COMMENT

AFTER-ACQUIRED EVIDENCE IN EMPLOYMENT CASES IN ALASKA: AN ALTERNATIVE APPROACH

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In this Comment, the author critiques a proposed model for the use in employment cases of evidence of employee misconduct acquired after the employee's discipline or dismissal on other grounds. The author argues that the model fails to address concerns about possible employer abuse of the rule allowing introduction of such after-acquired evidence. The author recommends an alternative approach in which employee wrongdoing must be severe and must be proved by clear and convincing evidence, which uses the date of discovery of the wrongdoing as the cutoff for damages, and which prohibits any use of evidence of employee misconduct engaged in after the employee's termination.

I. INTRODUCTION

This Comment will address the points and arguments made in the recent article, *A Brief Analysis of After-Acquired Evidence in Employment Cases: A Proposed Model for Alaska (and Points South)*.[1] In the article, the author suggests that, when it next faces

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1. Gregory S. Fisher, *A Brief Analysis of After-Acquired Evidence in Employment Cases: A Proposed Model for Alaska (and Points South)*, 17 ALASKA L. REV. 271 (2000).

the issue, the Alaska Supreme Court should adopt new rules for the application of the after-acquired evidence doctrine in employment cases. The author contends that the initial approach to after-acquired evidence offered by the Court, as set out in *Brogdon v. City of Klawock*,[2] "conflicts with existing legal principles, represents questionable policy, and needlessly fosters confusion in an already complicated area of law."[3]

As this Comment will illustrate, it is the author's proposed approach to after-acquired evidence ("the Model") that would conflict with existing legal principles, implement questionable policy, and needlessly foster confusion in this area of the law. This Comment will examine the proposed Model, describe how it fails to address concerns that have been expressed regarding the after-acquired evidence doctrine, and recommend an approach to after-acquired evidence in Alaska that takes into account those concerns.

II. THE MODEL'S APPROACH TO AFTER-ACQUIRED EVIDENCE

The Model's author notes that "[a]fter-acquired evidence is evidence independent of employee misconduct that the employer discovers after it has already disciplined the employee on different grounds."[4] Typically, an employer will raise the "after-acquired evidence" defense in the following scenario: an employee who has been dismissed alleges that his termination was either contrary to a specific provision of law or in breach of the employment contract. The employer, during the course of litigation concerning the dismissal, discovers evidence of alleged misconduct by the employee during that person's employment. The employer then claims that, even if the dismissal at issue in the case is found to be wrongful or illegal, the employee would have been dismissed anyway, in light of the discovery of the alleged misconduct. The employer goes on to assert that it cannot be held liable for the termination, or any damages stemming from the termination, because of the "after-acquired evidence" that it has identified.

The Model incorporates several suggestions concerning the use of after-acquired evidence in employment cases. First, the Model seeks a definition of after-acquired evidence that would not take into account the "significance or materiality" of the conduct in question.[5] In order to use after-acquired evidence as a defense, the

2. 930 P.2d 989 (Alaska 1997).
3. Fisher, *supra* note 1, at 274.
4. *Id*.
5. *Id.* at 288.

employer would be required to establish only that the conduct would warrant a "disciplinary action" of some type.[6] The employer would not be required, under this approach, to prove that the employee conduct constituted a terminable offense; the employer would be required to show only that the conduct was in some way a violation of employer rules.[7]

Second, the Model would not require that an employer actually prove that the employee engaged in the misconduct alleged. The employer would be required to prove only that it had a "good faith belief" that the employee engaged in the conduct in question.[8] This good faith belief may be "based on facts supported by substantial evidence."[9] Under this approach, the credibility of witnesses and evidence could not be tested. If one person gave a statement that the employee engaged in the misconduct or rules violation, and numerous others gave a statement to the contrary, the employer could claim "good faith belief" in the validity of the charge based on the single statement and offer the incident as after-acquired evidence.

