Post Termination Conduct and the After-Acquired Evidence Rule: an Arrow on Target or an Empty Quiver?

By Todd J. McNamara, Esq., and Kristina James, Esq.

While most employment counsel are well familiar with the doctrine of "after-acquired evidence," most practitioners assume this doctrine applies only to **pre**-termination misconduct, subsequently discovered by the employer, typically during litigation. Many practitioners are unaware of the pitfalls that may exist for the **post**-termination misconduct, which can have dramatic, and possibly unwelcome, results.

The After-Acquired Evidence Doctrine

In cases of employment discrimination, reinstatement is the preferred equitable remedy.[1] Front pay is the alternative equitable remedy, which may be awarded for lost compensation during the period between judgment and reinstatement, or in lieu of reinstatement.[2] If the work environment has been, or is likely to be hostile, front pay is more likely to be the appropriate remedy.[3] The district court has the discretion to decide whether an award of reinstatement and/or front pay is appropriate.[4]

In the seminal case of *McKennon v. Nashville Banner Publishing Co.*, [5] the United States Supreme Court held that an employee's **pre**-termination misconduct discovered by an employer after discharge, and sufficient to fire the employee, might render reinstatement and front pay "inequitable and pointless."[6] The "after-acquired evidence doctrine" is not a defense to liability, but rather, a limitation on post-trial relief.[7] The Tenth Circuit has consistently followed *McKennon*.[8] Thus, where an employer can show it would have fired the employee had it known of the prior wrongdoing, the employer is entitled to an "after-acquired evidence defense," and may not be liable for either reinstatement or front pay.[9]

Post-Termination Misconduct

In a case that has received scant attention, *Medlock v. Ortho Biotech, Inc.*,[10] the Tenth Circuit did not foreclose "the possibility that, in appropriate circumstances, the logic of *McKennon* may permit certain limitations on relief based on *post*-termination conduct." In *Medlock*, the Tenth Circuit *refused* to limit plaintiff's post-trial equitable remedies for post-termination "misconduct," in which she apparently physically pushed and cursed at defense counsel during the course of an unemployment compensation hearing. However, in so doing, the court noted that it could not foreclose the possibility that post-termination conduct might permit "certain limitations on relief."[11] Thus, the Tenth Circuit left the door open, at least a crack, to permit defendants to raise post-termination misconduct as a bar to, or a limitation of, the equitable remedies of front pay or reinstatement. In *Medlock*, however, the Tenth Circuit found the post-termination misconduct did *not* preclude or reduce the recovery, since the court determined it was "not difficult to envision a defendant goading a former employee into losing her temper."[12]

Few reported cases exist on this potential expansion of the after-acquired evidence doctrine; however, those that exist provide support for both sides of the argument. The Eighth Circuit case of *Sellers v. Mineta* clearly supports the proposition that post-termination misconduct may, in certain appropriate circumstances, bar or limit either front pay or reinstatement.[13] Sellers was an air traffic controller whose post-termination misconduct was *not* directed at her former employer, the FAA, but rather, occurred during Sellers' job with the Bank of America after she was fired by the FAA. Her alleged post-termination misconduct at the bank was her attempt to process an unauthorized loan application in the name of her spouse's former wife, with the purpose of obtaining her spouse's ex-wife's credit history. The trial court awarded Sellers front pay. The Eighth Circuit reversed and remanded to the district court for further factual and legal findings. Relying on the Tenth Circuit's decision in *Medlock*, the Eighth Circuit held "like the Tenth Circuit, we cannot establish a bright-line rule and foreclose the possibility that a Title VII plaintiff's post-termination

conduct may, under certain circumstances, limit the remedial relief available to the plaintiff."[14] At the same time,"[o]ur conclusion that an employee's post-termination conduct can, in some circumstances, limit an employee's remedies for wrongful discharge is not a new one."[15] Thus, if *Medlock* opened the post-termination door a crack, *Sellers* may well have thrown the door wide open as to post-termination misconduct. Indeed, *Sellers* is particularly unusual in that the post-termination misconduct, unlike *Medlock*, was not even directed at the prior employer. No other district court, or indeed circuit court, has adopted such a broad potential re-fashioning of the after-acquired evidence rule.

