Supreme Court Limits the After-Acquired Evidence Defense

The hotly contested issue of whether after-acquired evidence should be a defense in employment discrimination litigation was partially resolved on January 23, 1995, when the United States Supreme Court in a unanimous decision determined McKennon v. Nashville Banner Publishing Co., (1995 WL 20463 (U.S. Tenn.)). The Court held that application of the after--acquired evidence defense was generally limited to reducing a plaintiff's damages and other relief and was not a complete bar to a claim for employment discrimination.

The Defense

After-acquired evidence is evidence of an employee's misconduct during the period of employment which the employer discovers after the employee's discharge on other grounds. The evidence is usually discovered after the employee has filed a lawsuit. Such evidence is most commonly related to resume fraud although employee misconduct on the job is often alleged. For the past several of years, courts have debated whether or not after-acquired evidence should be a defense.

History of the Defense

The McKennon decision was the first after-acquired evidence case decided by the Supreme Court since the issue was raised in the 1988 case of Summers v. State Farm Mutual Automobile Ins. Co.. In Summers, the Tenth Circuit determined that after-acquired evidence of an employee's falsification of company documents constituted a complete defense to the age and religious discrimination claims that he filed against his employer. The Court reasoned that although the employer may have discriminated against the employee, the employee would have been discharged anyway upon the employer's discovery of the falsifications. The court likened the after-acquired evidence defense to a mixed motive employment discrimination case where the employer has two reasons for its adverse employment action, one lawful and one unlawful.

The Summers case sparked a series of decisions over the application and admissibility of after--acquired evidence. In 1992, the Eleventh Circuit adopted a more limited version of the defense in Wallace v. Dunn Const. Co., Inc.
Although the Wallace court agreed with Summers’ general principle that after-acquired evidence is relevant to the relief available to a plaintiff, it rejected Summers’ bar to relief. Instead, the defense barred only prospective relief in the form of front pay, reinstatement and injunctive relief. Back pay would only be reduced if the employer could prove that the after-acquired evidence would have been discovered absent the litigation and that the evidence alone would have caused the employer to discharge the employee.

The Third Circuit recently adopted yet another version of the after-acquired evidence defense in Mardell v. Harleysville Life Ins. Co. In Mardell, the court rejected the Summers approach by holding that after-acquired evidence was not a bar to a discrimination claim but that it would be considered only as to the remedy available to the plaintiff. Generally, the after-acquired evidence would bar relief after the misconduct was discovered or would have been discovered if not for the litigation.

The New Jersey courts had not taken a position on the after-acquired defense before McKennon.

McKennon

In McKennon plaintiff’s age discrimination claim had been dismissed by way of motion for summary judgment after the plaintiff admitted to copying and removing confidential company documents during her final year of employment. The lower courts had applied the Summers’ approach by allowing after-acquired evidence to be admitted as an absolute bar to the employee’s liability.

The Supreme Court, however, rejected the Summers’ approach. It concluded that generally an employee’s misconduct unrelated to the grounds for termination, etc. should not bar a discrimination claim. The Court also rejected the mixed motive analysis which Summers and other courts had used in barring such claims because the employee misconduct had not been considered at the time of decision making. The Court noted in closing, however, that there might be "extraordinary equitable circumstances" when after-acquired evidence of employee misconduct would be a complete bar to a claim. The Court did not elaborate.

The McKennon Court determined that after-acquired evidence was relevant to the remedial relief The Court reasoned that the employee’s wrongdoings become relevant not to punish the employee, but to give deference to the employer’s lawful pre-rogatives of hiring, firing, and promoting its employees and the equities arising from the employee’s wrongdoing. The Court found that when an employer would have taken adverse action against the employee as a result of after-acquired evidence, the employee is not entitled to reinstatement or front pay.

The McKennon Court also held that the appropriate measure of back pay should be from the date of discharge to the date the employer discovered evidence sufficient to discharge the employee. The Court stressed that where an employer seeks to apply the defense, the employer has the burden of proving the underlying facts and that it
would have terminated the employee for the misconduct had this been known. Interestingly, the Court did not say anything about whether the liability and damages issues should be bifurcated for trial.

**Unanswered Questions**

Although the *McKennon* decision limited application of the after-acquired evidence defense, there remain many unanswered questions concerning the application of the defense:

1. Under what circumstances would the after-acquired evidence defense operate as a complete bar to liability?
2. Is there an after-acquired evidence defense to claims other than for wrongful discharge; e.g. discriminatory pay or promotion; breach of contract?
3. Does the after--acquired evidence defense bar claims for liquidated or punitive damages? How does it affect a successful plaintiff’s entitlement to attorneys fees?
4. What discovery opportunities are available to defendants who want/need to determine the existence of the after-acquired evidence?
5. Will New Jersey courts follow *McKennon*?

Answering these questions is beyond the scope of this newsletter. However, these questions make it clear that there is still uncertainty after *McKennon*, and that the after-acquired evidence defense still has a life.

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