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EXPANDING THE AFTER-ACQUIRED EVIDENCE DEFENSE TO INCLUDE POST-TERMINATION MISCONDUCT

HOLLY G. EUBANKS*

INTRODUCTION

When a former employee brings a lawsuit against his or her previous employer claiming discriminatory treatment or wrongful discharge, the employer will immediately start preparing its defense. Now, what happens if that employer discovers that the plaintiff had previously committed some offense or misconduct that would have led to termination had the employer known? Can the employer use this information as a part of its defense to the discrimination lawsuit? In 1995, the Supreme Court established the after-acquired evidence defense as applied to federal anti-discrimination employment statutes in McKennon v. Nashville Banner Publishing Company.\(^1\) The defense generally requires an employer to establish that it would have fired the former employee because of the employee’s wrongdoing if the employer had known of the misconduct prior to termination.\(^2\) Thus, the employer needs to establish that the wrongdoing did in fact occur, that the employer was unaware of the wrongdoing prior to the decision to terminate, and that the wrongdoing would have resulted in termination based on the employer’s actual employment practices.\(^3\) If the defendant establishes these elements, then the Supreme Court determined that in the typical case, the remedies of front pay and reinstatement should be unavailable and that the calculation of backpay should end on the date the wrongdoing was discovered.\(^4\) In addition, the Supreme Court indicated that courts should also consider any “extraordinary equitable circumstances that affect the legitimate interests of either party” when fashioning the plaintiff’s remedy.\(^5\)

Since the Supreme Court’s formulation of the defense, lower federal courts have been forced to determine the boundaries of the defense as ap-

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3. See generally id. at 429-31.
4. See McKennon, 513 U.S. at 362.
5. Id.
plied to various situations and factually distinct cases. These courts have generally agreed that the defense applies to situations of resume and application fraud, as well as on-the-job misconduct like that at issue in *McKennon*.

However, federal courts have been unsure of how to handle other expansions of the defense, in particular, whether the defense is applicable to situations of post-termination misconduct. For example, does the defense apply when an employee steals confidential documents from his employer after his termination? Alternatively, does the defense apply when the employee engages in illegal conduct after termination that makes the employee unsuitable for reinstatement? Relatively few federal courts have evaluated the potential expansion of the after-acquired evidence defense, and those courts have taken various positions on the issue.

The after-acquired evidence defense should include the plaintiff’s post-termination misconduct when the defendant establishes it would have fired the plaintiff for the misconduct because this type of conduct potentially falls within the extraordinary equitable considerations that *McKennon* instructed federal courts to consider when determining the appropriate damages. Post-termination misconduct should only affect the available remedies and not the employer’s liability for unlawful discrimination. However, the post-termination misconduct should not be attributable to the defendant’s discriminatory actions or wrongful termination because allowing this sort of misconduct by the plaintiff to limit remedies would ignore the important purposes behind federal anti-discrimination employment laws. Thus, the *McKennon* Court’s framework of the after-acquired evidence defense in limiting back pay and barring reinstatement or front pay should apply to the plaintiff’s wrongdoing that occurs after termination, just as it applies to on-the-job misconduct and resume or application fraud.

This Note argues that the after-acquired evidence defense should expand to include a plaintiff’s post-termination misconduct when the misconduct does not directly flow from the unlawful discrimination or retaliation.

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expanding the defense will be discussed in detail. Finally, Part III will articulate why the Supreme Court’s formulation of the after-acquired evidence defense and the purpose of equitable remedies, particularly front pay, support the inclusion and consideration of post-termination misconduct that is not attributable to the discrimination claim and that makes the plaintiff ineligible for reinstatement.

I. THE SUPREME COURT FORMULATED THE AFTER-ACQUIRED EVIDENCE DEFENSE IN McKennon.

A. Prior to McKennon, the Circuit Courts Were Split on the Effect of After-Acquired Evidence on Liability.

In the late 1980s, employers commonly used the after-acquired evidence defense in employment discrimination litigation, and federal courts generally accepted the defense as a complete bar on liability and denied any recovery. The Tenth Circuit in Summers v. State Farm Mutual Automobile Insurance Company articulated this view by determining that after-acquired evidence of employee misconduct could not be ignored because even though the after-acquired evidence was not the cause of the employee discharge, it was relevant to the plaintiff’s claim of injury. Summers found after-acquired evidence cases to be similar to mixed-motive cases because both have a lawful and an unlawful justification for the termination. For mixed-motive cases, there is no remedy if the lawful motive for termination was sufficient to justify termination on its own. The Summers Court compared the situation of after-acquired evidence sufficient to lead to the employee’s termination to “the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a ‘doctor.’” The Tenth Circuit found that the plaintiff, whose misconduct was discovered after termination, was in the same position as the “masquerading doctor” and therefore was not entitled to any relief.

7. Id. at 405-06.
8. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) abrogated by McKennon, 513 U.S. 352. Here, the Defendant discovered that the Plaintiff had falsified many company records and that 18 of the falsifications had occurred after Plaintiff’s probation, in which he was warned that any future falsifications would result in discharge. Id. at 702-03.
9. See id. at 705-07.
10. Id. at 705.
11. Id. at 708.
12. Id.
The Eleventh Circuit disagreed with the Tenth Circuit’s approach to after-acquired evidence. The Eleventh Circuit found that the Summers opinion ignored the lapse of time that occurred between the decision to terminate and the discovery of the after-acquired evidence that provided a legitimate motive for the decision. The time lapse makes after-acquired evidence distinct from mixed-motive cases, where both a legitimate and an illegitimate motive played a role in the decision to terminate employment. The Supreme Court had previously determined that the defendant would not be liable in a mixed-motive case if the defendant could establish that the same decision would have been made absent the illegitimate motive. However, the Eleventh Circuit did not find this logic applicable to after-acquired evidence because in using the mixed-motive logic, the Summers Court “excuses all liability based on what hypothetically would have occurred absent the alleged discriminatory motive assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge.” This view violates the principle of federal anti-discrimination laws that the “plaintiff should be left in no worse a position than if she had not been a member of a protected class or engaged in protected opposition to an unlawful employment practice.”

