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The After-Acquired Evidence Doctrine: An Additional Hurdle for the Victim of Employment Discrimination

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THE AFTER-ACQUIRED EVIDENCE DOCTRINE: AN ADDITIONAL HURDLE FOR THE VICTIM OF EMPLOYMENT DISCRIMINATION

The lesson for employers: If you don't like the hand you're dealt, reshuffle the deck.[1]

I. INTRODUCTION

In employment discrimination law practice, opposing parties must climb a series of steps before reaching trial. At one such step, the defendant employer decides which defense to assert against the plaintiff employee's allegation of discrimination. If in agreement with the reason originally provided to the employee in the discharge records, such as, poor performance, chronic absence, or violation of company policy, then the employer might proceed to trial with little more than the employee's personnel file.[2]

Not all discharges, however, are based on legitimate motives. When an employer discharges an employee based upon illegal, discriminatory reasons, the employer will often look beyond what is written within the four corners of the employee's performance record to explore an alternative justification for the employee's discharge.[3] For instance, the employer might investigate the veracity of the employee's educational or work history or scrutinize the employee's job application or resumé to discover a material misrepresentation.[4] In some cases, the employer may question the former employee's co-workers to find evidence of incompe-

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[1] 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. LAW. 31, 41 (1993).

[2] *See, e.g.*, Spratley v. Hampton City Fire Dep't, 933 F. Supp. 535, 541 (E.D. Va. 1996), aff'd, 125 F.3d 848 (4th Cir. 1997) (accepting employer's articulated reason for firing employee who failed to come to work for two months without medical evidence of inability to work); Conaway v. Auto Zone, Inc., 866 F. Supp. 351, 354 (N.D. Ohio 1994) (firing employee who had omitted material information from employment application); Ashagre v. Southland Corp., 546 F. Supp. 1214, 1220-21, (S.D. Tex. 1982) (arguing convenience store employee not fired on basis of national origin, but rather because employee closed store early and failed to ring up sales).

[3] *See infra* note 54 (describing case in which employer investigated truthfulness of former employee's resume during discovery phase of employment discrimination law suit).

[4] *Id.*

tent performance.[5] These inquiries, typically occurring after the commencement of the employee's discrimination suit, are permissible according to the Federal Rules of Civil Procedure.[6] Yet, these inquiries reveal that the employer is, in effect, looking for an alternative reason to justify its adverse employment decision.[7]

This note analyzes this seemingly unfair, albeit legal practice of the "after-acquired evidence doctrine."[8] Part I of this note briefly reviews the history of employment discrimination in the United States and the steps that Congress has taken to eradicate unlawful discharge.[9] Part II traces the origin of the after-acquired evidence doctrine.[10] Part III discusses the after-acquired evidence doctrine after the landmark United States Supreme Court decision *McKennon v. Nashville Banner Publishing Co.*[11] Part IV highlights the effect the *McKennon* decision has had on employment discrimination cases and examines the questions that remain about the after-acquired evidence doctrine.[12] Part V concludes by suggesting that the

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[5] *See infra* note 70 (describing case in which employer inquired into former employee's pre-termination conduct during deposition).

[6] *See* FED. R. CIV. P. 26(b)(1) (governing rules of discovery). The Rule provides, in pertinent part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery . . . ." *Id.*

[7] *Id.* Adverse employment decisions include discharge, demotion, denial of benefits, lower pay, failing to promote an employee, and failing to hire an otherwise qualified applicant. *See, e.g.*, Weigel v. Target Stores, 122 F.3d 461, 464 (7th Cir. 1997) (including termination or denial of benefits within category of adverse employment decisions); Vichare v. AMBAC, Inc., 106 F.3d 457, 460 (2d Cir. 1996) (considering (1) denial of membership in Management Committee; (2) being paid lower salary; and (3) being fired, adverse employment decisions on the bases of race and national origin); Parrish v. Immanuel Med. Ctr., 92 F.3d 727, 732 (8th Cir. 1996) (holding "the ADEA . . . prohibit[s] employers from making adverse employment decisions, such as termination or demotion, on the basis of age . . ."). *But see*, Mungin v. Katten, Muchin & Zavis, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997) (rejecting employee's complaints that assignments were re-routed because of his race). In *Mungin*, the court stated that in a Title VII action, "changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes." *Mungin*, 116 F.3d at 1556-57.

[8] *See infra* note 33 (defining after-acquired evidence).

[9] *See infra* notes 13-38 and accompanying text.

[10] *See infra* notes 39-66 and accompanying text.

[11] *See infra* notes 67-84 and accompanying text.

[12] *See infra* notes 85-111 and accompanying text.

McKennon holding, while somewhat favorable to victims of discrimination, does not go far enough to ensure an equal playing field in employment discrimination cases.