However, even the Eighth Circuit recognized there were substantial limits to the potential expansion of the rule. The court specifically noted that a defendant must persuade the court by a preponderance of the evidence that any post-termination misconduct would render the employee ineligible for reinstatement under the employer's employment regulations, policies and actual employment practices.[16] The Eighth Circuit set forth a strict, but reasonable, standard, observing that, "[t]**he court must look to the employer's actual employment practices and not merely the standards articulated in its employment manuals, for things are often observed in the breach but not in the keeping."**[17]

Is Sellers Truly Worrisome?

Although, at first glance, *Sellers* would appear to substantially broaden the scope of the after-acquired evidence rule and place a new arrow in the defense quiver, considering the difficulty of establishing that the post-termination misconduct would have necessarily resulted in termination or a failure to rehire, it appears the detrimental effects of *Sellers* upon the doctrine may be more illusory than real.

Indeed, a number of pre-*Sellers* and pre-*Medlock* decisions have consistently found that purported post-termination misconduct is not sufficient to bar the equitable remedies of front pay and/or reinstatement.[18] In *Sigmon v. Parker Chapin Flattaun Klimpl*, the plaintiff, who had been terminated from a position as an associate at a law firm, was accused of copying her own personnel file, and those of approximately 20 other associates, after her termination. In refusing to expand the after-acquired evidence doctrine, the trial court noted the distinction of the doctrine's requirement for pre-termination, as opposed to post-termination conduct, and refused to apply the doctrine because "defendant was in no way prejudiced by plaintiff's conduct" since "the documents were not privileged attorney-work product but rather materials available through discovery."[19] While the court found the plaintiff's judgment might have been "questionable," the trial court found "any limitation of damages is not an appropriate response."[20] Certainly, it is difficult to see how the former employer in *Sellers*, the FAA, suffered any prejudice as a result of the post-termination misconduct of its former employee at a **subsequent employer**. This would appear to ameliorate, if not initiate, the holding in *Sellers*.

While neither *Medlock* nor *Sellers* appear to have been cited in any trial court decisions in Colorado, a pre-*McKennon* case, *Calhoun v. Ball Corporation*, rejected the suggestion that an employee's taking of over 5,000 company documents, after his termination, should bar post-trial equitable relief.[21] In *Calhoun*, Judge Babcock cogently noted:

> The employer is not left without remedy for a former employee's alleged post-termination misconduct. Civil remedies exist such as conversion, theft of trade secrets, interference with contractual relationship, outrageous conduct, and where appropriate, injunction.[22]

Since, however, *Calhoun* was decided prior to the Supreme Court's clear enunciation of the after-acquired evidence doctrine, at least as to pre-termination misconduct, *Calhoun*'s applicability and relevance remains, at best, unclear.

Two recent decisions have rejected the rationale that post-termination misconduct can bar the award of front pay or, alternatively, reinstatement. In *Vaughn v. Sabine County*, a failure to rehire case, the Fifth Circuit upheld the trial court's exclusion of evidence that the plaintiff had taken her personnel file when leaving the employ of the Sabine County Sheriff's Department.[23] The County contended that such an action constituted criminal misconduct and justified its decision not to rehire. The Fifth Circuit found that "the after-acquired evidence theory has no bearing on this case," since Sabine County's decision not to rehire the plaintiff occurred **before** her action with the personnel file had occurred, and thus could not form any basis for a decision not to rehire her.[24] In other words, having already made the decision, the employer could hardly argue that post-termination misconduct would have been the basis for its failure to rehire the plaintiff.

Similarly, in *Argo v. Blue Cross Blue Shield of Kansas, Inc.,* the trial court found that plaintiff's taking of paperwork from his former employer's place of business after termination, even if it was a violation of the employer's policies and procedures, could not operate to bar front pay or reinstatement, since the after-acquired evidence rule applied *only* to pre-termination misconduct discovered *after* termination.[25]

PRACTICE TIPS

While *Medlock* and *Sellers* appear to be the minority view, plaintiff's counsel should certainly be prepared to counter an argument that the after-acquired evidence doctrine can now be more broadly construed to bar or substantially diminish post-trial equitable relief. Given that potential front pay damage awards may be sizable, such a limitation can dramatically change the outlook of a case, particularly for purposes of settle-

ment. Thus, plaintiff's counsel should be well-prepared to rebut employers' arguments that an employee's post-termination conduct can either bar or offset potential damages. To do so, plaintiff's counsel must act accordingly:

1. Counsel should conduct a thorough pre-retention interview which establishes whether any argument as to post-termination misconduct exists. Waiting until litigation commences may prejudice your client. Typically, the "misconduct" consists of employees taking company documents, including personnel files, relevant emails or other probative information, after notification of termination. In most circumstances, company policies will, at least, articulate a standard rendering such conduct improper. Given that such documents will, of necessity, be disclosed during the discovery process, counsel should begin crafting a response to any "after-acquired evidence" defense even before it is asserted.