Instead, the Eleventh Circuit determined that after-acquired evidence is relevant to the available relief and remedies, which should be determined on a case-by-case basis. Courts need to balance the employer’s right to make business decisions for lawful reasons with the need to make the plaintiff whole after discrimination. The plaintiff, in this case, lied on her employment application concerning a previous conviction for possession of cocaine and marijuana. Assuming this is sufficient misconduct for the defendant to discharge the plaintiff, then reinstatement and front pay are inappropriate remedies because they would infringe on the defendant’s right to lawfully discharge employees and would put the plaintiff in a better position beyond making her whole. However, the remedy of backpay should remain available unless the defendant can establish that it would

14. Id. at 1179.
15. Id. at 1181.
16. See id. at 1180. See also Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989).
17. Wallace, 968 F.2d at 1179.
18. Id.
19. Id. at 1181.
20. Id.
21. Id. at 1176-77.
22. Id. at 1182.
have discovered the after-acquired evidence prior to the end of the backpay period without the litigation.23

The Third Circuit also weighed in on the debate and took a similar stance to the Eleventh Circuit.24 The Third Circuit determined that after-acquired evidence should have absolutely no bearing at the liability stage of employment discrimination claims because the legitimate reason for the adverse employment action did not motivate the employer in any way at the time of the decision.25 In addition, the victims of employment discrimination have clearly suffered real injury beyond that of the adverse employment action; they were unlawfully discriminated against.26 The Court articulated its disagreement with Summers by arguing that “to maintain that a victim of employment discrimination has suffered no injury is to deprecate the federal right transgressed and to heap insult (“You had it coming”) upon injury.”27 Federal courts need to provide a remedy for the violation of a federal right,28 especially in light of the public interest in punishing unlawful discrimination in order to deter future occurrences.29 However, after-acquired evidence of application fraud or employee misconduct on the job is relevant at the remedial stage of the litigation.30 Generally, courts should not cut off backpay prior to the date of judgment unless the employer can demonstrate that it would have discovered the misconduct outside of the litigation.31 For other remedies, especially reinstatement, the Third Circuit emphasized the importance of considering the employer’s interest in making choices for legitimate business purposes because the federal laws against employment discrimination were not designed to unnaturally interfere with employer free choice.32

B. The Supreme Court Resolved the Circuit Split in McKennon and Defined the Parameters of the After-Acquired Evidence Defense.

The Supreme Court granted certiorari to resolve the disagreement among the Circuit Courts on whether wrongful conduct that would have
resulted in discharge, discovered after an employee has been discharged in violation of the Age Discrimination in Employment Act (“ADEA”) bars all of the plaintiff’s relief.\textsuperscript{33} To evaluate the defendant’s motion for summary judgment, the Supreme Court had to assume that the defendant did indeed violate the ADEA and that the plaintiff’s misconduct was severe enough to result in termination.\textsuperscript{34} The Supreme Court determined that the after-acquired evidence could not bar all relief because it could not completely disregard an ADEA violation.\textsuperscript{35} However, as the Eleventh and Third Circuits found, the employee’s wrongdoing was relevant at the remedial stage.\textsuperscript{36}

The plaintiff in \textit{McKennon} brought an action under the ADEA when she was terminated from employment at age sixty-two.\textsuperscript{37} The ADEA makes it unlawful for an employer to discharge or discriminate against an employee because of the employee’s old age.\textsuperscript{38} During the plaintiff’s deposition, she testified that prior to her termination she copied and brought home several confidential documents concerning her employer’s financial state.\textsuperscript{39} In response to the deposition, the defendant notified the plaintiff again that she was terminated based on her testimony regarding the removal and copying of company records and the defendant then used this information to bring a motion for summary judgment.\textsuperscript{40} The District Court granted the motion for summary judgment, finding that her misconduct was grounds for termination and barring all relief, and the Sixth Circuit affirmed.\textsuperscript{41}

The Supreme Court began by considering the purpose of the ADEA, finding that Congress enacted the ADEA as part of a broader effort to “eradicate discrimination in the workplace.”\textsuperscript{42} The remedial measures in the ADEA as well as other federal anti-discrimination employment statutes were designed to deter unlawful discrimination as well as compensate victims of unlawful discrimination for their injuries.\textsuperscript{43} These objectives, specifically deterrence, would not be served if after-acquired evidence of

\textsuperscript{34} Id.
\textsuperscript{35} Id. at 356-57. Here, the Supreme Court effectively overruled Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988).
\textsuperscript{36} McKennon, 513 U.S. at 361.
\textsuperscript{37} Id. at 354.
\textsuperscript{38} Id. at 355.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 357. This broader statutory purpose is also encompassed in other federal statutes enacted to protect employees in the workplace such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the National Labor Relations Act, and the Equal Pay Act of 1963. Id.
\textsuperscript{43} Id. at 358.
employee wrongdoing that would have resulted in termination operated as a complete bar to relief for a violation under the Act.\textsuperscript{44}

In addition, the Supreme Court determined that after-acquired evidence cases are not like mixed-motive cases.\textsuperscript{45} In \textit{Mt. Healthy}, the Supreme Court previously found that an employee could not recover in a suit against an employer who had both a lawful and unlawful reason for the termination when the lawful reason alone would have justified termination.\textsuperscript{46} Here, in an after-acquired evidence case, the misconduct was not known at the time of the termination, and the assumption is that the unlawful motive was the only reason for the termination.\textsuperscript{47} Thus, “[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason.”\textsuperscript{48} The after-acquired evidence, then, is not relevant to the defendant’s liability.\textsuperscript{49}

However, after liability is established, the Supreme Court determined that the after-acquired evidence was relevant to the ultimate remedy.\textsuperscript{50} Courts must consider both the legitimate interests of the employer and the employee, and to advance the legitimate interests of the employer, the employee’s wrongdoing must be considered in the remedial stage.\textsuperscript{51} The ADEA prohibits discrimination; it is not intended to regulate the workplace generally or constrain employers from considering business priorities in their employment decisions.\textsuperscript{52} Courts should take “account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee’s wrongdoing.”\textsuperscript{53} The Supreme Court was attempting to strike a balance between the civil rights of the employee and the business prerogatives of the employer.\textsuperscript{54}

The Supreme Court provided some general guidelines for courts in determining the effect of after-acquired evidence on the available remedies.