The author also advances the position that "[a]fter-acquired evidence should bar suit in all wrongful termination cases except those alleging employment discrimination or civil rights claims."[10] This position is based primarily on the equitable and contractual nature of the employment relationship and the argument that no employee should be allowed to claim breach of contract where the employee has been shown to have "unclean hands" or to have concealed misconduct from the employer.[11] The author goes on, however, to state that suit should not be barred in all cases where after-acquired evidence is offered, distinguishing between cases where there is evidence that "may relate to misconduct which leads to an outcome less severe than termination," and evidence that would support a termination.[12] In the former situation, the after-acquired evidence "should bar prospective relief and limit the employee's remedy to damages between the date of wrongful discipline . . . and the date when the employee actually committed the misconduct related to the after-acquired evidence."[13]

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6. *See id*. at 289.
7. *See id*. at 288-90.
8. *Id*. at 289.
9. *Id*.
10. *Id*. at 290.
11. *See id*.
12. *Id*.
13. *Id*. Under this approach, ludicrous results could emerge. For example, if the employer discovers during the litigation that the employee was late for work

The author also argues for application of a "preponderance of evidence" standard to the after-acquired evidence defense, as opposed to a "clear and convincing evidence" test, claiming that there is no indication that such a heightened level of proof is needed.[14] The author adds that "[s]ome commentators, apparently under the assumption that any decision by an employer is inherently pretextual, have suggested an analysis that effectively would impose a clear and convincing standard of proof on employers. . . . No study, empirical or otherwise, has established that employers use after-acquired evidence in an impermissible manner."[15]

Finally, the Model posits that evidence of post-termination misconduct should be admissible as after-acquired evidence.[16] The author notes that "[i]t is difficult to see how post-discipline misconduct is not relevant and should not be admissible because such misconduct directly relates to an employee's potential remedies."[17]

III. PROBLEMS WITH THE MODEL'S APPROACH

The primary difficulty with the proposed Model for application of the after-acquired evidence rule is that it fails, on several levels, to address the concerns expressed by the Alaska Supreme Court and the U.S. Supreme Court regarding potential abuses associated with this defense. Virtually no safeguards are provided in the Model to protect against enthusiastic overuse of the defense by employers in almost every conceivable case where wrongful termination has been alleged. The proposed Model essentially would provide for self-immunization by employers against wrongful termination claims, turning almost any transgression of employer rules, actual or perceived, into a basis for dismissal of such claims. No court that has considered application of the after-acquired evidence rule has offered such facile treatment of concerns associated with the defense.

Any analysis of the after-acquired evidence rule in Alaska must begin with the decision in *Brogdon v. City of Klawock*.[18] In that case, the City of Klawock had issued a supplemental termination notice stating new grounds for terminating Brogdon from his

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once several years before his or her termination, and that single incident subjected the employee to some lesser disciplinary action than termination, the employer could introduce that evidence and argue that the employee's entire damages claim be dismissed.

14. *See id*. at 291-92.
15. *Id*. at 293-94.
16. *See id.* at 294-95.
17. *Id*. at 295.
18. 930 P.2d 989 (Alaska 1997).

employment.[19] The trial court held that the after-acquired evidence in support of the City's supplemental termination notice could be admitted only if it was evidence that the City reasonably could have discovered had Brogdon not been terminated.[20] The City appealed, claiming that the trial court's ruling concerning the after-acquired evidence was "legally unsupportable."[21]

The Alaska Supreme Court ruled that the limitation imposed by the trial court on the use of after-acquired evidence had been erroneous. Citing the U.S. Supreme Court's opinion in *McKennon v. Nashville Banner Publishing Co.*,[22] the court held that the discovery of "grave misconduct on the part of a terminated employee," which might have been concealed had the employee not been terminated, should excuse the employer from either reinstating the employee or paying prospective damages in a wrongful termination action.[23] The court also noted the legitimate concerns expressed by Brogdon concerning the possible pretextual nature of the after-acquired evidence the defendant sought to have admitted.[24] The court wrote that

> [a]fter-the-fact justifications should be viewed with skepticism. It might be appropriate to fashion a rule that no post-termination justification should serve to limit damages unless it is one which all reasonable employers would regard as mandating termination and which is, as a matter of law, just cause for termination. Other safeguards against after-the-fact pretextual justifications such as imposing a heightened burden of proof are also possible. However, these questions are not before us.[25]