2. Counsel should conduct thorough discovery on the issue to determine when, if ever, other employees have either been terminated, disciplined or refused rehire as a result of the purported misconduct of their client. Oftentimes, the company's policies are honored more in the breach than in actual practice. If this is the case, even *Sellers* would not preclude reinstatement or front pay.

3. The client should be thoroughly prepared on the issue, prior to deposition. For instance, if documents have been retained by the client (and disclosed during discovery), counsel should explore with the client whether the company typically enforced any policy that precluded the taking of documents from the workplace during the course of employment, or even after employment. Is the client aware of other employees who did not return all documents once their employment was terminated? Has discovery, either paper or deposition, revealed that the employer typically did not enforce any such policy? What steps, if any, has the employer taken to insure that, at the time of termination, documents are actually returned to the employer? Has any employee ever been refused rehire as a result of improper retention of company documents? Has the company been prejudiced in any way by the employee's retention of the documents? Typically, you can secure an admission from managerial departments that the company has suffered no harm. Were the documents the employees own work product or others? Were the documents retained originals or copies? Were they marked "confidential?" Have the documents been disseminated to third-parties such as competitors, or used for the litigation?

4. Assuming the "misconduct" is not document retention, but some other post-termination misconduct, is the conduct more or less serious than other circumstances where employees may have either continued in employment or, alternatively, been rehired? Discovery should thoroughly explore other purported instances of employee misconduct, whether pre- or post-termination, to determine whether conduct more egregious than that of the client has resulted in neither termination nor refusal to rehire.

Because the after-acquired evidence doctrine is so intensively fact driven, the possible extension of the doctrine to post-termination misconduct does not permit the drawing of hard and fast rules. Such an extension, however, can have dramatically adverse consequences for a former employee bringing a discrimination claim. As employers seek to expand the doctrine beyond the ambit of *McKennon*, counsel for employees should be well aware of the potential adverse consequences and plan their litigation and trial strategies accordingly.

Todd J. McNamara and Kristina James are partners in McNamara & Martinez LLP. Their practice is limited exclusively to employment law and civil rights issues. They can be reached at 303-333-8700 and at tjm@mcmarlaw.com or kj@mcmarlaw.com

Endnotes

1 *E.E.O.C. v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir. 1985), *cert denied*, 474 U.S. 946 (1985); *Anderson v. Phillips Petrol. Co*., 861 F.2d 631, 628 (10th Cir. 1988).

2 *Pollard v. E.I. Du Pont De Nemours & Co.*, 532 U.S. 843, 846 (2001).

3 *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003).

4 *Ballard v. Muskogee Reg'l Med. Ctr.*, 238 F.3d 1250, 1253 (10th Cir. 2001).

5 *McKennon v. Nashville Banner Publ'g Co.*, 512 U.S. 339 (1995).

6 *Id*. at 362.

7 *Id.*

8 *Ballard,* 238 F.3d at 1253; *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 554-55 (10th Cir. 1999).

9 *McKennon*, 513 U.S. at 360-363.

10 *Medlock*, 164 F.3d at 554-55.

11 *Id*.

12 *Id*.

13 *Sellers v. Mineta*, 358 F.3d 1058 (8th Cir. 2004).

14 *Id*. at 1063.

15 *Id*. at 1064.

16 *Id*. at 1065.

17 *Id*.

18 *See, e.g., Ryder v. Westinghouse Elec. Corp.*, 879 F. Supp. 534 (W.D. Pa. 1995); *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667 (S.D.N.Y. 1995).

19 *Sigmon*, 901 F. Supp. at 683.

20 *Id*.

21 *Calhoun v. Ball Corp.*, 866 F. Supp. 473 (D. Colo. 1994).

22 *Id*. at 477.

23 *Vaughn v. Sabine County*, 104 Fed. Appx. 980, 2004 WL 1683099 (5th Cir. 2004).

24 *Id*.

25 *Argo v. Blue Cross Blue Shield of Kansas, Inc*., 2005 WL 466212 (D. Kan. 2005).