J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 5(1) 11-17, 1996-97

McKENNON v. NASHVILLE BANNER PUBLISHING COMPANY: THE USE OF AFTER-ACQUIRED EVIDENCE IN ADEA AND TITLE VII CASES

ROSS L. FINK, PH.D.
Bradley University, Peoria, Illinois

ROBERT K. ROBINSON, PH.D.

ANN L. CANTY, PH.D.

The University of Mississippi, University

ABSTRACT

The Supreme Court in the case of *McKennon v. Nashville Banner Publishing Company* addresses the inconsistencies within the federal judicial system regarding the use of after-acquired evidence in ADEA and Title VII cases. Specifically in this case, Nashville Banner Publishing found evidence of wrongdoing by McKennon during the discovery process. This after-acquired evidence, if known at the time of termination, would have created a mixed-motive case, thus barring McKennon from remedies under the ADEA. However, the Supreme Court ruled, *citing Price-Waterhouse*, that a mixed-motive defense was inappropriate in this instance since the employer was not motivated by this after-acquire evidence at the time of their termination decision.

The restructuring of organizations and accompanying job losses for personnel have added a new dimension to the complex issues associated with the termination of employees. Such a situation is illustrated by the employee who was concerned about the possibility of being discharged after working for the same employer for some thirty years. The employer was contemplating downsizing its work force, and the employee was confident that the older employees would be the first to be faced with job losses. She was particularly concerned since she was sixty-two

doi: 10.2190/4LHP-B5JX-B4Y7-3B90
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years old. By her own admission, the employee copied several confidential company financial documents for "insurance" against the anticipated termination.

The employee was discharged despite this precaution and immediately filed suit alleging that this action violated the Age Discrimination in Employment Act of 1967 (ADEA) [1]. However, it was not until the summary proceedings (discussed in greater detail later in this article) that it was learned the employee had illegally taken the confidential company documents. The employer contended this act of misconduct by the employee would have resulted in her termination for cause. That is to say, the employee's wrongful removal of the company records would establish a legitimate nondiscriminatory reason for her termination. As a consequence, both the Federal District Court for the Middle District of Tennessee and the United States Court of Appeals for the Sixth Circuit held the employee's misconduct was justification for her discharge and that she was not eligible for back pay or any other remedy under the ADEA.

The United States Supreme Court, however, reversed this judgment in *McKennon v. Nashville Banner Publishing Co.* [2]. Declaring that the knowledge of the pilferage of the confidential records was "after-acquired evidence," the Court held the employee could not be completely barred from all ADEA remedies. In this decision, the Court resolved a general inconsistency for handling such cases in the federal judicial system.

The purpose of this article is to examine the Court's rationale in *McKennon v. Nashville Banner Publishing Co.* (hereafter *McKennon*). In doing so, a distinction will be drawn between cases involving "mixed-motive" decisions and those involving "after-acquired evidence." Though this differentiation may appear arcane to some readers, the distinction is instrumental in determining an aggrieved party's right to remedies under the ADEA and other equal employment opportunity statutes. To facilitate the reader's understanding of the issue of "mixed-motive," there is a thorough discussion of *Mt. Healthy City School District Board of Education v. Doyle* [3], the case upon which the Court relied heavily for the *McKennon* decision to draw the distinction between mixed-motive and after-acquired evidence cases.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION v. DOYLE

In a mixed-motive case, two motives are simultaneously operative in the employment decision. Contrasting motives, one leading to a lawful action and one leading to an unlawful action, are interwoven in the employer's decision. The question becomes one, therefore, of determining which motive is sufficient to sustain the employer's action. The *Mt. Healthy* decision [4] involved a mixed-motive constitutional tort case, in which a teacher (Doyle) was fired for communicating a school memorandum to a radio station (considered by the court to be a First Amendment right) and for making obscene gestures to students (not considered to be protected by the court). The question before the court was whether the same decision to fire Doyle would have been made if the protected action (communicating the memorandum) had not been considered in the employment decision [5].

To analyze a mixed-motive case, the decision process is reconstructed minus the protected conduct to determine whether the same decision would have been made. If the preponderance of the evidence indicates that the same decision would be made, no injury is shown. This is especially important in Title VII cases, such as those involving ADEA. Under the Civil Rights Act of 1991, the moment the protected conduct enters the employment decision the entire process violates the act [6]. However, if the employer can demonstrate the same decision would have been made in the absence of the prohibited consideration, the traditional Title VII remedies (i.e., reinstatement, front pay, back pay, etc.) will not be imposed [7]. In short, the employer would be guilty of an unlawful employment practice, but would not be liable for more than attorneys' fees and court costs.

In the case, *Summers v. State Farm Automobile Insurance Company* [8], the court applied the *Mt. Healthy* mixed-motive standard to an "after-acquired evidence" situation. Summers, a field claims representative for State Farm Insurance Company, began working for the company in 1963. During the period from 1963 to July 1980, Summers' employment record was satisfactory. In July of 1980, it was discovered that Summers had forged the signature of a representative of Monsanto Chemical Company. State Farm discovered further evidence of misconduct in September of 1981, involving a 1977 incident in the falsification of medical and pharmacy bills.