The proper boundaries of remedial relief in the general class of cases where, after termination, it is discovered that the employee has engaged

\begin{footnotes}
\footnote{44. \textit{Id.}}
\footnote{45. \textit{Id.} at 359.}
\footnote{46. \textit{Id.}}
\footnote{47. \textit{Id.} at 359-60.}
\footnote{48. \textit{Id.} at 360.}
\footnote{49. \textit{Id.}}
\footnote{50. \textit{Id.} at 360-61.}
\footnote{51. \textit{Id.} at 361 (“The employee’s wrongdoing must be taken into account, we conclude, lest the employer’s legitimate concerns be ignored.”).}
\footnote{52. \textit{Id.}}
\footnote{53. \textit{Id.}}
\footnote{54. See Hart, supra note 2, at 411.}
\end{footnotes}
in wrongdoing must be addressed by the judicial system in the ordinary
course of further decisions, for the factual permutations and the equitable
considerations they raise will vary from case to case.55

The Supreme Court did indicate that generally, reinstatement and front
pay would not be appropriate remedies because “[i]t would be both inequi-
table and pointless to order the reinstatement of someone the employer
would have terminated, and will terminate, in any event and upon lawful
grounds.”56 As for the determination of a backpay award, “[o]nce an em-
ployer learns about employee wrongdoing that would lead to a legitimate
discharge,” the employer is not required “to ignore the information, even if
it is acquired during the course of discovery in a suit against the employer
and even if the information might have gone undiscovered absent the
suit.”57 Trial courts should calculate backpay “from the date of the unlaw-
ful discharge to the date the new information was discovered.”58 The Su-
preme Court emphasized that federal courts should consider “extraordinary
equitable circumstances that affect the legitimate interests of either par-
ty.”59 Furthermore, in order to rely upon the after-acquired evidence of
wrongdoing, an employer “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 dis-
charge.”60

C. The After-Acquired Evidence Defense in Practice as it Applies to On-
the-Job Misconduct and Resume Fraud.

After McKennon, lower federal courts had to expand on the Supreme
Court’s interpretation of the defense and apply the general guidelines to
many different factual scenarios. First, federal courts had to determine what
the employer had to establish to assert the defense. The defendant must
establish that the employee’s alleged misconduct actually occurred.61 In
addition, the Ninth Circuit articulated that an employer must demonstrate
that it would have terminated the employee, not simply could have.62 This
requires an inquiry into the standards articulated in the employee handbook

55. McKennon, 513 U.S. at 361. It is important to note that the Supreme Court refers to “wrong-
doing.” This concept will be discussed later in the Note. See infra Part III.A.
56. Id. at 361-62.
57. Id. at 362.
58. Id.
59. Id.
60. Id. at 362-363.
61. See O’Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 761 (9th Cir. 1996); see also
concerning employee conduct and disciplinary proceedings, but it also requires an examination of the employer’s actual employment practices because “employers often say they will discharge employees for certain misconduct while in practice they do not.”\textsuperscript{63} Hence, the defendant must have been unaware of the misconduct prior to the decision to terminate because if the employer previously ignored the information, it would be incapable of establishing that it would have terminated the employee. The employer must prove this element by a preponderance of the evidence to assert the after-acquired evidence defense.\textsuperscript{64} This element becomes a question of fact in many cases because it is difficult to determine if an employer would have fired the employee rather than could have fired the employee for the misconduct.\textsuperscript{65} Other federal courts have generally accepted the Ninth Circuit’s formulation of these requirements.\textsuperscript{66}

Next, federal courts had to determine the point during litigation that the defendant could assert the defense. Federal courts have expressed divergent views on exactly when the defendant must present the defense, in particular whether the defendant can amend its answer to include the defense later in the litigation.\textsuperscript{67} The defense looks like an affirmative defense since it bars specific damages; however, a defendant must include an affirmative defense in its answer to be valid.\textsuperscript{68} A few courts have followed the Federal Rules of Civil Procedure in this respect and have refused to allow defendants to raise the defense at a later time.\textsuperscript{69} However, most federal courts have recognized the unusual nature of the defense in that it is typically not apparent until some discovery has been conducted.\textsuperscript{70} These courts generally permit the defendant to assert the defense at a later time, but the burden of proof is affirmatively placed on the defendant to establish the elements of the defense.\textsuperscript{71} The courts base their decision on a variety of factors including the seriousness of the alleged misconduct, how long it takes the defendant to assert the defense, and the availability of additional discovery for the plaintiff to respond to the alleged misconduct.\textsuperscript{72}

\textsuperscript{63} Id.
\textsuperscript{64} Id. at 761. Initially, there was some debate on whether the standard should be the clear and convincing evidence standard. See Christine Neylon O’Brien, The Law of After-Acquired Evidence in Employment Discrimination Cases: Clarification of the Employer’s Burden, Remedial Guidance, and the Enigma of Post-Termination Misconduct, 65 UMKC L. REV. 159, 161-62 (1996).
\textsuperscript{65} See Hart, supra note 2, at 419.
\textsuperscript{66} See, e.g., Nemeth, 08-CV-15326, 2012 WL 3262876, at *4.
\textsuperscript{67} Id., supra note 2, at 419.
\textsuperscript{68} Id. at 419-20.
\textsuperscript{69} Id. at 420.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 421.
In addition, federal courts have had to determine what type of misconduct is included in the defense. *McKennon* clearly supports the proposition that the after-acquired evidence defense includes on-the-job misconduct, but federal courts have also accepted the proposition that it applies to resume and application fraud as well. At first, federal courts struggled with whether to treat resume or application fraud differently from workplace misconduct, especially since the former are unlikely to ever be discovered absent discovery during litigation. Defendants also tried to argue that resume and application fraud should have a looser standard than on-the-job misconduct, in that the employer should only have to prove that it ‘would not have hired’ the plaintiff, not that it ‘would have fired’ the plaintiff. However, in general, federal courts have advocated the ‘would have fired’ standard and have elected to treat resume and application fraud according to the standards laid out in *McKennon*.

Finally, the first federal courts to apply *McKennon* were also immediately confronted with the possibility of expanding the defense, and they were asked to determine whether a plaintiff’s post-termination misconduct that would have resulted in termination had the plaintiff still been employed could be used to limit damages. Their answers as well as more recent responses to the issue will be discussed in the following section.

II. DOES THE *MCKENNON* FORMULATION OF THE DEFENSE ALLOW FOR THE INCLUSION OF THE PLAINTIFF’S POST-TERMINATION MISCONDUCT?

The federal courts that have considered expanding the after-acquired evidence defense to include post-termination misconduct can be sorted into three general categories based on their responses. First, courts that claim the plaintiff’s post-termination misconduct clearly falls outside of the scope of the employment relationship and should not be used at all to limit damages. Second, the courts that can imagine a situation in which they would consider post-termination misconduct when the elements of the defense have been met, but they are not willing to definitively rule on the issue. Finally, courts that have determined post-termination misconduct can be

73. *Id.* at 416.
74. *Id.*
75. *Id.* at 416 n.86.
considered in applying the after-acquired evidence defense. These opinions on the expansion of the defense will be examined in the following sections.

