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The After-Acquired Evidence Rule: The Best of All Possible Worlds?

SHARONA HOFFMAN

Although the Supreme Court provided substantial guidance in its McKennon decision, it left several significant questions unanswered. These questions include the following: (1) To which antidiscrimination statutes does the McKennon standard apply? (2) What is the employer's standard of proof with respect to after-acquired evidence? (3) To what extent, if any, should compensatory damages, punitive damages, liquidated damages, and attorney fees be limited in after-acquired evidence cases? (4) Which conditions constitute "extraordinary equitable circumstances" that may alter the scope of relief under the McKennon standard? In order to find answers to these questions, the author examines the EEOC Enforcement Guidance concerning after-acquired evidence, which was published in December 1995. In addition, she analyzes several court decisions and legal commentaries and provides her own insight into these issues.

Questions regarding after-acquired evidence arise in the arena of employment discrimination law when an employee challenges a discharge as discriminatory, and the employer subsequently learns of particular acts of employee wrongdoing which would have justified the termination if previously known.¹ After-acquired evidence can be defined as evidence of employee misconduct that is not known by the employer at the date of the discharge.²

In *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), the Supreme Court determined the extent to which after-acquired evidence may serve as a bar to recovery in an employment discrimination case. In an effort to evaluate the impact of the *McKennon* decision on charges of discrimination filed with the United States Equal Employment Opportunity Commission (EEOC), the EEOC issued "Enforcement Guidance on after-acquired evidence and *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 65 EPD

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¶43,368 (1995),” Notice No. 915.002, dated December 14, 1995 (hereinafter “Guidance” or “EEOC Enforcement Guidance”). In addition, numerous legal scholars have offered their own interpretations and criticisms of the *McKennon* decision and have expressed concern over questions left unanswered by the Supreme Court. This article analyzes the guidelines delineated by the *McKennon* opinion and the EEOC and discusses the after-acquired evidence issues yet to be elucidated by the courts.

MCKENNON V. NASHVILLE BANNER PUBLISHING CO.: RESOLUTION OF A SPLIT IN THE CIRCUITS

The use of after-acquired evidence as a defense in employment discrimination cases was extensively debated for almost a decade prior to the issuance of the *McKennon* decision. Circuit courts which considered the issue reached conflicting decisions, making the after-acquired evidence question ripe for resolution by the Supreme Court.

Prior Circuit Court Decisions

In *Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700 (10th Cir. 1988), the Tenth Circuit held that after-acquired evidence functioned as a complete bar to recovery in a case alleging age and religious discrimination. The court of appeals affirmed the district court’s granting of summary judgment to the employer based on evidence that the plaintiff, a State Farm claims representative, continued to falsify company records after being warned that such conduct would result in termination. Although the evidence was discovered four years after the date of discharge, the court determined that it precluded the plaintiff’s recovery for claims of discrimination. The *Summers* rule was followed by the Fifth, Sixth, and Eighth Circuits and inconsistently by the Seventh Circuit.³

In contrast, in *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992), vacated pending rehearing en banc, 32 F.3d 1489 (1994), affirmed in part, revised in part, 62 F.3d 374 (1995), the Eleventh Circuit ruled that evidence of an employee’s application fraud, discovered after she had instituted suit for retaliation and sexual harassment, could not bar her from relief under Title VII of the Civil Rights Act of 1964. The court rejected the *Summers* rule, deeming it “antithetical to the primary purpose of Title VII—‘to achieve equality of employment opportunity’” by encouraging “employers to eliminate discrimination.” The court stated that the *Summers* ruling invited employers to escape liability by rummaging through an unlawfully discharged employee’s background in order to discover flaws which it can claim would constitute legitimate reasons for

discharge. The *Wallace* approach was followed by the Third Circuit and at times by the Seventh Circuit, which itself issued contradictory rulings regarding after-acquired evidence.⁴

Facts and Holding of *McKennon*

In 1995, in *McKennon v. Nashville Banner Publishing Co.* the Supreme Court resolved the split, essentially adopting the *Wallace* approach. The case involved an age discrimination claim brought by a 62-year-old woman who had worked for Nashville Banner Publishing Company for 30 years before being discharged, purportedly as part of a reduction-in-force. During her deposition, McKennon admitted that prior to being terminated, she had copied and removed from the defendant's headquarters several confidential financial documents because she wanted "insurance" and "protection" once she became concerned that "she was about to be fired because of her age." When it learned of the misconduct, the defendant sent McKennon a letter informing her that she had violated her job responsibilities and advising her that had it learned of her misconduct while she was still employed, it would have terminated her immediately as a consequence of her actions.