II. EMPLOYMENT DISCRIMINATION IN THE UNITED STATES

Before the Civil Rights Act of 1964, employment discrimination had a devastating impact on the national economy.[13] By refusing to hire workers on the basis of racial or gender preference, employers added to a vast waste of human resources that resulted in a loss of contribution to society.[14] Recognizing the effect of this imbalance as well as the social ills discrimination caused, Congress sought to maximize the economic potential of African Americans, women, older workers, and workers with disabilities through the passage of several acts stemming from the Civil Rights Act of 1964.[15] Title VII[16] and the Age Discrimination in Employment Act ("ADEA")[17] focus on the employment relationship and generally

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[13] *See* MICHAEL J. ZIMMER, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 36 (4th ed. 1997) (articulating the reasons for prohibiting discrimination, including unfairness to individuals and detrimental economic impact on society). Zimmer suggests that discrimination is inherently unfair when based on a person's immutable characteristics such as gender and race. *Id.*

[14] *Id.*

[15] *Id.* "The Congressional debates on Title VII are replete with references to the economic condition of [African Americans]. . . . Congress clearly hoped to facilitate full participation by African Americans in the American economy. Prohibiting national origin and sex discrimination in employment similarly rests on a solid economic basis." *Id.*

[16] *See* 42 U.S.C. § 2000e-2 (1994) (codifying Title VII and defining employment practices that are unlawful under the Act). Title VII prohibits workplace discrimination on the basis of race, color, religion, sex (which includes pregnancy), and national origin. *Id.* The statute reaches employers, labor organizations, and employment agencies. *Id.* Further, an injured employee has a private right of action under Title VII. 42 U.S.C. § 2000e-5(f)(1). *Id.*

[17] *See* 29 U.S.C. § 623(a)(1) (1994) (codifying the Age Discrimination in Employment Act). The ADEA provides in pertinent part: "It shall be unlawful for an employer to fail or to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of an individual's age . . . ." *Id.* The ADEA authorizes private actions by claimants. 29 U.S.C. § 626(c). The ADEA closely mirrors the provisions of Title VII except that the ADEA allows for the recovery of liquidated damages or double damages in cases of willful violations. 29 U.S.C. § 626(b). To be protected by the Act, an individual must be at least forty years of age. 29 U.S.C. § 631(a).

prohibit employers from basing their employment decisions on protected group membership rather than an employee's qualifications.[18]

After the passage of these acts, employers accustomed to their preferences and unwilling to comply with the requirement that they not discriminate on the basis of race, age, gender, religion, or national origin, found themselves face-to-face with workers no longer willing to tolerate the social and economic injustices of discrimination. Protected class members treated unequally in the workplace or who had been refused employment came forward, challenging illegal employment practices that affected them.[19] The individuals, armed with their Title VII and ADEA rights to a private cause of action, based their discrimination claims on the theories of individual disparate treatment, systemic disparate treatment, and disparate impact.[20] Employers often responded to these claims and the establishment of the prima facie case of discrimination[21] with a series of defenses intended to rebut the presumption of discrimination levied against them.[22]

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[18] ZIMMER, *supra* note 13, at 36.

[19] *See supra* notes 16-17 (listing the groups that fall within the protected class).

[20] *See* Teamsters v. United States, 431 U.S. 324, 335, n.15, (1977) (defining the theories upon which employment discrimination cases are based). Individual disparate treatment is the employment practice of treating individual employees less favorably than others because of their race, age, religion, gender, or other protected trait. *Id.* Systemic disparate treatment is a formal, facially discriminatory policy or "pattern and practice" affecting many employees. *Id.* at 335. Disparate impact cases involve "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* at 335, n.15; see supra notes 16-17 (citing Title VII and ADEA provisions granting discrimination claimants a private right of action).

[21] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (introducing the prima facie case of employment discrimination). The four elements of a prima facie case of racial discrimination that a claimant must establish by a preponderance of the evidence are:

> (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. The prima facie case in an ADEA action requires the claimant to prove that he: "(1) is over forty years of age; (2) is qualified for the position in question; (3) suffered an adverse employment decision; and (4) was replaced by a sufficiently younger person . . . ." Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 136 (3d Cir. 1997).

[22] *See* McDonnell, 411 U.S. at 802-03 (approving a shift of the burden of production from plaintiff to defendant once the presumption of discrimination arises, i.e. after the establishment of the prima facie case); *see also* Texas Dep't of Community Affairs v.

