured employees.[51] The Court stated that private litigants effectuate the goals of public policy embodied in the equal employment opportunity statutes.[52] Recognizing these goals, the Court in *McKennon* found that "[i]t would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act."[53]

Moreover, the Court in *McKennon* stated that the Sixth Circuit utilized the decision in *Summers*, which in turn relied on *Mount Healthy City School District Board of Education v. Doyle*.[54] However, the Court distinguished *Mount Healthy* from after-acquired evidence cases, because *Mount Healthy* involved a mixed-motive situation.[55] In mixed-motive cases, the Court stated that "two motives [are] . . . operative in the employer's decision to fire an employee. One [is] lawful, the other . . . [is] . . . unlawful."[56] Thus, the Court determined that the Sixth Circuit relied on an inapplicable decision by basing its holding on the *Summers* decision.[57]

In *McKennon*, the Court assumed that the sole reason for McKennon's discharge was her age; a reason that violates the ADEA.[58] The Court also assumed that discovery of McKennon's misconduct would have led to her immediate termination.[59] The Court determined that severity of an employee's wrongdoing, then, becomes a threshold question that must be addressed before the after-acquired evidence is deemed relevant.[60] Thus, the Court stated that the employer must

---

Kneller, *Discrimination: Supreme Court Says Employee Misdeeds Don't Shield Employers from Bias Claims*, DAILY LAB. REP. (BNA) No. 15, Jan. 24, 1995, at AA-1.

51. *McKennon*, 115 S. Ct. at 884.

52. *Id.*

53. *Id.*

54. 429 U.S. 274 (1977); *McKennon*, 115 S. Ct. at 885 (citing Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (1988)).

55. *McKennon*, 115 S. Ct. at 885; Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1988).

56. *McKennon*, 115 S. Ct. at 885 (citing *Mt. Healthy City Sch. Dist. Bd. of Ed.*, 429 U.S. at 284-87). The Banner discovered McKennon's misconduct after she was fired, and thus, the Banner "could not have been motivated by knowledge it did not have. . . ." *McKennon*, 115 S. Ct. at 885.

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

58. *Id.* at 883. This accords with viewing the facts in the light most favorable to the plaintiff under standard summary judgment procedure. *See id.*

59. *Id.* The Court noted that the district court and the Sixth Circuit did not contest this premise and saw no need to question it on review. *Id.*

60. *McKennon*, 115 S. Ct. at 886. The Court stated that:

> 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

establish that the employee's misconduct amounted to an independent nondiscriminatory basis for discharge, before the after-acquired evidence will affect the remedy.[61] The Court, however, did not explicitly address after-acquired evidence of lesser wrongdoing.[62]

The Court discussed a number of important points relative to the impact of after-acquired evidence upon the remedy available to McKennon.[63] First, the Court resolved the question of whether equitable relief is available despite the plaintiff's "unclean hands."[64] The Court stated that, traditionally, such extraordinary relief would not be accorded a plaintiff who "engaged in [her] own reprehensible conduct in the course of the transaction at issue."[65] The Court noted, however, that the "unclean hands defense" is rejected " 'where a private suit serves important public purposes.' "[66]

Considering the remedies provided by the ADEA, the Court acknowledged the need to balance the legitimate interests of the parties to prevent the employer's or employee's interests from being ignored in favor of one or the other.[67] The normal prerogatives of an employer, including its discretion to make decisions about the workplace, remains intact as long as the decisions are not discriminatory.[68] The Court concluded that in the course of wrongdoing that would result in termination anyway, it is a "general rule" that "[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds."[69] In such cases, as a general rule, the award of front pay was also deemed inappropriate.[70]

The determination of backpay presented a more onerous task, according to the Court.[71] The restoration of a plaintiff to the place "he or

---

and the corresponding duties it has arising from the employee's wrongdoing. (citation omitted).

Id. (citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968)).

61. *McKennon*, 115 S. Ct. at 886-87. If the later-discovered information would not justify the employee's discharge, however, clearly its consequence is greatly diminished. While the information should not bar a successful employee's reinstatement, the information may subject the employee to some discipline commensurate with the wrongdoing.

