

2022

Now We Have Reason to Fire You: What Should States Do About the Employer “After-Acquired” Employee Wrongdoing Defense?

Michael J. Hayes

University of Baltimore School of Law, mjhayes@ubalt.edu

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [Labor and Employment Law Commons](#)

Online ISSN: 2643-7759

Recommended Citation

Michael J. Hayes, *Now We Have Reason to Fire You: What Should States Do About the Employer “After-Acquired” Employee Wrongdoing Defense?*, 16 FIU L. Rev. 621 (2022).

DOI: <https://dx.doi.org/10.25148/lawrev.16.3.7>

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact lisdavis@fiu.edu.

**Now WE HAVE REASON TO FIRE YOU:
WHAT SHOULD STATES DO ABOUT THE EMPLOYER
“AFTER-ACQUIRED” EMPLOYEE WRONGDOING
DEFENSE?**

*Michael J. Hayes**

Wrongful employer conduct, particularly discrimination and harassment, is leading to efforts to provide more protection to employees, and compensate them for wrongdoing already done to them. As shown by the Michigan Supreme Court’s July 2021 *Lichon v. Morse* decision that adopted a new and more pro-employee standard for when employers can compel employees to arbitrate instead of sue over claims of sexual harassment, much of the protection of employees may occur at the state level. Which makes it unfortunate that little attention is being paid to how states treat the employer after-acquired evidence defense that can undermine new and existing employee protections. Under that affirmative defense, if after the employee’s termination, or an employee’s claim against the employer, the employer discovers a “misrepresentation” or mistake that employee made in the application process, or any misconduct the employee committed while working for the employer, that employer can rely on that evidence to bar the employee’s claim or eliminate most of employee’s remedies. This article proposes that this 30+-year-old defense should be revisited given all the 21st century changes in hiring and employment relationships, including the ban-the-box movement and laws regarding criminal records and the #MeToo movement aimed at ending harassment and gender discrimination.

I.	Introduction.....	622
II.	What States <u>Have</u> Done: Variations in Treatment of the Employer After-Acquired Evidence Defense.....	625
	A. <i>Wrongful Discharge</i>	625
	B. <i>Statutory Claims: Discrimination, Whistleblowing, and Workers Compensation</i>	631
	1. Discrimination Claims	631
	2. Whistleblowing.....	635

*Professor, University of Baltimore School of Law. Former Director, Office of Labor-Management Standards, U.S. Department of Labor (Aug. 2013-2016). J.D., University of Virginia and B.S. Cornell University, School of Industrial & Labor Relations. All views expressed in this Article, and all errors, are the author’s own.

	3. Workers Compensation	636
	C. <i>Employment Contract Law</i>	642
III.	What <u>Should</u> States Do?	649
	A. <i>Adopt What Some Other States Have Already Done</i>	649
	1. Tort Damages for Harassment Should Be Unaffected by After-acquired Evidence	649
	2. Remedies “Compensatory “Loss of Earnings Capacity” as Alternative to Equitable”/Injunctive Reinstatement	651
	3. Stronger Substantive Standards for Justifying Termination 654	
	B. <i>Recalibrate the McKennon “Balance” for the 21st Century</i> ...	658
IV.	Conclusion	666

I. INTRODUCTION

This article brings me full circle to my “job talk” on the employer’s defense of after-[termination] acquired evidence of employee misconduct, in which I predicted the “compromise” liability-but-fewer-remedies approach the U.S. Supreme Court took on the issue shortly afterwards in its unanimous 1995 *McKennon v. Nashville Banner* decision.¹ This issue, like so many in employment law, has now perhaps become more important at the state level, and brought to prominence by courts in multiple states taking approaches to it that are very different from each other, and also from the Supreme Court’s approach in *McKennon*.²

A key aspect of the employer after-acquired evidence defense is that, as even its name suggests, the “evidence” in question has nothing to do with either the intent of the employer (or its agent) or the cause/reason for terminating the employee. This aspect has become all the more discordant given the U.S. Supreme Court majority’s holdings since 2009 that plaintiffs must prove “but for” causation/motive in claims under the Age Discrimination in Employment Act³ and the anti-retaliation provisions of Title VII,⁴ and based on those precedents other federal courts requiring plaintiff employees prove an illegal “but for” employer motive under other employee protection statutes.⁵ The U.S. Supreme Court’s after-acquired

1 *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 361 (1995).

2 *See infra* Parts I & II (discussing variety of approaches different courts in different states have taken to after-acquired evidence).

3 *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 190 (2009).

4 *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 351 (2013).

5 *See, e.g., Lestage v. Coloplast Corp.*, 982 F.3d 37, 41 (1st Cir. 2020) (adopting the “but for” standard for whistleblower retaliation claims under the False Claims Act and identifying multiple other

evidence decision in *McKennon* is not technically inconsistent with this trend, because the Court held that a plaintiff's discriminatory termination claim should not necessarily be dismissed based on after-acquired evidence when (as the Court had to assume to be true in that case) the employer has violated an anti-discrimination statute.⁶

However, the *McKennon* Court also held that under the Age Discrimination in Employment Act, at issue in that case, after an employer has discovered that an employee engaged in "wrongdoing," the remedies of reinstatement and front pay are inappropriate,⁷ and back pay can be cut off as of the date the employer discovered the wrongdoing.⁸ The Court further added, though, that back pay would be cut off only if the employer proved that the employee's wrongdoing was of sufficient "severity" that the employer actually would have fired the employee for that misconduct alone had the employer "known of it at the time of the discharge."⁹ Together these rules on remedies amount to a *McKennon* approach that federal courts have adopted for multiple federal statutes when an employer discovers a plaintiff employee's wrongdoing after that employee's termination,¹⁰ and that as discussed below numerous (but not all) states have applied to one or more types of state law claims.¹¹

As mentioned earlier, the after-acquired evidence defense does not relate to the employer's challenged action or the motive(s) for it, meaning no relation to whether the employer acted illegally, which should be the issue in the case. Consequently, scholars and others have rightly referred to the after-acquired evidence defense as an "extra" defense made available to employers sued for illegal terminations and other adverse actions, and one that employers can use even when they did act illegally.¹²

federal courts of appeal that have also done so); *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 235–37 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (requiring plaintiff employees to prove but-for causation under the Americans with Disabilities Act).

⁶ *McKennon*, 513 U.S. at 359–60.

⁷ *See id.* at 361–62.

⁸ *See id.* at 362.

⁹ *See id.* at 362–63.

¹⁰ *See generally* Stephen J. Humes, Annotation, *After-Acquired Evidence of Employee's Misconduct as Barring or Limiting Recovery in Action for Wrongful Discharge*, 34 A.L.R.5th 699 (1995) (cases updated regularly and decisions cited therein).

¹¹ *See infra* Parts II and III.

¹² *See, e.g.*, Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of "After-Acquired Evidence,"* 40 ARIZ. ST. L.J. 401, 401 (2008) (explaining that her article shows how the after-acquired evidence defense "shifts the focus of the discussion off the employer's illegal acts and onto the worthiness of the plaintiff and it chills full enforcement of discrimination laws"); Paul W. Mollica, *Employment Discrimination Cases in the Seventh Circuit*, 1 EMP. RTS. & EMP. POL'Y J. 63, 65–66 (1997) (referring to the after-acquired evidence defense as an "extra-statutory defense[] used to suffocate otherwise meritorious cases."); Robert F. Thompson III, *McKennon v. Nashville Banner Publishing Co.: The Masquerading Doctor, The "Greatest Treason," and After-Acquired Evidence in Employment*

This article focuses on states because, at least at present, addressing the problems with the federal law on this issue seems unlikely. As early as 2013, a study of U.S. Supreme Court decisions found that Court was moving in a strongly pro-business direction.¹³ A 2019 study found that 60 percent of then-serving Circuit Court judges had worked in corporate law.¹⁴ A study issued in 2021 showed that more than half of President Trump's appointees from 2017 to 2019 had a background representing corporations and the same study confirmed that such judges are less likely to rule in favor of workers.¹⁵ So an improvement in federal courts' oversight of the after-acquired evidence defense cannot be expected from hundreds of recently appointed judges.

Currently the situation with the law on after-acquired evidence defense at the state level is similar to the situation that existed at the federal level in the early 1990s prior to *McKennon*. State appellate courts have taken a variety of approaches to evidence of employee wrongdoing an employer discovers after employee's termination,¹⁶ just as federal appellate courts had done with such after-acquired evidence before the *McKennon* decision.¹⁷ The current disagreements among state appellate courts include many that are different from those that divided federal appellate courts, thus exemplifying the oft-quoted maxim attributed to Mark Twain that "history does not repeat itself, but it rhymes."¹⁸ State appellate courts now might be open to varying from the trends in federal courts, as Michigan's highest court was in July 2021 when in its *Lichon v. Morse* decision it adopted a new and more pro-employee standard for when an employer can rely on an arbitration agreement with an employee to require that employee to arbitrate a sexual harassment claim rather than suing in court.¹⁹

The remainder of this article will explain how the after-acquired evidence defense has been applied to state tort, statutory and contract law. Based on some innovative pro-employee rulings of some state courts, the

Discrimination Suits, 49 ARK. L. REV. 625, 630 (1996) (discussing employer's interest in "us[ing] after-acquired evidence as a weapon to avoid litigating the merits of a discharged plaintiff's claim under Title VII.>").

¹³ Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1431 (2013).

¹⁴ See *No More Corporate Judges*, DEMANDJUSTICE, <https://demandjustice.org/no-more-corporate-judges/> (last visited Apr. 9, 2022).

¹⁵ See generally Joanna M. Shepherd, *The Relationship Between Professional Diversity and Judicial Decisions*, DEMANDJUSTICE, <https://demandjustice.org/report/>.

¹⁶ See *infra* Parts II and III.

¹⁷ See Christine Neylon O'Brien, *Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing*, 23 PEPP. L. REV. 65, 68–69 (1995) (describing division among federal circuit courts on how to apply the after-acquired evidence defense).

¹⁸ See Jordan I. Rothman, *Two "Rhymes": A Comparative History of Texan and Confederate Courts*, 21 J. S. LEGAL HIST. 193, 193 n.1 (2013).

¹⁹ *Lichon v. Morse*, 507 Mich. 424, 446–47 (2021).

article will also recommend some revisions and new approaches to after-acquired evidence that state courts (and perhaps legislatures) should very much consider adopting. A substantial majority of highest courts of states have never taken a position on this issue, and some others have not done so in twenty years or more. This country and most of the states within it has changed in many ways since the U.S. Supreme Court established federal rules on after-acquired evidence in 1995, and a significant share of those changes have made the Supreme Court's *McKennon* rules outdated. This article will proffer a variety of ideas for state lawmakers to consider in determining how their states will deal with arguments by employers and their lawyers that information about a plaintiff employee that was not discovered by the employer until after discharge of that employee (and usually in litigation over that discharge) should result in dismissal of the employee's claim or elimination of most of the remedies available for that employee.

II. WHAT STATES *HAVE* DONE: VARIATIONS IN TREATMENT OF THE EMPLOYER AFTER-ACQUIRED EVIDENCE DEFENSE

A. *Wrongful Discharge*

Most states have recognized a tort claim for wrongful discharge violation of public policy. The most common employee activities for which courts find wrongful discharge are:

(1) Refusing to commit an illegal act (or one the employee reasonably believed to be illegal); (2) Performing a public obligation (like jury duty); (3) Exercising a legal right (like pursuing a good faith workers compensation claim); and (4) Reporting a violation of law (also known as whistleblowing).²⁰

Most state appellate court decisions since *McKennon* that have decided the after-acquired evidence defense issue in a wrongful discharge case have held that in some or all circumstances after-acquired evidence of plaintiff employee wrongdoing justifies, at the least, limits on available remedies.

Prior to *McKennon*, Oklahoma's Supreme Court showed signs it might take the approach that after-acquired evidence was not relevant to either liability or remedies, at least for claims for wrongful discharge for pursuing a workers' compensation claim. In 1993 in *Mosley v. Truckstops Corp.*,²¹ the court rejected a proposed jury instruction based on the 1988 *Summers* decision of the U.S. Court of Appeals for the Tenth Circuit—the Circuit

²⁰ See RESTATEMENT OF EMP. L. § 5.02 (AM. L. INST. 2015) and cases and authorities discussed therein.

²¹ *Mosley v. Truckstops Corp. of Am.*, 891 P.2d 577, 583–84 (Okla. 1993).

whose jurisdiction includes Oklahoma²²—an instruction that the employer was not liable if the employer “re-terminated” the plaintiff based on after-acquired evidence of employee misconduct.²³

The Oklahoma Supreme Court did so even though the Oklahoma Court of Appeals had held all relief could be withheld based on employer after-acquired evidence of employee misconduct.²⁴ Regarding using after-acquired evidence to limit remedies, what would later be the *McKennon* approach, the Oklahoma Supreme Court stated that “a decision on whether such after-acquired evidence should have the effect of reducing or limiting damages in this type of case will have to await another day.”²⁵

The Oklahoma Supreme Court actually approved the instructions the trial judge had given the jury, which made relevant only evidence known at the time of termination.²⁶ By contrast, the court held of the *Summers* instruction making after-acquired evidence relevant to liability that “it is not consistent with Oklahoma retaliatory discharge law.”²⁷ The *Mosley* court also said of the *Summers* instruction that “[a]pplying [it] to workers’ compensation claims violates public policy by allowing employers to circumvent the established workers’ compensation structure.”²⁸ The Oklahoma Supreme Court added, to explain why reliance on after-acquired evidence was inconsistent with the anti-retaliation policy of workers compensation, that “by narrowly focusing on what may have been legitimate reasons for termination which surfaced after termination or after a suit had commenced, the jury would be distracted from the real issue of the case—the retaliatory motive of the employee’s termination.”²⁹

However, thirteen years later the Oklahoma Supreme Court resolved the remedies issue it had reserved on in *Mosely* and in *Silver v. CPC-Sherwood*

²² See THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, <https://www.ca10.uscourts.gov/clerk>.

²³ See *Mosley*, 891 P.2d at 579–80.

²⁴ See *id.* at 580–81.

²⁵ *Id.* at 580.

²⁶ The full instruction was:

You are further instructed that the applicable statutes do not prohibit an employer such as Defendant from discharging an employee such as Plaintiff because the employee is absent from work, even when the absence is caused by compensated injury and medical treatment.

Also, Defendant may show that the Plaintiff’s discharge was for additional legitimate non-retaliatory reasons, such as Plaintiff’s inability to perform assigned duties, Plaintiff’s job abandonment and/or Plaintiff’s bad faith pursuit of a Workers’ Compensation claim.

Id. at 579 n.2.

²⁷ *Id.* at 585.

²⁸ *Id.* at 583.

