

5-1996

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Lauren L. Logan

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Recommended Citation

Logan, Lauren L. (1996) "*McKennon v. Nashville Banner Publishing Company*. Progression of the After-Acquired Evidence Doctrine," *Mercer Law Review*: Vol. 47 : No. 3 , Article 14.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol47/iss3/14

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McKennon v. Nashville Banner Publishing Company: Progression of the After-Acquired Evidence Doctrine

In *McKennon v. Nashville Banner Publishing Co.*,¹ the United States Supreme Court held that after-acquired evidence of employee wrongdoing that would have led to termination on lawful and legitimate grounds does not bar the employee from all relief sought under an employment discrimination action.² The plaintiff, Christine McKennon, had worked for the defendant, Nashville Banner Publishing Company, for thirty years when, as claimed by Banner, she was discharged as part of a work force reduction plan.³ McKennon, who was sixty-two years old at the time of her discharge, claimed that her termination was based on her age.⁴ She filed suit in the United States District Court for the Middle District of Tennessee, alleging a violation of the Age Discrimination in Employment Act of 1967 ("ADEA")⁵ and seeking the legal and equitable remedies available under the statute—back pay and liquidated damages.⁶ During discovery, Banner took McKennon's deposition and learned she had copied confidential documents concerning the company's financial condition.⁷ McKennon maintained she copied the documents for her own protection.⁸ Banner sent McKennon a letter saying that her actions were in violation of her job responsibilities and again notified her that she was terminated.⁹ The letter indicated that if Banner had known of McKennon's misconduct at the time of her termination, it would have discharged her at once for that reason.¹⁰ Both parties agreed that had Nashville Banner known of McKennon's misconduct

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1. 115 S. Ct. 879 (1995).
 2. *Id.* at 881.
 3. *Id.* at 882.
 4. *Id.* at 883.
 5. 29 U.S.C. §§ 621-634 (1994).
 6. *Id.* See 29 U.S.C. § 623(a)(1).
 7. 115 S. Ct. at 883.
 8. *Id.*
 9. *Id.*
 10. *Id.*

before discharge, the company would have had lawful grounds for discharge based on the neutral application of Banner's employment policies.¹¹ In order to reach summary judgment, Banner conceded discrimination against McKennon.¹² The district court held that McKennon's misconduct constituted grounds for termination and that, based on the after-acquired evidence doctrine, she was not entitled to any remedies under the ADEA.¹³ The United States Court of Appeals for the Sixth Circuit affirmed on the same rationale.¹⁴ The United States Supreme Court granted certiorari to resolve conflicting views among the circuit courts of appeals and held that an employee discharged in violation of the ADEA is not barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing, that in any event, would have led to the employee's termination on lawful and legitimate grounds.¹⁵ In addition, the Court determined that back pay, but not reinstatement or front pay, is appropriate under the ADEA if all relief is not barred.¹⁶

When dealing with employment discrimination cases, there is a continuum to which a court must refer concerning the severity of an employer's discrimination versus the degree of an employee's wrongdoing.¹⁷ Employment discrimination cases may be separated into three categories: inferential disparate treatment cases, mixed motive cases, and after-acquired evidence cases.¹⁸ An example of an inferential disparate treatment case is *McDonnell Douglas Corp. v. Green*.¹⁹ In *McDonnell Douglas*, the plaintiff established prima facie requirements for disparate treatment.²⁰ Defendant McDonnell Douglas maintained that the company refused to rehire the employee based on his illegal action concerning civil rights demonstrations directed at McDonnell

11. *Id.*

12. *Id.*

13. *Id.* After-acquired evidence is information that is discovered after an unlawful termination or disciplinary action that would have constituted grounds for lawful termination had it been known at the time of termination. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 886.

17. See generally HAL LEWIS, LITIGATING CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION CASES §§ 6.10-6.12, 305-29 (1996).

18. *Id.*

19. 411 U.S. 792 (1973).