Similar concerns about potential abuse of the after-acquired evidence rule were cited by Justice Kennedy in *McKennon*. In that case, the Court held that after-acquired evidence in an action under the Age Discrimination in Employment Act could not serve as a basis for dismissal of the case, but could serve to limit the damages recoverable in such a claim: "The 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 discovered."[26] The Court went on to state that

> [w]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of

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19. *See id.* at 991.
20. *See id*. at 991-92.
21. *Id*. at 992.
22. 513 U.S. 352 (1995).
23. *Brogdon*, 930 P.2d at 992.
24. *See id*.
25. *Id*.
26. *McKennon*, 513 U.S. at 362.

> 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. The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act is not an insubstantial one.[27]

The concerns expressed in *Brogdon* and *McKennon* are nowhere reflected in the proposed Model. The author simply dismisses any thought of employer abuse of the rule with the statement that "[n]o study, empirical or otherwise, has established that employers use after-acquired evidence in an impermissible manner."[28] The absence of a study in this area, however, cannot serve to outweigh both judicial worries about abuses of the after-acquired evidence rule and the shared experience of practitioners in the field of employment law. It borders on the naive to suggest that employers do not or would not actively search for information upon which to make a claim that the employee who sues for wrongful termination would have been fired anyway. Any approach adopted by the Alaska Supreme Court for consideration of after-acquired evidence should take into account the concerns already expressed in *Brogdon* and *McKennon* and should have safeguards built in to ensure that no claim under the rule is easily advanced or proved.

IV. AN ALTERNATIVE APPROACH TO APPLICATION OF THE AFTER-ACQUIRED EVIDENCE RULE

A. Application of the *McKennon* Standard

The approach outlined in *McKennon* should be applied to all cases where the employer seeks to invoke the after-acquired evidence rule. Under *McKennon*, an employer would be required to establish, prior to relying on after-acquired evidence of wrongdoing as a defense, "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."[29] If the employer were to meet this burden, the impact of the after-acquired evidence would be directed to the remedy afforded to the employee, rather than to the employee's right to maintain an action: "The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the

27. *Id*. at 362-63.
28. Fisher, *supra* note 1, at 294.
29. *McKennon*, 513 U.S. at 362-63.

date of unlawful discharge to the date the new information was discovered."[30]

Application of the test set out in *McKennon* is appropriate on several grounds. First, *McKennon* was the case principally relied upon by the Alaska Supreme Court in *Brogdon* as the leading case concerning the after-acquired evidence rule. Second, the *McKennon* standard builds in several protections against employer abuse of the after-acquired evidence rule. It would require that any after-acquired evidence offered reveal misconduct sufficiently severe to have justified termination, not just some unspecified disciplinary action. It would require that the employer prove that the employee actually engaged in the wrongdoing alleged, as opposed to simply proving a good faith belief that he or she had done so.[31] These requirements would make it difficult for an employer to invoke the after-acquired evidence rule simply on a "belief" that an employee had, at one time during employment, violated some rule of the employer.

In *McKennon*, the Court held that after-acquired evidence should be directed to the remedy afforded the employee, rather than the liability of the employer for the wrongful act.[32] The Model's author suggests that this analysis should not be applicable to wrongful termination cases because public policy is not implicated.[33] In fact, public policy is implicated in most, if not all, cases where wrongful termination has been claimed. Breaches of contract and tortious conduct constitute violations of the common law. In *Weissman v. Crawford Rehabilitation Services*,[34] the court discussed application of *McKennon* to a tort claim for wrongful discharge, holding that after-acquired evidence could not be used to dismiss the claim, but rather could be used only to limit the remedy.[35] The court rejected the dichotomy between employment dis-

30. *Id*. at 362.

31. A succinct statement of the test to be applied may be found in *Bullock v. Balis & Co.,* No. CIV.A. 99-748, 2000 WL 1858719, at *9 (E.D. Pa. Dec. 19, 2000), where the court noted that "[b]efore an employer can invoke the after-acquired evidence doctrine, it must prove that: (1) the employee actually committed the misconduct; and (2) the employer in fact would have terminated the employee on those grounds alone if it had discovered the wrongdoing."