To defend against a discrimination action, the employer must prove: (1) the presence of a voluntary affirmative action plan;[23] (2) a bona fide occupational qualification;[24] or (3) the preference was based on business necessity or job relatedness.[25] When these defenses are successfully raised, the employer will not be liable for employment decisions based on racial or gender preferences.[26]

In most instances, these defenses attack the factual basis of the employee's claim or the statistics the employee relies on to infer discrimination.[27] One particular affirmative defense available in ADEA and Title

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Burdine, 450 U.S. 248, 253 (1981) (clarifying the shifting burdens of production in disparate treatment discrimination cases and emphasizing the point that at all times the plaintiff has the burden of persuasion).

[23] *See* United Steelworkers of America v. Weber, 443 U.S. 193, 209 (1979) (upholding constitutionality of voluntary, private affirmative action programs which permit employer to take a person's race into account "to eliminate conspicuous racial imbalance in traditionally segregated job categories").

[24] *See* 42 U.S.C. § 2000e-2(e) (1994) (permitting preference based on applicant's religion, sex, or national origin if such characteristic is essential to the performance of the job). Notwithstanding any other provisions of the Act, Title VII provides:

> It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [an employee's] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id.; Pime v. Loyola Univ. of Chicago, 803 F.2d 351, 354 (7th Cir. 1986) (stating that university's decision to grant tenure to three Jesuits instead of a Jewish, part-time lecturer was acceptable because the religious affiliation of the Jesuits was reasonably necessary to the operation of the institution). The ADEA also permits use of the bona fide occupational qualification defense. *See* 29 U.S.C. § 623(f)(1) (1994) (providing for preferences based on age); Rasberg v. Nationwide Life Ins. Co., 671 F. Supp. 494, 496 (S.D. Ohio 1987) (finding mandatory retirement age of sixty two for a corporate pilot a bona fide occupational qualification in accord with FAA regulations).

[25] *See* Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1118, (11th Cir. 1993) (upholding decision to grant summary judgment to employer who successfully argued a "business necessity" defense). In Fitzpatrick, African-American firefighters claimed employer's "no-beard" rule amounted to systemic disparate impact discrimination because many African-American men develop a skin condition from daily shaving. *Id.* at 1113. The no-beard rule was a business necessity because the respirator masks worn by firefighters required a cleanly shaven face to work most effectively. *Id.* at 1120.

[26] *See supra* notes 23-25.

[27] *See* ZIMMER, *supra* note 13, at 298 (listing approaches to defending discrimination actions).

VII actions, bypasses the liability question and strictly addresses damages.[28] Consequently, the court's attention shifts from analyzing the employer's discriminatory practices to making the victim of discrimination whole.[29] At this point, employers hoping to limit their damages, present other, *legitimate* reasons for their adverse employment decisions, that, if discovered during employment, would have warranted termination.[30] These *other motivations* come to light after the commencement of the discrimination suit, through investigation and discovery devices.[31] This practice, known as either the "after the fact defense,"[32] or the "after-acquired evidence doctrine,"[33] has been the subject of intense litigation throughout the country since its inception.[34]

Before 1995, some courts permitted employers to avoid *total* liability for their alleged discriminatory practices if the defendant employer could prove that the terminated employee had engaged in misconduct during

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[28] *See* Lohmann v. Towers, Perrin, Forster & Crosby, Civ. No. H-91-3586, 1992 WL 548195, at *1 (S.D. Tex. 1992) (referring to after-acquired evidence as an affirmative defense).

[29] *See infra* note 62 (referring to make-whole relief).

[30] *See* Waldo & Mahar, *supra* note 1, at 34 (reviewing the prerequisites associated with the use of after-acquired evidence). The employer must show: (1) the misconduct occurred prior to the employee's termination, or the misrepresentation or omission in the employee's application was material; and (2) discharge would have occurred had the employer known of the employee's misdeeds or misrepresentations during employment. *Id.* at 34, 37-40.

[31] *See supra* notes 54 and 70 (referring to cases which detail how the employer came upon the damaging after-acquired evidence).

[32] *See* Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees' Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 19-20, (1990) (applying the after the fact defense to discrimination actions).

[33] *See* Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534, 537 (W.D. Pa. 1995) (stating definition of after-acquired evidence). After-acquired evidence is "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." *Id.* (quoting Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1222 (3d Cir. 1994)). Discovery of after-acquired evidence, according to advocates for the employers in these actions, is "akin to winning the lottery." Waldo & Mahar, *supra* note 1, at 32 n.1.