For purposes of summary judgment, the employer conceded that it had discriminated against McKennon but argued that McKennon was entitled to no relief due to her misconduct. In a unanimous opinion, the Supreme Court held that after-acquired evidence cannot insulate an employer from liability for violation of the Age Discrimination in Employment Act (ADEA). The Court noted that the ADEA and Title VII seek to achieve "the elimination of discrimination in the workplace" by serving as mechanisms of deterrence and by creating a right of action for victims of discrimination by which they can obtain redress for wrongs suffered in violation of the law. The Justices concluded that "[i]t would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act."

Under the *McKennon* ruling, however, the employee's misconduct is relevant to the formulation of the remedy to be awarded in each case. The Court stated that it was sensitive to the "employer's legitimate concerns" and the "lawful prerogatives of the employer in the usual course of its business." It thus deemed it appropriate to consider the employee's wrongdoing in determining the extent of the complainant's remedy even if the misconduct is unearthed only in the course of discovery in a discrimination action and would have remained undetected absent the lawsuit.

The Court ruled that an employer that seeks to rely on after-acquired

evidence must establish that the wrongdoing was so severe that the employee would in fact have been terminated due solely to the misconduct had the employer been aware of it. Once the certainty of a discharge has been established, however, neither reinstatement nor front pay constitutes an appropriate remedy. In fact, it would be illogical to order reinstatement of an individual whom the employer could lawfully fire immediately upon the commencement of his re-employment due to prior misconduct. Furthermore, the Court instructed that back pay should be calculated "from the date of the unlawful discharge to the date the new information was discovered." The Court added, however, that courts may also consider "extraordinary equitable circumstances that affect the legitimate interests of either party," thus declining to create an unyieldingly rigid rule but leaving unanswered questions regarding the nature of the egregious circumstances which would justify a deviation from its general standard.

The Court acknowledged that defendants may have an incentive to engage in extensive discovery into the former employee's background and job performance in order to resist claims brought under the ADEA. Such discovery would seek solely to unearth instances of prior employee misconduct that would limit liability with respect to the plaintiff's ADEA claim. Nevertheless, the Court concluded that the threats of attorney fees and Rule 11 sanctions will be sufficient to deter most discovery abuses.

The Unclean Hands Defense

It is significant to note that the Court explicitly rejected the "unclean hands defense" for after-acquired evidence cases involving employment discrimination claims. The clean hands doctrine proposes that equity will not grant relief to a party who, "in his prior conduct has violated conscience or good faith or other equitable principle."⁵ The Court rejected the unclean hands defense based on the fact that the case, although a private suit, involved "important public purposes" and, as an action brought under a federal antidiscrimination statute, implicated congressional authorization of "broad equitable relief to serve important national policies."

One commentator notes several additional reasons for the rejection of the unclean hands defense.⁶ She notes that the application of the unclean hands defense in employment discrimination cases would result in inequity in most cases. The previously undiscovered employee misconduct generally causes the employer little if any damage. In *McKennon* the harm consisted of limited financial and personnel information being revealed to an employee's husband. In cases of

falsification of a detail on the employee's resume, the employer often suffers no injury whatsoever. By contrast, the victim of discrimination suffers significant psychological and financial injury due to the loss of the job, income, benefits, reputation, dignity, and sense of self-worth.⁷

Furthermore, courts have imposed a "same transaction" limitation, requiring that the conduct giving rise to the defense of unclean hands be connected to the controversy at issue.⁸ Thus, if "the right claimed in the suit did not accrue because of [the misconduct], the misconduct will be held to be collateral and not to defeat the right to affirmative relief."⁹ In employment discrimination cases involving after-acquired evidence, the victim's right to recovery for the employer's discrimination does not arise from the employee's wrongdoing, which often precedes the unlawful adverse employment decision by years if not decades. By definition, the employer's decision is made without knowledge of or regard to the employee's misconduct, which is discovered only after the fact. Thus, for a multitude of reasons the clean hands doctrine cannot be utilized by defendants in after-acquired evidence cases related to employment discrimination claims.