A. The After-Acquired Evidence Defense Presupposes an Employer-Employee Relationship at the Time of the Misconduct.

The first courts to consider including post-termination misconduct within the bounds of the after-acquired evidence defense refused to do so. They were heavily influenced by a federal district court opinion released prior to McKennon and that considered the issue in relation to the original Summers doctrine. The plaintiff, in Calhoun v. Ball Corporation, took more than 5,200 work documents after his termination without the permission of his employer, so the defendant employer asserted the after-acquired evidence defense in a motion for summary judgment.\(^78\) The Court determined that the Summers defense presupposed that the employee was employed at the time of the misconduct.\(^79\) However, this conclusion must be considered in light of the fact that the Summers Court concluded that after-acquired evidence acted as a complete bar to liability. The District Court indicated that applying the Summers doctrine to post-termination misconduct seemed “harsh” because it acted as an absolute defense.\(^80\) Thus, a discredited interpretation of the after-acquired evidence defense led to the conclusion that post-termination misconduct should not be considered. However, since McKennon’s interpretation of the defense did not bar all liability, the concerns expressed by the Calhoun Court are no longer as persuasive, and its conclusion should have been re-evaluated.

Nevertheless, shortly after the Supreme Court’s decision in McKennon, several other district courts took the same approach as Calhoun and found that the defense did not apply when the plaintiff’s alleged misconduct occurred after her termination because “[t]he McKennon decision is premised on the employee’s misconduct occurring during her employment.”\(^81\) One District Court emphasized that the definition of after-acquired evidence “‘presuppose[d] that there was an employer-employee relationship at the time the misconduct occurred, i.e., that the employee had not yet been terminated.’”\(^82\) To the extent the plaintiff’s conduct occurred after termination, the Court would not limit the plaintiff’s available reme-

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79. Id. at 476-477 (“Summers presupposes that the employee was employed by the employer at the time of the employee’s misconduct. Stated another way, the misconduct must have occurred before termination.”).
80. Id. at 477.
82. Ryder, 879 F. Supp. at 537.
dies, but the Court was willing to reopen discovery to determine if any of the plaintiff’s alleged misconduct occurred while the plaintiff was still employed by the defendant.\textsuperscript{83} In a subsequent District Court case, after the plaintiff was terminated, the defendant provided her with an office and a telephone to use for her job search.\textsuperscript{84} While in the office, she found her professional evaluations as well as those of other associates, and she made copies of them for her own records.\textsuperscript{85} Since the “defendant and plaintiff were not in an employer-employee relationship at the time of the alleged incident,” the Court determined that “any complaint defendant [had] against plaintiff for her post-employment conduct falls outside of the McKennon rule, and outside of Title VII.”\textsuperscript{86} The Calhoun Court had also made a similar observation by indicating that employers are not left without remedies for their former employee’s post-termination misconduct because they can turn to civil remedies or criminal sanctions depending on the conduct.\textsuperscript{87}

In \textit{Carr v. Woodbury Juvenile Detention Center}, another District Court not only found that \textit{McKennon} was not applicable to “after after-acquired evidence” but also indicated that it was erroneous to apply an employer’s policies to someone, here the plaintiff, who is no longer receiving the benefits of employment.\textsuperscript{88} It determined that a presupposed condition of \textit{McKennon} is that the misconduct occurred prior to termination but the employer did not know about it.\textsuperscript{89} The implied condition of the after-acquired evidence defense is similar to a mixed-motive case where a necessary condition is that the lawful and unlawful motives both exist at the time of termination.\textsuperscript{90} After-acquired evidence simply provides a constructive motive for the termination, so it must be available at the time of termination.\textsuperscript{91} Equity requires some effect for the wrongdoing unknown to the employer that occurs during employment, but when the misconduct occurs only after employment, it “is even more distant from the employer’s deci-

\begin{flushleft}
\begin{enumerate}
\item \textit{Id.} at 538.
\item \textit{Sigmon}, 901 F. Supp. at 674.
\item \textit{Id.}
\item \textit{Id.} at 683.
\item Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 627-29 (N.D. Iowa 1995).
\item \textit{Id.} at 627.
\item \textit{Id.} at 628.
\item \textit{Id.}
\end{enumerate}
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sion-making process, because the misconduct is not temporally related to the decision as well as unknown to the employer.”

In Carr, the defendant discovered that after termination, the plaintiff had tested positive in a urine analysis for marijuana use. The defendant argued that this made the plaintiff unsuitable for employment, especially in light of its policy stating, “[a]ny employee found guilty of indulgence in a controlled substance without seeking treatment will be discharged.” The Court determined that the employer’s policies could not be imposed on a person after employment had terminated because “[i]t would be grossly inequitable to hold [her] to all of the burdens of [the employer’s] policies at a time when she is not receiving any of the benefits of County employment.” In addition, the Court found it especially relevant that the employer suffered no detriment from the plaintiff’s marijuana use because it did not relate to her employment.

Even though the employer was not negatively impacted by her post-employment conduct, the Carr Court did not consider the impact her marijuana use would have on possible reinstatement. The plaintiff worked at a juvenile detention center, so her marijuana use, while not relevant to liability for discrimination, may have been relevant to her ability or qualification to return to her job and to continue to work with youth. This logic is similar to that expressed in McKennon where the Supreme Court emphasized that reinstatement would be pointless if the employer has a nondiscriminatory reason to terminate the plaintiff.

More recently, in a failure to rehire case, the Fifth Circuit determined that the plaintiff’s conduct of taking her personnel file after leaving the Sheriff’s department could not be used to assert the after-acquired evidence defense. The defendant did not know about her actions because the plaintiff’s conduct occurred after the defendant decided not to hire her. Thus, the defendant cannot establish “that any wrongdoing was of

92. Id. This notion that post-termination misconduct is even more distant from the employer’s decision-making process may not be entirely accurate. It is possible that pre-hire or on-the-job misconduct occurred at a time much more distant from the decision to terminate than misconduct that occurs shortly after termination. See O’Brien, supra note 64, at 173.
94. Id.
95. Id. at 629.
96. Id. at 628-29.
97. See O’Brien, supra note 64, at 168.
98. Id.
99. Id.
100. Vaughn v. Sabine County, 104 F. App’x 980, 987-88 (5th Cir. 2004).
101. Id. at 988.
such severity that the wrongdoing alone would have resulted in the [plaintiff’s] termination.” The Court did not find post-termination conduct to be relevant, as it could not be the basis for the defendant’s failure to rehire the plaintiff.

