McKennon v. Nashville Banner Publishing Co.: The Supreme Court puts after-acquired evidence in its rightful place

Author: Christine Neylon O'Brien

Persistent link: http://hdl.handle.net/2345/1491

This work is posted on eScholarship@BC,
Boston College University Libraries.

Published in *Business Law Review*, vol. 28, pp. 47-67, Spring 1995

Use of this resource is governed by the terms and conditions of the Creative Commons "Attribution-Noncommercial-No Derivative Works 3.0 United States" (http://creativecommons.org/licenses/by-nc-nd/3.0/us/)

McKENNON V. NASHVILLE BANNER PUBLISHING CO.: THE SUPREME COURT PUTS AFTER-ACQUIRED EVIDENCE IN ITS RIGHTFUL PLACE

by CHRISTINE NEYLON O'BRIEN*

A division among the federal circuits arose concerning the impact of after-acquired evidence of employee wrongdoing upon an employer's liability for statutory employment discrimination. Where pre-trial discovery unveils a separate nondiscriminatory reason for termination, numerous circuits allowed such previously unknown information to constitute a legitimate basis for the employment decision, following the model of a mixed-motive discharge. A trend developed among several other circuits that after-acquired evidence of employee misconduct should not prevent the establishment of employer liability but should be considered when addressing the remedy. The United States Supreme Court recently affirmed the latter approach in "McKennon v. Nashville Banner Publishing Co."

> "Time and trouble will tame an advanced young woman, but an advanced old woman is uncontrollable by any earthly force."
> Dorothy L. Sayers,
> Clouds of Witness (1926)

INTRODUCTION

In what has been touted as the most closely watched labor case on the Supreme Court's 1994 docket, [1] *McKennon v. Nashville Banner*

* Wallace E. Carroll School of Management, Boston College. This case note is partially excerpted from an article entitled: "After-Acquired Evidence as a Bar to Employment Discrimination Claims: Do Two Wrongs Make a Right to Discriminate?" that will appear in Volume 23:1 *Pepperdine Law Review* @ 1995 and is published here with permission.

[1] *First Monday in October Shows Shrunken Supreme Court Case Load*, DAILY LAB. REP. (BNA) No. 186, at C-1-C-2 (Sept. 28, 1994).

Publishing Co.,[2] Mrs. Christine McKennon, a former secretary at the defendant newspaper, Nashville Banner Publishing Co., filed a lawsuit alleging that her employment termination at age 62 constituted age discrimination.[3] Mrs. McKennon's performance evaluations were consistently excellent during her 39 years with the newspaper.[4] She served as a secretary to six different individuals over the course of her employment with the defendant, having recently worked for Jack Gunther, Executive Vice President, for over seven years when, in March, 1989, Mr. Gunther's job assignment changed.[5] Thereafter, Mrs. McKennon was relocated to the position of secretary to the Comptroller, Ms. Imogene Stoneking.[6] Plaintiff was discharged on October 31, 1990 and filed suit in May, 1991.[7]

Within the normal discovery process, Mrs. McKennon was deposed on December, 18, 1991, at which time the newspaper learned that she had copied several confidential documents that she had access to during her final position at the company. [8] Plaintiff took these items home where she showed them to her husband, ostensibly to insure and protect herself "in an attempt to learn information regarding [her] job security concerns."[9]

[2] 9 F.3d 539 (6th Cir. 1993), *cert. granted* 114 S. Ct. 2099 (1994), *rev'd and remanded*, 115 S. Ct. 879 (1995).

[3] *McKennon*, 9 F. 3d at 540. Plaintiff averred violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1988 ed. and Supp V), and the correlative state statute, the Tennessee Human Rights Act (THRA) Tenn. Code Ann. § 4-21-101, *et seq.* McKennon v. Nashville Banner Publishing Co., 797 F.Supp 604, 605 (M.D. Tenn 1992). Because the district court and Sixth Circuit refer to the plaintiff as Mrs. McKennon, this same mode of reference was used herein to discuss the opinions from these courts.

[4] *McKennon*, 9 F. 3d 539, 540.

[5] *McKennon*, 797 F. Supp. 605, 605 (1992).

[6] *Id.* Since a secretary's status and position are often tied to that of her/his supervisor, it is noteworthy that the reassignment of Mrs. McKennon from secretary to an executive vice president to secretary to a comptroller, in all likelihood was a demotion of sorts, one that seemingly was not based upon poor work performance. *See id.* and *supra* note 4 and accompanying text.

[7] *McKennon*, 797 F. Supp. 604, 605.

[8] *Id.*

[9] *Id.* at 606. The plaintiff obviously sought her husband's counsel about her employment situation. This is not so unusual in light of her regressed situation at the newspaper. *See supra* note 6 and accompanying text. In addition, Mrs. McKennon was required to sign an acknowledgment of receipt of an employee handbook, dated February 28, 1990, which was subsequently appended to the paper's memorandum in support of its successful motion for summary judgment. *Id.* at 605. Unlike other precedent cited with approval by the Sixth Circuit in support of its affirmance of the defendant's motion for summary judgment, the facts in the *McKennon* case involved a sharing of information between husband and wife, a privileged communication that

Ironically, this conduct of the plaintiff, that she attributed to caution, and her honest admission to these acts, operated to bar recovery on her age discrimination complaint at the federal district court and the Sixth Circuit Court of Appeals.[10] The newspaper issued her a "termination letter" just two days after the deposition was taken (indicating that she had copied the documents); this despite the fact that she had been effectively discharged nine months earlier.[11]

While there are many legal issues present in the *McKennon* case, the primary issue of interest here is whether evidence acquired after employment termination should constitute a complete bar to a former employee's age (or other statutorily protected characteristic) discrimination complaint, or should such after-acquired evidence merely alter the remedy? May an employer's showing that it discovered another basis for dismissal (other than age or another protected characteristic), a basis of which it had *no knowledge* at the time when the decision to terminate was made, operate to preclude the plaintiff from proceeding with her claim? Should such after-acquired information bar liability for the defendant employer?[12] Will after-acquired

wrought no real injury or damaging publication upon the defendant. *Cf.* O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1468-70 (D. Ariz. 1992) (involving employee's removal of confidential management files from supervisor's desk, photocopying and showing them to a co-worker where court upheld summary judgment for employer based upon the after-acquired evidence doctrine.). *Id. See McKennon,* 9 F.3d 539, 542-43 & n. 7.

[10] *McKennon*, 787 F. Supp. 604 at 608; *McKennon*, 9 F. 3d 539, 542. A very important public policy is served when the law encourage parties and witnesses to tell the truth.