FURTHER ANALYSIS BY THE EEOC, THE COURTS, AND LEGAL SCHOLARS

The *McKennon* decision provided much-needed guidance as to the remedies available to plaintiffs in after-acquired evidence cases. Nevertheless, the Court left several significant questions unanswered. These questions include the following: (1) To which antidiscrimination statutes does the *McKennon* standard apply? (2) What is the employer's standard of proof with respect to after-acquired evidence? (3) To what extent, if any, should compensatory damages, punitive damages, liquidated damages, and attorney's fees be limited in after-acquired evidence cases? (4) Which conditions constitute "extraordinary equitable circumstances" that may alter the scope of relief under the *McKennon* standard? Detailed answers to most of these questions are contained in EEOC Guidance published in December 1995. In addition, several court decisions and legal commentaries provide further insight into the after-acquired evidence defense.

To Which Antidiscrimination Statutes Does the *McKennon* Decision Apply?

The *McKennon* decision applied explicitly only to after-acquired evidence in ADEA cases. The Supreme Court noted, however, that the "ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." It cited Title VII of the Civil Rights Act of

1964, the Americans with Disabilities Act of 1990 (ADA), the National Labor Relations Act (NLRA), and the Equal Pay Act of 1963 as additional statutes which prohibit discrimination in the workplace.

Based on this statement, the EEOC determined that the principles articulated in the *McKennon* decision are applicable in Title VII and ADA cases. In addition, the Tenth Circuit, in *Wallace v. Dunn Construction Co., Inc.*, 62 F.3d 374 (11th Cir. 1995), concluded, based on the above-cited Supreme Court language, "that the holding of *McKennon* is applicable to claims brought under Title VII and the Equal Pay Act." It is thus extremely unlikely that employers will be able to utilize after-acquired evidence to defeat non-age employment discrimination claims by arguing that the *McKennon* decision is limited only to ADEA cases.

The Employer's Standard of Proof

The Supreme Court established that an employer that seeks to utilize after-acquired evidence to limit the remedy in a particular case "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." This standard was elucidated by the Ninth Circuit in *McDonnell Douglas Helicopter Co. v. O'Day*, 79 F.3d 756 (9th Cir. 1996). The court held that an employer must "prove by a preponderance of the evidence that it would have fired the employee for that misconduct." It explicitly rejected the plaintiff's contention that the employer should be required to meet a higher burden of proof, that is, to prove by "clear and convincing evidence" that the individual would have been terminated.

The EEOC Enforcement Guidance grapples with the issue of how an employer might prove that it would have terminated the employee solely because of the misconduct in question. The clearest scenario, of course, is one in which other employees have committed the identical wrongdoing. In such cases the employer's reaction to the other incidents can be examined to determine how it would have responded to the plaintiff's misconduct.¹⁰ Thus, if the employer had not terminated other employees who engaged in behavior identical to that in question, the employer could not utilize the after-acquired evidence to curtail back pay or eliminate other forms of relief.

The case is far more difficult if the employer has no prior experience with the misconduct at issue. In such instances, the EEOC suggests that the following three factors be considered: (1) whether the misconduct is criminal in nature; (2) whether the employee's behavior compromised the integrity of the employer's business, such as via divulgence of trade secrets or other confidential information; or (3)

whether the adverse employment action appears reasonable and justifiable in light of the employee's misconduct. In addition, the court might determine whether the employer has ever stated that the conduct in question will lead to termination in its employee handbook, in a policy memorandum, or in an orientation or other training session.

The misconduct in *McKennon* occurred during the plaintiff's employment. Commonly, however, the after-acquired evidence consists of a misrepresentation on the employee's resume or application form, which the employer discovers after it begins investigating the individual's background in the face of a discrimination claim.¹¹ One might ask whether in such cases the employer should be required to prove that the employee would have been fired upon discovery of the misrepresentation during his or her employment or whether the employer need prove only that the employee would not have been hired if the misstatement had been discovered prior to commencement of the employment.