Subsequent incidents involving alleged false claims resulted in warnings and, eventually, placement on probationary status for Summers. On May 19th of 1982, State Farm discharged Summers, not because of his falsification of records, but "because of his poor attitude, inability to get along with fellow employees and customers, and similar problems dealing with the public and co-workers" [8, at 702-03]. Summers consequently brought action against State Farm in 1986, claiming wrongful discharge because of age [1, §621-34, 1967 as amended], and also because of alleged discrimination on the basis of religion [9].

State Farm, during its preparation for trial, but after Summers' discharge, discovered over 150 instances where Summers had falsified company records. During depositions, Summers did not deny these charges [8, at 703]. If this information had been known by State Farm in 1982, State Farm would have indeed terminated Summers [8, at 708]. As a consequence of this after-acquired evidence, Summers was denied any relief. The conclusion was that *all* relief must be denied when an employee has been discharged in violation of the ADEA, and the employer *later* discovers a misconduct that would justify the discharge *had it been discovered earlier.*

It is essential to make the distinction between "mixed-motive" and "after-acquired evidence." In a mixed-motive case, the unlawful grounds (i.e., the employee's age) occur at the same time as the legitimate nondiscriminatory reason (i.e., the pilferage of company property or the falsification of documents). The decision maker is confronted with both issues simultaneously, and the decision results from mutual consideration of both issues.

Though after-acquired evidence appears to operate in a similar way to mixed motive, it can be differentiated on the basis of the time lag between the action based on unlawful reasons and the discovery of a legitimate, nondiscriminatory justification. Unlike mixed-motive decisions, an after-acquired evidence case involves an initial employment decision predicated solely on unlawful consideration of the employee's protected class status. Only later are the legitimate grounds for termination found; the initial action was clearly a Title VII violation.

A few federal courts broke from the *Summers* rationale and held that after-acquired evidence does not preclude *all* relief under Title VII [10]. Such employment decisions did not permit after-acquired evidence to ignore the time lapse between the allegedly unlawful act and the time the employer would have discovered the employee's misconduct [10, at 1188]. These federal courts rejected the absolute exclusion of Title VII remedies, the so-called "affirmative defense" rule, of the *Summers* decision.

The resolution of this divergence among the district courts on the use of after-acquired evidence became the overriding purpose of the *McKennon* decision. On the one hand, there was the *Summers* standard, in which the timeframe between the employer's Title VII violation and the acquisition of legitimate nondiscriminatory justification for the action is immaterial. Under the opposing standard, the employer cannot counter the *prima facia* case of discrimination using after-acquired evidence. Clearly, according to this view, the *Summers* decision ignored the timing of the evidence. Since the evidence was acquired after the employment decision, it could not have been a factor in the decision itself.

McKENNON v. NASHVILLE BANNER PUBLISHING COMPANY

On January 23, 1995, the Supreme Court resolved the application of after-acquired evidence dilemma as it applies to age discrimination. As previously mentioned in *McKennon*, the employer found evidence of wrongdoing by the employee during discovery, which would have resulted in termination of the employee *had it known* of this information at the time of employment termination. Consequently, the question before the court was: Does *after-acquired evidence* of wrongdoing bar employees from *any* relief under the Age Discrimination in Employment Act of 1967? [11]. In short, would the *Summers* standard prevail in this case?

In *McKennon* [12], Nashville Banner employed McKennon from May 1951 to October 1990. During this time, she was primarily employed as a secretary. Her work performance evaluations were outstanding. Banner claimed McKennon was discharged as part of a workforce reduction program. McKennon, who was sixty-two at the time of her termination, claimed otherwise, relying on the ADEA. Using this rationale, she sought a variety of remedies available under the ADEA, including back pay [13].

During discovery, McKennon admitted in her deposition to copying and removing several confidential documents at Banner. The fact that Banner would have terminated her immediately *if they had known* of these actions of removing confidential documents, is undisputed [12, at 540]. McKennon even stated in her deposition that these actions would have resulted in her immediate termination [12, at 541]. As stated previously, the question was one of whether or not McKennon's misconduct barred her from remedies available under the ADEA.

ANALYSIS OF *McKENNON* DECISION

McKennon, and related cases, pose a difficult decision because both parties were engaged in prohibited behavior. The defendant, Banner, unlawfully used age as an initial rationale for the termination of McKennon, and the plaintiff unlawfully removed confidential company documents [12, at 540-41]. Does the court, therefore, allow Banner Publishing to escape liability for using age as a factor for terminating an employee, or is McKennon rewarded in spite of her on-the-job misconduct (an action that, if known at the time, would have resulted in immediate termination)? The *Summers* standard indicates the plaintiff should be left in no worse a position than if the plaintiff had not been a member of a protected class or had not engaged in protected opposition to an unlawful employment practice. But, the question is "in what position would the defendant have been?" In cases of this type, reinstating or awarding front pay would go beyond making the plaintiff whole and would unduly trammel the employer's right to lawfully discharge employees when a legitimate motive exists for termination, even though it was after-acquired evidence [10, at 1182]. Two different answers may result based on whether after-acquired evidence is used.