[11] *McKennon*, 797 F. Supp 605, 606. It is likely that the employer's letter of termination amounted to defendant's attempt to cut off any potential back pay liability as of the date when the after-acquired evidence became known. *But see* Mardell v. Harleysville Life Insurance Co., 31 F. 3d 1221 (3rd Cir. 1994), *cert. granted*, 63 U.S.L.W. 4104 (U.S. Mar. 28, 1995) (No. 94-742), *vacating and remanding* to Third Circuit in light of *McKennon*, 115 S. Ct. 879 (1995). The Third Circuit had provided guidance that backpay should not be cut off at the moment the employer obtains the after-acquired evidence, rather a backpay award should be awarded up to the date of judgment unless defendant establishes it would have discovered the after-acquired evidence anyway, absent the litigation. *See also* Wallace v. Dunn Construction Co., Inc., 968 F. 2d 1174 (11th Cir. 1992), *vacated, reh'g granted*, 32 F.3d 1489 (11th Cir. 1994) (same).

[12] *See* Linda Greenhouse, "Justices Appear to Favor Employees on a Job-Discrimination Issue," N. Y. Times, Nov. 3, 1994, at A22 (discussing oral arguments in *McKennon* case and reporter's interpretation that Supreme Court justices disapprove of employers escaping liability for discrimination by unearthing after-the-fact evidence that employee otherwise deserved dismissal); *Justices Debate After-Acquired Evidence as Device to Defeat Job Bias Liability*,[hereinafter, *Justices Debate*] DAILY LAB. REP. (BNA) No. 211, at AA-1-AA-3 (Nov. 3., 1994) (summarizing issues discussed at Supreme Court oral arguments in *McKennon*).

evidence prevent discrimination claims from ever "see[ing] the light of day," as Justice Ruth Bader Ginsburg reflected during oral arguments in the *McKennon* case?[13]

This article analyzes the Supreme Court's recent *McKennon* decision which straightforwardly clarifies the liability issue, but falls short of delineating the remedial ramifications in a manner that would fully restore the plaintiff to the position that she/he would have been in absent the defendant's discrimination. Thus, a discussion of projected interpretations of *McKennon's* limited guidance on remedies is in order. Recommendations as to how the federal courts should now deal with after-acquired evidence in employment discrimination cases, based upon the egregiousness of the violations of the parties, and the importance of the public policy and private interests involved, are set forth.

I. The Sixth Circuit Conveys the Question of After-Acquired Evidence to the Supreme Court.

A. *McKennon v. Nashville Banner Publishing Co.*

1. The Lower Courts

The Sixth Circuit's decision in *McKennon v. Nashville Banner Publishing Co.* represented the culmination of a series of after-acquired evidence cases that affirmed amongst several judicial circuits a serious inroad into the make-whole remedial intent behind the federal antidiscrimination statutes.[14] The facts in *McKennon* illus-

[13] *See* "Court hears case of justified firing after a bias suit," Boston Globe, Nov. 3, 1994, at 8. This result reflects upon the grant of summary judgment for employers prior to development of the employment discrimination claim pursuant to the rule in the Sixth and other circuits which permit a 'short-circuit' based upon after-acquired evidence. *See also Justices Debate, supra* note 12 at AA-3. (discussing plaintiff's loss of day in court); and Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?* 9 LAB. LAWYER 43, 63 (1993) (criticizing *Summers* rationale that allows jettison of plaintiff's case by summary judgment). The Supreme Court in *McKennon* ultimately answered Justice Ginsburg's query in the negative. *See infra* notes 57-86 and accompanying text.

[14] 9 F.3d 539 (6th Cir. 1993), *cert. granted,* 114 S. Ct. 2099 (1994), rev'd and remanded, 115 S. Ct. 879, (1995). Several commentators discussed the Sixth Circuit's opinion in the *McKennon* case, even prior to the Court's grant of *certiorari. See* Samuel A. Mills, Note, *Toward an Equitable After-Acquired Evidence Rule,* 94 COLUM. L. REV. 1525, 1534-55 (1994) (criticizing *McKennon* opinion as "best example yet of the unjust consequences that routinely follow the application of *Summers*" and reflecting that "proof" that McKennon would have been fired anyway was based upon affirmation of company president). *Id.* at 1534 & n. 73; Kenneth G. Parker, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray,* 72 TEX. L. REV. 403, 404

trate the importance of federal statutory protections against age discrimination. The tendency of some managers to prefer young women for secretarial positions and to treat older experienced women unfairly is well-documented in the case law, even though such practices are curbed to some extent by legislative prohibitions.[15]

Mrs. McKennon, at age 62, with 39 years of service and consistently excellent performance evaluations, was dismissed due to a purported "staff reduction," while two days prior to McKennon's dismissal, the Banner hired a 26-year old secretary.[16] The plaintiff's right to litigate the evidence of discrimination was removed because, during discovery, she admitted having improperly copied several confidential company documents and showing them to her husband.[17] The district court granted summary judgment to the defendant based upon this after-acquired evidence of Mrs. McKennon's misconduct.[18]

The district court relied upon the rule in *Summers v. State Farm Mut. Auto Ins. Co.*,[19] a precedent from the Tenth Circuit that is generally credited as creating the after-acquired evidence doctrine, also at times referred to as the *Summers* doctrine or defense.[20] This

(1993) (citing *McKennon* as a case where employer who discriminated got a "free ride because of...fortuitous discovery of useful information"); 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, 200-201 & n.193 (1993) (Importing breach of contract analysis into Title VII cases where later-discovered misconduct operates as "just cause" for discharge, resulting in dismissal of petitioner's claim is inappropriate translation of public statutory right into "purely private interests"). *Id.*

[15] *See* Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993). The facts in that case involved a woman with forty years of service to a company who was terminated, not because of poor performance, but because the president wanted a young secretary. The confluence of age with gender discrimination in these cases is clear...that older *women* in particular are subject to discrimination based upon stereotypic perceptions of occupational image, i.e., that the ideal secretary should look young. Nonetheless, McKennon's complaint only alleged age discrimination. *McKennon,* 9 F.3d 539, 540.

[16] *McKennon,* 9 F. 3d 539, 540; Ann Puga, "Supreme Court will hear an age bias case with a twist," Boston Globe, Nov. 2, 1994, at 7; Greenhouse, *supra* note 12; *see supra* notes 1-11 and accompanying text (discussing facts in *McKennon*).

[17] 9 F.3d 539, 540. And, as Justice John Paul Stevens noted at the end of oral arguments in *McKennon* , 'her wrongdoing didn't cause even a nickel of damages for the Banner. At worst, she told a corporate secret to her husband.' *Justices Debate, supra* note 12, at AA-3.