²⁹ *Id.*

Manor, Inc.,³⁰ and adopted the *McKennon* “limiting remedies” approach to Oklahoma’s retaliatory discharge tort. In *Silver* the Oklahoma Supreme Court relied on *McKennon*,³¹ but the court relied even more heavily on the Arizona Supreme Court’s 1998 decision in *O’Day*,³² a decision that will be discussed in the immediately succeeding paragraphs. Unfortunately, the *Silver* court did not expressly clarify the specific limits on remedies under Oklahoma’s retaliatory discharge tort,³³ and no Oklahoma appellate court has yet done so.³⁴ Most likely at least the limits identified in *McKennon* and *O’Day* would apply, and those limits presumably still apply to the Oklahoma tort of retaliatory discharge, which still exists.³⁵ However, with regard to the type of discharge at issue in 1993 in *Mosley*—discharge for pursuing a workers compensation claim—the Oklahoma legislature in 2013 replaced the judicial remedy with an administrative one.³⁶

The *en banc* Arizona Supreme Court’s 1998 decision in *O’Day*, on which the Oklahoma Supreme Court relied, was one of the first state highest court decisions to adopt the *McKennon* rules for after-acquired evidence. The *O’Day* court did not just adopt *McKennon* automatically, but engaged in a “Goldilocks” approach, as other courts have on other issues,³⁷ as it discussed three possible standards to apply to after-acquired evidence, and found two flawed, but found the *McKennon* approach, with the *O’Day* court’s own slight modification, just right.³⁸

The first approach that *O’Day* rejected was that after-acquired evidence is not admissible because it would undermine the public policy sought to be advanced by the employee’s claim. Ironically—given the Oklahoma

³⁰ *Silver v. CPC-Sherwood Manor, Inc.*, 151 P.3d 127, 128 (Okla. 2006).

³¹ *See id.* at 129–30 (citing *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 360 (1995)).

³² *See id.* at 130–31 (citing and quoting *O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792 (Ariz. 1998)).

³³ *See id.* at 131. The court did not do so because the appellate record was too incomplete to determine if the employer was required to or would have terminated the employee for failing to disclose their criminal record.

³⁴ That is the author’s conclusion based on searching on March 8, 2021 in WESTLAW for post-*Silver* Oklahoma appellate court decisions applying the after-acquired evidence rules to limit retaliatory discharge remedies, and finding none.

³⁵ *See, e.g.,* *Peuplie v. Oakwood Ret. Vill., Inc.*, 472 P.3d 213, 216 (Okla. Civ. App. 2019) (recognizing the tort but holding that plaintiff employee could not prove a key element of it).

³⁶ *See* *Southon v. Okla. Tire Recyclers, LLC*, 443 P.3d 566, 572 (Okla. 2019) (explaining the enactment of a 2013 “Retaliatory Discharge Act” that amended the retaliation provision of the Oklahoma workers compensation statute).

³⁷ *See, e.g.,* *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (discussing different state court standards for evaluating a “taking” of property by a government entity and choosing to apply the “reasonable relationship” test); *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 768 (La. 1999) (discussing different state standards for defining landowner’s duty to protect for third parties and choosing the “balancing test”).

³⁸ *See* *O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 796–97 (Ariz. 1998).

Supreme Court's later reliance on *O'Day* in also adopting the *McKennon* approach to wrongful discharge—the Arizona Supreme Court cited the Oklahoma Supreme Court's *Mosley* decision as an example of rejecting use of after-acquired evidence for wrongful discharge.³⁹ In any event, the *O'Day* court reasoned that while rejecting after-acquired evidence for wrongful discharge claims “has surface appeal,” that approach “cannot be reconciled with the employer’s right to let an employee go for the employee’s wrongful conduct.”⁴⁰

In *O'Day* the court also rejected the holdings of a couple lower state courts that after-acquired evidence of employee wrongdoing as an applicant or while working for the employer was an “absolute bar” to an employee’s wrongful discharge claim against an employer.⁴¹ The court’s brief explanation why that was inappropriate was that the wrongful discharge tort “evolved to cure the failure of the law of contracts to attribute any consequence to the employer’s tortious conduct.”⁴² Earlier in the decision, the court had itself carried out such a “failure” of contract law by adhering to a contract law principle in dismissing the employee’s breach of contract claim based on after-acquired evidence despite the employer’s own possible breach.⁴³ Interestingly, at that point the Arizona Supreme Court invoked the other remedies available to employees from tort (presumably wrongful discharge) and statute-based claims by stating, “We need not depart from the law of contracts just to duplicate relief that is already provided by tort and statutory causes of action that arose *because of* the possible harshness of the very contract principles before us today.”⁴⁴

The *O'Day* court’s reliance on tort and statutory remedies as adequately protecting employees did not make the court more generous regarding such remedies than the Supreme Court was in *McKennon* or than other federal and state courts have been. The Arizona Supreme Court instead turned to *McKennon* to define remedies, apparently based on a belief it is important for both employer and employee wrongdoing to be taken into account, as was made clear by its statement: “[t]he third [*McKennon*] approach attributes significance to both the employer’s and employee’s wrongful conduct.”⁴⁵

39 See *id.* at 796 (citing *Mosley v. Truckstops Corp.*, 891 P.2d 577, 585 (Okla. 1993)).

40 See *id.* (citing *Thompson v. Better-Bilt Aluminum Prods. Co.*, 927 P.2d 781, 789 (Ariz. Ct. App. 1996)).

41 See *id.*

42 See *id.*

43 See *infra* notes 196–206 and accompanying text (discussing the *O'Day* decision’s analyses and conclusions regarding the employee’s contract claim).

44 See *O'Day*, 959 P.2d at 796.

45 See *id.* (citing Rebecca Hanner White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L.REV. 49 (1993)).

The *O'Day* court next considered whether the Supreme Court in *McKennon* had struck “the proper balance between the interests of employers and employees in cases of tortious wrongful discharge.”⁴⁶ The court agreed with *McKennon*'s elimination of reinstatement and front pay as remedies for the employee, to “adequately protect[] the employer from an employee it has a right to fire.”⁴⁷ The court thus continued to treat the employer's right to do that as equal to the employee's right not to be fired for a reason inconsistent with public policy. The court also placed blame for limiting the remedies on the plaintiff employee by stating that “the unavailability of these remedies is caused by the employee's own conduct, not the tortious conduct of the employer.”⁴⁸ Based on its balance of employee and employer rights, the Arizona Supreme Court also reasoned, at least with regard to reinstatement, that “[a] contrary conclusion would lead to the absurd result that an employer would have to accept an employee and then discharge him.”⁴⁹

However, the Arizona Supreme Court in *O'Day* disagreed with *McKennon* to the extent that the decision limited remedies to truncated back pay.⁵⁰ The *O'Day* court ultimately agreed with *McKennon* on the measure for the back pay remedy, as the amount that the plaintiff employee would have earned between the date of discharge and “the time the employer discovers the misconduct.”⁵¹ But that court decided that the back pay remedy alone would “not always adequately protect the employee from all the consequences of the employer's wrongful conduct.”⁵² The court explained that, because wrongful discharge is a tort, when an employer is found liable for it that “should result in the tort measure of damages—compensatory and punitive, if justified by the evidence.”⁵³ The only example of such compensatory damages that the court identified was “any decrease in earning capacity,”⁵⁴ which it described as “an estimate of lost present ability to work in appropriate occupations, now and in the future.”⁵⁵

Two years after the Arizona Supreme Court's *O'Day* decision, the New Hampshire Supreme Court considered the effect of after-acquired evidence

46 *Id.*

47 *Id.* at 796–97.

48 *See id.* at 797.

49 *See id.*

50 *See id.*

51 *See id.* at 797–99.

52 *See id.* at 797.

53 *See id.* (citing *Thompson v. Better-Bilt Aluminum Prod.*, 832 P.2d 203, 207 (Ariz. 1992) (holding that a wrongful discharge plaintiff is entitled “to ordinary tort damages—all damages legally caused by the tort.”)).

54 *See id.*

55 *See id.* at 798.

in its 2000 *McDill* decision.⁵⁶ As is discussed in the next subpart the court in *McDill* determined that an employer's after-acquired evidence of reason to fire the employee could completely bar an employee's breach of contract claim.⁵⁷ But the New Hampshire Supreme Court in dicta next explained that such after-acquired evidence in a wrongful discharge torts case would not bar a claim but would limit the back pay remedy as described in *O'Day* and *McKennon*.⁵⁸

The *McDill* court's discussion of the role of after-acquired evidence in wrongful discharge cases, perhaps because it was only dicta, was much briefer and more cursory than the discussion of that issue in *O'Day* and *McKennon*. The court in *McDill* stated only that the *McKennon* approach to back pay was "appropriate in tort cases because it properly balances the employee's entitlement to a remedy as a result of the employer's tortious conduct with an employer's interest in lawfully managing its business affairs."⁵⁹

In at least two other states, the most recent appellate court precedents on applying an after-acquired evidence defense to an employee's wrongful discharge claim relied on *McKennon* to hold that to limit remedies an employer must prove it would have discharged the employee. In the Kansas Court of Appeals' 2000 *Riddle* decision,⁶⁰ that court after discussing *McKennon*'s limits on remedies adopted all those limits but (like *McKennon*) only if the employer proved to the trier of fact that "if [it had known] known of the misconduct, the employer would have discharged the plaintiff."⁶¹ Similarly, the Alabama Court of Civil Appeals in *Beaulieu*⁶² held that to limit remedies based on after-acquired evidence 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 discharge."⁶³

Interestingly and as further discussed below,⁶⁴ the Alabama appellate court in *Beaulieu* upheld a jury's determination that plaintiff employee had been fired solely for pursuing a workers compensation claim⁶⁵ and upheld

⁵⁶ See *McDill v. Environamics Corp.*, 757 A.2d 162, 165–66 (N.H. 2004).

⁵⁷ See *id.* at 166; discussion *infra* notes 154–59 and accompanying text.

⁵⁸ See *McDill*, 757 A.2d at 166 (citing *O'Day*, 959 P.2d at 797 and *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362–63 (1995)).

⁵⁹ See *id.*

⁶⁰ See *Riddle v. Wal-Mart Stores, Inc.*, 998 P.2d 114, 114 (Kan. Ct. App. 2000).

⁶¹ See *id.* at 120–21.

⁶² *Beaulieu of Am., Inc. v. Kilgore*, 680 So. 2d 288, 288 (Ala. Civ. App. 1996).

⁶³ See *id.* at 295 (quoting *McKennon*, 513 U.S. at 362).

⁶⁴ See *infra* notes 129–33 and accompanying text.

⁶⁵ See *Beaulieu*, 680 So. 2d at 290, 292, 295–96.

also the trial judge's exclusion from evidence that the plaintiff would have had two-and-a-half months of absences after being shot by his ex-wife and the employer would have fired him for those absences.⁶⁶

B. *Statutory Claims: Discrimination, Whistleblowing, and Workers Compensation*

1. Discrimination Claims

Historically since the enactment of Title VII, many state legislatures and state courts have patterned their employment discrimination rules after Title VII provisions and decisions.⁶⁷ Consequently it's not surprising that, apparently, every highest appellate court precedent in every state to decide the after-acquired evidence issue in an employment discrimination case has adopted the U.S. Supreme Court's *McKennon* decision approach to the issue. And that has meant no reinstatement or front pay and back pay reduced for discriminatees.

Probably the first state appellate court to do this was the Michigan Court of Appeals three months after *McKennon* in its *Wright v. Restaurant Concept Management* decision.⁶⁸ The court in *Wright* only indicated it would apply *McKennon* if the defendant employer proved the employee's wrongdoing would have led the employer to lawfully terminate the employee,⁶⁹ but the next year the same court applied the rule to uphold a trial court decision denying front pay and reinstatement to a plaintiff and remanding only to apply *McKennon* to back pay.⁷⁰

More recently and surely one of the most recent state appellate courts applying *McKennon* was the North Carolina Court of Appeals in *Brown v. Fayetteville State University*, in which that court upheld an Administrative Law Judge's decision concluding that, because the employer had proven its after-acquired evidence of the plaintiff's misconduct would have resulted in plaintiff's dismissal, the employer's remedy was limited to back pay from the time of his discharge to the employer's discovery of the misconduct.⁷¹

⁶⁶ See *id.* at 295–96.

⁶⁷ See generally Chuck Henson, *Title VII Works—That's Why We Don't Like It*, 2 U. MIA. RACE & SOC. JUST. L. REV. 41 (2012) (discussing similarities, and some differences, between federal employment discrimination rules and state employment discrimination/fair employment practices rules).

⁶⁸ See *Wright v. Restaurant Concept Mgmt., Inc.*, 532 N.W.2d 889, 891–92 (Mich. Ct. App. 1995). The Supreme Court decided *McKennon* in January 1995 while the Michigan Court of Appeals decided *Wright* in April 1995.

⁶⁹ See *id.* at 893.

⁷⁰ See *Horn v. Dep't of Corr.*, 548 N.W.2d 660, 664–65 (Mich. Ct. App. 1996).

⁷¹ *Brown v. Fayetteville State Univ.*, 837 S.E.2d 390, 396–98 (N.C. Ct. App. 2020).

The states whose appellate courts similarly adopted the *McKennon* approach to after-acquired evidence and remedies in state law discrimination cases, between Michigan's and North Carolina's, have so far included California,⁷² Iowa,⁷³ Kentucky,⁷⁴ Minnesota,⁷⁵ New Jersey,⁷⁶ and West Virginia.⁷⁷ In addition, the State of Florida's standard jury instructions for state law employment discrimination cases (and all civil employment law cases) incorporate the *McKennon* rules for remedies.⁷⁸

A Louisiana appellate court even stretched *McKennon* to justify its choice to allow an employer to use after-acquired evidence to rebut plaintiff defenses as to the employer's intent.⁷⁹

The court, perhaps inadvertently, revealed it was not using *McKennon* as the Supreme Court had when it stated, "defendants did not attempt to assert additional new grounds for plaintiffs' terminations."⁸⁰ The court then stated that the employer restaurant's after-acquired evidence, in the form of an audit finding "revenue shortages and high food costs" was admissible "to substantiate the defendants' claim that a justified basis existed for terminating plaintiffs' employment, and that the action taken by defendants was not racially based."⁸¹ In doing this, the Louisiana Court of Appeals disregarded the Supreme Court's admonitions in *McKennon* itself, such as that "[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"⁸² and "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made."⁸³

Harassment based on sex or any protected characteristic is treated as employment discrimination under federal law⁸⁴ and also under the fair

72 *Salas v. Sierra Chem. Co.*, 327 P.3d 797, 810–12 (2014) (applying *McKennon* to deny remedies to undocumented alien who misrepresented to the employer his eligibility to be hired).

73 *Walters v. U.S. Gypsum Co.*, 537 N.W.2d 708, 709–11 (Iowa 1995).