32. *See id* at 360-62. This concept was expressed best by Judge Fletcher of the U.S. Court of Appeals for the Ninth Circuit in his concurring and dissenting opinion in *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 764 (9th Cir. 1996), where he stated that "[after-acquired] evidence's only benefit to the employer is to limit the extent of the remedy."

33. *See* Fisher, *supra* note 1, at 279.

34. 914 P.2d 380 (Colo. Ct. App. 1995).

35. *See id*. at 386.

crimination and wrongful termination cases for purposes of public policy significance, stating that "the very considerations which led the judiciary of this state to recognize the tort of wrongful discharge compel the conclusion that the public policies that are present in such cases are no less important than those that are recognized by legislation."[36] In short, there is no reason to treat statutory claims differently from claims brought under the common law for purposes of applying *McKennon*.

Similarly, on application of the after-acquired evidence rule, there is no reason why the date of discovery of the misconduct should not be the cutoff for damages, as opposed to the date on which the misconduct took place. The Model's author argues that the "date of discovery" approach as adopted in *McKennon* "rewards a deceptive employee" for concealing misconduct.[37] This analysis assumes that the employee is aware that the conduct at issue constitutes a terminable offense. It assumes that the employee has "concealed" the conduct in an effort to enhance damages in a wrongful termination action, which makes little sense when viewed in the practical reality of employment litigation. The "date of discovery" rule is appropriate because the date on which misconduct is discovered is the date upon which an employee would be terminated for the offense. Employers do not terminate employees effective as of an earlier date, based on a claim that the conduct had been concealed. No valid reason has been offered to justify departure from the rule as set out in *McKennon*.

B. Adoption of the Clear and Convincing Evidence Standard

In *Lewis v. Fisher Service Co.*,[38] the South Carolina Supreme Court addressed in some detail the abuses that could be associated with use of after-acquired evidence by employers in employment litigation. The concerns expressed by the court were similar to those expressed by the Alaska Supreme Court in *Brogdon*. The South Carolina court wrote, "If free reign were given, then in defending breach of employment contract actions, less-than-principled employers (or their attorneys) may be tempted to 'rummage the file' in order to 'discover' any and all evidence that would permit them to escape liability."[39] To address the dangers of al-

36. *Id*. at 385-86. *See also* Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 312 (Tex. 1997) (adopting the after-acquired evidence doctrine as a limitation on an employee's recovery for a retaliatory discharge claim rather than as a basis for dismissing the claim).

37. Fisher, *supra* note 1, at 290.

38. 495 S.E.2d 440 (S.C. 1998).

39. *Id*. at 445.

lowing employers unrestricted use of after-acquired evidence, the court imposed two limitations on use of such evidence.[40] First, the court adopted the *McKennon* standard requiring the employer to prove that the misconduct 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."[41] Second, the court held that "this proof must be established, not by a preponderance of the evidence, but by clear and convincing evidence."[42] The court went on to express its belief "that these two limitations [would] serve to exclude doubtful or insignificant evidence of employee wrongdoing, while allowing evidence of very severe wrongdoing that should properly be considered."[43]

In addition to application of the *McKennon* standard concerning the severity of misconduct, the "clear and convincing evidence" standard adopted by the court in *Lewis* should be adopted for consideration of after-acquired evidence in Alaska. The Alaska Supreme Court has recognized that justifications associated with the presentation of after-acquired evidence "should be viewed with skepticism."[44] The Court has even suggested that "a heightened burden of proof" might be appropriate in considering after-acquired evidence claims by employers.[45] Given this suggestion, as well as the skepticism expressed by the Court concerning after-acquired evidence claims, the imposition of a "clear and convincing evidence" standard to such claims would be consistent with the opinion in *Brogdon* and would assist in addressing the concerns expressed in that decision.[46]

C. Barring Evidence of Post-Termination Misconduct

The Model proposes that employers should be allowed to introduce evidence of post-termination misconduct under the theory that "such misconduct directly relates to an employee's potential

40. *See id*.