20. *Id.* at 802. The four elements from *McDonnell Douglas* are evidence that the employee: "(1) belongs to protected group; (2) applied or continued to desire the position in question; (3) met minimum uniform qualifications to receive or retain the position; and (4) was rejected." LEWIS, *supra* note 17, § 6.10, at 306.

Douglas.²¹ The Court concluded when the prima facie requirements of disparate treatment exist, an employer may not use employee conduct as a pretext for refusing to rehire.²² A legitimate, nondiscriminatory reason must be shown with evidence that clearly explains its proffered reason.²³ The prima facie elements will be applied to each case in a flexible manner.²⁴ Prima facie evidence establishes disparate treatment unless the defendant employer can show a legitimate reason for termination.²⁵ This legitimate reason for termination, or even disciplinary action, forms a natural transition by courts to the application of the "mixed motive" doctrine. The Supreme Court dealt with the issue of mixed motive in *Price Waterhouse v. Hopkins*.²⁶ In order for a case to meet the mixed motive doctrine, an employer must show (1) there was both a legitimate reason for termination as well as an illegal reason at the time of termination, and (2) that the legitimate reason would have resulted in termination without any reliance on the unlawful reason.²⁷ This approach has been termed the "same decision" rationale.²⁸ Remedies available under the mixed motive doctrine vary depending on the discrimination statute involved.²⁹ Title VII³⁰ allows for compensatory and punitive damages while the ADEA allows for back pay and injunctive relief.³¹ After-acquired evidence varies from mixed motive in that when dealing with after-acquired evidence, at the time of termination, no lawful or legitimate reason for termination was known to the employer.³² It is important to distinguish an after-acquired evidence situation from a mixed motive situation.³³ For a case to fall under the after-acquired evidence doctrine, an employer must be able to establish that if it had known of the employee's misconduct prior to unlawful termination, such knowledge would have resulted in immediate termination.³⁴ Prior to the decision in *McKennon*, there was disparity

21. 411 U.S. at 796.

22. *Id.* at 804.

23. LEWIS, *supra* note 17, § 6.10, at 310.

24. *Id.* at 302.

25. *Id.* at 303; *McDonnell Douglas*, 411 U.S. at 802.

26. 490 U.S. 228 (1989).

27. LEWIS, *supra* note 17, § 6.11, at 316 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

28. *Id.* at 317. See *Mt. Healthy City Bd. v. Doyle*, 429 U.S. 274 (1977).

29. See generally 42 U.S.C. §§ 2000e-e17 (1994); 29 U.S.C. §§ 621-634 (1994).

30. 42 U.S.C. § 2000e-e17.

31. Compare 42 U.S.C. §§ 2000e-e17 (1994) and 29 U.S.C. §§ 621-634 (1994).

32. LEWIS, *supra* note 17, § 6.12, at 322.

33. *Id.*

34. 115 S. Ct. at 886-87. What policies a company would base this decision upon are not clear at this time. The Supreme Court has not yet determined whether an employer

among the circuits concerning the effects of after-acquired evidence. In *Milligan-Jensen v. Michigan Technological University*,³⁵ the Sixth Circuit determined that an employee suffered no legal damage from EEOC sexual discrimination because of after-acquired evidence that the employee had falsified her employment application.³⁶ In like fashion, the Seventh Circuit in *Washington v. Lake County*,³⁷ initially called what was in fact an after-acquired evidence case, a mixed motive case, and applied a similar rationale as the Sixth Circuit in *Milligan*, barring the employee's relief.³⁸ However, more recently, the Seventh Circuit in *Kristufek v. Hussmann Foodservice Co.*,³⁹ and the Eleventh Circuit in *Wallace v. Dunn Construction Co.*,⁴⁰ both found, to varying degrees, that after-acquired evidence does not bar all relief.⁴¹ The Seventh Circuit, in *Washington*, originally found that such evidence barred relief, but later found in *Kristufek* that such evidence only limits relief.⁴² Whereas, the Eleventh Circuit in *Wallace* "expressly rejected" that the doctrine of after-acquired evidence bars all relief.⁴³ In that case, the court found the after-acquired evidence irrelevant at the liability stage, but relevant in adjusting remedies equitably when considering the statutory purpose of discrimination statutes.⁴⁴ The Supreme Court's finding in *McKennon* constitutes a necessary first step toward continuity in the application of the after-acquired evidence doctrine in employment discrimination cases.