74 *See Brooks v. Lexington-Fayette Urban Cnty. Hous. Auth.*, 132 S.W.3d 790, 805–07 (Ky. 2004); *Toyota Motor Mfg., U.S.A., Inc. v. Epperson*, 945 S.W.2d 413, 415 (Ky. 1996).

75 *Meads v. Best Oil Co.*, 725 N.W.2d 538, 544–46 (Minn. Ct. App. 2006).

76 *Cicchetti v. Morris Cnty. Sheriff's Off.*, 947 A.2d 626, 642–43 (N.J. 2008) (applying to plaintiff's failure to expose expunged criminal conviction when applying for job).

77 *Barlow v. Hester Indus., Inc.*, 479 S.E.2d 628, 641–44 (W. Va. 1996) (affirming trial court's admission of employer's after-acquired evidence of plaintiff's misconduct and holding that such evidence was relevant only to determining appropriate remedies).

78 *See Florida Standard Jury Instructions in Civil Cases* § 417.11 (Feb. 1, 2018).

79 *See Wright v. Bennett*, 924 So. 2d 178, 185–86 (La. Ct. App. 2005).

80 *See id.* at 185.

81 *See id.* at 185–86.

82 *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995).

83 *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).

84 *See* 29 C.F.R. § 1604.11(a) (2022).

employment laws of many states.⁸⁵ In most of those states, plaintiffs can also recover damages for physical harm or emotional distress or both under the state's fair employment law or state tort law or both.⁸⁶ Multiple state appellate court decisions have held that after-acquired evidence of employee wrongdoing does not limit such compensatory damages for discriminatory harassment. One of the first was that of the Michigan Court of Appeals in its 1999 decision in *Grow*,⁸⁷ which held that plaintiff's emotional distress damages for the sexual harassment she'd suffered, available under the fair employment law of Michigan,⁸⁸ should not be limited by an employer's after-acquired evidence of plaintiff's application misrepresentations.⁸⁹ The court reasoned that for emotional harms from harassment, "the injury is to one's person and plaintiff is entitled to be free of that injury regardless of her status as a dischargeable employee."⁹⁰

The *Grow* court also relied on the fact that emotional distress damages are "of a continuing nature, and it would be inequitable to treat them the same as claims for back pay, reinstatement, or front pay."⁹¹ In a footnote, the court also indicated that the equities were also different on the employer side:

We refuse to conclude that, merely because plaintiff lied on her employment application, defendants were free to cause her emotional harm by subjecting her to an otherwise illegal, hostile, work environment; plaintiff was not fair game for harassment even though she might have been less than candid on her employment application.⁹²

For these reasons the Michigan Court of Appeals held in *Grow* that "a claim for emotional distress damages" should not have remedies limited in the same way as a claim "for purely economic damages" because of after-acquired evidence of application misrepresentation.⁹³

Nine years after *Grow* was decided, in 2008, the New Jersey Supreme Court decided in one decision to limit a plaintiff employee's "economic" claims based on *McKennon* and the plaintiff employee's application

⁸⁵ See generally Margaret Carroll Alli et al., Chapter 22, *Harassment Claims Under State FEP Statutes*, in BUREAU OF NAT'L AFFAIRS, INC. WORKPLACE HARRASMENT L. 2-4 (2021); Corey E. Devine, Chapter 23, *Harassment Claims under Common Law*, in BUREAU OF NAT'L AFFAIRS, INC. WORKPLACE HARRASMENT L. 2-3 (202a).

⁸⁶ See generally Devine, *supra* note 85.

⁸⁷ *Grow v. W.A. Thomas Co.*, 601 N.W.2d 426, 429 (Mich. Ct. App. 1999).

⁸⁸ See *id.* at 434 n.5.

⁸⁹ See *id.* at 434-35.

⁹⁰ See *id.* at 434 (quoting *Baab v. AMR Servs. Corp.*, 811 F. Supp. 1246, 1262 (N.D. Ohio 1993)).

⁹¹ See *id.*

⁹² See *id.* at 434 n.6.

⁹³ See *id.* at 434.

misrepresentation and not to limit plaintiff's compensatory and punitive damages for "hostile environment" harassment.⁹⁴ Regarding the remedies of back pay and front pay, the New Jersey Supreme Court concluded, "[w]e do not envision that our Legislature intended to condone resume fraud or similar misrepresentations of one's employment-related credentials; we do not conclude that such acts should go unpunished."⁹⁵ The court then "punished" the plaintiff's application misrepresentation by applying the *McKennon* rules and holding that if the employer could prove it would have discharged the plaintiff employee, a county sheriff's officer, based on his not disclosing a 20-year old expunged conviction, then the plaintiff could not recover any front pay and the back pay remedy would be cut off as of the date of the discovery of that conviction.⁹⁶

The New Jersey Supreme Court treated very differently the plaintiff's claim for damages for harassment after co-workers learned he had contracted Hepatitis C.⁹⁷ The New Jersey Supreme Court quoted with agreement a 2002 decision by a lower court that found:

a non-economic loss, such as emotional distress, if proven, relates to injuries that have no direct nexus to a plaintiff's status as an employee. Instead, they embody damages resulting from alleged misconduct of an employer, which, although directed at an employee, is nevertheless subject to redress because of indignities suffered, not because of the person's status as an employee.⁹⁸

Similarly to the Michigan Court of Appeals in *Grow*, both New Jersey appellate courts relied not only on the fact that plaintiff personally suffered, but on a determination that in the harassment situation the equities did not favor the employer: "An employer who creates a hostile work environment should not be excused from responding in damages for personal injuries . . . simply because it later learns that the injured employee did something in the past, which, if known at the time, would have caused his or her termination."

The New Jersey Supreme Court next referenced these affirmed holdings by the lower court as "strong policy considerations."⁹⁹ After that, the court considered the employer's contention that based on *McKennon* the plaintiff employee's "application fraud" should bar all his claims. The court

⁹⁴ *Cicchetti v. Morris Cnty. Sheriff's Off.*, 947 A.2d 626, 642-43 (N.J. 2008).

⁹⁵ *See id.* at 642.

⁹⁶ *See id.*

⁹⁷ *See id.* at 629-31 (describing the claimed harassment).

⁹⁸ *See id.* at 641 (quoting *Taylor v. Int'l Maytex Tank Terminal Corp.*, 810 A.2d 1109, 1118-19 (N.J. Super. Ct. App. Div. 2002)).

⁹⁹ *See id.*

characterized the employer's argument as meaning that if the employer proved the discovered "fraud" was "sufficiently severe that the individual would not have been hired in the first place, acts of discrimination or an atmosphere so 'severe or pervasive' that it constitutes a hostile work environment" would "even if entirely unrelated to the matters the individual failed to disclose in the application process" effectively be unremedied.¹⁰⁰ After referring to that result as "abhorrent"¹⁰¹ the New Jersey Supreme Court, as it had done with the economic remedies, turned to its view of likely legislative intent and declared, "[w]e cannot imagine that our Legislature intended such an outcome" and "[t]he broad language of the remedial purposes of the [state fair employment statute] as a mechanism to root out the cancer of discrimination . . . does not permit such a conclusion."¹⁰² The New Jersey Supreme Court consequently remanded the case to the lower courts to, among other things, allow the plaintiff to try to prove his damages for harassment.

2. Whistleblowing

In the few state-level appellate court decisions construing state whistleblowing statutes and actually deciding the after-acquired evidence issue, the appellate courts more often than not have decided against relying on it to limit remedies. One example is the Supreme Court of South Carolina's 1997 *Baber* decision, in which that court applied the state statute protecting state or local government whistleblowers by affirming a jury verdict in favor of such a whistleblower.¹⁰³ The trial judge in the case had admitted the employer's after-acquired evidence of the employee county internal auditor's alleged "poor job" of auditing, but had also instructed the jury to disregard any evidence "unknown to the public body at the time the public body terminated the employee."¹⁰⁴

The South Carolina Supreme Court found the judge's instruction was correct because of *McKennon*'s rule that the plaintiff employee's wrongdoing was "of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."¹⁰⁵ The court held:

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.* (citations omitted).

¹⁰³ *See Baber v. Greenville Cnty.*, 488 S.E.2d 314, 316 (S.C. 1997).

¹⁰⁴ *See id.* at 320.

¹⁰⁵ *See id.* at 320–21 (quoting *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362–63 (1995)).

Because after-acquired evidence of Baber's misconduct was relatively minor, and was not demonstrated to be of such severity that he in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge, then there was no error in failing to allowing the jury to consider the [after-acquired] evidence.¹⁰⁶

In *Watkins v. District of Columbia*, the District of Columbia Court of Appeals considered the trial judge's decision to award back pay and some front pay to the employee whistleblower in lieu of a \$35,000 jury verdict.¹⁰⁷ The District of Columbia as the employer argued that application fraud by the plaintiff employee, which the employer claimed it discovered during his post-termination deposition,¹⁰⁸ made him ineligible for the pay remedies he had received.¹⁰⁹ Relying on *McKennon* the D.C. Circuit Court of Appeals found that it was "not clear from the record . . . that the District would have terminated Mr. Watkins on the falsification 'alone' had it been aware of it at the time of its February 2003 termination."¹¹⁰

Based on this application of a rule from *McKennon*, and that there was a factual dispute between the plaintiff and the defendant over whether defendant knew of the application fraud even prior to plaintiff's termination, the District of Columbia Court of Appeals concluded that "[w]e cannot say that the trial court committed error under the *McKennon* principle in awarding eighteen months of front pay and back pay from February 7, 2003 to May 5, 2004, the date of the hearing on the District's motion to alter or amend."¹¹¹ As that description of the remedies actually awarded reveals, the trial judge exercised discretion that was affirmed by the appellate court in determining how remedies would be limited for violation of a District whistleblowing statute.

3. Workers Compensation

Perhaps the most complex issue regarding application of the after-acquired evidence defense to state statutory claims is how that defense can be used by employers for employee claims under workers compensation

¹⁰⁶ See *id.* at 321.

¹⁰⁷ *Watkins v. District of Columbia*, 944 A.2d 1077, 1079–80 (D.C. 2008).

¹⁰⁸ See *id.* at 1080 n.2.

¹⁰⁹ See *id.* at 1084.

¹¹⁰ See *id.* at 1084–85 (quoting *McKennon*, 513 U.S. at 362–63, where the Supreme Court stated that for remedies to be limited based on after-acquired evidence the employer must prove that the employee's "wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.").

¹¹¹ See *id.* at 1085 (citation omitted).

statutes. That is because employers can raise the defense both to employee claims for workers compensation benefits and to claims by employees that they were terminated for pursuing a claim for workers compensation. With regard to the former, Professor Sachin S. Pandya has explained how state courts expressly, and state legislatures perhaps implicitly, have relied on theories of fraud and contract law to bar employees from workers compensation benefits based on after-acquired evidence of employee misrepresentations and/or omissions regarding physical injuries, conditions, and disabilities the employee made prior to the injury for which the employee seeks benefits.¹¹² Professor Pandya also identified several states in which state appellate courts denied employers such a defense, on the grounds that the statute did not authorize such a defense and sometimes also because it conflicts with one purpose of most workers compensation statutes, that “employee fault” be removed as an issue in “recovery for workplace injuries.”¹¹³

Most states recognize that employees can bring claims against employers for retaliatory termination for pursuing workers compensation claims, sometimes as a state law “wrongful discharge” tort and sometimes based on one or more provisions in the workers compensation statute.¹¹⁴ With regard to the application of the after-acquired evidence defense to such workers compensation claims, the governing appellate precedent of multiple states directs that the *McKennon* rules on remedies apply to such claims. The highest court of Texas, the Texas Supreme Court, so pronounced in 1996 in *Trico Technologies*.¹¹⁵ In that case, the Texas Supreme Court addressed the issue after Texas intermediate appellate courts had split on it, including the court whose decision was being reviewed and that had ruled that *McKennon* did not apply to workers’ compensation retaliation claims.¹¹⁶

The Texas Supreme Court adopted the holdings and rationales of *McKennon* regarding remedies, praising that decision as “reach[ing] a compromise wherein the wrongdoing of both employer and employee is considered in determining damages, ensuring that neither party receives a windfall.”¹¹⁷ The court further explained that employees were protected from retaliation because they would obtain full recovery unless the employer met its burden of proving that the “employee would have been lawfully

¹¹² See Sachin S. Pandya, *Unpacking the Employee-Misconduct Defense*, 14 U. PA. J. BUS. L. 867, 904–05, 904–05 nn.117–20 (2012).

¹¹³ See *id.* at 875, 875 nn.32–33.

¹¹⁴ See generally Theresa Ludwig Kruk, Annotation, *Recovery for Discharge from Employment in Retaliation for Filing Workers’ Compensation Claim*, 32 A.L.R.4th 1221.

¹¹⁵ *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997).

¹¹⁶ See *id.* at 310–11.

¹¹⁷ See *id.* at 312.

discharged if evidence of the misconduct had been discovered during employment.”¹¹⁸ Therefore, the court reasoned, the *McKennon* approach “still discourages employers from wrongfully discharging employees, thus furthering the Legislature’s effort to eliminate retaliatory discharges.”¹¹⁹ On the other side of the balance on which it relied, the court identified the employer’s interest in “the wrongdoing of a dishonest employee to be taken into account and limiting the amount of damages.”¹²⁰ For these reasons, the Texas Supreme Court concluded that in a workers compensation retaliation case in which the employer met its burden, “the employee is only entitled to back pay from the date of the unlawful discharge to the date that the employer discovered evidence of the employee’s misconduct.”¹²¹

Intermediate appellate court decisions in at least two states serve as the governing precedent requiring the application of the *McKennon* remedy rules to claims of termination for pursuing workers compensation benefits. The 2000 Kansas Court of Appeals decision *Riddle v. Wal-Mart Stores*¹²² was discussed earlier with regard to the tort of wrongful discharge,¹²³ and the court in that decision observed that one of two “wrongful discharge” tort claims adopted by Kansas courts as exceptions to employment at will were “when an employer discharges an employee for exercising rights under the workers compensation laws.”¹²⁴ The court added, “Clearly, the public policy of preserving workers compensation rights is highly regarded in Kansas law.”¹²⁵ However, the Kansas Court of Appeals immediately afterwards pointed out how courts in other states had “balanced state public policy concerns and employers’ lawful prerogatives in hiring, promoting, and discharging their employees by applying the *McKennon* standard in state retaliatory discharge cases.”¹²⁶ As discussed earlier this court did the same,¹²⁷ and “thereby limit[ed] the application of the after-acquired evidence doctrine to the issue of damages.”¹²⁸

118 *See id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *See generally* *Riddle v. Wal-Mart Stores, Inc.*, 998 P.2d 114 (Kan. 2000).

123 *See supra* notes 60–61 and accompanying text.

124 *Riddle*, 998 P.2d at 119–20.

125 *Id.* at 120.

126 *Id.*

127 *See supra* notes 60–61 and accompanying text.