62. *McKennon*, 115 S. Ct. at 879-87.

63. *See infra* notes 64-76 and accompanying text.

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

65. *Id.*

66. *Id.* at 885-86 (citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968)).

67. *Id.* at 886.

68. *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989)).

69. *Id.*

70. *Id.*

71. *Id.*

she would have been in absent the discrimination" is an enigmatic principle in this context.[72] The Court was unwilling to force the employer to ignore the after-acquired evidence, even if the evidence might not have been discovered absent the lawsuit.[73] Rather, the Court stated that the calculation of backpay will ordinarily run from the date of termination to the date of discovery of the evidence.[74] The Court described this as "the beginning point in the trial court's formulation," noting that the "court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party."[75] Thus, the Court concluded that the specific remedies must be determined in light of the facts and equities involved in each case.[76]

ANALYSIS

After-Acquired Evidence not a Bar to Liability

In *McKennon v. Nashville Banner Publishing Co.*,[77] the United States Supreme Court properly clarified that liability for employment discrimination is not barred by after-acquired evidence.[78] This Supreme Court decision reversed a trend that had developed among the federal circuit courts.[79] The after-acquired evidence doctrine

72. *Id.* (citing Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 764 (1976)).

73. *Id.*

74. *Id.* The National Labor Relations Board has used a similar rule on backpay in an unfair labor practice case, terminating the backpay at the date that the employee's wrongdoing was discovered. John Cuneo, Inc., 298 N.L.R.B. 856 (1990).

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

76. *Id.*

77. 115 S. Ct. 879 (1995).

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

79. For a thorough examination of the conflict among the circuits on this issue, *see* Christine Neylon O'Brien, "Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing," 23 Pepp. L. Rev. 65, 65-124 (1995). *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885-87 (1995) (addressing the conflict among the circuit courts as to the effect of after-acquired evidence); Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1404-05 (8th Cir. 1994) (stating that after-acquired evidence will bar the plaintiff's cause of action); O'Driscoll v. Hercules Inc., 12 F.3d 176, 180 (10th Cir. 1994), *vacated by*, 115 S. Ct. 1086 (1995) (holding that after-acquired evidence bars the employee's cause of action); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1222 (3rd Cir. 1994), *vacated by*, 115 S. Ct. 1397 (1995) (rejecting the after-acquired evidence role articulated in *Summers*); Kristufek v. Hussman Foodservice Co., Toastmaster Div., 985 F.2d 364, 369 (7th Cir. 1993) (stating that after-acquired evidence is irrelevant and the only issue is the lawfulness of the employer's discharge); Wallace v. Dunn Constr. Co., Inc., 968 F.2d 1174, 1178 (11th Cir. 1992), *reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), *aff'd in part, rev'd in part by*, 63 F.3d 374 (11th Cir. 1995) (stating that employee's cause of action should not be barred in light of after-acquired evidence); Washington v. Lake County, Ill., 969 F.2d 250, 255 (7th Cir. 1992) (holding that after-acquired evidence bars employee's cause of action); Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409, 410-11 (6th Cir. 1992) (holding that after-acquired evidence is a defense); Summers v. State Farm Mut.

promulgated by the United States Court of Appeals for the Tenth Circuit in *Summers v. State Farm Mutual Automobile Insurance Co.*[80] and adopted by a majority of the federal circuits was clearly refuted by the Court's holding in *McKennon*.[81]

The Court dismissed the often-cited precedent supporting the after-acquired evidence doctrine, *Mount Healthy City School District Board of Education v. Doyle*,[82] because the facts of that case involved two justifications for termination known to the employer at the time of the termination.[83] One reason was unlawful, but the other was not.[84] In contrast, in after-acquired evidence cases, the employer does not know that evidence sufficient for lawful termination is available at the time of the discriminatory employment decision.[85] Cases involving after-acquired evidence must not be analyzed in the same manner as mixed-motive cases because a factor can not influence a decision when that factor is unknown to the decisionmaker.[86]

Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988), *overruled by*, 115 S. Ct. 879 (1995) (stating that after-acquired evidence would not serve as a bar to an employee's cause of action against the employer); Smallwood v. United Air Lines, Inc., 728 F.2d 614, 616 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984), *overruled by*, 115 S. Ct. 879 (1995) (holding that the "wouldn't-have-hired-anyway defense" was applicable).