The Fifth Circuit provided an answer to this question in a case entitled *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995), which involved an employee who had stated in his application that he was a college graduate, but was found on the eve of trial to have completed less than a year of college work. The court ruled that "the pertinent inquiry, except in refusal-to-hire cases, is whether the employee would have been fired upon discovery of the wrongdoing, not whether he would have been hired in the first instance." The EEOC Enforcement Guidance adopted the Fifth Circuit rule, adding that logically, in discriminatory refusal-to-hire cases, the pertinent question is whether the employer would have actually rejected the candidate had it been aware of the subsequently discovered evidence during the application process. Since the plaintiff in a discriminatory failure-to-hire case never began working for the employer, the question of whether he would have been terminated had he become an employee is irrelevant.

The distinction between the two inquiries is a significant one. The Fifth Circuit in *Shattuck* reasoned that an employer may retain an employee who has performed successfully even though the employee does not have the qualifications claimed in his application materials. Thus, an employee guilty of application fraud might be forgiven for the wrongdoing once he proves himself to be a valuable performer and after the employer has invested substantial resources in training him, even though he would not have been initially hired had his misrepresentation been discovered during the application process. In such instances, the employer suffers no injury as a result of the employee wrongdoing, and equity would not be served by limiting recovery for an unlawful act of discrimination on the part of the employer.

Furthermore, it is reasonable to impose upon the employer a high burden of proof in an application fraud case since employers have the opportunity to conduct background checks regarding their applicants and to call references to verify information contained in the employment application. In fact, it may be disingenuous for an employer that was lax and did not investigate the applicant's history at the time of hire to claim that it is so offended by the misrepresentation that it would have fired the employee for the wrongdoing and should benefit from the after-acquired evidence rule.

Compensatory Damages

The *McKennon* Court determined that in after-acquired evidence cases, back pay will be limited to that which accrued between the date of the discriminatory termination and the date of discovery of the employee's wrongdoing. The Court, however, did not reach the issue of the availability of compensatory and punitive damages in after-acquired evidence cases. The EEOC, in its Guidance, advised that pecuniary compensatory damages, that is, damages representing out-of-pocket losses such as job search expenses, like back pay, stop accruing on the date the evidence of wrongdoing is discovered, if that misconduct would justify termination by the employer. The Guidance quotes the language of the *McKennon* Court, which emphasizes that the "object of compensation is to restore the employee to the position he or she would have been in absent the discrimination" without ignoring "the lawful prerogatives of the employer in the usual course of its business."¹² Curtailing pecuniary compensatory damages at the time of discovery of the misconduct is sensible since at that time the employee would have been terminated in any case and would have begun accruing the expenses in question regardless of the discrimination.

In contrast, the EEOC has concluded that nonpecuniary compensatory damages, those designed to compensate the victim of discrimination for emotional harm, are unaffected by the discovery of after-acquired evidence. In *McKennon* the Supreme Court emphasized that remedies in after-acquired evidence cases should be limited not in order to punish the employee, but rather out of consideration for the valid business concerns of the employer. The EEOC Guidance notes that "no legitimate business prerogatives are served by exonerating a proven discriminator from paying the full cost of the emotional damage caused by the discrimination."¹³ Nonpecuniary compensatory damages, provided by the Civil Rights Act of 1991, are designed to compensate the victim for emotional distress suffered because of the discrimination itself.¹⁴ Consequently, the employee should be entitled

to the full extent of proven damages caused by the humiliation and degradation of discrimination, even if he or she would have been terminated for other reasons. On the other hand, the employee could be denied compensatory damages for emotional distress suffered after the date of discovery of the prior misconduct if the distress is linked not to the fact of discrimination but rather to the condition of unemployment, which presumably would have occurred regardless of the employer's unlawful decision.