41. *Id*. (quoting McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995)), *quoted in* Baber v. Greenville County, 488 S.E.2d 314, 320 (S.C. 1997).

42. *Baber,* 488 S.E.2d at 320.

43. *Id*.

44. *Brogdon*, 930 P.2d at 992.

45. *Id*.

46. Under Alaska law, the "clear and convincing evidence" standard is applied in several situations where extraordinary claims are made, including those for punitive damages, ALASKA STAT. § 09.17.020(b) (LEXIS 2000), and for relief from liquidated damages and attorney's fees in wage and hour actions, *see id.* § 23.10.110.

remedies."[47] It is unclear how such evidence could be relevant to any determination associated with the after-acquired evidence rule. The question to be addressed with respect to the rule is whether the employer would have dismissed the employee for violation of company policies during employment. Post-employment misconduct, by definition, does not involve conduct by the employee during employment. If the misconduct did not take place during employment, employers cannot claim that an employee would have been terminated earlier had the employer been aware of the misconduct.

Courts that have examined this issue have held uniformly that so-called "after after-acquired evidence" may not be admitted to limit damages in employment cases. In *Carr v. Woodbury County Juvenile Detention Center*,[48] cited by the Model's author, the court clearly rejected such evidence:

> County policies governing employment simply cannot properly, by which I mean either legally or equitably, be imposed upon a person after his or her employment has been terminated. It would be grossly inequitable to hold Carr to all of the burdens of County policies at a time when she is not receiving any of the benefits of County employment.[49]

In *Miller v. AT&T*,[50] the court held that a determination made after dismissal regarding the propriety of absences could not be offered as after-acquired evidence, because "[a]fter an employee has been terminated, there is no legitimate purpose in continuing to evaluate the employee. The only purpose behind post-termination, piece meal determinations regarding an employee's conduct, is to limit the damages of the employer in the event of an employment lawsuit."[51] The court argued that the after-acquired evidence rule "is not intended to be used as a fishing expedition by employers to find wrongful conduct on the part of their terminated employees for the purpose of limiting their damages."[52] In *Ryder v. Westinghouse Electric Corp.*,[53] the court noted, in rejecting evidence of post-employment misconduct, that the definition of after-acquired evidence

> presupposes that there was an employer-employee relationship at the time that the misconduct occurred, i.e. that the employee had not yet been terminated. Moreover, there cannot be mis-

47. Fisher, *supra* note 1, at 295.
48. 905 F. Supp. 619 (N.D. Iowa 1995).
49. *Id*. at 629.
50. 83 F. Supp. 2d 700 (S.D. W. Va. 2000).
51. *Id*. at 705.
52. *Id*. at 706.
53. 879 F. Supp. 534 (W.D. Pa. 1995).

> conduct that the employer did not know about prior to making its adverse decision if the misconduct did not even occur until after the adverse decision was made.[54]

The purpose to be served by invoking the after-acquired evidence rule should be a limited one. Employers should not be granted license, by the rule, to monitor employee behavior after employment with the goal of finding some act or omission as a reason that they would have terminated the employee, had the employee remained employed. No court has allowed such use of after-acquired evidence. In light of the concerns the court has already expressed about potential abuse of the rule, the Alaska Supreme Court should not and likely will not become the first jurisdiction to do so.

V. CONCLUSION

Any approach adopted by the Alaska Supreme Court to the application of the after-acquired evidence doctrine should address the concerns expressed in *Brogdon* regarding the rule. The test set out in *McKennon,* which was cited by the court in *Brogdon* as the seminal case on the use of after-acquired evidence, would address those concerns. Under that test, employers would be required to establish that the employee misconduct at issue "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 discharge."[55] The *Brogdon* court's concerns would further be addressed by imposing a requirement that there be "clear and convincing evidence" in support of the defense. The approach suggested in the Model, including allowing for introduction of post-termination misconduct as after-acquired evidence, would open the door to a multitude of abuses by employers in employment litigation and would not reflect the current state of the law in Alaska, as set out in *Brogdon* and *McKennon*.

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54. *Id*. at 537.

55. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995).