B. The After-Acquired Evidence Defense Might Extend to Post-Termination Misconduct.

Some federal courts have been willing to consider permitting the use of post-termination misconduct to limit damages as long as the post-termination misconduct did not arise as a result of the defendant’s discrimination or wrongful termination. The Tenth Circuit in Medlock v. Ortho Biotech, Inc. was the first court to express this view and to indicate that post-termination conduct may limit relief in certain circumstances, even though in the circumstances of this case it did not. The Court focused on the McKennon language encouraging courts to consider the unique “factual permutations and the equitable considerations” of each case individually in determining whether to limit relief. The defendant in Medlock argued that the jury instructions at the district court were improper when they did not include the after-acquired evidence defense because the plaintiff’s conduct of touching and cursing at defendant’s counsel during his unemployment compensation benefits hearing that occurred post-termination would have led to his discharge. The Tenth Circuit determined that the district court did not abuse its discretion in refusing to use the defendant’s jury instructions on the issue of damages. The post-termination misconduct occurred during a hearing that was concerned with the plaintiff’s wrongful termination. “In this case, as in most cases in which the alleged misconduct arises as a direct result of retaliatory termination, the necessary balancing of the equities hardly mandates a McKennon-type instruction on the after-occurring evidence.” The Medlock Court was especially concerned with the possibility of “a defendant goading a former employee into losing

102. Id.
104. Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 555 (10th Cir. 1999) (“[W]e do not foreclose the possibility that in appropriate circumstances the logic of McKennon may permit certain limitations on relief based on post-termination conduct.”).
105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
her temper, only to claim later that certain forms of relief should be unavailable because it would have discharged the plaintiff based on her inability to control her temper.”110 Thus, the Tenth Circuit articulated a limitation on the use of post-termination misconduct that considers the purposes behind federal anti-discrimination statutes such as deterring discrimination in the workplace and providing retribution to those who are discriminated against.

Following the reasoning in Medlock, the United States District Court for the Eastern District of Pennsylvania denied the defendant’s partial motion for summary judgment on the issue of damages.111 The defendant argued that the plaintiff was ineligible for reinstatement and also ineligible for front pay because she “was convicted of simple assault and making terrorist threats in an incident at [defendant’s] store.”112 After considering the Eighth Circuit’s decision in Sellers v. Mineta, discussed in the following section, and the Tenth Circuit’s decision in Medlock, the Court “[f]ound it premature to weigh the equities regarding front pay” because it determined that the concerns expressed in Medlock could be applicable here, as the incidents occurred at the defendant’s store.113 Thus, it is possible that the actions of the defendant contributed to the plaintiff’s conduct.

Similarly, the Sixth Circuit indicated that it was willing to consider employee misconduct that occurs after some sort of adverse action was taken by the employer, but as in Medlock, it should not apply to limit recovery when the “misconduct can be attributable to the defendant’s prior illegal action.”114 In this case, the plaintiff’s wrongful conduct in violating the defendant’s policies occurred while he was on medical leave and still an employee, so his conduct did not exactly occur after termination.115 However, the Court determined that the defendant’s actions caused the plaintiff’s misconduct because if the defendant had not wrongfully imposed medical restrictions, making the plaintiff unfit to work, then the plaintiff would not have been forced to seek employment without the defendant’s permission in violation of its policies.116

The District Court in Cohen v. Gulfstream Training Academy, Inc. took a slightly different approach to the applicability of post-termination misconduct to the after-acquired evidence defense and was willing to con-

110. Id. at n.7.
112. Id. at *16.
113. Id. at *17-18.
115. Id.
116. Id.
sider it when it flows from pre-termination misconduct. The Court denied the plaintiff’s motion for summary judgment on the defendant’s assertion of the after-acquired evidence defense.\textsuperscript{117} The defendant claimed that it would have terminated the plaintiff if it had known he was setting up a competing business, and the plaintiff contended that\textsuperscript{118} McKennon did not govern because the evidence used to support the defense occurred post-termination.

Plaintiff distinguishes\textsuperscript{119} Crapp (police officer) and Sellers (Federal Aviation Administration employee) as cases involving a plaintiff’s loss of government certifications required to perform the previous job. However, what the Court finds significant in\textsuperscript{119} Crapp, Sellers and the present case is that the post-termination evidence directly flows from the conduct that occurred pre-termination. In\textsuperscript{119} Crapp and Sellers, the loss of a certification precluded the ability to perform the previous job. In the present case, the post-termination evidence of Cohen’s actions corroborate the pre-termination evidence of beginning to set up a competing business.\textsuperscript{119}

The Court decided not to exclude the post-termination evidence because it could be used to support the proposition that the plaintiff took certain actions to set up a competing business prior to termination.\textsuperscript{120} Therefore, the Cohen Court was unwilling to consider exclusively post-termination misconduct, but it was willing to permit defendants to use it to develop misconduct that occurred during the employment relationship.

Similarly, in a more recent case, the District Court for the Northern District of Indiana considered both post-termination misconduct and on-the-job misconduct when it determined that the plaintiff’s violations of the employer’s policies made the after-acquired evidence defense applicable.\textsuperscript{121} The plaintiff took proprietary documents after termination in violation of the defendant’s Information Safeguarding Policy.\textsuperscript{122} The plaintiff also failed to report a potential infraction in violation of the Anti-Harassment Policy.\textsuperscript{123} For its decision, the Court considered both post-termination misconduct and on-the-job misconduct, so it is not possible to determine definitively if the after-acquired evidence defense would still apply if the misconduct had only occurred post-termination.

Other federal courts have been unwilling to hold that there are no circumstances in which post-termination misconduct could be used to limit


\textsuperscript{118} Id. at *2.

\textsuperscript{119} Id. at *3. For a discussion on both Crapp and Sellers, see infra Part II.C.

\textsuperscript{120} Id. at *3.

\textsuperscript{121} Treat v. Tom Kelley Buick Pontiac GMC, Inc., 710 F. Supp. 2d 762, 777 (N.D. Ind. 2010).

\textsuperscript{122} Id.