Punitive Damages

Punitive damages are appropriate when a plaintiff proves that the employer engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."¹⁵ The EEOC has determined that punitive damages, like nonpecuniary compensatory damages, are unaffected by the discovery of after-acquired evidence that would justify termination. The EEOC's Guidance notes that in *Russell v. Microdyne*, 65 F.3d 1229 (4th Cir. 1995), the Fourth Circuit indicated without discussion that the date of discovery of the employee's wrongdoing would limit not only back pay but also all compensatory and punitive damages. The EEOC Enforcement Guidance explicitly rejected the *Microdyne* court's decision. With respect to punitive damages, the Guidance asserts that "[i]t is the employer's motivation at the time of the discriminatory conduct that is relevant in determining the propriety of punitive damages."¹⁶

The purpose of punitive damages is to punish the defendant for its unlawful conduct and to deter other employers from behaving similarly.¹⁷ In after-acquired evidence cases, the employer is ignorant of the misconduct at the time it perpetrates the discriminatory employment decision. Consequently, limiting punitive damages due to the belated discovery of employee wrongdoing would be inconsistent with the goals of deterrence and retribution.¹⁸

It must be recalled that back pay in after-acquired evidence cases may be very limited due to the discovery of the evidence of wrongdoing very soon after the date of the discriminatory discharge and that reinstatement and front pay are always excluded.¹⁹ In light of these restrictions, some commentators have noted that discrimination cases involving after-acquired evidence issues may not be economically viable unless the plaintiff can recover substantial compensatory and punitive damages. Victims of discrimination may hesitate to file charges of discrimination with the EEOC or to bring suit if their recovery will be limited to a minimal amount of back pay and declaratory relief. Thus, employers that violate federal antidiscrimina-

tion laws would not be prosecuted and the policy goals of these statutes would be undermined.²⁰

Liquidated Damages

Liquidated damages are available under the Age Discrimination in Employment Act in cases of "willful violations" of the Act.²¹ Liquidated damages are intended to be punitive in nature²² and are limited to an amount equal to the employee's lost wages.²³ Similarly, liquidated damages are available under the Equal Pay Act in an amount equal to the employee's unpaid compensation.²⁴ Under the Equal Pay Act, liquidated damages are mandatory once a violation is found by the court unless "the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation" of law.²⁵

The EEOC Guidance provides that liquidated damages are available in age discrimination and Equal Pay Act cases even where after-acquired evidence of employee misconduct which would justify termination is found. Since liquidated damages are punitive in nature, their award is justified by the same rationale that applies to punitive damages, discussed above. The employer's motive in after-acquired evidence cases is in fact discriminatory since the proof of prior employee misconduct is a windfall, obtained by the employer only after the unlawful adverse employment decision is made. Thus, the employer should be punished via the imposition of liquidated damages for conduct which violates the federal antidiscrimination statutes.

Nevertheless, since liquidated damages are limited to an amount equal to that of the lost wages recovered by the victim of discrimination, these damages are significantly affected by the *McKennon* decision. Liquidated damages will be limited to the back pay accrued by the employee between the date of the adverse employment action and the date upon which the evidence of misconduct was discovered.

Attorney Fees

The EEOC Guidance does not address the issue of attorney fees, presumably because, as a federal governmental agency, the EEOC cannot recover such fees.²⁶ The *McKennon* decision explicitly states that attorney fees are available in after-acquired evidence cases, stating that "the authority of the courts to award attorney's fees, mandated under the statute, 29 U.S.C. §§ 216(b), 626(b) . . . will deter most [discovery] abuses." A question remains, however, as to whether attorney fees should be reduced if the employer is able to prove that

it would have terminated the employee due to the subsequently discovered wrongdoing.

In *Kristufek v. Hussmann Foodservice Co., Toastmaster Division*, 985 F.2d 364 (7th Cir. 1993), a Seventh Circuit case which preceded *McKennon* but is consistent with its ruling, the court indicated that a portion of the attorney fees awarded below must be deducted to reflect the time after the discovery of the plaintiff's falsification of his educational qualifications. This standard, however, seems unfair and contrary to the purpose of the federal antidiscrimination statutes. In many cases, evidence of misconduct may be discovered very soon after a charge of discrimination is filed with the EEOC,²⁷ when the employer conducts a thorough investigation of the employee and his or her background in order to defend itself against the allegations. Many employees do not hire attorneys until their cases are ready for litigation, after the EEOC has completed its processing of the charge of discrimination and the evidence of the employee's tainted history has been unearthed.