[34] *See* 2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1799, n.131 (Paul W. Cane, Jr., et al. eds. 3d ed. 1996) (discussing the three differing theories of the effect of after-acquired evidence before the Supreme Court of the United States considered the doctrine).

employment which would have warranted termination.[35] By contrast, other courts have held that an employer could merely seek to *limit* the remedies available to the employee if the employer introduced evidence that showed a non-discriminatory reason for firing the employee, even if the employer acquired the evidence after the commencement of the discrimination suit.[36] The effect of completely barring relief or limiting the employee to partial relief differed among jurisdictions and hinged upon the employer's ability to discover legitimate, non-discriminatory reasons, that, in the first instance, would have resulted in termination.[37] Consequently, an employee with a valid discrimination claim could be barred from recovering back-pay, front-pay, liquidated damages, reinstatement, or other equitable remedies usually awarded to a victim of discrimination.[38]

III. THE AFTER-ACQUIRED EVIDENCE DOCTRINE — HISTORY & APPLICATION

In the landmark after-acquired evidence case, *Summers v. State Farm Mutual Automobile Insurance Co.*,[39] the United States Court of Appeals for the Tenth Circuit adopted and applied the after-acquired evidence doctrine as an affirmative defense.[40] In *Summers*, Ray Summers sued his employer for age discrimination after State Farm terminated him at the age of fifty-six.[41] State Farm asserted its decision was based on Summers' "poor

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[35] *See generally*, Duncan B. Hollis, Project, *1993-1994 Annual Survey of Labor and Employment Law - Employment Discrimination Law*, 36 B.C. L. REV. 373 (1995) (suggesting several "United States circuit courts' treatment of after-acquired evidence . . . has differed").

[36] *Id.*

[37] *See supra* notes 39-66 (reviewing the leading appellate court opinions that chose opposing sides in the debate over the effect after-acquired evidence has on discrimination claims).

[38] *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995) (addressing remedies typically afforded successful ADEA claimants). With regard to relief in employment discrimination cases, the McKennon Court stated:

> [A] district court is authorized to afford relief by means of reinstatement, back-pay, injunctive relief, declaratory judgment, and attorney's fees. In the case of a willful violation of the Act, the ADEA authorizes an award of liquidated damages equal to the back-pay award. The Act also gives federal courts the discretion to 'grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act].'

Id. (citing 29 U.S.C. § 626(b)).

[39] 864 F.2d 700 (10th Cir. 1988).

[40] *Id.* at 708.

[41] *Id.* at 702.

attitude [and] inability to get along with [others]."[42] During discovery, however, State Farm learned that Summers had falsified over 150 company documents during his employment even after being warned that such activity would result in termination.[43] State Farm argued that evidence of Summers' misconduct should be admitted not to show *reason* or *cause* for discharge, but to abrogate the remedies available to Summers.[44]

The District Court denied Summers' motion in limine, which sought to preclude State Farm's use of the after-acquired evidence, and ultimately granted summary judgment to State Farm.[45] The appellate court affirmed and held that despite being irrelevant to the motivation for Summers' termination, the evidence was relevant to Summers' claim of injury.[46] Summers would not have suffered any injury if State Farm had known of the additional falsifications because Summers would have been legitimately fired.[47] Accordingly, State Farm escaped liability altogether because it had successfully demonstrated that it would have terminated Summers for this misconduct had State Farm known of it during Summers' employment.[48]

Even though the Tenth Circuit firmly recognized and admitted the employer's after-acquired evidence, other circuits declined to permit the defense. The United States Court of Appeals for the Eleventh Circuit declined to apply the after-acquired evidence doctrine as a complete bar to

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[42] *Id.* at 703.

[43] *Id.* at 702-03.

[44] Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 704 (10th Cir. 1988) (emphasis added).

[45] *Id.*

[46] *Id.* at 708.

[47] *Id.* After analyzing many cases related to this issue, the court denied Summers any relief and summarized its holding in this oft-quoted analogy:

> [T]he present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a 'doctor.' In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.

Id.

[48] *Id.* The Summers' holding resulted in the following formula: "[C]ourts should award summary judgment to an employer charged with discrimination if the employer can prove that after-acquired evidence of the employee's misconduct would have resulted in the employee's termination, had the employer discovered the misconduct." *Hollis, supra* note 35, at 388.

relief.[49] Instead, this court limited the devastating effect after-acquired evidence had on an employee's otherwise legitimate discrimination claim.[50] In *Wallace v. Dunn Construction Co.*,[51] the Eleventh Circuit criticized the Tenth Circuit's rationale in *Summers v. State Farm*, and noted specifically that the Tenth Circuit misinterpreted employment discrimination case law.[52] In *Wallace*, the employee brought suit against Dunn Construction Company claiming sexual harassment and retaliatory discharge.[53] During the employee's deposition, she admitted that she had fraudulently omitted from her job application a pre-employment conviction for possession of cocaine and marijuana.[54] Under the holding of *Summers*, this after-acquired evidence would have barred the plaintiff from any relief.[55]

The Eleventh Circuit, however, refused to apply the *Summers* rule[56] and held that *Summers* improperly ignored the lapse of time between the discriminatory act and the employee's misconduct or fraud.[57] According

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[49] *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181 (11th Cir. 1992), *vacated and reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), *rev'd*, 62 F.3d 374 (11th Cir. 1995) (reversing initial appellate court opinion in light of the Supreme Court's decision in McKennon).