The Supreme Court in *McKennon v. Nashville Banner Publishing Co.* began its analysis by first distinguishing the case from the Court's decision in *Mt. Healthy City School District v. Dolye*.^{45, 46} *Mt. Healthy* was a mixed motive case where both a lawful and unlawful reason motivated the employee's dismissal.⁴⁷ The Court found that *Mt. Healthy* could not control *McKennon* since at the time of *McKennon*'s termination, Banner only had knowledge of an unlawful reason.⁴⁸ Even

would have to use previously established policies that have already been neutrally applied.

35. 975 F.2d 302 (6th Cir. 1992).

36. *Id.* at 305.

37. 969 F.2d 250 (7th Cir. 1992).

38. *Id.* at 255, 257.

39. 985 F.2d 364 (7th Cir. 1993).

40. 968 F.2d 1174 (11th Cir. 1992).

41. *Kristufek*, 985 F.2d at 371; *Wallace*, 968 F.2d at 1184.

42. 985 F.2d at 371. *Washington*, 969 F.2d at 256-57.

43. 968 F.2d at 1184.

44. LEWIS, *supra* note 17, § 6.12, at 324.

45. 429 U.S. 274 (1977).

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

47. *Id.*

48. *Id.*

though only an unlawful reason for termination existed at the time of termination, the Court did not find *McKennon* was a case of inferential disparate treatment, but instead a case of after-acquired evidence since later a lawful reason to terminate was discovered.⁴⁹ The Court determined that in order for the after-acquired evidence doctrine to be applicable, the employer must establish that the wrongdoing is of such severity that the employee would have been terminated on those grounds alone if the employer had knowledge of such wrongdoing at the time of termination.⁵⁰ The Court in *McKennon* held that the application of the after-acquired evidence rule will not preclude employees from all relief granted under the ADEA.⁵¹ According to the Court, the employee's wrongdoing must be taken into account in determining which remedies are appropriate considering the "lawful prerogative of the employer in the usual course of its business."⁵² The Court found that generally, in an after-acquired evidence situation, neither reinstatement nor front pay is an appropriate remedy.⁵³ Back pay is more difficult to measure and cannot be completely barred.⁵⁴ A court should take equitable circumstances into account in determining the appropriate remedies.⁵⁵ The Court of Appeals for the Sixth Circuit had relied on *Summers v. State Farm Mutual Auto Insurance Co.*⁵⁶ and *Johnson v. Honeywell Information Systems*⁵⁷ in barring relief to *McKennon* on the basis of after-acquired evidence.⁵⁸ In distinguishing *McKennon* from *Summers* and *Honeywell*, the Supreme Court refused to allow after-acquired evidence to carry the same weight as either lawful termination or mixed motive termination.⁵⁹ Allowing after-acquired evidence to carry the same weight would not further the purposes of employment discrimination statutes.⁶⁰ Discrimination statutes generally have two primary objectives—(1) deterrence and (2) compensation.⁶¹ "[I]f after-acquired evidence of wrongdoing that would have resulted in termination

49. *Id.*

50. *Id.* at 886-87.

51. *Id.* at 883. This is a similar course to the Eleventh Circuit, but not identical. LEWIS, *supra* note 17, § 6.12, at 320.

52. 115 S. Ct. at 886.

53. *Id.*

54. *Id.*

55. *Id.* at 885-86.

56. 864 F.2d 700 (10th Cir. 1988).

57. 955 F.2d 409 (6th Cir. 1992).

58. 115 S. Ct. at 885.

59. *Id.*

60. *Id.* at 884.