[18] 797 F. Supp. 604, 608 (M. D. Tenn. 1992).

[19] 864 F. 2d 700 (10th Cir. 1988).

[20] *McKennon,* 797 F. Supp. at 606-08. *See e.g.,* William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered after* an Employee's Discharge to Bar Discrimination Claims, 9 LAB. LAWYER 31, 35 (1993) (discussing

doctrine permits after-acquired evidence of employee misconduct (or resume or application fraud) to bar an employer's liability for employment discrimination. In most instances, the after-acquired evidence is unrelated to the reason(s) proferred for the discharge, and by its definition, the information was not known to the employer at the time of the discharge or negative employment decision.[21] Thus, the after-acquired reason cannot be deemed a causative factor in the employment decision, unlike the motivating factors in mixed-motive cases where the defendant possesses both legal (good) and illegal (discriminatory) reasons for an employment decision.[22]

The grant of summary judgment in the *McKennon* case effectively prevented the plaintiff from having her day in court to prove that she was discriminated against. The district court noted that the Sixth Circuit adopted the *Summers* doctrine in *Johnson v. Honeywell Info. Sys., Inc.*, a case decided earlier the same year.[23] Mrs. McKennon argued that her conduct (in copying several confidential documents) was for her protection in light of her concern about her job.[24] The district court found that the "nature and materiality" of the misconduct was the central issue regarding the applicability of the after-

Summers defense); Jason M. Weinstein, *No Harm, No Foul?: The Use of After-Acquired Evidence in Title VII Employment Discrimination Cases*, 62 GEO. WASH. L. REV. 280, 296 (1994) (discussing *Summers* doctrine). *See also* James G. Babb, *The Use of After-Acquired Evidence as a Defense in Title VII Employment Discrimination Cases*, 30 HOUS. L. REV. 1945, 1952-61 (1994) (discussing *Summers* as beginning of after-acquired evidence and complete denial of relief).

[21] A good definition of after-acquired evidence in an employment discrimination case is provided in Mardell v. Harleysville Life Insurance Co., 31 F.3d 1221 (3rd Cir. 1994) where the Court states it:

> denotes evidence of the employee's or applicant's misconduct or dishonesty which the employer did not know about at the time it acted adversely to the employee or applicant, but which it discovered at some point prior to or, more typically, during, subsequent legal proceedings; the employer then tries to capitalize on that evidence to diminish or preclude entirely its liability for otherwise unlawful employment discrimination.

Id. at 1222.

[22] *See* Babb, *supra* note 20, at 1947-54 (discussing framework of Title VII claims in mixed-motive situations, application of after-acquired evidence in context of constitutional claims of former employee, and onset of *Summers* and progeny); *see generally*, Jennifer Miyoko Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 658, 667-68, 670 (1993) (criticizing *Summers* approach, categorized as majority view on after-acquired evidence, and use of mixed-motive analysis since after-acquired information not a motivating factor).

[23] 955 F.2d 409 (6th Cir. 1992); *McKennon*, 797 F. Supp. 604, 606-07 (M.D. Tenn. 1992).

[24] 797 F. Supp. at 607.

acquired evidence doctrine.[25] The defendant established to the court's satisfaction that it would have terminated plaintiff if it had known of her misconduct by introducing an affidavit to that effect from the president of the company.[26] Thus, the employer's testimony was pivotal to barring all relief for petitioner.

The Sixth Circuit affirmed the district court's grant of summary judgment to the Banner.[27] The appellate court's determination also relied upon the employer's evidence that it would have fired petitioner had it known of her misconduct.[28] At the Supreme Court oral

[25] *Id.*, citing *Johnson*, 955 F.2d at 413.

[26] *McKennon*, 797 F. Supp at 608. The district court deemed petitioner's misconduct, in light of her "status as a confidential secretary. . .adequate and just cause for her dismissal *as a matter of law*". *Id.* (emphasis added). The district court characterized the president's affidavit as "undisputed evidence" and later noted that plaintiff did not produce any evidence that the company would have retained her if it had known of her misconduct. *Id.* The Sixth Circuit also mentioned the testimony of other officers of the defendant that supported their finding. 9 F. 3d 539, 541 at n. 3.

It seems unfair to grant summary judgment for defendant based upon its own conclusory and self-serving statement of what it would have done had it known of petitioner's misconduct. In employment discrimination cases, where the defendant's real reasons for an employment decision have yet to be flushed-out, and may be suspect in light of statutory protections, it is inappropriate for a court to allow employer speculation (as to what it would have done if it had known about after-acquired information) to preclude a full examination of the relevant evidence. What petitioner did may have been wrong and unprotected activity, but her allegations concerning the defendant's actions deserve to be developed so that the entire context of both parties' actions may be envisaged.

In particular, petitioner's concerns about the destruction of documents that she felt would buttress her discrimination claim appear to have been based upon factual occurrences that might be deemed to ameliorate her breach of duty. *See* Reply Brief for Petitioner, McKennon v. Nashville Banner Publishing Co., (U.S.) No. 93-1543, 1994 WL 563409, at *19 (discussing that respondent did not deny that documents may contain evidence supporting petitioner's discrimination claim and respondent conceded that company officials had sought to destroy several of the documents and had directed petitioner to shred them). *See also McKennon*, 9 F. 3d 539, 540, n.1. The company documents that Mrs. McKennon improperly copied and showed to her husband included: a fiscal period payroll ledger dated 9/30/89; a profit and loss statement dated 10/30/89; a note from Elise McMillan to Simkins; a memo from I. Stoneking (the comptroller and Mrs. McKennon's supervisor) to Irby C. Simkins, Jr., dated 2/3/89; a handwritten note dated 2/8, and an agreement between the company and one of its managing employees, notarized 3/1/89. *Id.*

[27] *Id.* at 540.

[28] *Id.* at 541. The petitioner even admitted under questioning in her deposition that she would have been terminated for her actions. *Id.* at 541 n.3. The court refers to the fact that petitioner did not dispute the company's assertions to the effect that her conduct would have led to discharge if known to the employer. *Id.* at 540-41. Petitioner's counsel appeared to concede this issue when indicating that "employee misconduct might forfeit a right to reinstatement and front pay." *Justices Debate,*

arguments, Justice Ruth Bader Ginsburg remarked that the issue of whether McKennon would have been fired for taking the documents is a fact question that was inappropriately determined at the summary judgment stage.[29] The company affidavits that carried the motion for summary judgment were depositions which, as Judge Ginsburg cautioned, are not the same as presenting a witness in court with an opportunity for cross-examination.[30] Nonetheless, the Supreme Court chose not to rule on the propriety of that process in *McKennon*, perhaps because that issue was not specified in the question presented in the petition for *certiorari*.[31]

The Sixth Circuit narrowed their consideration to a "sole issue in after-acquired evidence cases...whether the employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct."[32] The appellate court refused to acknowledge that Mrs. McKennon's copying and removal of the confidential

supra note 12, at AA-1 (discussing oral arguments before Supreme Court in *McKennon*). It should be noted, however, that absent the alleged discrimination and subsequent litigation, the misconduct probably would not have been discovered in the ordinary course of business.