In *McKennon*, Banner Publishing, for purposes of summary judgment, conceded to the district court its discrimination against McKennon [14]. Using the after-acquired evidence principle, however, Banner Publishing maintained that McKennon's misconduct was sufficient grounds for termination. Therefore, she was due neither back pay nor any other remedy under the ADEA [14]. Relying on the principles from *Summers*, Banner Publishing's motion for summary judgment was granted, and affirmed at the court of appeals level [14].

The Supreme Court granted certiorari [15] to resolve the conflict in the various district courts regarding the use of after-acquired evidence, and whether all relief must be denied when an employee has been discharged under the ADEA [14]. The Court, citing *Price-Waterhouse*, held that the "employer's legitimate reason for discharge in a mixed-motive case will not suffice—if that reason did not motivate it at the time of the decision" [14, at 4]. As the unlawful motive was the sole basis for the termination, and since McKennon's misconduct was not discovered until after she had been fired, mixed-motive analysis was not pertinent here [14, at 5]. In other words, the decision made by Banner Publishing in this instance evolved from a motive that violated the federal antidiscrimination law, and the court had jurisdiction to grant appropriate relief for that violation.

REMEDIES IN AFTER-ACQUIRED EVIDENCE CASES

The ADEA permits an employee to obtain compensation for injuries caused by the prohibited discrimination. As illustrated through further inquiry into Banner Publishing's violation of the ADEA, after-acquired evidence of the employee's wrongdoing affects the specific remedies available [14, at 4]. It would be inappropriate to require the employer to ignore information regarding employee misconduct, even when this information is found in discovery for a trial, and even when this information may not have been found except for the trial [14, at 6].

In cases of this type, the court concluded that reinstatement or front pay is inappropriate. It would be an injustice to the employer to require reinstatement of someone who would have been terminated for a legitimate reason. Back pay is a more difficult question. The object of compensation in ADEA and Title VII cases is to restore the employee to his or her original position given that the discrimination did not occur [16]. Barring all back pay would be contrary to the ADEA's objectives of forcing employers to examine their motives and to consider the penalties of their employment decisions that result from age discrimination [13].

Once it is determined that the employee would have been terminated on the after-acquired evidence grounds alone, the calculation of back pay can begin from the date of the termination to the date the after-acquired evidence is discovered [14, at 6]. The employer is now responsible for the period of its unlawful action until the date that a legitimate nondiscriminatory justification is found.

CONCLUSION

This article attempted to explore some of the implications of wrongful dismissal under the ADEA when such decisions are intermingled with after-acquired evidence of the employee's unlawful actions. Clearly, employers will have to adjust to the context for ADEA dismissal because it is based on statutory standards. Employers will, in many cases, be faced with the burden of proving that an employment decision was based on the unlawful actions of the employee and not on ADEA or Title VII discriminatory grounds. Finally, employers should use this information to assess the costs and benefits associated with litigation when there is a possibility of after-acquired evidence having an impact on the likely remedies. The prudent employer is advised to document at all stages of the selection, performance evaluation, and termination processes.

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Dr. Ross L. Fink is Assistant Professor of Operations Management in the Business and Management Administration Department at Bradley University, Peoria, Illinois. Dr. Fink's writings have appeared in numerous professional journals.

Ann L. Canty is presently Assistant Dean and Assistant Professor of Management in the School of Business Administration at the University of Mississippi, teaching courses in Organizational Behavior and Organization Theory. She has conducted management development programs in supervisory management, team development, and gainsharing for private industry.

Dr. Robert K. Robinson is Associate Professor of Management at the University of Mississippi. Professor Robinson's articles have appeared in numerous professional journals.

ENDNOTES

1. 29 U.S.C. §621 *et seq.*
2. Slip op no. 93-1543 (January 23, 1995).
3. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).
4. A more recent mixed-motive case is *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), which relied heavily on *Mt. Healthy.*
5. *Mt. Healthy*, at 287, 97 S.Ct. at 576.
6. 42 U.S.C. 2000e-2(m).
7. 42 U.S.C. 2000e-5(g)(B)(ii).
8. 864 F.2d 700.
9. 42 U.S.C. §§2000e-2(a), 3(a) (1964 as amended).
10. *Wallace v. Dunn Construction Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992).
11. 81 Stat. 602, as amended, 29 U.S.C. 621 et seq. (1988 ed. and supp. V).
12. *McKennon v. Nashville Banner Publishing Company*, 9 F.3d 539 (6th Cir. 1993).
13. *McKennon v. Nashville Banner Publishing Company*, Slip op. 93-1543 (Jan. 23, 1995).
14. *McKennon v. Nashville Banner Publishing Company*, Slip op. 1514 at 2.
15. 511 U.S. ____ (1994).
16. *Franks v. Bowman Transportation Company*, 424 U.S., at 764.

Direct reprint requests to:

Dr. Robert K. Robinson, Ph.D.
Department of Management and Marketing
University of Mississippi
University, MS 38677