\textsuperscript{123} Id.
damages.124 In Ellis v. Cygnus Enterprises, the plaintiff brought a motion to strike the defendant’s affirmative defense, which asserted that the “[p]laintiff’s post-termination misconduct consisting of threats and purported extortion rendered him unsuitable for employment.”125 The Court was unwilling to strike the defense.126 “Although this Court is not entirely convinced that [the plaintiff’s] post-termination activities can serve as the basis for limiting his equitable damages, the Court cannot affirmatively rule, given the lack of Second Circuit precedent, that there are no circumstances under which the defense could be successful.”127

C. The After-Acquired Evidence Defense Extends to Post-Termination Misconduct.

Some federal courts have found that the plaintiff’s post-termination misconduct can affect his available remedies and can be included in the after-acquired evidence defense. In Crapp v. City of Miami Beach, the Eleventh Circuit determined that a plaintiff’s loss of certification to be a police officer after his termination limited the availability of backpay and reinstatement.128 The plaintiff, a black police officer, brought suit under Title VII alleging that his termination was racially motivated, and he was awarded compensatory damages, backpay, and reinstatement.129 However, reinstatement was stayed, while the Florida Department of Law Enforcement investigated the plaintiff’s certification to be a police officer.130 The investigation resulted in his decertification for conduct unbecoming an officer for two years, beginning with the date of his termination.131 The District Court determined that the principles of McKennon required the award of backpay and reinstatement to be vacated, and the Eleventh Circuit agreed.132 The plaintiff’s loss of certification made the defendant unable to employ him as a police officer, so it was proper to vacate the award of

124. See Sanders v. Madison Square Garden, L.P., No. 06 CIV. 589 (GEL), 2007 WL 2254698, at *12 (S.D.N.Y. Aug. 6, 2007) opinion withdrawn in part on reconsideration, 525 F. Supp. 2d 364 (S.D.N.Y. 2007) (“The Second Circuit has never had occasion to decide whether post-employment misconduct can support an after-acquired evidence defense .... It is unnecessary to rule on this legal issue to decide defendants' motion.”).


126. Id. at *5.

127. Id. at *3.

128. Crapp v. City of Miami Beach, 242 F.3d 1017, 1021 (11th Cir. 2001).

129. Id. at 1018-19.

130. Id. at 1019.

131. Id. at 1019 n.5.

132. See id. at 1019-21.
backpay and reinstatement.133 However, the jury determined that the defendant’s decision to fire the plaintiff was racially motivated, so the award of compensatory damages was appropriate in order to compensate him for the discrimination and to deter the defendant from future acts of discrimination.134

The Eighth Circuit in Sellers v. Mineta held that a plaintiff’s post-termination conduct was relevant to the availability of front pay when a plaintiff’s post-termination conduct made her ineligible for reinstatement.135 The Court found that the previous district courts that considered including post-termination misconduct in the after-acquired evidence defense had read McKennon too narrowly, especially in regards to the McKennon instructions indicating that courts need to evaluate the equitable considerations of each case individually.136 There are clearly circumstances in which post-termination misconduct would be relevant to limiting relief.137 For example, if after termination a plaintiff was convicted of a crime unrelated to the former position with the defendant and was then incarcerated because of it, this would make reinstatement impossible.138 The Eighth Circuit found that “[s]imple common sense tells us that it would be inequitable to award [the plaintiff] front pay in lieu of reinstatement where she had rendered herself actually unable to be reinstated.”139 This is especially obvious in light of the nature of front pay as a disfavored remedy that should only be awarded in place of reinstatement when “reinstatement is impractical or impossible due to circumstances not attributable to the plaintiff.”140 Furthermore, federal courts have concluded that a front pay award is precluded when the plaintiff unreasonably rejects an offer of reinstatement, so similarly, “post-termination misconduct of a type that renders an employee actually unable to be reinstated or ineligible for reinstatement should also be one of the ‘factual permutations’ which is relevant in determining whether a front pay award is appropriate.”141

133. Id. at 1021.
134. Id.
135. Sellers v. Mineta, 358 F.3d 1058, 1064 (8th Cir. 2004).
136. Id. at 1063.
137. Id.
138. Id.
139. Id.
140. Id. at 1063-64. “It would be inequitable for a plaintiff to avail herself of the disfavored and exceptional remedy of front pay where her own misconduct precludes her from availing herself of the favored and more traditional remedy of reinstatement.” Id. at 1064.
141. Id. at 1064. Here, the Sellers Court is referencing the language found in the McKennon decision.
In *Sellers*, the plaintiff brought an action based on Title VII of the Civil Rights Act of 1964 when she was terminated from her position as an Air Traffic Control Specialist.\(^{142}\) During the litigation, she was employed at Bank of America, and the jury ultimately returned a verdict in her favor.\(^{143}\) However, after the trial, the plaintiff was terminated from Bank of America for attempting to process an unauthorized loan application for her spouse’s former wife.\(^{144}\) The defendant argued that the plaintiff’s conduct after termination was relevant to the availability of reinstatement or front pay as a remedy because it made her unsuitable for reinstatement as an air traffic controller.\(^{145}\) Based on the Court’s decision to consider post-termination misconduct as one of the relevant equitable considerations for determining the appropriate remedy, the *Sellers* Court remanded the case for a determination of whether the plaintiffs’ post-termination conduct “render[ed] her ineligible for reinstatement under the [defendant’s] employment regulations, policies, and actual employment practices.”\(^{146}\) The Court emphasized that “[f]ront pay is an alternative remedy to reinstatement and should be unavailable where the plaintiff’s own conduct prevented reinstatement.”\(^{147}\)

Relying on *Medlock* and *Sellers*, the District Court for the Northern District of Oklahoma determined that the plaintiff’s post-termination misconduct could not be presented to a jury but courts should consider it when determining the equitable remedy of front pay.\(^{148}\) The plaintiffs brought a motion in limine in order to ask the Court to exclude facts concerning an alcohol-related arrest and misdemeanor charge that occurred after termination.\(^{149}\) The Court found that the incident was not relevant for jury purposes because courts decide the availability of equitable remedies such as front pay.\(^{150}\) However, after the jury returned a verdict, the Court would consider the evidence in deciding whether to award front pay.\(^{151}\) The plaintiff’s arrest and subsequent incarceration might have made him unfit for employment if he had not been previously terminated.\(^{152}\) The Court explained that the circumstances of the case were distinguishable from the circum-

\(^{142}\) *Id.* at 1059.
\(^{143}\) *Id.* at 1060.
\(^{144}\) *Id.*
\(^{145}\) *Id.*
\(^{146}\) *Id.* at 1065.
\(^{147}\) *Id.*
\(^{148}\) Lunsford v. Bd. of County Comm’rs of County of Rogers, No. 05-CV-0218CVE-FHM, 2006 WL 2679578, at *8 (N.D. Okla. Sept. 18, 2006).
\(^{149}\) *Id.*
\(^{150}\) *Id.*
\(^{151}\) *Id.*
\(^{152}\) *Id.*
stances in Medlock and the concerns expressed by the Tenth Circuit because the plaintiff’s misconduct was independent of the alleged retaliatory termination.  