For a discussion of cases that disallow after-acquired evidence as a bar to liability for employment discrimination, *see* Wallace v. Dunn Constr. Company, Inc., 968 F.2d 1174 (11th Cir. 1992), *reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), *aff'd in part, rev'd in part by*, 63 F.3d 374 (11th Cir. 1995). The *Wallace* Court held that, even though after-acquired evidence of application fraud was not a bar to liability, reinstatement and front pay were not available, because the employee never would have been hired but for the false application. *Wallace*, 968 F.2d at 1183. In order to cut off back pay liability as of the date the information would have been discovered, the *Wallace* court required the employer to establish that it would have discovered the after-acquired evidence absent the employee's unlawful acts and the litigation. *Id.* at 1182. On remand, these evidentiary requirements were dispensed with in light of *McKennon*, 115 S. Ct. 879 (1995). *See Wallace*, 63 F.3d 374 (11th Cir. 1995). Kristufek v. Hussman Foodservice Co., Toastmaster Div., 985 F.2d 364, 369 (7th Cir. 1993) (finding that after-acquired information regarding resume fraud was not a bar to liability even though backpay cut off from the date the fraud was discovered); Mardell v. Harleysville Life Insurance Company, 31 F.3d 1221, 1223, 1239 (3rd Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995), *rev'd in part*, 65 F.3d 1072 (3rd Cir. 1995) (holding that after-acquired evidence of resume fraud was not a bar to liability and awarding backpay to the date of judgment).

80. 864 F.2d 700 (10th Cir. 1988).

81. *Compare* Summers v. State Farm Mut. Ins. Co., 864 F.2d 700, 705 (10th Cir. 1988) (holding that after-acquired evidence cannot be ignored when determining compensation) *with McKennon*, 115 S. Ct. at 883 (questioning the holding of *Summers* in which after-acquired evidence bars recovery).

82. 429 U.S. 274 (1977).

83. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); *McKennon*, 115 S. Ct. at 885 (stating that *Mount Healthy* is inapplicable).

84. *McKennon*, 115 S. Ct. at 885. The Court stated that "in *Mt. Healthy* we addressed a mixed-motive case." *Id.*

85. *Mardell*, 31 F.3d at 1222 (defining the "after-acquired evidence" doctrine).

86. *McKennon*, 115 S. Ct. at 885; Jennifer Miyoko Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 667-80 (1993).

The Court in *McKennon* discussed *Price Waterhouse v. Hopkins*,[87] which involved legitimate reasons for termination along with discriminatory reasons.[88] In *Price Waterhouse*, the United States Supreme Court explicitly required that a proffered legitimate reason must actually have motivated the decision "at the time."[89]

When damaging information is obtained at a date following termination, its relevance with regard to establishing lawful motivation for employment decisions is disqualified. An employer cannot use information it does not possess, and therefore, after-acquired evidence falls outside the scope of factors causing the employer's action.[90] Thus, the Court's refusal in *McKennon* to allow after-acquired evidence of dischargeable conduct to bar an employer's liability follows past precedent as well as rudimentary logic.[91] The decision in *McKennon* is also in accord with Equal Employment Opportunity Commission ("EEOC") guidelines that state that after-acquired evidence does not bar liability for employment discrimination but may both preclude reinstatement and alter the measure of damages.[92]

---

87. 490 U.S. 228 (1989).

88. Price Waterhouse v. Hopkins, 490 U.S. 228, 260-61 (1989); *McKennon*, 115 S. Ct. at 885.

89. *Price Waterhouse*, 490 U.S. at 252.

