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# 'If I Knew Then What I Know Now': The Role of After-Acquired Evidence in Employment Discrimination Cases: An Analysis of *McKennon v. Nashville Banner*

Barbara J. Fick

*Notre Dame Law School*, [barbara.j.fick.1@nd.edu](mailto:barbara.j.fick.1@nd.edu)

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# Case at a Glance

The Age Discrimination in Employment Act prohibits employers from discharging employees because of age. In this case, after McKennon was fired, allegedly because of age, her employer discovered evidence of misconduct justifying discharge. The employer argued that this after-acquired evidence relieved it of liability for terminating McKennon because of age. To date, lower courts have disagreed on the appropriate use of after-acquired evidence in employment discrimination cases. Now, the Supreme Court will decide if such evidence is a complete defense to liability or if its use should be limited, affecting only the remedy for a proven violation.

## "If I Knew Then What I Know Now:" The Role of After-Acquired Evidence in Employment Discrimination Cases

by Barbara J. Fick

*Barbara J. Fick is an associate professor of law at Notre Dame Law School, Notre Dame, IN 46556; (219)631-5864.*

### ISSUE

Is after-acquired evidence of employee misconduct a complete defense for an employer's termination decision which would otherwise violate the Age Discrimination in Employment Act or is it relevant only to the scope of the remedy afforded to an employee terminated in violation of the Act?

### FACTS

Christine McKennon worked as a secretary for the Nashville Banner Publishing Company ("Nashville Banner") for 39 years. In 1990, Nashville Banner fired her; she was 62 at the time. Nashville Banner claimed the discharge was necessitated by a reduction in force; McKennon claimed it was motivated by age discrimination and filed a lawsuit in federal district court under the Age Discrimination in Employment Act (the "ADEA").

McKennon was deposed by counsel for Nashville Banner in preparation for trial. (A deposition consists of answers given under oath to questions related to a lawsuit. Typically, its purpose is to uncover information useful to a plaintiff to make its case or useful to a defendant to mount a defense.)

In the course of her deposition, McKennon admitted that, prior to her discharge, she had copied and removed several confidential company documents. Upon learning of this misconduct, Nashville Banner filed a motion for summary judgment with the district court. (See Glossary for definition of summary judgment.)

Nashville Banner's motion alleged that by removing the documents without authorization, McKennon violated her duty to keep company documents confidential. Nashville Banner asserted that such serious misconduct was grounds for immediate termination.

The district court granted Nashville Banner's motion for summary judgment, relying on the after-acquired evidence doctrine. 797 F. Supp. 604 (M.D. Tenn. 1992). (Under the after-acquired evidence doctrine, the misconduct of a terminated employee in an employment discrimination case gives the employer either complete immunity from liability for unlawful discharge or, at the least, limits the

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remedy available to the employee in the event the employer is found to have violated employment discrimination laws.) Applying the after-acquired evidence doctrine, the district court held that when an employment discrimination plaintiff engages in misconduct serious enough to justify termination even though the misconduct was unknown to the employer at the time of the discharge, the plaintiff cannot recover even if the motive behind the original termination was age discrimination or some other form of unlawful employment discrimination.

The Sixth Circuit affirmed, stating that "we have firmly endorsed the principle that after-acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence." 9 F.3d 539 (6th Cir. 1993). According to the Sixth Circuit, it is irrelevant whether or not, at the time of discharge, the employer acted in violation of the ADEA. The Supreme Court granted McKennon's petition for a writ of certiorari to consider the effect of after-acquired evidence of employee misconduct on the litigation of an employment discrimination claim.

### CASE ANALYSIS

After-acquired evidence, as noted above, is evidence of an employee's misconduct or dishonesty unknown to the employer at the time it acted adversely to the employee, but which the employer discovers after the fact during later legal proceedings. The employer then tries to use that evidence to diminish or preclude entirely its liability for otherwise unlawful employment discrimination.

The use of after-acquired evidence has divided the federal courts of appeals into two camps. One group,

including the Sixth Circuit which is involved in the present case, holds that after-acquired evidence constitutes a complete defense to otherwise unlawful employment discrimination, in effect barring both a finding of liability and the imposition of a remedy.