In McKenna v. City of Philadelphia, the United States District Court for the Eastern District of Pennsylvania found the reasoning in Sellers to be persuasive and was willing to consider post-termination conduct that made the plaintiff ineligible for rehire or would justify termination, unless the conduct was attributable to the defendant. The plaintiff after his termination from the police department was arrested for possession of marijuana and subsequently convicted of knowingly possessing marijuana. The defendant asserted that the police department did not tolerate any drug use, including marijuana use, by its officers and that if the plaintiff had still been employed at the time of his conviction, he would have ultimately been terminated. Based on this assertion, the defendant argued that the after-acquired evidence defense was applicable to cut-off backpay and front pay as to the date the defendant learned of the conviction.

The District Court found this evidence relevant to determining the plaintiff’s equitable remedies because the broad language in McKennon supported including post-termination conduct within the defense.

Where a plaintiff has engaged in conduct after leaving the defendant’s employ that would justify refusing to re-hire him, or justify terminating him if he had remained employed at the defendant, then that fact should be taken into account in calculating equitable damages in order to take “due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee’s wrongdoing.”

In addition, the District Court found that the defendant had established that the plaintiff’s misconduct was severe enough to justify termination, as required by McKennon. However, it was necessary to determine if there was a causal relationship between the unlawful discrimination and the plaintiff’s conduct because “a plaintiff’s post-termination wrongdoing must not be attributable to the defendant’s conduct.” Here, the McKenna Court found it inequitable to cut off the plaintiff’s backpay because there

153. Id.
155. Id. at 454.
156. Id.
157. Id. at 459.
158. Id. at 461.
160. Id. at 461-62.
161. Id. at 462. The Court applied the limitation expressed in Medlock. Id.
were sufficient facts, such as the plaintiff’s inability to treat his depression without medical insurance, to find that the plaintiff’s marijuana use was causally related to the discrimination.\textsuperscript{162} “Although the Court has found that after-acquired evidence of a plaintiff’s post-termination misconduct can cut off an award of back pay in appropriate circumstances, it should only do so where that misconduct is independent of the defendant’s wrongdoing.”\textsuperscript{163}

III. THE AFTER-ACQUIRED EVIDENCE DEFENSE SHOULD EXPAND TO INCLUDE POST-TERMINATION MISCONDUCT BY THE PLAINTIFF IN CERTAIN CIRCUMSTANCES.

A. McKennon Does Not Require the Misconduct to Occur During the Employment Relationship.

The Supreme Court’s opinion in McKennon does not require a plaintiff’s misconduct to occur during the employment relationship. The Supreme Court referred to employee “wrongdoing,” not employee on the job misconduct.\textsuperscript{164} It also directed lower federal courts to consider the “factual permutations and equitable considerations” of each case.\textsuperscript{165} The Third Circuit emphasized this when it stated, “[T]he Supreme Court did not limit the general principles articulated in McKennon to cases involving on-the-job misconduct, instead using the broader term ‘wrongdoing’ as well as listing both types of after-acquired evidence cases (resume fraud and cases of on-the-job misconduct).”\textsuperscript{166} This terminology is one reason federal courts decided to apply the defense to resume and application fraud, with little hesitation after McKennon.\textsuperscript{167} In fact, in any situation of plaintiff misconduct, pre-hire, on-the-job, or post-termination, the defendant was entirely unaware of the wrongdoing when it made its decision to discriminate against or terminate the plaintiff. Thus, in the context of the defense, there is little reason to distinguish between wrongdoing that occurs before termination or after termination because in every case it is always discovered after the defendant’s unlawful act.

Some scholars have even indicated that pre-hire misconduct such as resume fraud is logically similar to post-termination misconduct because the plaintiff’s misconduct occurred when there was not an established em-

\textsuperscript{162} Id. at 463.
\textsuperscript{163} Id. at 464.
\textsuperscript{164} See McKennon, 513 U.S. at 361.
\textsuperscript{165} Id.
\textsuperscript{166} Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072, 1074 n.4 (3d Cir. 1995).
\textsuperscript{167} Hart, supra note 2, at 416.
ployment relationship, though no federal courts have yet reiterated this view. Any arguments suggesting that the post-termination misconduct is too distant from the defendant’s decision-making process to be included in the after-acquired evidence doctrine have to be considered in light of the recognition that instances of pre-hire misconduct (or even on-the-job misconduct) might actually occur at a much more distant time from the defendant’s decision. Post-termination misconduct to be asserted as a defense in a lawsuit must occur at some time between termination and the end of the litigation, but an instance of resume fraud could potentially occur years before the defendant’s discriminatory termination. However, it can be argued that instances of resume or application fraud may have influenced the employer’s decision to hire that particular plaintiff, effectively starting the employment relationship, while post-termination misconduct clearly falls outside of the employment relationship.

In addition, the McKennon Court supported a balancing of the lawful prerogatives of the defendant in running its business with the purposes of federal anti-discrimination employment statutes, mainly deterrence and the remedial interests in making the plaintiff, who was wrongly discriminated against, whole. The balance between these two competing interests does not indicate that post-termination misconduct should be treated differently than on-the-job or pre-hire misconduct. The defendant employer has a legitimate and lawful interest in not reinstating someone whose conduct has made him or her ineligible for reinstatement or whose conduct would have resulted in a lawful termination. As the Sellers Court expressed, front pay should not be available when the plaintiff’s own wrongdoing made reinstatement impossible. Furthermore, the McKennon articulation of the defense did not impact other types of damages, such as compensatory damages for the emotional distress or even punitive damages if the defendant’s actions were reprehensible, that are available to the plaintiff depending on the particular federal statute. These damages can provide retribution for the plaintiff and can work to deter future discrimination by employers.

B. The Purposes of Front Pay and Other Equitable Remedies Support the Consideration of Post-Termination Misconduct in the Remedial Stage.

The plaintiff’s wrongdoing does not justify the unlawful actions of the defendant, but equity requires the wrongdoing to be considered. As empha-

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168. See O’Brien, supra note 64, at 168.
169. Id. at 173. This is a response to the argument in Carr.
171. Sellers v. Mineta, 358 F.3d 1058, 1064 (8th Cir. 2004).
sized by the Supreme Court, the employer’s legitimate interests need to be taken into account when deciding whether equitable remedies are available to the plaintiff.\textsuperscript{172} Equitable remedies are used to make the plaintiff whole,\textsuperscript{173} or “to restore the employee to the position he or she would have been in absent the discrimination.”\textsuperscript{174} In the context of employment discrimination, the available equitable remedies are backpay, front pay, and reinstatement.\textsuperscript{175} Equitable remedies are not intended to place the plaintiff in a better position than she would have been absent the discrimination.