[50] *Id.* at 1180-81.

[51] *Id.* at 1174.

[52] *Id.* at 1178-79. The court took issue with the Tenth Circuit's reading of Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). *Id. See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 705-06 (10th Cir. 1988) (relying on the holding of Mt. Healthy to justify admissibility of after acquired evidence). In *Mt. Healthy*, a teacher was discharged after engaging in protected and unprotected speech directed toward school. *Mt. Healthy*, 429 U.S. at 282. The Wallace court pointed out that *Summers* failed to draw a distinction between ". . . what actually would have happened [in *Mt. Healthy*] . . . [and] what hypothetically would have occurred [in *Summers*] absent the alleged discriminatory motive . . . ." *Wallace*, 968 F.2d at 1179.

[53] *Wallace*, 968 F.2d at 1176.

[54] Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1176-77 (11th Cir. 1992), *vacated and reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), *rev'd* 62 F.3d 374 (11th Cir. 1995) (reversing initial appellate court opinion in light of the Supreme Court's decision in McKennon).

[55] *See supra* notes 47-48 (referring to the Summers' holding).

[56] *Wallace*, 968 F.2d at 1178. The Eleventh Circuit's restatement of the Summers rule is: "[A]n employer may avoid all liability for a discharge based solely on unlawful motives by proving that it would have discharged the plaintiff absent any unlawful motives if it had possessed full knowledge of the circumstances existing at the time of the discharge." *Id.*

[57] *Id.* at 1179. The Eleventh Circuit considered this an improper extension of *Mt.*

to the *Wallace* court, admissibility of after-acquired evidence would result in reliance on hypothetical motivations for discharge as opposed to actual motivations.[58] Such a practice would frustrate the objectives of the anti-discrimination laws because it would not encourage employers to eliminate discrimination.[59] On the contrary, employers would be encouraged to investigate an employee's history or rummage through the employment application for material omissions to avoid liability.[60]

On the other hand, the *Wallace* court agreed with the *Summers* decision on the important role after-acquired evidence serves when determining the relief due to successful employment discrimination plaintiffs.[61] In discrimination actions, the employer's interest in freedom to make adverse employment decisions runs counter to the employee's interest in make-whole relief.[62] Accordingly, under *Wallace*, the court must balance these conflicting interests when determining the proper boundary for relief.[63] In this case, the *Wallace* court noted that reinstatement and front-pay would go beyond making the plaintiff whole.[64] Conversely, curtailing the back-pay award to the point when the employer would have discovered the misrepresentation would provide a windfall to the employer.[65] The *Wallace* court, unable to justify application of the *Summers* holding, yet unwilling

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Healthy. Id.

[58] *Id.*

[59] *Id.* at 1180.

[60] Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180-81 (11th Cir. 1992), *vacated and reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), rev'd, 62 F.3d 374 (11th Cir. 1995) (reversing initial appellate court opinion in light of the Supreme Court's decision in McKennon).

[61] *Id.* at 1181.

[62] *Id.* at 1181-82. "Make-whole relief refers to the relief that places a discrimination victim in the same place he would have been in the absence of discrimination." Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 LAB. LAW. 43, 44 n.6 (1993). The author detailed the effect after-acquired evidence had on discrimination cases before the Supreme Court addressed the validity of the doctrine in 1995. *Id.*; *see also* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995) (listing the remedies typically available in Title VII actions).

[63] *Wallace*, 968 F.2d at 1182.

[64] *Id.* at 1181.

[65] Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180 (11th Cir. 1992), *vacated and reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), *rev'd*, 62 F.3d 374 (11th Cir. 1995) (reversing initial appellate court opinion in light of the Supreme Court's decision in McKennon).

to offer an alternative, rejected the employer's after-acquired evidence as an affirmative defense to liability.[66]

IV. CLARIFICATION OF THE DOCTRINE -- RESOLVING THE DEBATE

In 1995, the Supreme Court of the United States settled the dispute among the circuits when it addressed how the discovery of after-acquired evidence should affect employees' claims of discrimination.[67] In *McKennon v. Nashville Banner Publishing Co.*,[68] the Court analyzed whether the after-acquired evidence doctrine should act as a complete bar or, alternatively, a partial bar to recovery in an employment discrimination action.[69] Christine McKennon, a sixty-two year old secretary at the Nashville Banner Publishing Company ("the Banner"), brought a claim against her employer under the ADEA for allegedly dismissing her on the basis of age.[70] The Banner cited a reduction in workforce as the reason for terminating McKennon's employment.[71] During the course of discovery, McKennon testified that during her final year of employment she removed and copied confidential company records, ostensibly for "insurance and protection" because she was concerned about her job security.[72] McKennon's acts constituted a violation of company policy, the discovery of which prompted the Banner to send McKennon a second letter of dismissal.[73] The Banner, conceding age discrimination, moved for summary judgment and argued had it known of McKennon's breach of company policy earlier, it would have discharged her for that reason.[74]

The District Court admitted the Banner's after-acquired evidence, granted Banner's motion for summary judgment, and held that McKen-

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[66] *Id.* at 1184-85.