In the alternative, employers may discover the after-acquired evidence very soon after the hiring of the attorney, during the plaintiff's deposition early in discovery. In such cases, under the *Kristufek* rule, the attorney would be entitled to little if any attorney fees. As a result, plaintiffs would be discouraged from filing meritorious discrimination claims, and the congressional objective of eliminating discriminatory employment practices would be thwarted.

Furthermore, as one commentator has argued, discrimination suits are filed first and foremost in order to prove employer liability.²⁸ The after-acquired evidence defense is merely an affirmative defense. The need to prove liability does not disappear once after-acquired evidence is discovered since the case is not subject to dismissal at that point and the victim of discrimination may still be entitled to a substantial recovery. Consequently, attorney fees should not be curtailed at the time the evidence of misconduct is discovered.

In an after-acquired case, however, it may be reasonable to disallow the award of attorney fees for time devoted to the issue of after-acquired evidence and to unsuccessfully resisting a reduction of the recovery due to the employer's affirmative defense. Attorney fees are awarded to the prevailing party in appropriate cases.²⁹ Since the plaintiff in such cases does not prevail with respect to the after-acquired evidence issue, the plaintiff should not be awarded fees related to that defense.

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court determined that where a plaintiff has achieved only limited success, the award of attorney fees for all hours spent by the attorney on the litigation

may be excessive. The Supreme Court instructed that “[t]he district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.” Eliminating hours expended on an unsuccessful attempt to disprove the employer’s after-acquired evidence defense would be consistent with the Supreme Court’s approach. Under this standard, attorneys would be required to maintain records as to whether their work was related to issues of liability and allowable damages or issues of after-acquired evidence.

Extraordinary Equitable Circumstances That May Alter the Scope of Relief

In the *McKennon* opinion, the Supreme Court instructed that “[i]n determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.” The Court thus suggested that in unusual circumstances courts may deviate from the *McKennon* guidelines as to relief but did not provide any guidance as to what events would constitute such extraordinary circumstances.

The EEOC Guidance provides that additional relief is warranted when the after-acquired evidence is unearthed during a retaliatory investigation by the employer after a charge of discrimination is filed with the EEOC. In some instances, an employer may launch an extensive investigation into the employee’s background not in order to verify the truth or falsehood of the complainant’s allegations, but specifically in order to uncover derogatory information about the employee or to discourage other employees from filing charges of discrimination in the future. Since retaliation is itself unlawful under the federal antidiscrimination laws,³⁰ the employer should not benefit from its retaliatory conduct by enjoying a reduction in the back pay owed to the victim of discrimination. The EEOC Guidance states that where an employer commences a retaliatory background check with respect to the employee during an investigation of a charge of discrimination, back pay should be extended to the date the complaint is resolved.

The EEOC Guidance has been criticized by some plaintiff’s attorneys as being too lax and unduly generous to employers.³¹ Civil rights attorneys have emphasized that the EEOC’s rule is limited to retaliatory investigations conducted during the administrative process, before suit has been filed in court. The EEOC has not stated that back pay should be extended in cases of exceptionally aggressive and abusive discovery during litigation. Plaintiffs’ attorneys have suggested that “[u]sing an imprudent private investigator, invading the plaintiff’s privacy, bringing the plaintiff into disrepute among friends or acquaint-

tances, and similarly extreme steps,"³² during discovery should also justify a deviation from the *McKennon* limitation on back pay damages.

Overzealous discovery practices, however, are unlikely to be considered "extraordinary equitable circumstances" by the courts. Discovery abuses can be addressed by the courts through a variety of channels including sanctions and protective orders. The extent and nature of discovery means are routinely challenged by the parties, particularly in discrimination cases involving highly personal and emotional issues. The Supreme Court itself in *McKennon* suggested that traditional means such as the award of attorney fees and Rule 11 sanctions be utilized to deter and punish inappropriate conduct during litigation. Consequently, the use of questionable discovery methods should not justify a deviation from the *McKennon* standard.