90. In the unfair labor practice arena, establishing the employer's knowledge of an employee's protected activity constitutes one element of the *prima facie* case that the employer discriminated against the employee in violation of § 8(a)(1) & (3) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(1) & (3) (1988) because of that activity. *See, e.g.*, Emerson Elec. Co. v. N.L.R.B., 573 F.2d 543, 545-47 (8th Cir. 1978) (holding that, despite the employee's support of the union and the supervisor's knowledge of the employee's pro-union activities, inference of an anti-union animus was insufficient in light of other legitimate reasons for termination). *See* Kenneth G. Parker, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 441 (1993) (recommending a substantive standard of legal cause so that employers must prove that they would have discovered the damaging evidence and would have acted upon it, whereupon backpay terminates as of the date the after-acquired evidence would have been discovered).

91. *See* Robert M. Shea, *Posttermination Discovery of Employee Misconduct: A New Defense in Employment Discrimination Litigation*, 17 EMPLOYEE REL. L.J. 103, 103-04 (1991) (noting the traditional rule that "posttermination discovery of employee misconduct . . . [is] . . . no defense to employee's claim of discrimination" and reasoning that such could not be deemed a "true reason but rather was pretext for discrimination"); Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees' [sic] Termination as a Defense to Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 28 (1990) (concluding that something is "wrong with a body of law which allows an employer to cover up its illegal activities by searching an employee's past for unknown falsifications").

92. *See* EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory (July 7 1992), *reprinted in* 8 Fair Empl. Prac. Man. (BNA) 405: 6926-28; Richard G. Steele, *Rethinking the After-Acquired Evidence Defense in Title VII Disparate Treatment Cases*, 46 HASTINGS L.J. 243, 274 (1994) (discussing EEOC Enforcement Guide).

A REMEDY TO SUIT THE CONDUCT

Public interest is significantly served by awarding a make-whole remedy to a victim of employment discrimination.[93] In *McKennon*, the Court noted that the legitimate concerns of the employer must be considered where employee wrongdoing is present.[94] The Court recognized the necessity of allowing each trial court to fashion remedies suitable to the particular facts of each case.[95] To a certain extent, the Court in *McKennon* deferred to the traditional discretion of the trial courts. It is uncertain, however, what factors the lower courts will use to determine remedies. Should the courts consider the nature and timing of the wrongdoing in granting relief so that resume or application fraud will have one consequence and on-the-job misconduct will have another? If the employee misconduct is a result of employer discrimination, should the employee misconduct be treated more leniently? Furthermore, in what situations should backpay extend to the date of judgment rather than to the date of discovery of the evidence?

In *McKennon*, the Court stated that, where an employer discovers evidence of a terminable offense and establishes that the employee would have been terminated upon discovery of the offense (even absent the proven discrimination) reinstatement and front pay will generally be precluded.[96] Once the severity of the offense is determined, should resume or application fraud be treated differently than on-the-job misconduct? Some commentators argue that the right to be free from discrimination generally is separate from the right to the job.[97] Thus, the employee is entitled to nondiscriminatory treatment once employed, even if the employee would never have been hired but for his/her pre-hiring misrepresentations. Under this theory, the public policies underlying the federal statutes take precedence over lesser common law counterclaims against a former employee.[98]

In *Wallace v. Dunn Construction Company, Inc.*,[99] in a dissenting opinion, Judge John C. Godbold presented a counterargument to this theory, in which he classified the employee as a "false claimant" be-

93. *McKennon*, 115 S. Ct. at 884 (stating that the ADEA provides reinstatement, backpay, injunctive relief, declaratory judgment, and attorneys' fees).

94. *Id.* at 886.

95. *Id.*

96. *Id.*

97. See 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, 200 n.190 (1993) (discussing the right to relief as a result of discrimination as being somewhat distinct from the employee's right to the job).

98. *Id.* at 200-02 (noting that such claims may be based on tort, contract, etc.).

99. 968 F.2d 1174 (11th Cir. 1992).

cause, but for her false application, she would not have been hired.[100] Judge Godbold noted that the facts in *Wallace* were different from a case involving a plaintiff obtaining employment and thereafter engaging in wrongdoing.[101] Both pre-hire and on-the-job wrongdoing have similar effects on operation of a business and the employee's ability to do the job.