128 *Riddle*, 998 P.2d at 120.

Similarly, and as also discussed earlier,¹²⁹ the Alabama Civil Court of Appeals in *Beaulieu of America*¹³⁰ applied the *McKennon* rules to an employer after-acquired evidence defense raised to an employee's claim he was terminated for pursuing a workers compensation claim. The Court of Civil Appeals first discussed and quoted decisions of Alabama's highest court—its Supreme Court—that had held, based on a provision of Alabama's workers compensation statute prohibiting terminations for that reason, that employees could sue employers for such terminations.¹³¹ The court then applied *McKennon*, which it noted had been invoked by the employer,¹³² and based on *McKennon* rules rejected the employer's arguments and motions why after-acquired evidence of plaintiff's wrongdoing justified reversal of the trial court's rulings in favor of the plaintiff.¹³³

By contrast, the highest court of Kentucky—its Supreme Court—in its 1996 *Toyota Motor Manufacturing* decision¹³⁴ implied, at least in dicta, that after-acquired evidence of an employee's misrepresentation on their employment application warranted dismissal of that employee's claim of wrongful discharge for seeking workers compensation benefits. The plaintiff employee in that case had originally brought claims of workers compensation retaliation and disability discrimination after being terminated while on medical leave for an injury suffered at work.¹³⁵ The trial court had granted summary judgment in favor of the employer on the employee's claims and the intermediate appellate court had affirmed.¹³⁶ However, by the time the case had reached the Kentucky Supreme Court the only remaining issue on appeal was “whether misrepresentations by the employee on his employment application will bar a suit for employment discrimination” based on Kentucky's civil rights statute.¹³⁷ As indicated earlier in this article's subsection on state employment discrimination statutes, the Kentucky Supreme Court rejected the lower courts' decisions dismissing the employee discrimination claims based on after-acquired evidence and held the *McKennon* rules on limiting remedies should be applied instead.¹³⁸

129 See *supra* notes 62–66 and accompanying text.

130 See generally *Beaulieu of Am., Inc. v. Kilgore*, 680 So. 2d 288 (Ala. Civ. App. 1996).

131 See *id.* at 291.

132 See *id.* at 294.

133 See *id.* at 294–96. See also discussion of case at *supra* notes 62–66 and accompanying text.

134 See generally *Toyota Motor Mfg., U.S.A., Inc. v. Epperson*, 945 S.W.2d 413 (Ky. 1996).

135 See *id.* at 413.

136 See *id.*

137 *Id.*

138 See *supra* note 74 (citing *Toyota Motor Mfg.* as an example of a state court applying *McKennon* to its employment discrimination statute); see also *Toyota Motor Mfg.*, 945 S.W.2d at 415–16 (discussing that *McKennon* rules should be applied in discrimination cases and by the lower court(s) on remand).

However, prior to its discussion of the plaintiff's discrimination claim, the Kentucky Supreme Court considered the Court of Appeals' decision that had based its dismissal of the plaintiff's claims on the 1993 *Honaker* decision of the Kentucky Supreme Court.¹³⁹ The Kentucky Supreme Court in *Honaker* dismissed the plaintiff employee's claim for workers compensation benefits because, at least when "language that a successful passage of a pre-employment physical was a prerequisite to the beginning of an employment relationship," no such relationship was formed under the Kentucky workers' compensation statute when the plaintiff lied about his physical condition on his employment application and had his cousin take this pre-employment physical test.¹⁴⁰ The court in *Honaker* had concluded, based on Kentucky's workers compensation statute's reference to a "contract of hire," that to be covered by the statute "an employee must have a contract of hire, expressed or implied," and that contract must be "valid."¹⁴¹ Three years later in *Toyota Motor Manufacturing*, the same Kentucky Supreme Court observed that in *Honaker* it had dismissed the employee's claim because "no employer/employee relationship was formed because Honaker failed to perform a condition precedent to the contract formation; to wit: he failed to take and pass the preemployment physical."¹⁴²

The Kentucky Supreme Court in *Toyota Motor Manufacturing* did acknowledge that the plaintiff employee sought to distinguish *Honaker* on the ground that plaintiff Honaker's "misrepresentation regarding his prior medical history and the work-related injury were closely related (both involved Honaker's back)" while his wrist injury "had no apparent connection to the medical conditions omitted from the application," and moreover he "actually took and passed the required preemployment physical for Toyota."¹⁴³ This might have influenced the court in its decision to apply *McKennon* to plaintiff Epperson's discrimination claim. But the Kentucky Supreme Court in *Toyota Motor Manufacturing* also found it necessary to determine and state that the policy considerations underlying the state's workers compensation statute were less weighty than those behind the state's anti-discrimination statute, even though it recognized "the stated purpose of the [former] [is] that of affording financial protection to workers injured or killed in the course of employment."¹⁴⁴ The Kentucky Supreme Court declared, "[t]he concerns of the Workers' Compensation Act are far narrower

¹³⁹ See *Toyota Motor Mfg.*, 945 S.W.2d at 414–15 (discussing *Honaker* and the Court of Appeals' reliance on that decision).

¹⁴⁰ *Honaker v. Duro Bag Mfg. Co.*, 851 S.W.2d 481, 483–84 (Ky. 1993).

¹⁴¹ *Id.* at 483 (quoting and citing KY. REV. STAT. ANN. § 342.640(1) (West 2014)).

¹⁴² *Toyota Motor Mfg.*, 945 S.W.2d at 414 (citing *Honaker*, 851 S.W.2d at 483).

¹⁴³ *Id.* at 414–15.

¹⁴⁴ *Id.* at 415 (quoting *Layne v. Newberg*, 841 S.W.2d 181, 183 (Ky. 1992)).

than those of the Civil Rights Act, and its benefits are properly limited to those workers whose contracts of hire satisfy the formal requirements of contract law.”¹⁴⁵ The court did further explain:

The financial concern of the Workers’ Compensation Act, while important, pales beside the Civil Rights Act’s stated aim for all Kentuckians and others within the Act’s reach, to “protect their interest in personal dignity and freedom from humiliation, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest which would menace its democratic institutions, to preserve the public safety, health, and general welfare, and to further the interest, rights and privileges of individuals within the state[.]”¹⁴⁶

The court said nothing further about plaintiff Epperson’s workers compensation retaliation claim that was not actually an issue before it.

The Kentucky Supreme Court’s discussion of Mr. Epperson’s lawsuit was not its last word on how after-acquired evidence affected claims under Kentucky’s workers compensation statute. Two years later in *Clarion Manufacturing Corp. of America*,¹⁴⁷ the Kentucky Supreme Court reversed a Court of Appeals ruling barring the plaintiff employee from obtaining workers compensation benefits because she had misrepresented her education level on her employment application.¹⁴⁸ The Kentucky Supreme Court in this decision distinguished its *Honaker* decision on the ground that the plaintiff, unlike Mr. Honaker, had not misrepresented her physical condition.¹⁴⁹ The court declared, “We conclude that, regardless of its effect for other purposes, a verbal misrepresentation, standing alone, will not be viewed as preventing the formation of an employment contract for the purposes of [the Kentucky Workers’ Compensation coverage provision].”¹⁵⁰ If this reasoning were followed for employees pursuing claims they were terminated for seeking workers compensation benefits, then any Kentucky employees would not have their claims dismissed based on employer after-acquired evidence of misrepresentations not relating to physical condition, and perhaps could survive dismissal for after-acquired finding of employee misconduct as well.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* (citing KY. REV. STAT. ANN. § 344.020(1)(b) (LexisNexis 1994)).

¹⁴⁷ *Clarion Mfg. Corp. of Am. v. Justice*, 971 S.W.2d 288 (Ky. 1998).

¹⁴⁸ *See id.* at 288.

¹⁴⁹ *See id.* at 291.

¹⁵⁰ *See id.* at 290 (citing KY. REV. STAT. ANN. § 342.640(1) (West 2014)).

C. *Employment Contract Law*

Reviewing how state courts apply the after-acquired evidence defense in employment contract cases soon demonstrates that whether that defense is relevant, and how it is used when it is found to be, depends very much on what contract language and/or obligations the plaintiff terminated employee claims have been violated and what remedies that plaintiff is seeking.

For example, in *McDill v. Environamics Corp.*,¹⁵¹ the New Hampshire Supreme Court reviewed a jury's award of \$65,000 in damages on a plaintiff company controller's claim that his termination breached his employment contract that provided he could be fired only "for cause."¹⁵² The trial judge in that case had refused to admit testimony of the employer's owner offered to support that this owner would've fired the employee based on after-acquired evidence of misconduct.¹⁵³ The New Hampshire Supreme Court therefore considered whether after-acquired evidence of employee misconduct should "act as a complete bar to liability in a breach of contract action."¹⁵⁴ The court found it should based on "contract law principles" relied on by then-recent decisions of other states' highest courts in deciding that after-acquired evidence justified dismissal of a terminated employee's breach of contract claim.¹⁵⁵

With regard to after-acquired evidence of employee misconduct, the *McDill* court relied on the Arizona Supreme Court's 1998 ruling in *O'Day v. McDonnell Douglas Helicopter Co.*¹⁵⁶ to find that "prior misconduct of the employee excuses the employer's subsequent breach" and that such misconduct "is a defense to a breach of contract action for wages and benefits lost as a result of discharge if the employer can demonstrate that it would have fired the employee had it known of the misconduct."¹⁵⁷

Regarding a terminated employee's resume or application fraud, the New Hampshire Supreme Court in *McDill* invoked the Colorado Supreme Court's 1997 decision in *Crawford Rehabilitation Services v. Weissman*¹⁵⁸ for the rule that "contract principles dictate that an employer may be permitted to use after-acquired evidence as a complete bar if it can prove that the employee's wrongdoing, such as resume or application fraud,

151 See *McDill v. Environamics Corp.*, 757 A.2d 162 (N.H. 2000).

152 See *id.* at 163.

153 See *id.* at 165.

154 *Id.* at 166.

155 See *id.*

156 *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792 (Ariz. 1998).

157 *McDill*, 757 A.2d at 166 (quoting *O'Day*, 959 P.2d at 799).

158 *Crawford Rehab. Servs. v. Weissman*, 938 P.2d 540 (Colo. 1997).

‘undermined the very basis upon which [the employee] was hired.’”¹⁵⁹ The *McDill* court did not mention that both the *O’Day* and *Crawford* decisions involved claims of breach of *implied* contracts, and also that the Colorado Supreme Court in *Crawford* had relied on principles of equity as well as contract law.¹⁶⁰

Finally, and probably unsurprisingly, the *McDill* court found that these two prior state supreme court decisions, as well as the Kansas Supreme Court’s 1997 decision in *Gassmann*,¹⁶¹ had adopted for the after-acquired evidence defense’s application to contract claims a three-prong test similar to that in *McKennon*, although *McDill* and the decisions it cited relied on this standard to dismiss claims and not lessen remedies. This standard required the employer to show that:

- (1) The plaintiff was guilty of some misconduct of which the employer was unaware; (2) the misconduct would have justified discharge; and (3) if the employer had known of the misconduct, the employer would have discharged the plaintiff.¹⁶²

The New Hampshire Supreme Court remanded the case to the trial court with instructions to admit the after-acquired evidence and apply the rules on such evidence that Supreme Court (and to some extent the U.S. Supreme Court) had adopted.¹⁶³

In contrast with *McDill*, other state appellate court decisions have held, based on the language of the employment contract and other factors, that the employer’s after-acquired evidence of alleged employee wrongdoing did not prevent that employee from proving their termination breached their contract. For example, in the 2000 decision *Cherry v. American Technical Services*,¹⁶⁴ in which the plaintiff terminated employee characterized his breach of contract claim differently than did the employee in *McDill*, the Court of Appeals of Michigan rejected the employer’s argument that its after-acquired evidence defense warranted dismissal of the plaintiff employee’s breach of employment contract claim.

Mr. Cherry was a salesperson for his employer, which claimed that its discovery after his termination that he had committed resume fraud and had falsely described his prior work experience meant Mr. Cherry’s contract

¹⁵⁹ *McDill*, 757 A.2d at 166 (quoting *Crawford*, 938 P.2d at 549).

¹⁶⁰ See *infra* notes 185–205 (discussing these decisions).

¹⁶¹ *Gassmann v. Evangelical Lutheran Good Samaritan Soc’y, Inc.*, 933 P.2d 743 (Kan. 1997).

¹⁶² See *McDill*, 757 A.2d at 166 (quoting *Gassman*, 933 P.2d at 745).

¹⁶³ See *id.* at 167.

¹⁶⁴ *Cherry v. Am. Tech. Servs.*, No. 213888 & 217620, 2000 WL 33403005 (Mich. Ct. App. Nov. 3, 2000).

claim should be dismissed. Responding to this argument, the Court of Appeals explained that in its 1996 decision in *Horn v. Dep't of Corrections*, it had accepted a trial court's relying on the employer's after-acquired evidence defense to dismiss the plaintiff employee's claims for reinstatement and front pay but had reversed the trial court's denial of back pay. The court in *Cherry* described its prior decision in *Horn* as finding that while after-acquired evidence of employee misconduct would usually preclude reinstatement and front pay, back pay might still be permissible.

However, the *Cherry* court next noted that the plaintiff was not seeking back pay or what the court called "post-termination damages." Plaintiff *Cherry's* breach of contract claim instead sought compensation "for work he had already done." The Court of Appeals therefore concluded that the after-acquired evidence rule, because it limits damages accrued subsequent to the termination of an employee, did not apply in the case.

Three years after its decision in *Cherry*, the Michigan Court of Appeals again found after-acquired evidence irrelevant in an employee's breach of contract case in its 2003 *Gramer* decision.¹⁶⁵ The *Gramer* court upheld the trial court's grant of summary judgment on the plaintiff employee's claim of breach of a written employment contract limiting grounds for termination and providing for compensation if the employee was terminated.¹⁶⁶ The Michigan Court of Appeals specifically rejected the employer's argument that the same court's 1992 *Bradley* decision supported after-acquired evidence of employee misconduct as justifying dismissal of a breach of contract claim.¹⁶⁷

The court in *Gramer* distinguished its prior *Bradley* decision on the ground that "in that case, the employer had evidence of wrongful conduct when it initially terminated the plaintiffs' employment."¹⁶⁸ The *Gramer* decision added that *Bradley* "does not stand for the proposition that an employer may terminate a person's employment and then only later search for evidence that will support a determination that the termination was for cause."¹⁶⁹ The *Gramer* court actually relied on the employer's after-acquired evidence defense to reinforce its affirmation of the trial court's ruling for the employee, as the Court of Appeals stated, "if we accept defendant's argument that discovery was necessary in order to obtain after-acquired evidence of plaintiff's malfeasance, it logically follows that defendant did not have cause to terminate plaintiff when it did."¹⁷⁰

¹⁶⁵ *Gramer v. Malan Realty Invs., Inc.*, No. 237519, 2003 WL 21508505 (Mich. Ct. App. July 1, 2003).