[67] *See* Martin Adler, *Nailing Down the Coffin Lid: The Rise and Fall of the After-Acquired Evidence Doctrine in Title VII Litigation*, 39 N.Y.L. SCH. L. REV. 719, 751 (1994) (reflecting on the Court's decision in McKennon and the arguments presented for the abolition of the doctrine).

[68] 513 U.S. 352 (1995).

[69] *Id.* at 354.

[70] *See* McKennon v. Nashville Banner Publ'g Co., 797 F. Supp. 604, 605 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 513 U.S. 352 (1995).

[71] *Id.* McKennon was notified on October 31, 1990 that her employment was terminated. *Id.*

[72] *Id.* at 605-06.

[73] *Id.* at 606. McKennon received this notice of dismissal on December 20, 1991; three days after her deposition and seven months after the commencement of her discrimination suit. *Id.*

[74] *Id.*

non's misconduct justifiably resulted in her termination, entitling her to neither back-pay nor any other remedy under the ADEA.[75] The United States Court of Appeals for the Sixth Circuit affirmed.[76] The appellate court considered McKennon's misconduct the supervening grounds for termination, which effectively nullified her allegation of discrimination.[77] Recognizing "that a violation of the ADEA must not be so altogether disregarded," the Supreme Court reversed and held that the objectives of the antidiscrimination statutes, namely deterrence and compensation for injuries, would be undermined if "after-acquired evidence of wrongdoing . . . operates in every instance, to bar all relief for an earlier violation of the [antidiscrimination law]."[78]

The Court criticized the Banner's reliance on knowledge it did not have before it first fired McKennon and reminded the Court of Appeals that "[this] case comes to us on the express assumption that an unlawful motive was the sole basis for the firing."[79] Yet, despite this hopeful rhetoric in the introductory paragraphs of the opinion, the Court did not "sound the death knell" for the doctrine.[80] The Court held that McKennon's misconduct was relevant to a degree and that it justified a limitation of the remedies she sought.[81] A back-pay award would appropriately re-

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[75] McKennon v. Nashville Banner Publ'g Co., 797 F. Supp. 604, 608 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 513 U.S. 352 (1995).

[76] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 355 (1995).

[77] *Id.* at 356-57. The appellate court stated "that the misconduct renders it irrelevant whether or not [McKennon] was discriminated against." McKennon v. Nashville Banner Publ'g Co., 9 F.3d 539, 543 (6th Cir. 1993) (citing Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 305 (6th Cir. 1992), *cert. granted*, 509 U.S. 903, *cert. dismissed*, 509 U.S. 943 (1993)).

[78] *McKennon*, 513 U.S. at 358.

[79] *Id.* at 359-60. The Court found it necessary to distinguish this case from a "mixed-motive" case which arises when an employee is fired for both discriminatory and non-discriminatory reasons. *Id.* at 359. *See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (focusing on mixed-motive cases of employment discrimination that are characterized by a decision based on legitimate as well as illegitimate considerations). Unlike a true mixed-motive case, the Banner did not discover McKennon's misconduct until after she had been fired, therefore, it cannot cite this reason as the motivation for its "non-discriminatory" reason for her discharge. *McKennon*, 513 U.S. at 359-60.

[80] *See Adler*, *supra* note 67, at 749-50 (suggesting that the McKennon decision, while favorably altering the effect of after-acquired evidence, does not go far enough in maintaining the objectives of antidiscrimination laws).

[81] *McKennon*, 513 U.S. at 361-62. The Court stated that the "proper boundaries of remedial relief" in these instances "will vary from cases to case." *Id.* at 361. In the case at

store McKennon to the position she would have been in absent the discrimination.[82] The Court, hesitant to determine the extent of the back-pay award, suggested that in these cases, back-pay should be calculated from the date of the unlawful discharge to the date the employer discovered the new information.[83] The Court also fashioned a test which the employer must pass before he can rely upon after-acquired evidence: "[the employer] 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]

V. THE DOCTRINE AFTER RESOLUTION

The *McKennon* decision put an end to the controversy among the circuits regarding the nullifying effect of after-acquired evidence. Simply restated, *McKennon* held that evidence of misconduct will not completely bar an employee from all relief when the initial discharge violates an anti-discrimination law.[85] Despite this dual victory for employers and employees, commentators believe several questions concerning the doctrine were unanswered in the Court's decision.[86] For example, will allowing after-

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bar, McKennon would not be entitled to front-pay or reinstatement, because to allow such remedy would be "pointless" considering the Banner could justifiably terminate McKennon on non-discriminatory grounds. *Id.* at 361-62. McKennon would, however, be entitled to back-pay. *Id.* at 362.