While *McKennon* involved on-the-job misconduct, the Court simply framed the question as when "the employer discovers evidence of *wrongdoing*" and did not distinguish between on-the-job wrongdoing and pre-hire misconduct.[102] Instead, the Court focused on whether the misconduct would have resulted in termination anyway absent the discrimination. The Court did not address the nature of the wrongdoing, or whether the wrongdoing occurred prior to hiring. The distinction between pre-hire and post-hire misconduct seems inconsequential, because both applicants and employees are protected by equal employment opportunity statutes. The relevance of either type of wrongdoing depends on its infringement upon the employer's legitimate interests and its interference with the employee's continued ability to perform the job. Thus, the materiality of the wrongdoing is the key to its effect upon the remedy.

Trial courts will also consider the entire context that prompted the employee's wrongdoing. While McKennon's copying of confidential documents was not a protected activity, McKennon alleged that she had been instructed to destroy some documents that may have supported her potential discrimination claim.[103] In fact, company officials "had previously sought to destroy several of the documents, and had actually directed [McKennon] to shred them."[104] The Banner did not deny that the documents might have contained evidence to assist McKennon in regard to her Title VII action.[105] If McKennon had not perceived that she was being eased down and then out, one wonders whether she would have violated her fiduciary duty to her employer by

100. Wallace v. Dunn Constr. Co. Inc., 968 F.2d 1174, 1188 (11th Cir. 1992) (Godbold, J., dissenting), *vacated*, 32 F.3d 1489 (11th Cir. 1994), *aff'd in part, rev'd in part*, 62 F.3d 374 (11th Cir. 1995) (en banc).

101. *Wallace*, 968 F.2d at 1185.

102. *McKennon*, 115 S. Ct. at 882 (emphasis added). The recent *en banc* opinion in Wallace v. Dunn Constr. Co., Inc., 63 F.3d 374 (11th Cir. 1995) (en banc), makes clear that the Eleventh Circuit interprets that the Court's logic in *McKennon* applies to fraud in the application process as well as to wrongful conduct during employment. *Wallace*, 63 F.3d at 374.

103. *McKennon*, 9 F.3d at 543, 543 n.7.

104. Reply Brief for Petitioner, McKennon v. Nashville Banner Publising Co., 115 S. Ct. 879 (1995) (No. 93-1543), 1994 WL 563409 at *19.

105. *Id.*

copying and removing the documents.[106] The trier of fact may consider the nexus between the two events as some amelioration of an employee's uncharacteristic misconduct. While the employee's wrongdoing must not be ignored, its egregiousness may be discounted when balancing the equities on the facts of each case.[107] The following hypothetical examples further illustrate case-by-case determination of remedies.

HYPOTHETICAL 1

If a plaintiff, A, establishes that he was discharged because of unlawful race discrimination, but during the course of litigation it is shown that A put poison ivy on the toilet used by his supervisor, thus causing the supervisor a severe physical reaction, how should A's misconduct affect his remedy?[108]

Assuming the misconduct would have given rise to A's termination anyway, reinstatement and front pay would be unavailable after the holding in *McKennon*.[109] There would be no reason to extend backpay beyond the date of discovering A's misconduct because A's actions caused a real harm to the supervisor, one that could be actionable in tort as a battery.[110] On the facts, A's intentional on-the-job misconduct is not connected to the employer's discrimination, and, therefore, it is clearly an independent legitimate reason for discharge.

HYPOTHETICAL 2

Compare a hypothetical instance of resume fraud that is discovered when the former employee, B, pursues an age and gender discrimination complaint. Assume that the misrepresentations will disqualify B from reinstatement and front pay where the employer establishes that B never would have been hired and would have been

106. *McKennon*, 115 S. Ct. at 883. In 1989, McKennon was reassigned as secretary to the comptroller after serving as secretary for other company executives. *McKennon*, 797 F. Supp. at 604. She was discharged in 1990. *McKennon*, 9 F.3d at 540.