[29] *Justices Debate*, *supra* note 12, at AA-3. Judge Anthony Kennedy specifically objected to questioning on the issue since the Court accepted the case based upon the conclusion that Mrs. McKennon would have been fired for her misconduct. *Id.* Justice John Paul Stevens also clearly desired to confine the oral arguments to the issue of liability presented in the petition. *Id.* at AA-1. Also, according to the Sixth Circuit, this 'would have been fired anyway' finding was not disputed. *McKennon*, 9 F.3d 539, 540-41.

[30] *Justices Debate*, *supra* note 12, at AA-3.

[31] *See generally id.* The question certified in *McKennon* follows:

> Is employee who is dismissed in violation of ADEA barred from obtaining any remedy if, solely as result of unlawful dismissal and litigation challenging it, employer discovers another basis for dismissal, question previously accepted for review by court in Milligan-Jensen v. Michigan Technological Univ., . . .(citations omitted).

114 S. Ct. 2099 (1994).

Despite the seemingly narrow question, the question of what relief might be appropriate, if any, appears to be a subset of the question. *See* Brief for the United States and EEOC in McKennon v Nashville Banner [hereinafter, *U.S. & EEOC Brief*], (U.S.) No. 93-1543, Daily Lab. Rep. (BNA) No. 140, D-1, at D-4 (July 25, 1994) ("The issue that this case presents is *what relief* remains appropriate under the ADEA and Title VII when, after an employee is unlawfully discharged, evidence of employee misconduct is subsequently discovered.") *Id.* (emphasis added).

It should be noted that petitioner maintains in its brief that defendant's evidence on the 'would have been fired anyway' issue is inadequate and something that would be subject to objective determination upon remand once petitioner has established the merits of her discrimination claim. Petitioner's Brief, McKennon v. Nashville Banner Publishing Co., (U.S.) No. 93-1543, 1994 WL 385636, at *49-50.

[32] 9 F. 3d 539, 543, citing *Milligan-Jensen*, 975 F.2d at 304-305.

documents may have had a nexus or connection to her allegations of discrimination against the company, at least not a nexus that would be relevant to the application of the after-acquired evidence doctrine.[33] Petitioner's argument that her activity was protected, in that it fell within opposition to the employer's unlawful practice under the "opposition clause" of the ADEA, was similarly not persuasive to the Court.[34]

In *McKennon*, the Sixth Circuit affirmed its earlier wholesale adoption of the *Summers* doctrine in *Johnson v. Honeywell Info. Sys., Inc.*[35] and later, in *Milligan-Jensen v. Michigan Technological Univ.*[36] It should be highlighted at this juncture that the after-acquired evidence doctrine applied by the Sixth and other circuits suffered from serious shortcomings in terms of traditional legal theory and analysis. The negative consequences of the doctrine heavily impact upon members of protected classes under federal statutes while providing a complete and arguably undeserved defense to discriminators. The primarily common law "counterclaims" that employers may assert are allowed to carry the day and bar important relief provided by federal statutes that generally preempt the lesser claims. This presents a problematic paradigm wherein collateral or subordinate matters obstruct the development of a primary claim.

It is also a concern that the courts seem to jumble the common law and statutory causes of action together so that a theory such as "wrongful discharge" that often describes a contractual claim under state law or the arbitral standard of review under a collective bargaining agreement, is used to support a "just cause defense" to "state civil rights claims."[37] From there it is a short trip to suppress

[33] 9 F.3d at 543.

[34] *Id.* The Court noted that "copying and removing confidential documents is clearly not protected conduct." *Id.* at n. 7. Both cases cited by the Sixth Circuit in support of this holding differ from *McKennon* in important respects. In Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980), the employer terminated the petitioner *because of* her copying and internal dissemination of confidential documents. In O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz 1992), the petitioner also disseminated the confidential information to a co-employee, and this later-acquired information was used to bar petitioner's relief. The petitioner in *McKennon* only showed the documents to her husband, not a fellow-employee of the company, and thus similar managerial concerns are not implicated. *See* 9 F. 3d 539, 540. *O'Day* also relied upon supportive language in an employee handbook that is not present in *McKennon*. The employment handbook in *McKennon* merely set out that the employment was "at will." *See McKennon*, 797 F. Supp at 605.

[35] 9 F. 3d 539, 541-42, citing Johnson v. Honeywell Info. Sys., Inc. 955 F.2d 409 (6th Cir. 1992).

[36] 9 F.3d 540, 542, citing *Milligan-Jensen*, 975 F.2d 302 (6th Cir. 1992).

[37] *See McKennon*, 797 F. Supp. 604, 607 (M.D. Tenn. 1992)(discussing *Johnson*, 955 F.2d at 410-12).

federal statutory rights, as well, based upon the plaintiff's own, and at the time, unknown misconduct.[38] It is very telling that the district court in *McKennon* uses the terms of art for nonstatutory claims in summarizing its position:

> The Court does not hold that any or all misconduct during employment constitutes *just cause* for dismissal or serves as a complete defense to a *wrongful discharge action.* The Court concludes, however, that Mrs. McKennon's misconduct, by virtue of its nature and materiality and when viewed in the context of her status as a confidential secretary, provides 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.[39]

While the courts *seem* to rely upon theories and defenses from nonstatutory civil claims in cases applying the after-acquired evidence doctrine, they are overlooking critical elements of traditional legal theories. For how can courts say that a plaintiff has suffered "no legal damage" or injury,[40] when but for the defendant's discrimination, the after-acquired information that provides a "valid" reason for termination, may never have been discovered? The approach sanctioned by the Sixth Circuit is particularly problematic because it provides no inquiry into an element that it seems should, at a minimum, be established by the employer in order for the doctrine to vindicate the defendant's responsibility in any way... that the after-acquired information would have been discovered absent the lawsuit engendered by the defendant's alleged discrimination.[41] Otherwise, the defendant's conduct may be, if one refers to tort theory, the proximate cause of the injury to the plaintiff, because, but for the defendant's (illegal) conduct, plaintiff's misconduct (or application fraud) would never have been known to the defendant, and would not have provided a valid reason (that is to say, a nondiscriminatory reason, albeit after-the-fact) for the discharge.[42] In some instances, as

[38] 797 F. Supp. at 608.