¹⁶⁶ *See id.* at *1, *9.

¹⁶⁷ *See id.* at *7.

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

Such reasoning that after-acquired evidence can be deemed immaterial because, by definition, it could not have been considered by the employer when terminating an employee will be discussed in Part II of this article.¹⁷¹ In 2016 the highest court of Massachusetts—the Supreme Judicial Court—also found the employer’s after-acquired evidence irrelevant to the employee’s breach claim over his termination.¹⁷² When the employer originally terminated the employee Mr. Leness, its president/executive director said it was “without cause.”¹⁷³ Afterwards though the employer conducted a forensic examination of Mr. Leness’s work laptop computer and found that Mr. Leness had used it to copy proprietary information to an internet service he could access.¹⁷⁴ Based on this after-acquired evidence, which the employer asserted showed the employee violated non-disclosure provisions of the agreement,¹⁷⁵ the employer retroactively converted Mr. Leness’s termination to be “for cause” as the employment contract required.¹⁷⁶ The Supreme Judicial Court, applying a “material breach” standard to define “for cause,”¹⁷⁷ found that Mr. Leness’s violating the non-disclosure provisions “would not have supported a decision to terminate him for cause.”¹⁷⁸

Even when courts find after-acquired evidence to be relevant, that doesn’t mean the employer’s defense using such evidence prevails. That is illustrated by one of the first few post-*McKennon* employment contract/after-acquired evidence defense decisions by a state’s highest court. That was *Gassmann v. Evangelical Lutheran Good Samaritan Society, Inc.*,¹⁷⁹ in which, as referenced earlier,¹⁸⁰ the terminated employee’s claim was alleged breach of an “implied employment contract.” The Kansas Supreme Court in that case described the issue before it as “application of the after-acquired

171 See *infra* Part III.

172 *EventMonitor, Inc. v. Leness*, 44 N.E.3d 848, 851 (Mass. 2016).

173 See *id.* at 850–51.

174 See *id.* at 850.

175 The nondisclosure provision the employer claimed Mr. Leness violated required Mr. Leness to “hold in confidence and not knowingly disclose or, except within the scope of his employment, knowingly use any ‘Proprietary Information,’” defined in the same provision, and further provided that if and when he was terminated, he “was required ‘promptly [to] return to [employer] all items containing or embodying Proprietary Information (including all copies).” See *id.* at 850, 852.

176 See *id.* at 850–51.

177 See *id.* at 851, 853.

178 See *id.* at 855. The court found also that Mr. Leness’ copying the information did not amount to a “defalcation” of the employer’s assets, which would have violated another provision of the employment agreement, because Mr. Leness “did not misuse or deprive” his employer of the information. See *id.* at 856.

179 *Gassmann v. Evangelical Lutheran Good Samaritan Soc’y, Inc.*, 933 P.2d 743 (Kan. 1997).

180 See *McDill v. Environamics Corp.*, 757 A.2d 162, 166 (N.H. 2000) (quoting *O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 796 (Ariz. 1998)).

evidence doctrine to a wrongful discharge case involving breach of implied contract and not raising public policy concerns.”¹⁸¹

On that issue the court based its decision squarely on the U.S. Supreme Court’s *McKennon* decision. The court declared, “There is no reason why the after-acquired evidence doctrine should not apply if the three-prong test of *McKennon* can be satisfied.”¹⁸² Applying that test to the employer’s after-acquired evidence that plaintiff committed theft (in the form of affidavits from the administrator from the employee’s location and from one of her co-workers), the court found that the affidavits did not prove that the employee’s taking home the videotape of in-service training constituted theft.¹⁸³ The court therefore found that issues of fact remained on whether the employer could prove all aspects of the employer’s after-acquired evidence defense, including that the plaintiff employee’s bringing the videotape home was a ground for discharge and that the employer would have actually discharged the plaintiff if it had known of that action.¹⁸⁴

Three months later, in June 1997, the Colorado Supreme Court considered an employer’s after-acquired defense to a terminated employee claims of promissory estoppel and breach of an implied employment contract.¹⁸⁵ These employee claims were based on the employer’s failure to comply with termination procedures contained in an employment manual.¹⁸⁶ The employer defended against these claims with its after-termination discovery the employee had committed resume and application fraud.¹⁸⁷ Based on this evidence, the court applied the contract principle that “[a] party that has been fraudulently induced to enter into a contract may rescind the contract to restore the status quo.”¹⁸⁸ The court interpreted that principle as meaning that “an employer that has been fraudulently induced to hire an employee,” by that employee’s resume and/or application fraud, “may rescind the employment agreement.”¹⁸⁹ The court therefore concluded that the employer could rescind any contractual obligations implied by the employment contract.¹⁹⁰

181 *Gassmann*, 933 P.2d at 744.

182 *Id.* at 746.

183 *Id.* at 747–48.

184 *See id.*

185 *See Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 542 (Colo. 1997).

186 *See id.* at 543.

187 *See id.* at 542, 543–44, 550. The evidence of resume fraud, obtained at plaintiff Weismann’s depositions, was that “(1) she completely omitted one employer; (2) she misstated the nature of her employment with another employer; and (3) she lied about never having been discharged from a job.” *Id.* at 550.

188 *See id.* at 547 (quoting RESTATEMENT (SECOND) OF CONTS. § 164 (AM. L. INST. 1981)).

189 *See id.*

190 *See id.*

In *Crawford*, the Colorado Supreme Court also applied to Ms. Weissman the equitable principle that “[one] who seeks equity should do equity and come with clean hands.”¹⁹¹ The court found that because of her resume fraud Ms. Weissman’s hands were not clean. The court observed that one of Ms. Weissman’s claims was promissory estoppel, and mentioned in a parenthetical that “promissory estoppel is based upon principles of both contract law and equity,”¹⁹² thus implying Ms. Weissman’s unclean hands was a further reason to reject her promissory estoppel claim. The court further concluded that “resume fraud, even when discovered after termination, may serve as a defense to claims of wrongful discharge predicated on contract or equity.”¹⁹³ However, the court stated in a footnote that “[w]e limit our holding here to resume fraud and do not address whether after-acquired evidence of post-hire misconduct” would be accepted as a defense to an employee’s contractual claim against an employer.¹⁹⁴

By contrast, the Supreme Court of Arizona in *O’Day* based its rejection of an employee’s contractual claim on the employer’s after-acquired evidence of such post-hire misconduct.¹⁹⁵ And, of course, the court had to utilize a different contract principle to do so, from the Restatement (Second) Section 237: “it is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that *there be no uncured material failure by the other party* to render any such performance due at an earlier time.”¹⁹⁶ The most relevant Comment from Section 237 to the after-acquired defense is Comment C that explains “Ignorance immaterial.”¹⁹⁷ The *O’Day* court quoted Illustration 8 of that Comment, which the court referenced as “directly on point” because it applied the “immaterial ignorance” rule to an employment contract:

A and B make an employment contract. After the service has begun, A, the employee, commits a material breach of his duty to give efficient service that would justify B in discharging him. B is not aware of this but discharges A for

191 *See id.* at 548 (quoting *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951)).

192 *See id.* at 548 (citing *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983)).

193 *See id.* at 548.

194 *See id.* at 548 n.12.

195 *See O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 794–96 (Ariz. 1998). The misconduct was that plaintiff searched his supervisor’s office for “documents that he thought might be useful to his discrimination claim,” copied those he found to be useful, and then “returned the originals to the supervisor’s desk.” *See id.* at 793.

196 *See id.* at 795 (quoting RESTATEMENT (SECOND) OF CONTS. § 237 (AM. L. INST. 1981)) (emphasis added).

197 *See* RESTATEMENT (SECOND) OF CONTS. § 237 cmt. c (AM. L. INST. 1981).

an inadequate reason. A has no claim against B for discharging him.¹⁹⁸

The court later declared, “We adhere to the traditional contract approach” as described in Section 237, its Comment C and its Illustration 8.¹⁹⁹ As an example of such adherence, the court “emphasize[d] that the non-breaching party is discharged only from its *remaining* duties of performance.”²⁰⁰ Therefore, the court explained, in a unilateral employment contract of employer payment for performance of work “an employer would, in most cases, still be obligated to provide wages and benefits for services rendered up to the moment of termination.”²⁰¹ In addition, as an apparent application of the rule that only the employer’s “remaining duties,” after discovery of the after-acquired evidence, would be excused, the court adopted the rule for breach of contract cases that “[o]f course, if the employee can demonstrate that the employer knew of the misconduct and chose to ignore it, then he will defeat the employer’s attempted use of the after-acquired evidence and defense of legal excuse.”²⁰²

Like the Colorado Supreme Court in *Crawford*,²⁰³ the Arizona Supreme Court in *O’Day* also invoked principles of equity, but to maintain that modifying the cited contractual rules to protect employees was “absurd”²⁰⁴ and also unnecessary because, according to the court, “[i]n almost all imaginable circumstances, the doctrines of *quantum meruit* and unjust enrichment would prevent an employer from using past wrongdoing to recover wages already paid to an employee.”²⁰⁵

As the above discussion of the application of the after-acquired evidence defense makes clear, the wording of an express contract, and even an implied contract based on employer policies and handbooks/manuals, can impact whether the defense will preclude a claim or limit remedies. That should be unsurprising, but some state courts in decisions discussed in this subpart, like the New Hampshire Supreme Court in *McDill* and the Kansas Supreme Court in *Gassman*, have instead taken an essentially *per se*, anti-employee approach to the issue based apparently on nothing more than the Supreme Court’s *McKennon* decision. Those courts, like every court considering a breach of

¹⁹⁸ See *O’Day*, 959 P.2d at 795 (quoting RESTATEMENT (SECOND) OF CONTS. § 237 cmt. c, illus. 8 (AM. L. INST. 1981)).

¹⁹⁹ See *id.* at 796.

²⁰⁰ See *id.* (emphasis added) (citing RESTATEMENT (SECOND) OF CONTS. § 237 (AM. L. INST. 1981)).

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *supra* notes 158–160 and accompanying text.

²⁰⁴ See *O’Day*, 959 P.2d at 796.

²⁰⁵ See *id.*

employment contract claim, should recognize that every decision on how a contract should be applied should primarily consider the language of that contract. Courts should also fully and correctly apply the relevant contract law rules which, as discussed below in Subpart A, Section (3), a couple scholars in the past have pointed out courts have failed to do.

III. WHAT SHOULD STATES DO?

A. *Adopt What Some Other States Have Already Done*

Bearing in mind the late popular history author Barbara W. Tuchman's admonition that "[i]nertia in the scales of history weighs more heavily than change,"²⁰⁶ this section of the article will begin by recommending relatively modest modifications of the *McKennon* after-acquired evidence defense rules that have already been adopted in some states, and that are actually already identified in Part I, that courts and perhaps legislators should also consider. These modifications have been established not only in so-called blue states, but also red and purple ones as well, and so should be able to attract bipartisan support.

1. Tort Damages for Harassment Should Be Unaffected by After-acquired Evidence

With the #MeToo movement's consequences continuing to be felt, it seems appropriate to begin with claims for harassment. Most states allow employees to bring claims for harassment, some only for sexual harassment but most for harassment based on any characteristic protected by anti-discrimination statutes.²⁰⁷ All states that allow such harassment claims should follow the example of the New Jersey Supreme Court²⁰⁸ and the Michigan Court of Appeals²⁰⁹ and make clear that after-acquired evidence of a plaintiff employee's wrongdoing does not eliminate or reduce damages for illegal harassment, or any tort claims related to such harassment.

In 1999, one of the Michigan Courts of Appeals' rationales for treating harassment damages differently from such remedies as reinstatement and

²⁰⁶ BARBARA W. TUCHMAN, *A DISTANT MIRROR* 397 (1978). One hopes that the inertia regarding protection of workers will not be as extreme as that referenced by Ms. Tuchman, who used the phrase to describe the 400-year gap between the 1789 storming of the Bastille at the start of the French Revolution and the always-repressed worker and peasant rebellions during the "calamitous 14th century" that was the subject of her book.

²⁰⁷ See generally Alli, *supra* note 85; DEVINE, *supra* note 85.

²⁰⁸ See *Cicchetti v. Morris Cnty. Sheriff's Off.*, 947 A.2d 626 (N.J. 2008).

²⁰⁹ See *Grow v. W.A. Thomas Co.*, 601 N.W.2d 426 (Mich. Ct. App. 1999).

back or front pay was that for harassment claims “the injury is to one’s person” and is not based on plaintiff’s “status” as an employee subject to discharge.²¹⁰ The New Jersey Supreme Court in 2008 similarly reasoned that “a non-economic loss, such as emotional distress, if proven, relates to injuries that have no direct nexus to a plaintiff’s status as an employee.”²¹¹ Put another way, those who agree with the after-acquired evidence defense, as both those courts have done, maintain that an employee who has committed wrongdoing doesn’t deserve their job; but it is more difficult to insist that such an employee deserves to be harassed based on sex or another protected characteristic. Indeed, and especially when considering that in most jurisdictions harassment must be “severe and/or pervasive” to justify damages,²¹² and/or a state law tort has to be proven,²¹³ it would be manifestly unjust—as both the Michigan and New Jersey courts recognized—to deny a plaintiff damages based on application misrepresentation or some other previously unknown wrongdoing.

In discussing this injustice, the Michigan court in *Grow* also relied on the “continuing nature” of the emotional distress damages for harassment.²¹⁴ And both the Michigan and New Jersey courts relied on the possible unjust benefit to a plaintiff’s co-workers or employer or both if the after-acquired evidence defense precluded damages for harassment. In *Grow*, the Michigan court declared that the defendants, the plaintiff’s supervisor and her employer, should not be “free to cause [plaintiff] emotional harm by subjecting her to an otherwise illegal, hostile, work environment” even if she had not been fully truthful on her employment application.²¹⁵ And the New Jersey Supreme Court called it “abhorrent” to “excuse” an employer “who creates a hostile work environment” from having to pay “damages for personal injuries” because it later discovers previously unknown wrongdoing by the plaintiff employee.²¹⁶

The U.S. Supreme Court in *McKennon* did invoke “equitable considerations” as justifying the after-acquired defense rules it adopted in that decision.²¹⁷ As just discussed, the equities are very different, on both

²¹⁰ See *id.* at 434 (quoting *Baab v. AMR Servs., Corp.*, 811 F. Supp. 1246, 1262 (N.D. Ohio 1993)).

²¹¹ See *Cicchetti*, 947 A.2d at 641 (quoting *Taylor v. Int’l Maytex Tank Terminal Corp.*, 810 A.2d 1109, 1119–20 (N.J. Super. Ct. App. Div. 2002)).