Employers are entitled to utilize after-acquired evidence to limit liability under *McKennon* and have a financial incentive to discover the evidence as quickly as possible. Moreover, in order to establish a valid defense to unlawful termination cases, employers often must examine questions regarding the employee's job performance and qualifications. The EEOC Guidance thus could not have meant to forbid the employer from conducting nonabusive and reasonable research into the employee's background during the EEOC's administrative process. Instead, the EEOC condemned retaliatory investigations commenced solely for the purpose of unearthing "derogatory" information which would serve only to embarrass the complaining party or which were designed to deter other employees from filing charges via harassment and ridicule of the individual in question. Such conduct by the employer during the EEOC's administrative process, which is not subject to constraint by the court since the case is not yet in litigation, may in extreme circumstances be deemed to justify an extension of the back pay award under the *McKennon* standard.

In addition, courts may consider the nature and severity of the discrimination itself in formulating the remedy in a particular case. In some instances the discriminatory termination may be accompanied by abusive conduct such as racial slurs or violence or the discharge may be designed maliciously to maximize harm to the victim, such as where an older worker is unlawfully terminated while the employer knows his or her spouse is severely ill and needs costly medical treatment. In such egregious cases courts may not allow employers to utilize after-acquired evidence to limit recovery.

CONCLUSION

In *McKennon v. Nashville Banner Publishing Co.* the Supreme

Court delineated guidelines as to how after-acquired evidence affects the remedy available to the complaining party in cases where unlawful discrimination is proved but the employer discovers evidence of employee misconduct that was severe enough to justify the plaintiff's termination had it been previously known. The Court's ruling has been explicated in EEOC Guidance and by other commentators.

In cases where the employer can establish that it would in fact have terminated the employee for the misconduct, reinstatement and front pay awards are inappropriate. In general, back pay awards and pecuniary compensatory damages are limited to damages that accrued between the date of the unlawful discharge and the date of discovery of the wrongful conduct. Compensatory and punitive damages awards should not be reduced due to after-acquired evidence, and liquidated damages are by definition limited to the amount of back pay awarded. Attorney fees present the most difficult question, since they are discussed by neither the Supreme Court nor the EEOC Guidance. Attorney fees should probably be limited in after-acquired evidence cases to reflect the employee's failure to defeat the employer's affirmative defense and to avoid a limitation of the remedy.

The *McKennon* decision has been criticized as devaluing the employer's rights and the public's interest in deterring misconduct.³³ Commentators have utilized the example of convicted criminals who have omitted their convictions from application materials, thereby depriving employers of the opportunity to make informed hiring decisions.³⁴ Arguably, individuals who know they will be entitled to recovery if they become victims of discrimination may not be sufficiently deterred from attempting to gain access to the workplace by deceit.

The deterrence argument assumes, however, that employees or applicants commit the misconduct with the expectation that they will suffer discrimination in the future. This assumption is unrealistic since the likelihood that any particular individual will suffer employment discrimination and prevail in a court action is unpredictable and minute. An employee whose misconduct is undeterred by the fear of discovery, by the threat of criminal action, or by moral considerations, would certainly not be deterred by the remote chance that he or she will suffer discrimination in the future and be unable to obtain a complete recovery because of past wrongdoing.

Furthermore, as one commentator has suggested, employers that are injured by employee misconduct may file counterclaims against the employee, seeking their own relief.³⁵ Thus, an employee who makes costly mistakes because he or she does not have the qualifications claimed on the resume or who violates company policy, thereby

injuring the employer, may be entitled to damages for discrimination but may also be liable to the employer for the wrongful conduct.

The *McKennon* opinion strives to structure guidelines for remedies that consider both the rights of employees to be free of discrimination and “the lawful prerogatives of the employer in the usual course of its business.” Given the complexity and the sensitive nature of the issues involved in after-acquired evidence cases, the Court offered an admirably balanced approach to resolving damages issues implicating the competing rights, concerns, and injuries of the parties in such cases. Nevertheless, certain ambiguities and questions remain concerning the *McKennon* standard, which will continue to evolve and crystallize as relevant cases come before the EEOC and the courts.