The second camp holds that after-acquired evidence has no impact on the issue of whether or not the employer's conduct violated the law and, thus, does not preclude a finding of employer liability. These courts take the position that after-acquired evidence is relevant only to the nature and scope of the remedy to be awarded to the unlawfully terminated employee.

The use of after-acquired evidence as a complete defense was first enunciated by the Tenth Circuit in *Summers v. State Farm Mut. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988). While the Tenth Circuit acknowledged that after-acquired information could not have caused the employee's discharge, it being unknown to the employer at that time, such evidence nevertheless precluded a finding of employer liability and, thus, precluded the imposition of *any* remedy because the employee had not been injured by a discriminatory act. In other words, since the employer could have fired the employee for a lawful reason, the employee in effect had not sustained a legally recognized injury and, accordingly, had no basis on which to sue. Under this formulation of the after-acquired evidence doctrine, it ceases to matter that the original reason for terminating the employee violated one or more employment discrimination laws.

Other courts applying the after-acquired evidence doctrine to bar recovery have justified its use on the equitable notion of *unclean* hands, a doctrine that holds that an *unclean*

litigant, i.e., a litigant who has done something wrong, cannot profit from his or her own misconduct. In other words, when an employee engages in misconduct sufficiently severe to justify discharge, he or she should not be permitted to recover for unlawful termination merely because the employer was, at the time of discharge, unaware of the misconduct.

Lastly, some courts have held that the after-acquired evidence doctrine precludes the terminated employee from even proving that the termination constituted unlawful employment discrimination. A factor that an employment discrimination plaintiff must prove in order to establish that his or her termination was unlawful is that the plaintiff was qualified for the job. However, after-acquired evidence of misconduct prevents the plaintiff from proving that he or she was qualified since the misconduct, by definition, means that the employee was unqualified for the job.

There is a second group of appellate courts that, as mentioned above, holds that the after-acquired evidence doctrine does not preclude a finding of employer liability but is merely a factor to consider in determining an appropriate remedy. In the context of the ADEA, these courts rely on the language of the statute as well as the Supreme Court's analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

The statutory language of the ADEA makes it unlawful to discharge any individual because of age. For courts that see the after-acquired evidence doctrine as relevant only to remedy, the issue is whether or not age was one of the reasons the employer decided to fire the employee. If so, the employer has committed an unlawful act regard-

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less of what it subsequently discovers about the employee's on-the-job misconduct.

These courts rely for their remedy-oriented use of the after-acquired evidence doctrine on *Price Waterhouse*. In that case, the Supreme Court considered the appropriate analysis when an employment decision is based on mixed motives. A mixed-motive case involves employer reliance on both an illegal reason as well as a legitimate reason when making an employment decision. The Court held that the *simultaneous* existence of a legitimate reason can make lawful an action that was based in part on an illegal reason. The Court made clear, however, that "an employer may not . . . prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."

These remedy-only courts reason that after-acquired evidence, by definition, cannot have motivated a decision made before the evidence was known. Accordingly, these courts hold that such evidence is irrelevant to deciding employer liability because it cannot make an otherwise unlawful act lawful.

Finally, since these courts hold that after-acquired evidence relates only to remedy and not to employer liability, they also hold that the terminated employee has standing to sue because he or she has been the victim of unlawful employment discrimination.

For the remedy-only courts, if the employer is found to have violated the law at the time it made its discharge decision, the employee is entitled to a declaration that his or her termination violated the law and also is entitled to attorneys' fees. Further, where the violation of the ADEA is determined to be wilful, liquidated damages could be awarded. (Under the ADEA, liquidated damages is an amount equal to the payment of wages lost and is awarded in addition to the total amount of wages lost.)

On the other hand, if the employer proves the after-acquired evidence would have justified termination, the court could limit any award of back pay to the period between the date of discharge and the date the employer discovered evidence of the employee's misconduct. Moreover, in this situation, the court could refuse to order reinstatement.

## SIGNIFICANCE

Although this case specifically involves age discrimination under the ADEA, the after-acquired evidence doctrine has been applied to race, religion, and gender claims under Title VII of the Civil Rights Act. Moreover, the analysis is potentially applicable to other types of federal antidiscrimination laws such as the Americans with Disabilities Act and the Equal Pay Act.