For instance, backpay is intended to compensate a plaintiff for the wages she would have received but for the discriminatory actions of the defendant, and it is typically calculated from the date of termination through the rendering of the verdict.\textsuperscript{176} However, in \textit{McKennon}, the Supreme Court determined that successful application of the after-acquired evidence defense required backpay to be cut off earlier, at the date the defendant discovered the misconduct.\textsuperscript{177} If an award of backpay was not cut off at that time, then possibly the plaintiff would be in a better place than she would have been absent the discrimination because, as required by the defense, she would have been fired for the wrongdoing. Arguably, this same result could occur even when a plaintiff’s wrongdoing occurred post-termination such as in the case of the incarcerated plaintiff.

Similarly, an award of front pay or reinstatement “would be inappropriate where it would ‘catapult the plaintiff into a better position than [he] would have enjoyed in the absence of discrimination.’”\textsuperscript{178} Front pay is only awarded in lieu of reinstatement when reinstatement is impractical or impossible for reasons not attributable to the plaintiff.\textsuperscript{179} Generally, reinstatement is not awarded when there is workplace hostility from the discrimination litigation.\textsuperscript{180} However, as the \textit{Sellers} Court articulated, when the plaintiff, through her own actions, becomes ineligible for reinstatement, it would be inequitable to award front pay instead.\textsuperscript{181} For example, a plaintiff that loses a required certification for her job, even when the loss occurs

\textsuperscript{172}. See \textit{McKennon}, 513 U.S. at 361.

\textsuperscript{173}. See Valerie Harris, \textit{Front Pay and Sexual Harassment Cases: What It Is, Why It Is Important and How to Make It Better}, 7 WM.

\textsuperscript{174}. \textit{McKennon}, 513 U.S. at 362.

\textsuperscript{175}. See Harris, supra note 173, at 226-27.

\textsuperscript{176}. \textit{Id. at 226}.

\textsuperscript{177}. \textit{McKennon}, 513 U.S. at 362.


\textsuperscript{179}. See \textit{Sellers v. Mineta}, 358 F.3d 1058, 1063-64 (8th Cir. 2004).

\textsuperscript{180}. See Harris, supra note 173 at 225.

\textsuperscript{181}. \textit{Sellers}, 358 F.3d at 1064.
after termination, should not be awarded front pay because her own actions made her ineligible for reinstatement to her former position. It would be inequitable in this situation to ignore the plaintiff’s wrongdoing, especially in light of the legitimate business considerations of the defendant. Thus, in some circumstances, post-termination misconduct must be considered in order to promote the goal of restoring the plaintiff without putting the plaintiff in a better position than she would have been absent the discrimination.

C. The McKennon Principles Should Apply to a Plaintiff’s Post-Termination Misconduct Unrelated to the Employer’s Discrimination.

The plaintiff’s post-termination misconduct should be included in the after-acquired evidence defense as articulated in McKennon, just as on-the-job misconduct and resume fraud are included. The defendant must establish that if the plaintiff had still been employed it would have terminated the plaintiff, based on the defendant’s actual employment practices. In addition, since this requires hypothetical analysis, it may be necessary to consider if the post-termination misconduct makes the plaintiff ineligible for reinstatement. The Sellers Court stated the most obvious example, when it described a plaintiff who is convicted of a crime and then incarcerated. In this situation, the plaintiff clearly could not be reinstated, and most employers would terminate an employee who was incarcerated. However, some post-termination misconduct will be much less clear on whether or not the defendant would fire the plaintiff for the conduct if he had still been employed.

Courts will have to consider the unique factual permutations of each individual case in relation to the post-termination misconduct, just as instructed by the McKennon decision. Federal courts, in determining whether the plaintiff’s misconduct would have resulted in termination if the plaintiff had still been employed, can consider the nature of the defendant’s business and the seriousness of the plaintiff’s misconduct in relation to that business. For example, if the plaintiff’s post-termination misconduct concerns stealing the employer’s confidential documents, the seriousness of this misconduct may be different depending on the defendant’s policies and the nature of the defendant’s business. In addition, courts should also consider whether the misconduct affects the plaintiff’s ability or qualifications to perform her prior job. The plaintiff’s inability to perform her prior job

182. Id. at 1063.
183. See O’Brien, supra note 64, at 168.
will make reinstatement impossible, which, as already indicated, should prevent the award of front pay. Courts should also determine whether the plaintiff’s misconduct was particularly egregious or criminal in nature, which generally supports a decision by the employer to terminate for the conduct, as the misconduct is more severe.184

Finally, not all post-termination misconduct by the plaintiff should be considered when limiting damages through the after-acquired evidence defense. The post-termination misconduct should not be attributable to the defendant’s wrongful and discriminatory actions because this would go against the purposes of anti-discrimination employment statutes. Defendants should not benefit when their discriminatory actions lead to or cause the plaintiff’s misconduct. Courts must decide whether the unlawful discrimination was the cause of the plaintiff’s misconduct.

The concern expressed by the Tenth Circuit in Medlock is a perfect example of post-termination misconduct that should not be used to limit damages through the after-acquired evidence defense. The Court described a situation where the defendant goads the former employee into losing her temper or threatening the defendant and then the defendant attempts to use her behavior to limit damages “based on her inability to control her temper.”185 In this situation, the defendant not only initiated the plaintiff’s reaction, but because of the defendant’s discrimination and the emotional distress associated with it, the plaintiff may be more susceptible to the defendant’s provocation. Thus, when the plaintiff’s wrongdoing occurs after termination, it must be independent from the discrimination the plaintiff suffered and not attributable to the defendant’s unlawful actions.

CONCLUSION

The Supreme Court’s decision in McKennon articulated the after-acquired evidence defense as applied to federal employment discrimination cases, and it, as well as the purposes behind the defense and the purposes in awarding equitable remedies, supports the premise that post-termination misconduct by the plaintiff should be included within the defense. McKennon emphasized that the plaintiff’s wrongdoing should be considered when determining the appropriate remedies after liability is established. This focus on wrongdoing supports the inclusion of post-termination wrongdoing, as well as on-the-job or pre-hire wrongdoing, by the plaintiff. In addition, equitable remedies, especially front pay, are intended to place the

184. See id. at 172.
185. Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 555 n.7 (10th Cir. 1999).
plaintiff in the position he would have been absent the discrimination. If post-termination misconduct is not considered, then in some circumstances, a plaintiff may end up in a position better than he would have been in absent the discrimination. Equitable remedies are not intended to provide the plaintiff with a windfall. However, post-termination wrongdoing that is attributable to the defendant’s discrimination should not be used to limit damages because defendants should not benefit from their discriminatory conduct. Federal courts have to consider the unique factual circumstances of each case when fashioning the appropriate remedies for the plaintiff, and hence, in some cases, this will require the court to consider post-termination wrongdoing when applying the after-acquired evidence defense.