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IN PRACTICE

EMPLOYMENT LAW

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Turning the Tables in Discrimination Suits

The employer's use of after-acquired evidence of employee misconduct

Discovery often reveals skeletons in the closet of a former employee that may reduce or even eliminate the employer's liability in a discrimination action by the employee. When an employee's past misconduct is unearthed in discrimination litigation, the after-acquired evidence defense can level the playing field for employers in this otherwise employee-leaning area.

The defense applies to employee misconduct sufficiently serious to have justified termination had the employer known of it during the employment. If proven, it can bar a plaintiff from obtaining front pay and reinstatement, limit a backpay award, and in certain instances, result in dismissal of the entire case.

In *McKennon v. Nashville Banner Publishing Co*., 513 U.S. 352 (1995), the Supreme Court of the United States resolved a split in the circuits regarding the effect on liability of after-acquired evidence of employee wrongdoing. A unanimous Supreme Court held that the defense generally precludes a plaintiff suing under federal discrimination statutes from receiving front pay or reinstatement. The Court also held that backpay awards ordinarily should be limited to the period between termination and the employer's discovery of the malfeasance.

In the decade after *McKennon*, New Jersey courts have applied its liability limitation principles to actions under New Jersey's antidiscrimination statutes, including the Law Against Discrimination and the Conscientious Employee Protection Act. In some instances, the New Jersey courts have gone beyond *McKennon* in favoring employers. In *Taylor v. International Maytex Tank Terminal Corporation,* 355 N.J. Super. 482 (App. Div. 2002), for instance, the Appellate Division held that after-acquired evidence that an employee falsely denied responsibility for releasing hazardous chemicals justified not only limiting backpay damages but also cutting them off at a date *prior* to the employer's discovery of the cover-up.

In an even more expansive application of the after-acquired evidence defense, the New Jersey Supreme Court in *Cedeno v. Montclair State University*, 163 N.J. 473 (2000) dismissed a LAD and CEPA action in its entirety based on the plaintiff's having hidden a prior criminal conviction that would have barred statutorily his employment in the public position from which he was fired. Applying *Cedeno*, the Appellate Division in *Crespo v. Evergo Corporation*, 366 N.J. Super. 391 (App. Div.), *certif. denied*, 180 N.J. 151 (2004) dismissed a plaintiff's LAD action for failure to disclose her illegal alien status, also a statutory bar to employment. These dispositive applications of the after-acquired evidence defense appear, however, to be reserved for cases where a statute would have prohibited the employment ab initio had the truth been known.

As illustrated by *Cedeno* and *Crespo*, misrepresentations in employment applications and résumés are fertile ground for the after-acquired evidence defense. In seeking employment, plaintiffs often lie about criminal convictions, educational qualifications, terminations from prior jobs or other facts bearing on their eligibility or qualification for employment.

Grounds for the defense may also come from a plaintiff's on-the-job misdeeds. During discovery, a plaintiff may reveal that he took home confidential company documents for use in anticipated litigation. Or the silence of a plaintiff's former coworkers may be broken by his departure, outing him as a harasser, filcher of company property or expense-report padder.

While it is crucial that the employer's counsel explore the plaintiff's background thoroughly during discovery, an employer should not embark on a fishing expedition in response to an employee's discrimination complaint.

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Equal Employment Opportunity Commission guidelines on after-acquired evidence adopted in response to *McKennon* warn that "[e]vidence of employee wrongdoing may not cut off backpay if the evidence was unearthed during a retaliatory investigation, i.e., one initiated in response to a complaint of discrimination in an attempt to uncover derogatory information about the complaining party or discourage other charges or opposition … An employer who chooses to wage a retaliatory investigation must lose the advantage of equities that would, absent the retaliation, favor that employer, especially since retaliation is an independent violation of the federal employment discrimination laws." EEOC Notice 915.002, Dec. 14, 1995.

But should the employer become aware of a former employee's transgressions in the course of litigation, the employer's counsel should move expeditiously to plead the defense. Although it is unclear whether the after-acquired evidence defense is waived if not pleaded as an affirmative defense in the employer's answer, the defense clearly is affirmative in the sense that the employer bears the burden of proof — and courts have termed it an "affirmative defense." *Nemar v. Disney Store, Inc*., 91 F.3d 610, 621 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

As grounds for the defense often do not appear until after the initial pleadings have been filed, a motion for leave to amend likely will be required. Courts should be hard-pressed to deny well-founded amendment motions made shortly after the employer's discovery of the misconduct. Even in *Miller v. Beneficial Management Corporation*, 844 F. Supp. 990 (D.N.J. 1993), where the defendant-employer delayed several years in seeking leave to assert affirmative defenses based on after-acquired evidence, the court was constrained to allow their assertion, noting the absence of prejudice to the plaintiff.

Once the defense is in the case, the employer's counsel should conduct discovery with an eye toward moving for summary judgment. To obtain summary judgment on the after-acquired evidence defense, an employer bears the burden of demonstrating: (1) the occurrence of the misconduct; and (2) that, if discovered, the employee would have been terminated.

To establish the absence of disputed material fact on the first element, an employer must have the former employee "cold" on the misconduct. Ideally, the plaintiff will have admitted the misconduct at deposition. Otherwise, the employer should seek objective proof of it.

On the second element, as explained in *McKennon*, the employer has the burden of demonstrating that the employee's 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 discharge." In other words, an employer must show that the plaintiff's after-discovered misconduct *would* have caused the employer to terminate the former employee, not merely that it *could* have.

The most relevant "would have" proof is whether other employees have been terminated for the same or comparable misconduct. Also probative is the existence of an unambiguous company policy against the employee's conduct. Evidence that the company's management was aware of the misconduct during the employment but failed to act would seem to defeat the requisite "would have" showing.

An employer may lack examples of comparable misconduct by other employees to cite on summary judgment. In that case, EEOC guidelines indicate that relevant evidence that the employer would have discharged the plaintiff for the misconduct includes whether: "(1) the misconduct is criminal in nature (e.g., embezzlement, fraud, assault or theft); (2) the employee's behavior compromised the integrity of the employer's business (divulgence of trade secrets, security or confidential information); or (3) the nature of the employee's misconduct was such that the adverse action appears reasonable and justifiable." EEOC Notice Number 915.002, Dec. 14, 1995.

If the employer succeeds in obtaining summary judgment, the employee's economic remedies should be limited significantly. This may bring the plaintiff to the negotiating table for settlement.

But even if summary judgment is not possible, the employer's pursuit of the defense can work a sea-change in the dynamics of the case. The defense's psychological effect on a plaintiff may be great. He may not have counted on having his own misconduct scrutinized in the litigation. And shining the spotlight on his wrongdoing may make the plaintiff less sanguine about appearing sympathetic to a jury.

The key for defense counsel is to be alert to facts establishing the after-acquired evidence defense, to move quickly to assert it, and to establish facts to prove it. Whether the result is a limitation of liability for the employer or a more-favorable-than-expected settlement, the employer will be better off for having asserted it. ■