Should the Court adopt the analysis of the Sixth Circuit and hold that after-acquired evidence is an absolute bar to employer liability, the focus of many employment discrimination lawsuits will shift from an examination of the employer's motives to an inspection of the employee's life and work history. Thus, an employer would be encouraged to conduct a detailed investigation into a plaintiff's background in the hopes of uncovering evidence sufficient to prove after-the-fact justification for an otherwise unlawful discharge. The prospect of such an investigation may deter some employees with legitimate claims from pursuing their rights.

A decision limiting the doctrine to remedy might be seen as a reasonable accommodation between the rights guaranteed to employees under federal law and the employer's right to protect itself from employee misconduct that might not have come to light had an employment discrimination action not been filed.

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## ARGUMENTS

### For Christine McKennon

(Counsel of Record: Michael E. Terry; 150 2nd Avenue North, Suite 315, Nashville, TN 37201; (615) 256-5555):

1. Cases dealing with analogous federal statutes have found that after-acquired evidence does not preclude liability or the award of appropriate relief. For example, the United States Department of Labor limits an employer's use of after-acquired evidence in cases brought under the Fair Labor Standards Act and the Longshoremen's and Harbor Worker's Compensation Act.

2. After-acquired evidence cannot affect the legality of events that occurred before the point in time at which the employer was aware of the evidence.

3. After-acquired evidence may limit the scope of the remedy but does not bar a finding of liability.

### For Nashville Banner Publishing Co.

(Counsel of Record: R. Eddie Wayland; King & Ballow; 1200 Noel Place, 200 4th Avenue, North, Nashville, TN 37219; (615) 215-3456):

1. After-acquired evidence acts as a complete bar to all relief.

2. After-acquired evidence deprives McKennon of standing since she has suffered no legally recognized injury to her rights. McKennon's misconduct breaks the causal connection between the discriminatory motive and the adverse employment action. The misconduct constitutes an independent cause for the discharge.

3. McKennon cannot prove an essential element of her case because her misconduct precludes her from establishing that she was qualified for the job.

4. The doctrine of unclean hands bars plaintiff's claim for relief.

## AMICUS BRIEFS

### In support of Christine McKennon

American Federation of Labor and Congress of Industrial Organizations (Counsel of Record: Laurence Gold; 815 16th Street, NW, Washington, DC 20006 (202) 637-5390);

Joint brief of the Lawyers' Committee for Civil Rights Under Law, the American Civil Liberties Union, and the American Association of Retired Persons (Counsel of Record: William Sheehan; Shea & Gardner; 1800 Massachusetts Avenue, NW, Washington, DC 20036 (202) 828-2000);

Joint brief of the National Employment Lawyers Association and the Association of Trial Lawyers of America (Counsel of Record: Nancy Erika Smith; Smith Mullin; 200 Executive Drive, Suite 155, West Orange, NJ 07052; (201) 736-7033);

Joint brief of the Women's Legal Defense Fund, Equal Rights Advocates, National Council of Jewish Women, National Council of Negro Women, National Organization for Women, National Women's Law Center, NOW Legal

Defense and Education Fund, Older Women's League, People for the American Way, Women Employed, Women's Law Project, and YWCA of the U.S.A. (Counsel of Record: Donna R. Lenhoff; Women's Legal Defense Fund; 1875 Connecticut Avenue, NW, Suite 710, Washington, DC 20009; (202) 986-2600);

### In support of Nashville Banner Publishing Co.

Chamber of Commerce of the United States of America (Counsel of Record: Zachary D. Fasman; Paul, Hastings, Janofsky and Walker; 1299 Pennsylvania Avenue, NW, Washington, DC 20004; (202) 508-9500);

Joint brief of the Equal Employment Advisory Council, the Employers Group, the Michigan Manufacturers Association, the Newspaper Association of America, and the Newspaper Personnel Relations Association (Counsel of Record: Ann Elizabeth Reesman; McGuinness & Williams, 1015 15th Street, NW, Washington, DC 20005; (202) 789-8600).

### In support of neither party

Joint brief of the United States and the Equal Employment Opportunity Commission (Counsel of Record: Drew S. Days, III, Solicitor General; Department of Justice, Washington, DC 20530; (202) 514-2217).