²¹² See generally Diane M. Soubly, Chapter 1, *Workplace Harassment Law in the Wake of the #Me Too Movement*, in BUREAU OF NAT’L AFFAIRS, INC. WORKPLACE HARRASMENT L. (2021); see Devine, *supra* note 85, at 4–6, nn. 21–26.

²¹³ See Devine, *supra* note 85, at 13 nn.73–74.

²¹⁴ See *Grow*, 601 N.W.2d at 434.

²¹⁵ See *id.* at 434 n.6.

²¹⁶ See *Cicchetti*, 947 A.2d at 642.

²¹⁷ See *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 361–62 (1995).

sides, for harassment claims, and favor the employee over the harassers or any employer who permitted such harassment. That warrants the different approach that the *Grow* and *Cicchetti* decisions took to harassment damages, holding that after-acquired evidence should not limit recovery for harassment.

The New Jersey Supreme Court also rightly invoked “policy considerations” for this holding.²¹⁸ According to the bipartisan Select Task Force on the Study of Harassment in the Workplace, “[t]here is a compelling business case for stopping and preventing harassment.”²¹⁹ This task force’s report, issued prior to the #MeToo movement, pointed out that “[a]lmost fully one third of the approximately 90,000 charges” filed with the EEOC in fiscal year 2015 “included an allegation of workplace harassment.” And yet the report also stated that “[w]orkplace harassment too often goes unreported.” In a 2019 special report, the Atlanta Journal-Constitution explained how challenging it is for victims of sexual harassment to pursue any redress for the harms they suffered.²²⁰ Victims of this and other forms of harassment do not need after-acquired evidence as another challenge to overcome to receive some compensation for the emotional distress and in many cases even physical injury inflicted on them. With no contrary precedent from the U.S. Supreme Court or other state appellate courts, the choice that after-acquired evidence of plaintiff misconduct cannot reduce damages for harassment is clearly the reasonable one for any state interested in combating the harassment scourge.

2. Remedies “Compensatory “Loss of Earnings Capacity” as Alternative to Equitable”/Injunctive Reinstatement

In *McKennon*, the Supreme Court declared that in after-acquired evidence cases reinstatement is not an appropriate remedy because “[i]t would be both *inequitable* and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.”²²¹ Numerous state appellate courts have

²¹⁸ See *Cicchetti*, 947 A.2d at 641.

²¹⁹ See Chai R. Feldblum & Victoria A. Lipnic, *Report of Select Task Force on the Study of Harassment in the Workplace, Executive Summary* (June 2016), available at https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686300.

²²⁰ Johnny Edwards, *AJC Investigation Sexual Harassment Odds Stacked Against Victims*, ATLANTA J.-CONST., July 29, 2019, at A1.

²²¹ *McKennon*, 513 U.S. at 362. The Supreme Court at the same point in its decision applied the same reasoning to the remedy of front pay, *see id.*, but regarding front pay the Court was probably implicitly presaging its holding on the remedy of back pay, which the Court discussed next and held should be cut off on “the date the new information [the employer proves would’ve resulted in discharge] was discovered.” *See id.* Given that front pay is “simply money awarded for lost compensation during the

relied on that language to support their limiting of employees' remedies in after-acquired evidence cases.²²² Professor Sachin S. Pandya has forcefully responded that when statutory remedies are disallowed, the court should explain why "denying remedies otherwise due . . . promotes [the] public good to such an extent as to align with or trump the restorative aims of those remedies."²²³ Professor Pandya also more specifically argued that the authority of a court or agency to order reinstatement, expressly granted by Title VII and other employment protection laws, might be appropriately exercised at the time the court issues its order because of changed employer policies or other changed circumstances.²²⁴ While federal courts recognizing this would likely have to distinguish *McKennon*, state courts applying state laws would not even have to do that to order reinstatement.

Nonetheless, perhaps an alternate remedy should be considered for state courts (and legislatures) reluctant to order reinstatement in cases when an employer proves an after-acquired evidence defense, or in any case in which the plaintiff refuses or might not be best served by a reinstatement remedy. The latter types of cases are mentioned because studies have shown and other experts have recognized that by the time reinstatement is available, many employees do not want it, and among the employees who accept, many of them shortly afterwards leave that job anyway.²²⁵ Moreover and for many

period between judgment and reinstatement or in lieu of reinstatement," see *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001), and that an employer's successful defense would have to precede the final judgment, it would be impossible to award front pay in a case in which the employer prevailed based on after-acquired evidence. See *id.*

²²² See, e.g., *Brown v. Fayetteville State Univ.*, 837 S.E.2d 390, 395 (N.C. Ct. App. 2020);

Howard v. West Baton Rouge Parish Sch. Bd., 843 So. 2d 511, 514 (La. Ct. App. 2003);

Taylor v. Int'l Maytex Tank Terminal Corp., 810 A.2d 1109, 1116, 1118 (N.J. Super. Ct. App. Div. 2002);

Meads v. Best Oil Co., 725 N.W.2d 538, 542 (Minn. Ct. App. 2006); *Gassmann v. Evangelical Lutheran Good Samaritan Soc'y, Inc.*, 921 P.2d 224, 228 (Kan. Ct. App. 1996); *Wright v. Restaurant Concept Mgmt., Inc.*, 532 N.W.2d 889, 892 (Mich. Ct. App. 1995).

²²³ See Sachin S. Pandya, *Unpacking the Employee-Misconduct Defense*, 14 U. PA. J. BUS. L. 867, 893 (2012).

²²⁴ See *id.* at 893–85. See also *infra* at note 275 and accompanying text (discussing the possible relevance of state and local "ban the box" laws on after-acquired evidence defenses based on "application fraud").

²²⁵ See generally Rita Travedi, *What to Do When Reinstatement Falls Short of the Ideal: Considering Front Pay as an Alternate Legal Remedy under the National Labor Relations Act*, 22 EMPLOYEE RTS. & EMP. POL'Y J. 59 (2018); Bernard Walker & Robert T. Hamilton, *Employer-Employee Grievances: A Review*, 13 INT'L J. MGMT. REV. 40 (2011); Brent Garren, *When the Solution is the Problem: NLRB Remedies and Organizing Drives*, 51 LAB. LAW J. 76 (2000), 2000 WL 36692184; Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 28; see also RESTATEMENT OF EMP. L. § 9.06(b) ("Unless specifically authorized by law, courts will not reinstate employees to their lost employment"), §9.04 cmt. b (explaining rule of no specific performance, i.e. reinstatement, for breach of employment contract justified "to protect courts from the burden of enforcing and supervising the performance of affirmative duties in a continuing relationship already badly strained by the litigation and the dispute that led to it") (AM. L. INST. 2015); Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 520

reasons, the reinstatement remedy might be problematic for months and maybe years after the pandemic when it can again be safely and plausibly ordered.

As discussed earlier,²²⁶ the Arizona Supreme Court in *O'Day*, while agreeing with the Supreme Court that an employer's proven after-acquired evidence defense barred reinstatement (and front pay), also identified compensation for "decrease in earning capacity" as an alternate remedy not limited by the defense.²²⁷ The *O'Day* court defined that remedy as "an estimate of lost present ability to work in appropriate occupations, now and in the future."²²⁸ The Arizona Supreme Court specifically held that "after-acquired evidence does not affect other compensatory damages attributable to the employer's wrongful conduct, including any decrease in earning capacity, and punitive damages, if they are otherwise warranted by the evidence."²²⁹

As the *O'Day* decision's reference to "employer's wrongful conduct" indicates, the Arizona Supreme Court reasoned that the availability of the "decreased earning capacity" remedy followed from application of tort law.²³⁰ The court distinguished "front pay," an obviously similar remedy, as one that "arose from federal statutory employment discrimination law, and is a monetary substitute for the equitable remedy of reinstatement."²³¹ All of the *O'Day* court's discussion of these distinct remedies was in the decision's section on "*Tortious Wrongful Termination and After-Acquired Evidence*,"²³² appropriate because state wrongful discharge claims are universally recognized to be tort claims.²³³ This tort in most states protects employees from being terminated for exercising legal rights, fulfilling public obligations, and refusing to commit and/or reporting ("whistleblowing") illegal activity.²³⁴ A few states currently also allow the tort to be used for all

(2003) (noting that "[w]hile legally available, reinstatement ceases to be a practical option after months, or years, have elapsed since the employee was on the job.").

²²⁶ See *supra* notes 38–55 and accompanying text.

²²⁷ See *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 797–98 (Ariz. 1998).

²²⁸ See *id.* at 798.

²²⁹ *Id.* at 797.

²³⁰ See *id.* at 798 (distinguished "lost earnings" from "lost earning capacity," and held that while after-acquired evidence can limit the former, the same is not true of the latter: "employer's conduct may have damaged the employee in other ways, and thus the employee is still entitled to general damages for diminished earning capacity if supported by the evidence, even where he is not entitled to lost future earnings.").

²³¹ See *id.* at 798.

²³² See *id.* at 795–98 (emphasis added).

²³³ See generally RESTATEMENT OF EMP. L. § 5 (AM. L. INST. 2015).

²³⁴ See generally *id.* at § 5.02.

or some challenges to discharges alleged to violate state discrimination statutes.²³⁵

Where a wrongfully discharged employee is blocked from obtaining the remedies of reinstatement, full back pay, and front pay, as employees are now under federal discrimination law when the employer proves an after-acquired evidence defense, the “decreased earning capacity” tort remedy could be used to offset a substantial portion of the compensation owed to the plaintiff employee for the employer’s tortious act. This remedy, known by slightly different names that all reference future capacity to earn income, has been long established and widely recognized in state tort law.²³⁶ State courts in addition to Arizona’s, and perhaps also state legislatures, should act to make clear that this remedy is available to employees discharged in violation of, or inconsistently with, the state’s legal rules and policies.

3. Stronger Substantive Standards for Justifying Termination

This article discussed in its brief section on whistleblowing²³⁷ the Supreme Court of South Carolina’s admirable support, in its 1997 *Baber* decision, of that state’s whistleblowing statute by holding that because the employer’s after-acquired evidence of plaintiff employee’s misconduct was “relatively minor” the trial judge did not err in excluding that evidence from presentation to the jury.²³⁸ This statement that “minor” misconduct is not sufficient for the employer to prove its after-acquired evidence defense is consistent with the Supreme Court *McKennon* decision’s standard’s requirement that the employee’s “wrongdoing” be “sever[e].”²³⁹ Despite this consistency, federal and state courts have rarely discounted employer after-acquired evidence as “minor.” Probably more state courts, at every level, should consider how significant a plaintiff employee’s misconduct really was, perhaps in comparison with how long and how well an employee has performed service for that employer. Doing so would not disrespect employer prerogatives, because an employer’s litigation position should not be equated with what business or managerial judgment the employer would have applied to that employee’s tenure. Thus, when making rulings or preparing jury

²³⁵ See *id.* at § 5.01 cmt. e (discussing state courts’ split over whether to allow wrongful discharge claims for alleged violation of a “statute [that] does not expressly preclude a common-law wrongful-discharge claim.”).

²³⁶ See, e.g., RESTATEMENT (SECOND) OF TORTS § 906, § 906 cmt. b; see also *id.* at §§ 910, 913A, 924, 925A, and sources cited therein.

²³⁷ See *supra* at notes 103–111 and accompanying text.

²³⁸ See *Baber v. Greenville Cnty.*, 488 S.E.2d 314, 321 (S.C. 1997).

²³⁹ See *id.* at 320–21 (quoting *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 362–63 (1995)).

instructions on after-acquired evidence, state courts should more often consider whether terms like “minor” or “relatively” should be applied to that evidence.

In the State of Washington, an employer must sometimes prove an “overriding justification” for discharging the employee if the plaintiff employee has proven that their protected activity was a “significant factor” in the employer’s decision to discharge them.²⁴⁰ In its 2018 *Martin v. Gonzaga University* decision,²⁴¹ the Washington Supreme Court made clear that the four-element standard, including the “element” of overriding justification, “should not be applied to a claim that falls within one of the four categories of wrongful discharge” that are most widely recognized,²⁴² the four identified earlier in this article.²⁴³ The court explained that “[t]he overriding justification element entails balancing the public policies raised by the plaintiff against the employer’s interest.”²⁴⁴ In dicta in *Martin* the court also ruled that in those wrongful discharge cases in which the “overriding justification” test should be applied, any after-acquired evidence of the employer is irrelevant to that element and at that stage.²⁴⁵ The Washington Supreme Court explained this was because the *McKennon* after-acquired evidence rules “[do] not comport with the balancing posture of the overriding justification element.”²⁴⁶

Washington State’s “overriding justification” standard, although limited in application in that state as discussed in the preceding paragraph, is an intriguing option for application to the after-acquired evidence defense. As mentioned earlier, scholars have pointed out that the after-acquired evidence defense is an “extra” defense unrelated to the merits of the employee’s claim the employer “wrongfully” discharged them in violation of public policy and/or a statute.²⁴⁷ “Overriding justification” in Washington State operates as an “extra” defense for the employer also, and that state applies a balancing test that requires an employer’s “overriding” interest to outweigh the public policy impaired by the employee’s discharge. Extending that logic that the public interest should be balanced against the employer’s interest would also

²⁴⁰ See, e.g., *Ellis v. City of Seattle*, 13 P.3d 1065, 1070 & 1072 (Wash. 2000) (en banc); *Gardner v. Loomis Armored Inc.*, 913 P.2d 377 (Wash. 1996).

²⁴¹ See *Martin v. Gonzaga Univ.*, 425 P.3d 837 (Wash. 2018).

²⁴² See *id.* at 843 (first citing *Becker v. Cmty. Health Sys., Inc.*, 359 P.3d 746 (Wash. 2015); then citing *Rose v. Anderson Hay & Grain Co.*, 358 P.3d 1139 (Wash. 2015)).

²⁴³ See *supra* note 20 and accompanying text.

²⁴⁴ See *Martin*, 425 P.3d at 845.

²⁴⁵ See *id.* at 846.

²⁴⁶ See *id.*

²⁴⁷ See *supra* note 12.

make sense for the “extra” employer defense based on after-acquired evidence.