[82] *Id.* at 362.

[83] *Id.*

[84] *Id.* at 362-63. Post-McKennon courts characterize the test for the use of after-acquired evidence as follows:

> To bar relief based on after-acquired evidence, there must be proof that: (1) the employer was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the misconduct.

Dalton v. Wal-Mart Stores, Inc., Civ. No. 95-484-SD, 1996 WL 435146, at *1 (D.N.H. June 6, 1996).

[85] *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 356 (1995) (preserving, in part, the employee's discrimination claim). The plaintiff must establish that the employer discriminated against him or her before the doctrine will be applied. *See* Miranda v. Costco Wholesale Corp., Civ. No. 95-1076-JO, 1996 WL 571185, at *7 (D. Or. May 7, 1996) (restating *McKennon* holding as to when the doctrine comes into play).

[86] *See, e.g.*, Andrea L. Calvaruso, *Two Wrongs Don't Make a Right: The Supreme Court Strikes Down the After-Acquired Evidence Doctrine*, 46 SYRACUSE L. REV. 1321, 1334-35 (1996) (criticizing the *McKennon* decision's failure to define a strict standard "under which the employer must prove that it would have fired the employee regardless of

acquired evidence encourage employers to "dig up the dirt" on plaintiffs?[87] Can the *McKennon* holding be extended to include cases where the evidence discovered concerns the employee's post-termination actions?[88] Are employers encouraged "to stop their unlawful practices" with a doctrine that allows them to "discriminate . . . with impunity?"[89] Are the objectives of Title VII and the ADEA hindered by the use of the doctrine?[90]

These and other questions focus on the failure of the *McKennon* decision to articulate a solid test for admissibility or draw a definite boundary regarding remedies.[91] While it is true the test the Supreme Court introduced in *McKennon* will pose a hurdle for some employers, what standard will the defendant be held to when "establishing" that the decision to terminate would have been made absent the discriminatory act?[92] The United States Court of Appeals for the Ninth Circuit examined this issue in *O'Day v. McDonnell Douglas Helicopter Co.*,[93] concluding that the *McKennon* decision did not define the burden of production the defendant must carry

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the discrimination"); Phong T. Dinh, Comment, *After-Acquired Evidence of Employee's Pretermination Misconduct Does Not Bar Recovery in ADEA Actions--McKennon v. Nashville Banner Publishing Co.*, 29 SUFFOLK U. L. REV. 348, 356 (1995) (suggesting that the McKennon decision "removed the confusion about what role after-acquired evidence should play in employment discrimination cases"); Nina Joan Kimball, A Plaintiff's Perspective on the Much Debated After-Acquired Evidence Rule, MASS. LAW. WKLY., May 22, 1995, at B5 (advising practitioners that the McKennon opinion does not "set any bright lines in determining the appropriate [remedial] relief").

[87] *See* ZIMMER, *supra* note 13 (reflecting on the lengths employers will go to discover after-acquired evidence). One pro-employer commentary described the commencement of the discrimination suit as the "beginning point for a new inquiry about whether the employee engaged in additional acts of misconduct . . . ." Waldo & Mahar, *supra* note 1, at 31. As a result, the authors of the article suggest "that lawyers should leave no stone unturned in ferreting out any evidence . . . ." Waldo & Mahar, *supra* note 1, at 32. Yet, the authors also acknowledge that "employers certainly cannot engage in ex-post facto nitpicking of an employee's employment record to dredge up trivialities in an attempt to justify an improper discharge . . . ." *Id.* at 41-42.

[88] *See infra* note 105 (referring to case which coined the phrase "after after-acquired evidence").

[89] *See Adler*, *supra* note 67, at 755-56.

[90] *Id.* at 762.

[91] *See* Kimball, *supra* note 86 at B5 (criticizing the *McKennon* decision for failing to draw a definite line regarding remedies).

[92] *See* O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 759 (9th Cir. 1996) (analyzing the evidentiary standard applicable to after-acquired evidence cases).