61. *Id.*

operates, in every instance to bar all relief for an earlier violation[,]” the two objectives of discrimination statutes would be lost.⁶² The fact that discrimination did take place cannot be ignored because the intent behind the ADEA is to protect employees from discrimination in the workplace.⁶³ As a result, both deterrence and compensation are goals of the statute.⁶⁴ Under the ADEA, means of relief normally include reinstatement, back pay, injunctive relief, declaratory judgement, and attorney fees.⁶⁵ The Court refused to bar McKennon from all relief in light of the after-acquired nature of the lawful reason for termination and remanded the case for further determination of the appropriate remedies.⁶⁶

While the Supreme Court's decision in *McKennon* takes the requisite first step toward clarifying the application of the after-acquired evidence doctrine, it does not provide all the answers necessary to establish uniformity for all types of employment discrimination cases. The Court's decision in *McKennon* resolves the disparity among federal circuits with regard to the ADEA and after-acquired evidence.⁶⁷ The Court's finding is a natural progression from the mixed motive doctrine's emphasis on employer's actions.⁶⁸ With the after-acquired evidence doctrine, the burden is on the employer to establish that the wrongdoing of the employee would have been severe enough to bring about lawful termination and thereby lessen the remedies that are available to wrongfully terminated employees.⁶⁹ However, even with an apparently straight forward holding, the Court left several issues unresolved. First, the Court failed to address the application of the after-acquired evidence doctrine to other types of employment discrimination.⁷⁰ Also, it is unclear how severe an employee's misconduct must be to warrant the application of the after-acquired evidence rule instead of the discrimination being determined to be merely inferential disparate treatment.⁷¹

62. *Id.*

63. *Id.* at 886.

64. *Id.* at 884.

65. *Id.* See 29 U.S.C. § 626(b) (1994).

66. 115 S. Ct. at 887.

67. *Id.* at 883.

68. It is key to distinguish an after-acquired evidence situation from a mixed motive situation.

69. LEWIS, *supra* note 17, § 6.12, at 326.

70. *McKennon* was seeking to recover only under the ADEA. 115 S. Ct. at 883.

71. See *O'Driscoll v. Hercules, Inc.*, 12 F.3d 176, 179 (10th Cir. 1994), *vacated*, 115 S. Ct. 1086, *abrogated* by 115 S. Ct. 879. “It appears from this standard that it is unnecessary for the court to agree that the employee's misconduct is ‘serious’ or ‘pervasive’ as long as the employer can prove that under its established rules, applied without discrimination, it would have discharge the employee had it known of such conduct when

Next, the Court did not address the standard for judging the equity of an employer's lawful termination policies and whether those policies have been neutrally applied.⁷² In addition, the Court alluded to, but failed to describe, special circumstances affecting the legitimate interests of the involved parties that would cut off back pay with termination.⁷³ The Court merely gave a "beginning point" for others to use in the determination of calculation of back pay.⁷⁴ As is generally appropriate under the ADEA, the Court did not consider the issue of liquidated damages and left the issue to the lower court on remand for consideration concerning remedies.⁷⁵ Finally, because the decision in *McKennon* involved only the application of the ADEA and no other employment discrimination statutes, it is unclear what remedies will apply to other employment discrimination statutes, such as Title VII.⁷⁶ In conjunction with the issue of remedies available under other employment discrimination statutes like Title VII, allowance of compensatory and punitive damages in the face of after-acquired evidence is unclear.⁷⁷ It may be assumed that the application of liquidated damages to an ADEA situation and compensatory and punitive damages in a Title VII situation would be allowed by future decisions concerning after-acquired evidence because of the objectives of employment discrimination statutes.⁷⁸ If these remedies are not allowed, the general objectives of employment discrimination—deterrence and compensation—would be abandoned.⁷⁹

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it occurred." LEWIS, *supra* note 17, § 6.12, at 326.

72. Will the standard of the employer be used? What if the employer does not have an established standard or has an established standard that has not yet been applied?

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

74. LEWIS, *supra* note 17, § 6.12, at 327.

75. LEWIS, *supra* note 17, § 6.12, at 328. Back pay is doubled under the ADEA for liquidated damages. *Id.*

76. *Id.* at 324.

77. *Id.* at 323-24. Compensatory and punitive damages are allowed under Title VII, § 703(m).

78. LEWIS, *supra* note 17, at § 6.12, at 324.

79. *Id.*