107. *McKennon*, 115 S. Ct. at 882. The Court in *McKennon* noted that "the employee's wrongdoing must be taken into account." *Id.* at 882. Further, the Court stated that "it cannot be required to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if [the information] might have gone undiscovered absent the suit." *Id.*

108. *See* Preston v. Phelps Dodge Copper Prod. Co., 647 A.2d 364, 366 (Conn. App. Ct. 1994).

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

110. In the *Preston* case, which involved a retaliatory discharge for whistleblowing and not statutory employment discrimination, the Connecticut Court of Appeals placed the burden of proof regarding a potential award of future earnings on the employee. *See* Preston v. Phelps Dodge Copper Prod. Co., 647 A.2d 364, 369 (Conn. App. Ct. 1994). The employee would need to establish that "he would still be employed and would have remained with his employer for a period of years." *Preston*, 647 A.2d at 369.

terminated upon discovery of the information. Should B's backpay award automatically terminate on the date the resume fraud was discovered?

What if B performed well in her position but had been told by her supervisor that she was beng replaced by someone who had a younger, stronger image, a "guy" who fit in better with the customers and the all-male upper-management group? Also, the facts show that B left an equivalent position in order to join what later proved to be an overtly discriminatory environment. Assume that B was not provided with the same advancement opportunities as males in similar positions. Does the Court's holding in *McKennon* mandate that backpay be curtailed as of the date of discovery of the resume fraud in such a case?

More likely, the totality of the circumstances will determine the equities and the relief. So, despite the fact that B's resume fraud indicates that she did not rightfully obtain the job, her right to be free from disparate treatment by the employer takes legal precedence. Using its discretionary power, the trial court could extend backpay to the date of judgment.

HYPOTHETICAL 3

Plaintiff C's application fraud involved failure to disclose a petty crime committed during his adolescence. In light of the sealed criminal record, the crime's lack of connection to the employment for which C applied, and the passage of twenty years, C decided to omit the offense on his job application at the defendant employer. C was hired and gave ten years of exemplary performance. C was then discharged because of his religious beliefs. The evidence established that C's supervisor repeatedly taunted him about his religion, telling several coworkers that he was "getting rid of" C because of his religion.

Would C's application fraud have resulted in his termination anyway? It is unlikely that the employer would be able to prove this, and, thus, if C effectively establishes his religious discrimination claim, C would be entitled to reinstatement, front pay, backpay, and other remedies available under Title VII.[111] In C's case, backpay should continue to the date of judgment and front pay should be awarded until the reinstatement is effected. Generally, in cases where an employee's misconduct is of the severity that the employee would not have been hired or would have been terminated upon discovery of the misconduct, backpay will be curtailed as of the date of discovery.

111. Steele, 46 HASTINGS L.J. at 246-47, 277-78 (discussing Title VII remedies).

CONCLUSION

The use of after-acquired evidence in employment discrimination cases was clarified by the United States Supreme Court's holding in *McKennon v. Nashville Banner Publishing Co.*[112] The Supreme Court appropriately refused to allow after-acquired evidence to legitimize a discriminatory employment decision. In this way, the employer's liability may still be established despite the later discovery of the employee's own wrongdoing.

The remedial guidelines provided by the Court are straightforward but afford trial courts their traditional discretion to balance the equities of each case. What is a dischargeable offense is a critical determination because such a determination will cut off the employee's right to reinstatement and front pay. Moreover, the severity of the employee's wrongdoing may limit entitlement to backpay. In most instances, backpay will terminate as of the date of discovery of the after-acquired evidence. Thus, it is advantageous for management to uncover such evidence at the earliest possible date.

It also behooves managers to document the legitimate nondiscriminatory reasons for employment decisions in anticipation of potential discrimination complaints. Similarly, applicants and employees need to be beware of engaging in practices that may come back to haunt them as a defensive strategy in the form of after-acquired evidence. For, after *McKennon*, both sides will be held accountable for their wrongs.

112. 115 S. Ct. 879 (1995).