[39] *Id.* (emphasis added).

[40] *Milligan-Jensen,* 975 F. 2d 302, 305 (6th Cir. 1992).

[41] The Seventh, Eighth, and Tenth Circuits are also in accord with the Sixth Circuit's approach. The author argues that a 'would have been discovered anyway' standard should apply before remedies are curtailed, assuming that the plaintiff establishes that the defendant is liable for the discrimination. This would permit the employer to prove that the after-acquired evidence would have been discovered even absent the discrimination litigation in order to cut off future wage liability as of the date when the evidence would have been discovered anyway.

[42] *See generally* Zemelman, *supra* note 12, at 175, 201 (1993) (discussing courts increasing use of "tort law rhetoric" in Title VII cases and tendency to hinge Title VII liability upon proof the defendant's conduct *caused* the plaintiff's injury).

was alleged by McKennon, the defendant's discrimination may also have instigated the offensive conduct on the part of the plaintiff.

And yet, the employer also has legitimate business interests that deserve protection under the legal system. Employee misconduct, disloyalty, or dishonesty should not be ignored by the courts as they balance the equities amidst the wrongdoing present on both sides. Interestingly, the United States Supreme Court decided a case in 1994 that involved employee dishonesty in the context of an unfair labor practice case before the National Labor Relations Board.

a. *Balancing an Unfair Labor Practice against Employee Dishonesty*

In *ABF Freight System, Inc. v. N.L.R.B.*,[43] the Supreme Court affirmed an NLRB order that an employer reinstate a complainant with backpay based upon the Board's finding of an unfair labor practice, despite the fact that the former employee had lied about a reason for his tardiness.[44] While the Supreme Court granted *certiorari* in *ABF Freight* to consider whether the complainant's own misconduct should prevent the Board's relief, the Court ultimately determined that the absence of a legitimate excuse for tardiness provided only a pretext for the discharge.[45] This finding supported that of the Board's order and the Court of Appeals' enforcement decision.[46]

In the opinion of the court of appeals in *ABF*, the employer's contention that the employee's lie should bar his reinstatement and backpay was rejected.[47] The Supreme Court affirmed, placing great weight on Congress' delegation to the NLRB of remedial decisions in unfair labor practice cases.[48] The Court expressed the question presented as whether the Board *must* adopt a rule barring reinstatement when a former employee testifies falsely, not whether the Board *might* adopt such a rule.[49] Despite the fact that false testimony was

[43] 114 S.Ct. 835 (1994).

[44] *Id.* at 835-36. The petitioner's "car trouble" excuse to the employer, which he restated under oath at the Board hearing, was not credited by the Administrative Law Judge. *Id.* at 837-38.

[45] *Id.* at 837-838. Justice Stevens authored the opinion of the Court, in which C. J. Rehnquist, and Justices Blackmun, Kennedy, Souter, Thomas and Ginsburg joined. Justice Kennedy, and also Justice Scalia joining with Justice O'Connor, provided two concurring opinions. *Id.* at 836.

[46] *Id.* at 838.

[47] *Id.* This conclusion was due in part to the Board's wide discretion to further the policies of the National Labor Relations Act. *Id.*

[48] *Id.* at 839.

[49] *Id.*

deemed "intolerable" and that "[p]erjury should be severely sanctioned in appropriate cases," the Court concluded that such a case was not a "discharge for cause" where the statute limits the remedial power of the Board.[50]

The concurring opinions authored by Justice Kennedy, and jointly by Justices Scalia and O'Connor in *ABF* are instructive as to the justices' concerns about the conflict inherent in granting relief to an employee who has exhibited dishonesty.[51] Justice Kennedy reflected that honesty and the integrity of the Board's process are important interests that the Board has discretion to "take into account in fashioning appropriate relief."[52]

Justice Scalia feared that the Board grows too tolerant of perjury in its adjudicatory hearings, as evidenced by the Board's failure to expressly consider the possibility of denying relief in light of the petitioner's lying under oath.[53] Justice Scalia took issue with the Board's "understand[ing]" of the petitioner's lie in light of his "history of mistreatment."[54] He found the Board's order "at the very precipice of the tolerable," because the Board did not "consider and discuss" the option of limiting relief.[55]

Certainly the *ABF* decision deals with some issues that are separate from those presented in *McKennon*. The concerns in *ABF* in part relate to the significance of maintaining the integrity of the administrative agency process, and the facts in the case are more analogous to mixed-motive than to after-acquired evidence cases. And

[50] *Id.* and n. 9; 29 U.S.C. § 160(c). The Court referred to long-standing precedent regarding the "relation of remedy to policy [being] peculiarly a matter for administrative competence." 114 S. Ct. 840, *citing* Phelps Dodge Corp. v. NLRB, 313 U. S. 177 (1941). It should be noted that after-acquired evidence cases generally would not be categorized as discharges for cause, either. After-acquired evidence cases fall outside the mixed-motive paradigm, as will be discussed.

[51] 114 S. Ct. 835, 840 (J. Kennedy, concurring); 841 (J. Scalia & J. O'Connor, concurring). The preliminary matter indicated that Justice Souter filed a concurring opinion in which Justice Kennedy joined, but at the close of the syllabus and at the start of the concurrences, only Justice Kennedy is listed. *See* 114 S. Ct. 835, 836, 840 (1994).

[52] *Id.* at 840. J. Kennedy also expressed agreement with Justice Scalia's separate opinion. *Id.*

[53] *Id.* at 841-42. This case contrasts with the facts in *McKennon* where plaintiff told the truth about her misconduct in depositions. *See supra* notes 8-10 and accompanying text.

[54] *Id.* at 841. Justice Scalia terms the Board's failure to adequately consider the false testimony "insouciance." *Id.*

[55] *Id.* at 842. Justice Scalia hypothesized that posting a notice indicating that the petitioner would have been reinstated "but for his false testimony" better serve by making clear "that perjury does not pay." *Id.* at 843.

yet, *ABF* provides a clear precedent on the issue of the infringement of legitimate employer interests where those interests are subservient to important federal statutory policies. The Supreme Court in *ABF* permits enforcement of an award of reinstatement with backpay to a discriminatee who had engaged in numerous acts of dishonesty because the NLRB determined that the *real* reason for the discharge was a discriminatory reason.[56] Following similar logic in after-acquired evidence cases would grant a plaintiff the right to establish an employer's liability for discrimination, and only admit after-acquired evidence to influence the remedy.