With regard to employee breach of contract claims against employers, this article earlier discussed state court decisions from Massachusetts and Michigan that rejected the after-acquired evidence defense because it involves reason(s) that the employer did not consider when terminating the contract. As was also discussed earlier, some other state court decisions relied on a couple of contract law rules to dismiss breach of contract claims based on the after-acquired evidence defense. For example, the Arizona Supreme Court in *O’Day* held that an employee’s breach of contract claim could be dismissed based on the contract law rule from Restatement (Second) of Contracts Section 237: “it is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured *material failure* by the other party to render any such performance due at an earlier time.”²⁴⁸ As a standard for applying this rule, the court suggested only the *McKennon* requirement that employer “demonstrate that it would have fired the employee had it known of the misconduct.”²⁴⁹ Other state courts, however, have adopted a high threshold for an employer to prove the employee’s alleged misconduct amounted to a “material failure” to perform contractual obligations. For example, the State of Maryland’s highest court, the Court of Appeals, reaffirmed in *Regal Savings Bank*²⁵⁰ that the reason for terminating an employee with a written employment “just cause” or “definite duration” contract must “[go] to the root of the matter or essence of the contract.”²⁵¹ Applying that standard, the Maryland Court of Appeals held that a consultant with a written contract with a bank might not be terminable for after-acquired evidence he allegedly had violated the bank’s overdraft policies when he was the bank’s managing officer.²⁵² Similarly, in the 2016 *Leness* decision discussed earlier,²⁵³ the Supreme Judicial Court applied the similar standard that the employee’s wrongdoing is material only when it involves “an essential and inducing feature of the contract.”²⁵⁴ That court applied that standard to overrule the trial judge’s finding that the employee’s copying “proprietary information” stored in a database, without disclosing that to his employer—facts similar to

248 See *O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 795 (Ariz. 1998) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 237 (AM. L. INST. 1981)) (emphasis added).

249 See *id.* at 799.

250 *Regal Sav. Bank, FSB v. Sachs*, 722 A.2d 377 (Md. 1999).

251 See *id.* at 381.

252 See *id.* at 382, 384.

253 See *supra* notes 172–178 and accompanying text.

254 See *EventMonitor, Inc. v. Leness*, 44 N.E.3d 848, 853 (Mass. 2016).

McKennon itself²⁵⁵ and also similar to the *O'Day* case decided by the Arizona Supreme Court²⁵⁶—was not a “material” breach of the employer-employee written agreement.²⁵⁷

Regarding states with less stringent standards for finding breach of employment contracts, Professor Sachin S. Pandya has correctly explained that the term “material” in Restatement (Second) section 237 is further defined in section 241 by identifying multiple “non-dispositive” circumstances that courts should consider in deciding if an employee’s performance failure was “material.”²⁵⁸ Professor Pandya further pointed out that none of these circumstances, nor any other tests commonly used in contract law, are part of the “employer would have fired” standard some state and federal courts apply when deciding employment contract cases based on the after-acquired evidence defense.²⁵⁹

This article earlier discussed²⁶⁰ the Colorado Supreme Court’s *Weissman* decision,²⁶¹ in which that court applied a principle of contract law stated in Restatement (Second) of Contracts section 164 as “[a] party that has been fraudulently induced to enter into a contract may rescind the contract to restore the status quo.”²⁶² Other federal and state courts have also relied on this principle to reduce remedies for or dismiss breach of employment contract claims by employees found after their terminations to have committed application or resume fraud.²⁶³ Professor Pandya has perceptively observed that this principle requires proof of “reliance” by the party to whom the fraudulent statement has been made, and possibly also restitution by that relying party.²⁶⁴ Additionally, both Professor Pandya and Mr. Joseph Spadola have described how these and other elements required to permit “rescission” or “voiding” of a contract are usually not acknowledged or applied to courts applying the after-acquired evidence defense to employment contract and other claims.²⁶⁵ As these scholars have argued, such “short cuts” should not be resorted to by state courts in after-acquired evidence cases.²⁶⁶

255 See *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 355 (1995).

256 See *O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 793 (Ariz. 1998).

257 See *Leness*, 44 N.E.3d at 853–54.

258 See Pandya, *supra* note 112, at 901.

259 See *id.* at 901–02.

260 See *supra* notes 186–195.

261 See *Crawford Rehab. Servs. v. Weissman*, 938 P.2d 540, 542 (Colo. 1997).

262 See *id.* at 547 (quoting RESTATEMENT (SECOND) OF CONTS. § 164 (AM. L. INST. 1981)).

263 See Humes, *supra* note 10, at § 3 and decisions discussed and cited therein.

264 See Pandya, *supra* note 112, at 902–06.

265 See *id.* at 902–906; Joseph Spadola, *An Ad Hoc Rationalization of Employer Wrongdoing: The Dangers of the After-Acquired Evidence Defense*, 102 CAL. L. REV. 691, 707–10 (2012).

266 In fairness to the Arizona Supreme Court it should be recognized that, as discussed earlier, that court did explain that an employee who had already performed work could be entitled to *quantum meruit*

Unfortunately, such short cuts are all too common when state courts consider employment contract cases.²⁶⁷ For example, one important principle of contract law is that modifications of contracts, to be binding on the other party, should be supported by acceptance and additional consideration.²⁶⁸ Nevertheless, multiple state courts have permitted employers, who obviously have a continuing obligation to pay employees for work performed, to unilaterally modify implied contracts with incumbent employees with disclaimers that make any employer promises unenforceable or with other negations of promises that are not supported by any additional consideration provided to employees than continued payment.²⁶⁹ Some courts have also required more to enforce oral promises of employment security than is required to enforce most oral contracts.²⁷⁰ Even if state court judges believe they are departing from contract law principles when disregarding after-acquired evidence, as Professor Pandya and Mr. Spadola have certainly placed in doubt, they could do so for pro-employee reasons as so many have already for pro-employer reasons.

B. *Recalibrate the McKennon “Balance” for the 21st Century*

The *McKennon* “balance” of which federal courts and some (but not all) state courts are so fond is outdated in the current decade. It’s now apparent that the U.S. Supreme Court was incorrect in believing that federal courts would protect against excess use and abuse of the “*McKennon* rules.” Based on this author’s search, there might have been more than 5,800 employment cases in which after-acquired evidence of employee wrongdoing was urged as the reason that the court should dismiss an employee’s claim or grant

compensation for all the work that they had already performed. *See supra* notes 196–206 and the discussion there of *O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792 (Ariz. 1998).

²⁶⁷ *See, e.g.*, *Asmus v. Pacific Bell*, 999 P.2d 71, 85–95 (2000) (George, C.J., dissenting) (discussing multiple contract law principles violated by court majority’s ruling that when the employer unilaterally terminated promises of employment security to employees already working there, the employees’ continued employment served as acceptance and consideration for the modified employment contracts).

²⁶⁸ *See generally* 3 WILLISTON CONTS. §§ 7:36–7:37 (discussing the Promise to perform or performance of preexisting obligation other than debt; contractual preexisting duty rule and the Promise to perform or performance of preexisting obligation other than debt; contractual preexisting duty rule—Exceptions to rule—Modification agreements under Restatement (Second) of Contracts).

²⁶⁹ *See, e.g.*, *Elliott v. Bd. of Trustees*, 655 A.2d 46, 51 (1995); *Sadler v. Basin Elec. Power Co-op.*, 431 N.W.2d 296, 300 (N.D. 1988); *Ryan v. Dan’s Food Stores, Inc.* 972 P.2d 395, 401 (Utah 1998); *see also* RESTATEMENT OF EMP. L. §§ 2.05, 2.06 (AM. L. INST. 2015) and cases and authorities discussed therein.

²⁷⁰ *See, e.g.*, *Spacesaver Sys., Inc. v. Adam*, 98 A.3d 264 (2014); *Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591, 598 (Mich. 1993).

summary judgment to the employer.²⁷¹ Professor Melissa Hart’s empirical study published in 2008 found that the after-acquired evidence defense caused considerable sifting of employment discrimination claims at early stages of litigation and leads many victims of discrimination to not advance far in pursuing their claims, much less winning them.²⁷²

As was stated at the outset of this article, these negative consequences arise from an “extra” defense, the evidence for which has no bearing on or connection with whether the employer acted illegally. Usually in a civil case when evidence is offered on an issue of no relevance to the claim presented or the wrongfulness of a defendant’s conduct, the admission of the evidence is denied as irrelevant and immaterial. Statutes can change that, and make other issues germane in a case, but the after-acquired evidence defense is not contained in most of the statutes to which it is applied.²⁷³

In addition, the after-acquired evidence defense is by definition about past wrongdoing by an employee, which seems misdirected in a time when more than a dozen states have enacted “ban the box” laws prohibiting private employers from asking applicants about criminal records, and 35 states and 150 municipalities have enacted such prohibitions on government employers and companies with public contracts.²⁷⁴ Especially in a time of growing disapproval of questions about past misconduct, a “balance” that equates an employer’s policies to seek such information with federal statutes banning invidious discrimination based on race, gender and other protected characteristics—an equation executed by the after-acquired evidence defense—is simply flawed public policy.

Obtaining after-acquired evidence could also be the only reason that the employer asks questions about, for example, past arrests or convictions. The reason that might well be true is that there are multiple free or low-cost databases of criminal records to which employers have access.²⁷⁵ Most

²⁷¹ WESTLAW search for term “after-acquired evidence” along with “employer,” “employee,” and “summary judgment” or “dismiss” conducted on March 25, 2021.

²⁷² See Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of “After-Acquired Evidence”*, 40 ARIZ. ST. L.J. 401 (2008).

²⁷³ Probably the most common exceptions are workers compensation statutes. In some states the definition of “employee” in the workers’ compensation statute makes relevant after-acquired evidence that the employee lied on an employment application. See Pandya, *supra* note 112, at 874–75, and in these and others there is language in the statute making relevant after-acquired evidence of the employee’s past (or current) physical condition or past injuries.

²⁷⁴ See Andrew M. Ballard, *North Carolina Eases Hiring for People With Criminal Records*, BLOOMBERG DAILY LAB. REP. (Aug. 18, 2020, 5:29 PM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/north-carolina-eases-hiring-for-people-with-criminal-records>.

²⁷⁵ See Kerry A. Thompson, *Countenancing Employment Discrimination: Facial Recognition in Background Checks*, 8 TEX. A&M L. REV. 63, 66 (2020) (discussing that employers already rely on consumer reporting agencies to search criminal and other public record databases, and some are further relying on such agencies to use facial recognition technologies to assist with matching individuals with

employers with large or even “medium” numbers of employees have long relied on these databases, and a substantial percentage of “small employers” do also.²⁷⁶ Consequently, virtually any employer who asks during the hiring process about any past criminal misconduct probably does not need to and might be asking to gather information (whether on advice of counsel or not) to use for a later after-acquired evidence defense. That could be true of employers of almost any size, because even small employers have free or low-cost access to criminal record databases.²⁷⁷ Therefore, trial courts should—no pun intended—police discovery to ensure that employers asking plaintiffs about criminal records are not employers who already knew those records, or could have, before they hired or fired the employee.

The availability of criminal record databases is one of the many ways in which employment, and applications and hiring in particular, has changed since *McKennon*. In addition to public records and proprietary databases, and more reporting agencies offering background check services to employers, the use of algorithms and other artificial technology is revolutionizing hiring of employees. Ninety-nine percent of Fortune 500 companies and countless number of other employers are now using such “Applicant Tracking Systems,” as those in the industry call them.²⁷⁸ With these recent developments one might have expected that after-acquired evidence defenses based on application fraud would begin to disappear, but that has not happened yet. In the past five years, there have still been nearly 350 public court decisions involving the defense.²⁷⁹

A major cause of this persistence is that the defense is raised against employees no matter how long they’ve worked for the employer, and/or how long ago the employee “wrongdoing” occurred. For example, in the 2020 North Carolina case *Brown v. Fayetteville University*,²⁸⁰ in which the

records); Eugene A. Frid, *Background Checks and Employment Discrimination: Distant Parallels Between U.S. and E.U. Privacy Regimes*, 40 HASTINGS INT’L & COMP. L. REV. 159, 167–169 (2017) (discussing problems with employer reliance on criminal record databases); Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 894–95 (2014).

²⁷⁶ See Paul-Emile, *supra* note 275, at 895.

²⁷⁷ To the extent there is concern about small employers losing the after-acquired evidence defense, it’s worth knowing that many employee protection statutes do not even cover the smallest employers because of “minimum number of employee” provisions.

²⁷⁸ See ReportsandData, *Applicant Tracking System Market* (Mar. 2022), available at <https://www.reportsanddata.com/report-detail/applicant-tracking-system-ats-market>. Legal scholars have already identified possible discrimination issues with these. See, e.g., Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017).

²⁷⁹ The number is based on the author’s WESTLAW search on March 27, 2021 for federal and state cases with the terms “employer,” “employee,” “after-acquired,” and “misrepresentation” or “fraud” near the terms “apply” or “application.”

²⁸⁰ See generally *Brown v. Fayetteville State Univ.*, 837 S.E.2d 390 (N.C. Ct. App. 2020).

employer successfully raised an after-acquired “application fraud” defense in a discrimination case, the plaintiff employee had applied and committed the fraud in 2001 and was not fired until 2017.²⁸¹ Similarly, in the *Cicchetti* case in New Jersey, the trial court granted the summary judgment motions of the employer and its agents based on the plaintiff’s not disclosing an expunged criminal conviction when he applied to the sheriff’s department.²⁸² The facts of the *Cicchetti* case demonstrate how pernicious an accepted after-acquired evidence defense can be.

The convictions for breaking and entering and stealing were twenty years old when plaintiff Cicchetti applied to the sheriff’s department, committed when he was twenty-one years old, and had been expunged four years before he applied. Plaintiff Cicchetti consulted a lawyer prior to applying to the department, and the lawyer told him the expungement meant the conviction never existed, which is why plaintiff Cicchetti did not disclose it. Officer Cicchetti continued to serve the sheriff’s department faithfully for the next six years, even as he was harassed because it was discovered he had Hepatitis C.²⁸³ On appeal, the New Jersey Supreme Court reserved on whether the after-after acquired evidence defense limited remedies largely because the department had no policy providing that it should or could discharge an officer for failing to disclose even a non-expunged conviction.²⁸⁴ However, even when that was true, a trial court had granted summary judgment for the defendants based on the employer’s after-acquired evidence, and even the New Jersey Supreme Court stated that if the employer “can bear its burden of proving that it would have terminated plaintiff as soon as it learned of this expunged conviction, then that date may be used to limit any back pay award and to eliminate any front pay award.” Sheriff Officer’s near-fate and actual fate serve as a prime example of what is wrong with the after-acquired evidence defense.

The *Brown* and *Cicchetti* decisions and many others like them indicate a possible way in which the after-acquired evidence defense should be recalibrated. When an employee has performed a job to their employer’s satisfaction for a significant period of time, as Officer Cicchetti apparently had, then back pay and front pay remedies should not be limited based on “application fraud” or long past undiscovered misconduct when the employee proves they were discharged illegally. In most cases an employer in that situation is not ridding itself of an employee who does not deserve their job, even though the employer (or its lawyer(s)) turned up after-acquired evidence to make that argument. An employer doing that is making a

²⁸¹ *See id.* at 392.

²⁸² *See generally* *Cicchetti v. Morris Cnty. Sheriff’s Off.*, 947 A.2d 626 (N.J. 2008).

²⁸³ *See id.* at 629–30.