NOTES

1. *McKennon* (cited on p. 79).
2. *Summers* (cited on p. 80).
3. See *Redd v. Fisher Controls*, 35 F.3d 561 (5th Cir. 1994); *Johnson v. Honeywell Information Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992); *Washington v. Lake County, Illinois*, 969 F.2d 250 (7th Cir. 1992); *Welch v. Liberty Mach. Works*, 23 F.3d 1403 (8th Cir. 1994). With respect to the Seventh Circuit, compare note 4 below.
4. *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3rd Cir. 1994), vacated, 115 S. Ct. 1397 (1995), on remand, 65 F.3d 1072; *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989); *Kristufek* (cited on p. 89).
5. *Black's Law Dictionary* 227 (5th ed. 1979), citing *Franklin v. Franklin*, 365 Mo. 442, 283 S.W.2d 483, 486 (1955). See also John N. Pomeroy, *A Treatise on Equity Jurisprudence* §397 (Spencer W. Symons ed., 5th ed. 1941), cited in the *McKennon* opinion, 115 S. Ct. at 885.
6. Elissa J. Preheim, Note, “Discrimination, Deceit, and Legal Decoys: The Diversion of After Acquired Evidence and the Focus Restored by *McKennon v. Nashville Banner Publishing Company*,” 71 *Ind. L.J.* 235 (1995).
7. *Id.* at 254.
8. *Id.* at 253, citing Henry L. McClintock, *McClintock on Equity* (2d ed. 1948) at 63, and Pomeroy, note 12 at §401.
9. *Id.*, citing *McClintock* at 64.
10. Guidance at p. 4.
11. See *Wallace* (cited on p. 80); *Shattuck* (cited on p. 85).
12. Guidance at p. 7, quoting *McKennon*, 115 S. Ct. at 886.
13. Guidance at p. 8.
14. See Clark Boardman Callaghan, 3 *Employment Discrimination Coordinator* ¶¶44,402.3 and 44,402.3A (1995).
15. 42 USC §1981a(b)(1) (1994).

16. Guidance at p. 8.
17. *Black's Law Dictionary* 352 (5th ed. 1979). See also Carolyn L. Whitford, Note, "While the United States Supreme Court Waves Goodbye to the After-Acquired Evidence Doctrine, It May Allow the Employer to Hold a Card Up Its Sleeve in *McKennon v. Nashville Publishing Co.*," 115 S. Ct. 879 (1995), 74 *Neb. L. Rev.* 374, 407 (1995).
18. See Whitford (cited in note 17).
19. *McKennon* (cited on p. 79) at 886.
20. See Tory E. Griffin, Note, "*McKennon v. Nashville Banner Publishing Co.*: The Future Role of After-Acquired Evidence in Employment Discrimination Litigation," 74 *Or. L. Rev.* 781, 818 (1995).
21. 29 USC §626(b) (1985).
22. *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613, 624 (1985).
23. 29 USC §216(b) (1995 Supp.), incorporated into the ADEA by reference, 29 USC §626(b) (1985).
24. 29 USC §216(b) (1995 Supp.).
25. 29 USC §260 (1985).
26. See 42 USC §1988(b) (1994) ("In any action or proceeding to enforce a provision of sections . . . 1981a . . . of this title [the Civil Rights Act of 1991] . . . the court, in its discretion, may allow the prevailing party, *other than the United States*, a reasonable attorney's fee as part of the costs.") (emphasis added).
27. Charges of discrimination must be filed with the EEOC before suit can be filed in court. See, e.g., Title VII of the Civil Rights Act of 1964, 42 USC §§2000e-5(b), (e)(1), and (f)(1) (1994); Age Discrimination in Employment Act, 29 USC §626(d) (1985).
28. See Preheim (cited in note 6) at 235, 266.
29. 42 USC §1988 (1994).
30. Section 704 of Title VII of the Civil Rights Act of 1964, 42 USC §2000e-3(a) (1994) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicant for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . .").
31. 23 *Civil Rights Act and EEO News* 4 (Feb. 21, 1996).
32. *Id.*
33. Barbara Ryniker Evans and Robert E. McKnight, Jr., "Splitting the Baby on After-Acquired Evidence in Employment Discrimination Cases," 19 *Am. J. Trial Advoc.* 241 (1995).
34. *Id.* at 262.
35. Whitford (cited in note 17) at 407.