2. The United States Supreme Court

> "A right which goes unrecognized
> by anybody is not worth very much."
> Simone Weil,
> *The Need for Roots* (1952)

a. *Liability*

In an unexpected showing of unanimity, the Supreme Court reversed the Sixth Circuit in *McKennon*.[57] The opinion, authored by Justice Anthony M. Kennedy, broadly reinforced the important public policies embodied in federal equal employment legislation, policies that are reinforced by deterrence and compensation for injuries.[58] The Court noted the conflicting views among the courts of appeals as its motivation for resolving the question "whether all relief must be denied when an employee has been discharged in violation of the ADEA and the employer later discovers some wrongful conduct that would have led to discharge if it had been discovered earlier."[59]

[56] *Id.* at 838, 840.

[57] Susan R. Kneller, *Discrimination: Supreme Court Says Employee Misdeeds Don't Shield Employers from Bias Claims,* DAILY LAB. REP. (BNA) No.15 at AA-1 (Jan. 24, 1995) (discussing claimant's attorney "very pleased with decision and surprised by the [c]ourt's [sic] unanimity"). *McKennon* 115 S. Ct. 879 (1995).

[58] *See McKennon,* 115 S. Ct. at 884. While the question was phrased in terms of the ADEA, the opinion discussed the "common substantive features" and "common purpose" that is shared with Title VII. *Id.* Commentators immediately interpreted the decision as applying broadly to job discrimination proscriptions. *See* Linda Greenhouse, "Justices Rules for Employee in a Bias Suit, Reject Employers' Use of Belated Evidence," N.Y. Times, Jan. 24, 1993, at 1 & A13; Kneller, *supra* note 57.

[59] *McKennon* 115 S. Ct. at 883. The Supreme Court grouped the two major "camps" on the question of after-acquired evidence barring relief by comparing the major precedents as follows:

> *Compare* Welch v. Liberty Machine Works, Inc., 23 F. 3d 1403 (CA 8 1994); O'Driscoll v. Hercules Inc., 12 F. 3d 176 (CA 10 1994); 9 F. 3d 539 (CA 6

The Supreme Court held that the federal courts reaching the "legal conclusion...that after-acquired evidence of wrongdoing which would have resulted in discharge bars employees from any relief...[were] incorrect."[60] Where the Sixth Circuit deemed the presence of discrimination "irrelevant" in light of McKennon's misconduct that was categorized as a "supervening ground[s] for termination," the Supreme Court concluded "that a violation of the ADEA cannot be so altogether disregarded."[61] The statutory scheme of the ADEA was examined by the Court in the context of Congress' broad program to eliminate workplace discrimination, and the enforcement of remedies was elevated as serving more than the interest of the private plaintiffs.[62] The Court found that barring "all relief"..."in every instance" where after-acquired evidence of employee wrongdoing would have affected a discharge anyway, "would not accord with this [statutory] scheme."[63]

Each individual case provides an opportunity to elucidate "patterns of noncompliance," making the "efficacy of its enforcement mechanisms...one measure of the success of the Act."[64] Remedies were similarly ennobled in the Court's view in that they "serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination."[65]

The Supreme Court addressed the inappropriate reliance of the Sixth and Tenth Circuits upon the case of *Mt. Healthy City Bd. of*

1993) (case below); Information Systems, Inc., 955 F. 2d 409 (CA 6 1992); Summers v. State Farm Mutual Automobile Ins. Co., 864 F.2d 700 (CA 10 1988); Smallwood v. United Air Lines, Inc., 728 F.2d 614 (CA 4), *cert. denied*, 469 U.S. 832 (1984) *with* Mardell v. Harleysville Division, 985 F. 2d 364 (CA 7 1993); Wallace v. Dunn Construction Co., 968 F. 2d 1174 (CA 11 1992), *vacated pending rehearing en banc*, 32 F. 3d 1489 (1994).

Id. at 883.

The Court effectively compared those employment discrimination decisions that barred relief based upon after-acquired evidence with those that permit the plaintiff to establish defendant's liability, and then allow the after-acquired evidence to alter the remedy where appropriate. It is interesting that the Court framed the question "whether all relief *must* be denied..." very similarly to the question in *ABF Freight* where the issue was whether the Board *must* adopt a rule precluding reinstatement and back pay. *Id.* (emphasis added); *see supra* notes 43-56 and accompanying text discussing *ABF Freight*, 114 S. Ct 835, 839 (1994) (emphasis in original).

[60] *McKennon*, 115 S. Ct. at 883.

[61] *Id.* at 884, citing 9 F. 3d 539, at 542.

[62] *McKennon*, 115 S. Ct. at 884-85.

[63] *Id.* at 884.

[64] *Id.* at 885.

[65] *Id.* at 884, quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (alterations in original - internal quotation marks and citations omitted).

Ed. v. Doyle.[66] The Court deemed *Mt. Healthy* "inapplicable" to the *McKennon* case in that *Mt. Healthy* involved a mixed-motive termination where the employer's legitimate reason alone would have served to justify the discharge.[67] This was not the case in *McKennon* because the evidence of misconduct could not have motivated the employer's decision since the employer did not learn of the misconduct until after the termination.[68]

The Tenth Circuit precedent, upon which the Sixth Circuit relied, *Summers v. State Farm Mutual Automobile Ins. Co.*, did involve facts where the employer had some knowledge of the employee's wrongdoing prior to the decision to terminate.[69] This may have provided the genesis for the Tenth Circuit's inappropriate reliance upon the mixed-motive analysis in *Mt. Healthy.* In any event, the Supreme Court in *McKennon* makes clear that evidence acquired after the employment decision was made simply cannot be *deemed causative and will not provide a complete defense to* liability.[70] This outcome follows both prior precedent and basic logic.

b. *Remedies*

> "There is always a time to make
> right what is wrong."
> Susan Griffin,
> *I Like to Think of Harriet Tubman,*
> *Like the Iris of an Eye (1976)*

The *McKennon* opinion also responded to a number of important questions about the impact of after-acquired evidence upon the remedies available in employment discrimination cases. The Court reinforced the potential for equitable relief despite a defendant's assertion of the plaintiff's unclean hands.[71] This is so because of the "important national policies. . .[and] public purposes" embodied in the legislation and the actual language of the ADEA.[72]

[66] *McKennon* 115 S. Ct. at 885, citing *Mt. Healthy*, 429 U.S. 274 (1977).