²⁸⁴ *See id.* at 641.

litigation decision, not a business decision. There is no valid reason to so extensively defer to an employer in that situation as the *McKennon* rules on after-acquired evidence do. The New Jersey Supreme Court might even have implicitly recognized and applied that in *Cicchetti* because it stated that “we discern in the [New Jersey Law Against Discrimination] expression of public policies that requires us to strike a new balance between the rights of the employee to be free from workplace discrimination and the rights of the employer to make legitimate hiring and firing decisions.”²⁸⁵

The immediately preceding paragraph did not mention the reinstatement remedy, and that was for multiple reasons. First, as discussed earlier, a considerable percentage of wrongfully terminated employees don’t want the remedy by the time it is actually offered, and alternate remedies like front pay (which is advocated for expansion in the preceding paragraph) are available.²⁸⁶ Second, the alleged pointlessness of reinstatement has been treated by courts as the clinching argument for limiting remedies based on the after-acquired evidence—it was the final point in favor of the defense asserted by the U.S. Supreme Court in *McKennon*. The Court, plainly considering the issue from the perspective of a judge, declared that “[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.”²⁸⁷ Many courts adopting the *McKennon* rules have quoted that or similar language in justifying all or most of the limits on remedies of *McKennon*.²⁸⁸ The combination of this popular rationale for relying on after-acquired evidence with a plaintiff’s demand for a reinstatement remedy could prove fatal to many employee claims.

Third, even scholars who generally oppose the after-acquired evidence defense have accepted that exceptions for the reinstatement remedy will have to be made.²⁸⁹ In addition to the “egregious” misconduct that they’ve discussed, there are situations in which barring reinstatement based on after-acquired evidence is unavoidable. One set of cases involve an employer’s

285 See *id.* at 641–42.

286 See *supra* notes 224–34 and accompanying text.

287 *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 362 (1995).

288 See, e.g., *Zisumbo v. Ogden Reg’l Med. Ctr.*, 801 F.3d 1185, 1205 (10th Cir. 2015); *Sellers v. Mineta*, 358 F.3d 1058, 1061 (8th Cir. 2004); *Norrington v. Pace Indus. Castings, LLC*, 215 F. Supp. 3d 810, 817 (D. Minn. 2016); *Brown v. Fayetteville State Univ.*, 837 S.E.2d 390, 395 (N.C. Ct. App. 2020); *Riddle v. Wal-Mart Stores, Inc.*, 998 P.2d 114, 120 (Kan. Ct. App. 2000) (all directly quoting that language from *McKennon*); see also *O’Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 797 (Ariz. 1998) (“A contrary conclusion would lead to the absurd result that an employer would have to accept an employee and then discharge him.”).

289 See Spadola, *supra* note 265, at 725 (remedies can be limited for “egregious” misconduct like “sexual harassment and physical assault”); 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, 174 (1996).

after-acquired discovery that the employee, who might have made misrepresentations relevant to the matter when applying or at other times, cannot safely perform their job, even with a reasonable accommodation of an alleged disability.²⁹⁰ Another set involves after-acquired evidence disclosing information about an employee that revealed that the employee was disqualified from their job by a federal or state statute; these have been and should be considered on a case-by-case basis because the circumstances surrounding the claim and the “disqualifying” law can vary.²⁹¹ In sum, at least for lawyers who want to obtain at least some significant remedies for their employee clients, choosing to not seek reinstatement (except for employee clients who want or need it) might make sense in some jurisdictions for now and the near-future.

Another important calibration would be to protect employees who, following advice they receive from lawyers and even employers, seek to document the instances of harassment and mistreatment they endure and to gather available evidence to support that such conduct occurred.²⁹² The U.S. Court of Appeals for the Sixth Circuit provided some protection for such employees in *Jones v. Nissan North America, Inc.*²⁹³ when it held that an employer is not entitled to a “*McKennon* instruction limiting damages” where the employee’s alleged misconduct arose as a direct result of the discriminatory act.²⁹⁴ In *Jones*, the plaintiff, who was still technically an employee of the defendant because he was on medical leave,²⁹⁵ proved his employer had (tried to) discriminatorily discharge him in violation of the

²⁹⁰ See, e.g., *E.E.O.C. v. Rexnord Industries, LLC*, 966 F. Supp. 2d 829, 843–45 (E.D. Wis. 2013); *Finegan v. Cnty. of Los Angeles*, 109 Cal. Rptr. 2d 762, 770–71 (Ct. App. 2001).

²⁹¹ See, e.g., *Camp v. Jeffer, Mangels, Butler & Marmaro*, 41 Cal. Rptr. 2d 329, 338–40 (Ct. App. 1995) (applying after-acquired evidence to the discovery that the employee had been convicted of defrauding a federal bank when employer’s contract with the Resolution Trust Company (RTC) was subject to a government-imposed requirement that it must certify that none of its employees had been convicted of a felony). *But see Cedeno v. Montclair State Univ.*, 750 A.2d 73, 75–76 (N.J. 2000) (state Forfeiture Act justified dismissing the claim of a plaintiff University purchasing director who’d previously been convicted of bribery, but court added that a discrimination claim plaintiff might still prevail if “able to allege facts that would constitute aggravated harm or egregious discriminatory conduct sufficient to survive a motion for summary judgment”).

²⁹² See, e.g., *Portland General Electric Corporate Policy [implementing Oregon Workplace Fairness Act]* (Oct. 1, 2020), <https://assets.ctfassets.net/416ywc1laqmd/7mCddNr6D84Ue5rmVfykVS/2524722e8d1fecba547abfc094804b8d/workplace-fairness-act-policy.pdf>; Silvia Stanciu, *Racial Discrimination at Work: the Signs and Responses*, LAWYER MONTHLY, <https://www.lawyer-monthly.com/2018/11/racial-discrimination-at-work-the-signs-and-responses> (Apr. 8, 2020); William M. Julien, *Reporting Workplace Safety Issues and Employee Rights Violations*, L. OFF. OF WILLIAM M. JULIEN, P.A. (Dec. 19, 2017), <https://www.attorneyjulien.com/blog/2017/12/reporting-workplace-safety-issues-and-employee-rights-violations/>.

²⁹³ *Jones v. Nissan N. Am., Inc.*, 438 F. App’x 388 (6th Cir. 2011).

²⁹⁴ See *id.* at 407.

²⁹⁵ See *id.*

Americans with Disabilities Act,²⁹⁶ and the employer sought to limit plaintiff's remedies based on after-acquired evidence that the employee had violated employer policy by seeking other jobs while on leave.²⁹⁷ The Sixth Circuit denied that employer request, reasoning that the plaintiff would not have engaged in the alleged "misconduct" if his employer had not already "fired" him.²⁹⁸ The Sixth Circuit relied on the *McKenna* decision of the U.S. District Court for the Eastern District of Pennsylvania,²⁹⁹ in which that court held that the plaintiff's using marijuana because he was depressed after being fired from the Philadelphia police department was "sufficiently causally related to the [employer's] discrimination that it would be inequitable to cut off Carnation's back pay as a result. . . ."³⁰⁰

State courts should apply these and similar precedents, lest this principle be lost forever. And they should do so even though the after-acquired evidence in the seminal U.S. Supreme Court decision in *McKennon* was that the plaintiff employee, a secretary to the newspaper employer's comptroller, out of fear she was going to be fired "had copied several confidential documents bearing upon the company's financial condition" and also shared them with her husband.³⁰¹ Certainly there are many points on the spectrum between plaintiff *McKennon*'s use of confidential information to disclose financial information and an employee doing any number of things that violate employer policies but protect the employee against harassment or other illegal conduct or document that such conduct is going on.

When I first encountered the after-acquired evidence as a practicing lawyer, prior to *McKennon*, what I found most unjust about it was that employees were having their remedies limited based on information their employer would not have learned if the employee had not sued over possibly illegal firing or other mistreatment the employer had inflicted on them.

Multiple scholars have also highlighted this injustice inherent in the after-acquired evidence defense. Employers and their lawyers claim not to believe the following, but lawyers who represent employees know it: nearly every employee has violated an employer policy and/or was not fully forthcoming in their application for employment, and unless and until

²⁹⁶ See *id.* at 407–08.

²⁹⁷ See *id.* at 407.

²⁹⁸ See *id.*

²⁹⁹ *McKenna v. City of Philadelphia*, 636 F. Supp. 2d 446 (E.D. Pa. 2009).

³⁰⁰ See *id.* at 463–64. In doing so this court stated it was adhering to the "mandate of the U.S. Supreme Court *McKennon* decision to evaluate all the 'factual permutations and the equitable considerations they raise' in assessing the effect of after acquired evidence." See *id.* at 463 (quotes in original).

By the way, apologies to all readers for the similarities between the decision names of *McKenna* and *McKennon*.

³⁰¹ See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 355 (1995).

Amazon warehouse-style surveillance³⁰² becomes universal, the employer never discovers such “wrongdoing” of most of its employees. Or, as employee and union lawyer Thomas Geoghegan once put it, “We all deserve to be fired. At some point in our lives, we’ve all smashed the company’s truck.”³⁰³ Professor Pandya said this in a more academic way when he stated that the “[after-acquired evidence] defense thereby forces judges and juries to assume that the employer’s wrongful act did not substantially affect the odds of misconduct discovery in cases where evidence suggests that this assumption is implausible or false.”³⁰⁴ Mr. Spadola well-described the unfairness inherent in the after-acquired evidence defense:

[The *McKennon* rules] set up a . . . counterfactual framework that leaves plaintiffs demonstrably worse off because of their membership in a protected class. This results from giving employers the benefit of information that they would not have otherwise had. Not only will such a result fail to compensate victims of discrimination, it will also undermine the deterrence of discrimination in the workplace. To the extent that some percentage of all employees—and thus of all potential plaintiffs—will have something in their record that can serve as the basis for an after-acquired evidence defense, the overall price employers pay for discrimination will drop as a purely statistical matter.³⁰⁵

Thus, reasoning like the U.S. Court of Appeals for the First Circuit in *Johnson v. Spencer Press of Maine, Inc.*,³⁰⁶ holding that eliminating a plaintiff’s remedies based on after-acquired evidence makes that employee no worse off because they would have been fired otherwise, is unrealistic and probably mistaken.

State courts and/or legislators could also address this injustice by simply denying a limit on full back pay or other remedies when an employer seeks limits based on after-acquired evidence based on minor misconduct or long past application fraud. This would be less costly to employers than allowing

³⁰² See Press Release, Brian Schatz, U.S. Senator for Hawai‘i, Schatz Statement with other Senators to Amazon to Stop Suppressing Unions, Undermining Right to Organize (Oct. 15, 2020), <https://www.schatz.senate.gov/news/press-releases/schatz-senators-to-amazon-stop-suppressing-unions-undermining-right-to-organize>.

³⁰³ THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? 168 (1991).

³⁰⁴ Pandya, *supra* note 112, at 884–85.

³⁰⁵ See Spadola, *supra* note 265, at 717; see also Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 Conn. L. Rev. 145, 147 n.10 (1993) (defining rule as “evidence of an employee’s on-the-job misconduct or of an employee’s misrepresentation on his [or her] job application or resume that the employer unearths only after making an adverse employment decision regarding the employee”).

³⁰⁶ See generally *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368 (1st Cir. 2004).

employees to sue for retaliation when employers raise the after-acquired evidence defense, as some scholars have proposed.³⁰⁷

IV. CONCLUSION

As discussed throughout this article, the after-acquired evidence defense has been denying employees full recovery for the illegal conduct of their employers for more than thirty years and counting. Given that history, it's striking how many highest courts of major states have not yet taken a position on this issue. In the most populous state, California, its Supreme Court has done so only in a decision on the fraught and complicated issue of undocumented immigrants.³⁰⁸ And did so after the U.S. Supreme Court had decided not only *McKennon*, but after the Supreme Court had held that federal immigration law barred undocumented immigrants from most remedies under the National Labor Relations Act,³⁰⁹ which the California Supreme Court took into account.³¹⁰

In light of the many highly-publicized examples in recent years demonstrating that women and minorities are victims of discrimination and wrongful treatment, and that there are persons willing to engage in such wrongful conduct against them, the time has come for states' highest courts (and intermediate courts) to look for opportunities to revisit the after-acquired evidence defense. State lawmakers should recognize that the term "after" in after-acquired evidence refers not so much to "after discharge" (or after other adverse action) but "after" the employee's claim against the employer. Parts I and II of this article discussed many options that have been or could be chosen for addressing what should be done when an employer, after being sued by an employee, claims it has discovered a legitimate reason for discharging that employee.

One option that so far has been chosen by the state courts that have decided it, and that should be universally adopted, is that after-acquired evidence does not impact at all compensatory, and where appropriate even punitive, damages for unlawful harassment. That will ensure that discrimination and tort laws aimed at harassment will have their full compensatory and deterrent effects, which is so important as society seeks to end harassment in the workplace.

Employees protected by state whistleblowing statutes have also been spared from the effects of after-acquired evidence in most of the few state

307 See Pandya, *supra* note 112, at 919–25 (discussing such proposals and obstacles to them).

308 See generally *Salas v. Sierra Chem. Co.*, 372 P.3d 797 (Cal. 2014).

309 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002).

310 See *Salas*, 373 P.3d at 805–12.

appellate court decisions deciding that issue.³¹¹ State legislatures and Governors enacted such whistleblowing laws to protect the community and state residents, and to support adherence to the law, and regulators and courts should not dilute such protections by weakening the remedies for whistleblowers who expose activity that is unlawful and unsafe.

Of course all statutes and common law rules that authorize employees to sue for wrongful discharge or other wrongful acts by employers are important. However, it's also clear that many state courts are unwilling to completely ignore after-acquired evidence of employee application fraud or on-the-job misconduct. This Article has offered and recommended multiple options to ameliorate the excessively negative effects of after-acquired evidence, while not completely ignoring it, including: (1) adopt and apply more demanding substantive standards for an employer to prove the defense (e.g. the "overriding justification" standard sometimes used in Washington State³¹²) instead of deferring to the employer's assertion it would have fired the employee now suing it; (2) make available full back pay and also front pay for all plaintiff employees who worked for the employer for a significant period of time and the employer's proven after-acquired evidence defense is based on application fraud or misconduct that occurred some years ago; (3) in breach of employment contract cases fully consider and apply all state contract laws, and not just selective ones, when ruling on after-acquired evidence; (4) trial judges could ensure that an employer asking an employee about a past criminal record (when that is not illegal under state law) did not already have access to that record based on searching a criminal records database or obtaining a background check report; or (4) order compensatory "loss of earnings capacity" damages, or if more appropriate under state law the remedy of front pay, and desist only from ordering reinstatement in "limiting" remedies

State lawmakers have created legal rules to protect employees. The after-acquired evidence defense undermines those protections based on evidence and arguments that have no relation to the merits of claims of employees invoking those protections. What should be done about this disconnect is up to state judges and other lawmakers, but they should do something.

³¹¹ See *supra* notes 103–111 and accompanying text.

³¹² See *supra* notes 241–247 and accompanying text.