[93] 79 F.3d 756 (9th Cir. 1996).

when showing it would have terminated the employee on non-discriminatory grounds.[94] In *O'Day*, the employee argued that the employer should be held to a clear and convincing standard, which would likely have prevented the employer from raising the defense.[95] The Ninth Circuit reasoned that employers should be required to do more than merely "establish" their true motive.[96] Yet, the court held it would not apply the clear and convincing standard.[97] The *O'Day* court concluded that use of the higher evidentiary standard in this scenario would violate the Civil Rights Act of 1991 which "stood squarely for the proposition that an employer may limit the employee's remedy if it shows by *a preponderance of the evidence* that it would have made the same decision apart from the illegal motive."[98]

In addition to the issues of evidentiary standards and remedies, another breed of cases has emerged focusing on "after after-acquired evidence."[99] Specifically, in *Ryder v. Westinghouse Electric Corp.*,[100] the employer asked the court to consider admitting into evidence two acts of misconduct that occurred after the employee had been terminated, which ostensibly would have warranted termination.[101] Noting that the employer/employee relationship had ended before these acts transpired, the District Court concluded that it could not extend the holding of *McKennon* because the misconduct played no part in the motivation for the employer's adverse employment decision.[102] The court also observed that the defendant presented no authority supporting the application of the doctrine in

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[94] *Id.* at 760.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 761.

[98] O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 760 (9th Cir. 1996) (emphasis added).

[99] *See infra* note 105 (citing case which discusses "after after-acquired evidence").

[100] 879 F. Supp. 534 (W.D. Pa. 1995).

[101] *Id.* at 537 (emphasis added). The employee allegedly divulged confidential information to an adversary of the company and removed confidential computer files after discharge. *Id.*

[102] *Id.* at 537-38. *See also* Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 683 (S.D.N.Y. 1995) (declining to apply the doctrine to "after after-acquired evidence" due to the absence of the employer/employee relationship.) The *Sigmon* court noted that any complaint the employer has concerning the ex-employee's post-termination misconduct falls outside the scope of *McKennon*. *Id.* at 683.

cases where the employer learns of misconduct happening after discharge.[103]

The *Ryder* court's cursory discussion of the topic did not include confronting the issues of relevancy and admissibility inherent in "after after-acquired evidence." If the court had considered the probative value or relevancy of evidence of misconduct occurring and acquired *after* discharge, it would, in all likelihood, have concluded that such evidence should not be admitted.[104] "After after-acquired evidence" has no probative value to the determination of whether the employer discriminated. This was precisely the holding in *Carr v. Woodbury County Juvenile Detention Center.*[105] In *Carr*, a female employee had allegedly suffered a constructive discharge from her position due to the sexually hostile working environment of her workplace.[106] Before trial, Carr requested the court preclude evidence of her post-constructive discharge use of marijuana.[107] Carr argued that even though marijuana use violated agency policy, the defense should not be applied because her post-discharge behavior was not governed by company policy.[108]

Before granting Carr's motion in limine, the district court meticulously analyzed the relevancy question and concluded this evidence is "less relevant" because it "is not temporally related to the [employer's] decision."[109] The comparative phrase "less relevant" arguably means that the court found "after after-acquired evidence" less relevant than regular after-acquired evidence to the defense of an employment discrimination claim. The *Carr* court agreed with the district court in *Ryder* and refrained from extending the *McKennon* holding because even if Carr's marijuana use was relevant, "its probative value was slight and its admission would be unfairly prejudicial."[110] This fundamental evidentiary analysis necessitated a

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[103] *Ryder*, 879 F. Supp. at 537.

[104] *See* FED. R. EVID. 401 (defining relevant evidence). "Evidence which is not relevant is not admissible." FED. R. EVID. 402.

[105] 905 F. Supp. 619 (N.D. Iowa 1995), aff'd, 97 F.3d 1456 (8th Cir. 1996).

[106] *Id.* at 621.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 628.

[110] Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 631 (N.D. Iowa 1995), aff'd, 97 F.3d 1456 (8th Cir. 1996). *See* FED. R. EVID. 403 (limiting admissibility of relevant evidence that is ". . . outweighed by the danger of unfair prejudice . . .").

rejection of the employer's argument in favor of extending the after-acquired evidence doctrine.[111]

VI. CONCLUSION

Indeed, the *McKennon* decision has not answered all the questions that remain concerning after-acquired evidence. Until the Supreme Court finds another occasion to address it, trial courts will attempt to apply the doctrine in accordance with the Court's holding. Moreover, with each application of the doctrine, commentators will criticize the *McKennon* decision's imperfections, despite the Court's good faith effort to even-handedly assist employees and employers engaged in discrimination actions. Meanwhile, employers will continue in their efforts to seek out a legitimate motivation to replace the discriminatory grounds on which their decisions are based. Employers will succeed, more often than not, in limiting their liability because proving they would have made the same decision by a preponderance of the evidence is not an onerous burden. If this truly is the lesson to be learned from *McKennon*, perhaps the principles and objectives of the antidiscrimination laws necessitate closer scrutiny.

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[111] *Carr*, 905 F. Supp. at 630.