[67] *McKennon* 115 S. Ct. at 885, citing *Mt. Healthy*, 429 U.S. at 284-87.

[68] 115 S. Ct. at 885. The Supreme Court referred to language from Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) where the plurality noted the distinction between "proving that the same decision would have been justified. . .[which] is not the same as proving that the same decision would have been made." *Id.* For an expanded discussion of the *Price Waterhouse* decision, *see* Gerard A. Madek & Christine Neylon O'Brien, *Women Denied Partnerships: From "Hishon" to "Price Waterhouse v. Hopkins,"* 7 HOFSTRA LAB. L. J. 257 (1990).

[69] 864 F. 2d 700, 702-03 (1988).

[70] *McKennon* 115 S. Ct. at 885.

[71] *Id.*

[72] *Id.* at 885-86. The Court quoted the following remedial language from the ADEA:

And yet, the misconduct of a plaintiff may be relevant to the available remedies in light of the employer's legitimate interests.[73] The Court concluded that an "employee's wrongdoing must be taken into account. . .lest the employer's legitimate concerns be ignored."[74] Justice Kennedy noted that the proper remedies must be determined case by case in light of the varying facts and equities involved.[75] Nonetheless, the Court set out as a general rule that would apply to the *McKennon* case, that reinstatement and front pay would not be appropriate where the employer "would have terminated [the employee]. . .in any event and upon lawful grounds."[76]

Progressing to the determination of backpay, the Court acknowledged that this posed "a more difficult problem."[77] While the concept of restoring a plaintiff to the position he/she would have been in absent the discrimination was acknowledged as an important goal,[78] the Court expressed its concern that this "principle is difficult to apply with precision where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it."[79] The Court "cannot require the employer to ignore the information, even if it ... might have gone undiscovered absent the suit."[80]

The Supreme Court provided trial courts with the following remedial guidance - that the "beginning point. . .should be a calculation of backpay from the date of the unlawful discharge to the date the new information was discovered."[81]The Court also instructed that

> the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for [amounts owing to a person as a result of a violation of this chapter].

Id. at 886, citing 29 U.S.C. 626 (b).

[73] *See McKennon*, 115 S. Ct. at 886.

[74] *Id.*

[75] *Id.*

[76] *Id.* Such an order would be "inequitable and pointless." *Id.* This rule clearly does not prohibit the use of reinstatement and front pay in cases where the employee wrongdoing does not amount to a dischargeable offense. The Court otherwise frames the issue of relief as permitting discretion to the court that is familiar with the facts in each case.

[77] *Id.*

[78] *Id.*, citing Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976).

[79] *McKennon*, 115 S. Ct. at 886.

[80] *Id.*

[81] *Id.* This starting point accords with calculations used by the National Labor Relations Board. *See* John Cuneo, Inc., 298 N.L.R.B. 856 (1990), where back pay was terminated as of the date when the Respondent acquired knowledge of the discriminatee's falsification of his employment application and history. *Id.* 856-57.

"extraordinary equitable circumstances that affect the legitimate interests of either party" may be considered in fashioning the relief.[82] It would undermine the statutory objectives if backpay was barred pursuant to an "absolute rule," the Court cautioned.[83]

The Supreme Court leaves the remedial determination largely to the discretion of the trial courts. There is an invitation here to vary the calculation of damages based upon the equities of the situation. Within the parameters of the appropriate statute(s), courts are instructed to award relief that will meet the objectives of the public policy behind the statute(s), while also considering the legitimate interests of both parties in the litigation.

Finally, the Court outlined that in order for an employer to use after-acquired evidence, "it must *first* establish that the wrongdoing was of such severity 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."[84] Thus, the process places a prerequisite burden of proof on the defendant prior to its introduction of the after-acquired information. Implicitly, it would seem that after-acquired evidence of lesser misconduct (not enough to give rise to termination) is suppressed, at least until relief is considered.

Arguably, if the offensive acts are not dischargeable, the employer would be required to reinstate the plaintiff if such relief is requested. Thereafter, the employee would be subjected to appropriate discipline, meted out by the employer in a nondiscriminatory manner. The courts need not involve themselves regarding these internal penalties in most instances, as long as the discipline is consonant with other similar incidents at the company, and is not retaliatory. Where a grievance-arbitration process is in effect, such would be the usual route for an employee to object to the severity or perceived unfairness of the punishment.

The Supreme Court's decision in *McKennon* will encourage employers to proceed to discovery promptly when defending an employment discrimination case because *McKennon* confirms that new and damaging information regarding the plaintiff may sever the continuing accumulation of backpay as of the date of the discovery.[85] The Court

[82] *McKennon*, 115 S. Ct. at 886.

[83] *Id.*

[84] *Id.* at 886-87 (emphasis added).

[85] This strategy of prompt investigation of an employment discrimination charge because of the possibility that the after-acquired evidence would cut off backpay liability has of course been advocated for employers prior to the *McKennon* decision. *See* James A. Burstein & Steven L. Hamann, *Better Late Than Never-After-Acquired Evidence in Employment Discrimination Cases*, 19 EMPLOYEE REL. L.J. 193, 203 (1993).

underscored that the federal courts may prevent employer abuse of discovery through Rule 11 of the Federal Rules of Civil Procedure and by invoking the award of attorney's fees.[86]

The *McKennon* opinion does not specifically comment on the trial court's use of summary judgment to resolve the "would have been fired anyway" question. Judge Ginsburg reflected at the oral arguments that the use of summary judgment to determine this fact issue was inappropriate, but Justices Kennedy and Stevens successfully sought to confine the Court's consideration of the case to the question presented in the petition for *certiorari*.[87] The Court's substantive rule that all liability is not barred by the discovery of after-acquired evidence relegates the defendant's burden of proving that plaintiff "would have been fired anyway" to the relief stage. The breadth of the remedy is thus confined where the plaintiff engaged in a dischargeable offense. There may also be instances where the plaintiff's damages are merely nominal, and yet the discriminatee's right to establish the defendant's liability protects the important public policies underlying the federal statutes.

McKennon squarely rebuts the general premise that after-acquired evidence of employee wrongdoing bars evaluation of a plaintiff's employment discrimination claim. In its discussion of the issues presented, the Court avoided creating boundaries that would inhibit the federal courts from designing remedial relief appropriate to the facts found in each case. This resolution allows the circuits to adopt somewhat varying formulae at the remedial stage.

c. *Discussion of Supreme Court Guidance*

The *McKennon* Court specifically noted that they could not "require the employer to ignore the [after-acquired] information. . . even if the information might have gone undiscovered absent the suit."[88] However, the Court prefaced its discussion by referencing the interests and equities that must be balanced in determining the proper measure of backpay.[89]

The language that "[t]he *beginning point* in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was

[86] *McKennon*, 115 S. Ct. at 887, citing 29 U.S.C. §§ 216 (b), 626 (b).

[87] *See supra* notes 28-31 and accompanying text discussing oral arguments before the Supreme Court in *McKennon* and the question in the petition for *certiorari*.

[88] *McKennon*, 115 S. Ct. 879, 886. *See supra* notes 77-86 and accompanying text discussing remedial guidance from *McKennon*.

[89] *Id.* at 886.

discovered,"[90] might be interpreted to encourage the trial courts to award backpay beyond that point in instances where it is warranted. This construction is reinforced in that the next sentence of the opinion sets forth that "the court can consider taking into further account [in determining the appropriate relief] extraordinary equitable circumstances that affect the legitimate interests of either party."[91] Certainly the Court anticipated that the trial courts would exercise their discretion based upon their evaluation of the facts and equities in each case:[92]

d. *Analysis and Recommendations*

Once liability for employment discrimination is ascertained, the employer may use after-acquired evidence of employee wrongdoing to establish that, if it had known of the wrongdoing, it would have terminated the employee on those grounds alone.[93] If the employer is successful at that stage, the remedies of reinstatement and front pay will be unavailable,[94] but backpay need not be curtailed as of the date of the discovery of the after-acquired evidence in every case. This is so because such a rule would reward the employer for its wrongdoing where the evidence would not have been discovered absent the discrimination lawsuit. The egregiousness of the wrongdoing and its nexus to the plaintiff's employment and to the discrimination must be considered, as well as the harm suffered by the employer as a result of the wrongdoing.

In the *McKennon* case, arguably, an exemplary employee of nearly four decades would hardly have violated confidentiality if she had not been a victim of the defendant's discrimination. While the courts should be loathe to overlook employee breaches of duty, they should also weigh the harm to the employer resulting from the plaintiff's breach of duty. In *McKennon*, the harm to the employer was small. As was noted earlier, Justice Stevens reportedly reflected at the close of oral arguments in the case, 'the result is a severe one for McKennon but did not cause even a nickel of damages for the Banner. At worst, she told a corporate secret to her husband.'[95] Of course, the courts should be mindful that their resolution of the two wrongs in these cases will ultimately impact upon the future conduct of both employers and employees.

[90] *Id.* (emphasis added).

[91] *Id.*

[92] *See id.*

[93] *See id.* at 886-87.

[94] *See id.*

[95] *Justices Debate*, *supra* note 12, at AA-3. *See also supra* note 17 and accompanying text.

It is unlikely that the Banner would have discovered McKennon's wrongdoing absent the lawsuit. Thus, but for the discrimination, she would not have been discharged. This is the premise upon which several circuits have required the employer to establish that the after-acquired evidence would have been discovered anyway, absent the lawsuit, in order to curtail backpay prior to the date of judgment.[96] This rule more nearly places the victim of discrimination in the place that he/she would have been in absent the discrimination,[97] rather than the use of the actual date of discovery of the information.[98]

Certainly, the use of the actual date of discovery is a more convenient rule than the 'would have been discovered anyway' rule. But convenience is not the sole concern where important statutory rights have been violated. Placing a burden of proof on the employer on this issue sends a message that discrimination is not lightly tolerated, and that defendant's wrongdoing will not inadvertently bear fruit, by allowing the after-acquired evidence from pre-trial discovery to automatically cut off the accrual of backpay. For an outcast employee is often the proverbial David seeking retribution against a Goliath with far greater financial and legal resources to combat litigation. The remedy should fit the injuries in these cases and neither party is entitled to escape the consequences of misconduct.

CONCLUSION

The purposes and policies behind the federal labor and employment laws include balancing the inequalities between employers and the employed, as well as the inequalities between employees. These purposes are well served when plaintiffs come forward to process legitimate complaints of statutory violations, and are rewarded for telling the whole truth. The after-acquired evidence doctrine, prom-

[96] *See* Mardell v. Harleysville Life Insurance Co., 31 F.3d 1221 (3rd Cir.1994), *cert granted, vacated and remanded*, 63 U.S.L.W. 4104 (U.S. Mar. 28, 1995) (No. 94-742); Wallace v. Dunn Construction Co., Inc., 968 F.2d 1174 (11th Cir. 1992), *vacated, reh'g granted*, 32 F.3d 1489 (11th Cir. 1994) (backpay awarded until date of judgment unless defendant proves it would have independently discovered the evidence, without the lawsuit).

[97] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).

[98] The use of the actual date of discovery may be appropriate in some cases, *e.g.*, where the employee's wrongdoing is egregious in nature or extent. Although the NLRB used this standard in *John Cuneo, Inc.*, 298 N.L.R.B. No. 125, 856 (1990), the facts in that case involved serious employee wrongdoing, a willful, deliberate and intentional misstatement of employment history that resulted in a hiring that would not otherwise occurred. The Board there sought to avoid an "undue windfall" to either side. *Id.* at 856.

ulgated in the *Summers* case, and adopted by a majority of the federal circuit courts of appeal, permitted after-acquired evidence of employee wrongdoing to bar liability for defendant employers in employment discrimination cases where the after-acquired nondiscriminatory reason for termination would have independently resulted in discharge.

The United States Supreme Court in *McKennon* clarified that after-acquired evidence may not establish a legitimate "reason" for a termination that will bar liability for employment discrimination. After-acquired evidence, lacking temporal propinquity to the decision, could not have even partially motivated the decision, and thus these cases may not be analyzed as mixed-motive cases. If the employer who is found liable for employment discrimination proves that the after-acquired grounds for termination alone would have resulted in discharge, then reinstatement and front pay will not be available as remedies. Backpay may terminate as of the date of the discovery of the after-acquired evidence that provided the employer with an independent, nondiscriminatory reason for discharge. Where the facts and equities dictate, backpay may extend to the date when the after-acquired information would have been discovered anyway (absent the lawsuit) or to the date of judgment. Other compensatory and punitive damages,[99] attorney's fees and prejudgment interest may also be awarded. The trial courts are vested with discretion to balance the interests and equities of the parties once the facts are determined.

[99] These are available for causes of action under Title VII occurring after 1991 in addition to the previously available remedies of reinstatement, backpay, front pay, injunctive relief, and prejudgment interest and attorney's fees. Caps are placed upon the compensatory and punitive damages based upon the size of the employer. *See* 42 U.S.C. § 1981 a(b)(2) & (3) (Supp. III 1991) and Parker, *supra* note 14, at 425-26 & n. 136-141.