
REPLY

AFTER ACQUIRING AN AUDIENCE: A BRIEF REPLY TO THE JUNE 2001 CRITIQUE REGARDING AFTER-ACQUIRED EVIDENCE

GREGORY S. FISHER*

This Reply briefly answers a critique by Terry A. Venneberg of the author's previous article addressing the use of after-acquired evidence in employment cases in Alaska.

I was gratified to read the June 2001 critique¹ of my article analyzing the use of after-acquired evidence in employment cases in Alaska,² if only to confirm that someone, somewhere, actually read my article (other than my mother). I was perhaps more pleased that my analysis inspired others to publish. Good academic dialogue inspires, perhaps provokes, responses to which re-

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* Law Clerk, Honorable John W. Sedwick of the United States District Court for the District of Alaska; B.A., with honors, Binghamton University, 1988; J.D., University of Washington School of Law, 1991. The author will commence a term clerkship with the Honorable Barry G. Silverman, United States Court of Appeals for the Ninth Circuit in September 2002. The views expressed in this article, as well as any mistakes, are solely the author's and do not represent the views of any court or employer with whom the author has been associated.

1. Terry A. Venneberg, *After-Acquired Evidence in Employment Cases in Alaska: An Alternative Approach*, 18 ALASKA L. REV. 59 (2001).

2. Gregory S. Fisher, *A Brief Analysis of After-Acquired Evidence in Employment Cases: A Proposed Model for Alaska (and Points South)*, 17 ALASKA L. REV. 271 (2000).

plies are customarily granted. The editors of the *Alaska Law Review* have graciously permitted me this brief Reply to respond to the critique's analysis of after-acquired evidence.

The critique asserts that my analysis is inconsistent with Alaska law³ without offering any support for this surprising contention. The critique implies that the principles set out in *Brogdon v. City of Klawock*⁴ and *McKennon v. Nashville Banner Publishing Co.*⁵ answer all outstanding questions regarding the use of after-acquired evidence and that these cases "reflect the current state of the law in Alaska,"⁶ thereby leaving the reader with the impression that all relevant issues have been resolved. The critique announces that it will offer an approach to the use of after-acquired evidence in Alaska that negates the perceived deficiencies in my analysis.⁷ Unfortunately, the critique never supports its central thesis and fails to explain how my analysis is inconsistent with Alaska law or how the critique's recommendations represent an improvement.

Contrary to the critique's suggestion, the Alaska Supreme Court has not decided what effect, if any, after-acquired evidence will have in employment litigation. With regard to the use of after-acquired evidence, two questions are of primary importance: (1) what burden of proof should be placed on employers to establish the existence of after-acquired evidence; and (2) once established, what effect should after-acquired evidence have? That is, should after-acquired evidence bar suit or merely limit available remedies?⁸ There is no current state of the law in Alaska with respect to these issues. In *Brogdon v. City of Klawock*, the court offered tentative thoughts in dicta indicating how it might, or might not, resolve these issues.⁹ The *Brogdon* court suggested that it "might be appropriate to fashion a rule that no post-termination justification should serve to limit damages unless it is one which all reasonable employers would regard as mandating termination and which is, as a matter of law, just cause for termination."¹⁰ The court also opined that it might be appropriate to impose a heightened burden of proof upon employers seeking to rely on after-acquired evidence.¹¹ Since then, the court has not revisited any issue related to

3. Venneberg, *supra* note 1, at 60.

4. 930 P.2d 989 (Alaska 1997).

5. 513 U.S. 352 (1995).

6. Venneberg, *supra* note 1, at 60.

7. *Id.*

8. See Fisher, *supra* note 2, at 275-83 for further discussion.

9. *Brogdon*, 930 P.2d at 992.

10. *Id.*

11. *Id.*

after-acquired evidence. Thus, the critique inaccurately implies that all relevant issues have been resolved by *Brogdon*.

Identifying *Brogdon* as reflecting the current state of the law in Alaska seems somewhat puzzling insofar as the supreme court essentially acknowledged that its comments were dicta.¹² Of course, dicta may possess predictive value, and thus may foreshadow precedent.¹³ There is no reason, however, to accept dicta uncritically where—as I would argue with respect to the *Brogdon* court’s analysis—it arises in a factual and legal vacuum and conflicts with the developing weight of authority. The *Brogdon* court’s dicta arose in such a vacuum because the only issue confronted by the court was whether after-acquired evidence could be relied upon if it was evidence that would have been discovered had the termination not occurred.¹⁴ The court was never asked to consider what burden of proof should apply or what effect after-acquired evidence should have once introduced. The trial court ruled that after-acquired evidence could not be relied upon unless it was evidence that would have been discovered had the termination not occurred,¹⁵ and the supreme court reversed. No other issues pertaining to after-acquired evidence were properly before the court. Indeed, the court emphasized that “the question whether a new cause for termination merely serves to limit damages or eliminates entirely the right to damages is not presented.”¹⁶ The court additionally stressed that “[w]e rule at this time only that the limitation imposed by the trial court that evidence in support of new reasons for termination must be such as would have been discovered had termination not taken place was erroneous.”¹⁷ To read *Brogdon* as holding anything beyond the issue it confronted would be contrary to settled principles governing *stare decisis* and precedent.¹⁸

12. *Id.*

13. See Note, *Dictum Revisited*, 4 STAN. L. REV. 509, 512-13 (1952); see also Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (implying that dicta may be relevant by stating that the law includes the “prophecies of what courts will do in fact”).

14. *Brogdon*, 930 P.2d at 992.

15. *Id.*

16. *Id.*

17. *Id.*

18. Although courts and commentators often speak of “holdings,” surprisingly little attention is paid to what the Anglo-American legal community actually means when it discusses holdings, *stare decisis* and precedent. Chief Judge Singleton succinctly states the basic concept as follows:

The holding of the case is the application of the law to the specific facts before the court, while dicta involves expressions of opinion about the

The *Brogdon* court's dicta conflict with the developing weight of authority because, as discussed in greater detail in my article, a growing majority of courts now hold that after-acquired evidence bars suit in common law actions¹⁹ and may be established by a preponderance of evidence (not a heightened burden of proof).²⁰ Indeed, what I characterize as a growing majority has been described as an overwhelming majority, at least to the extent that after-acquired evidence operates to bar claims.²¹

Perhaps the most unsettling aspect of the *Brogdon* court's dicta is the extent to which it can be read to intrude upon private contractual relationships. By stating that after-acquired evidence should be limited to situations where "all reasonable employers would regard [the employee's misconduct] as mandating termination and which is, as a matter of law, just cause for termination,"²² the court suggested a rule that undermines the right of private employers and employees to define the terms and conditions of employment relationships. The full theoretical import of this rule has not been analyzed, but one wonders why it would not impair contractual obligations,²³ or operate to take property rights associated with contract powers vested in private parties.²⁴ Leaving these issues aside, it seems questionable to establish a rule increasing court supervision of employment matters in derogation of the courts' general reluctance to intrude upon employers' management discretion.²⁵ In light of these considerations, the *Brogdon* court's dicta should carry little persuasive weight. The critique's reliance on *Brogdon* is, I argue, therefore misguided.

way the law would be applied to facts not before the court. The Ninth Circuit does not consider itself bound by dicta in earlier cases.

United States v. Reed, 810 F. Supp. 1078, 1080 n.3 (D. Alaska 1992) (citations omitted).

19. See *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 795 (Ariz. 1998); *Crawford Rehab. Serv., Inc. v. Weissman*, 938 P.2d 540, 547-48 (Colo. 1997); *Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc.*, 933 P.2d 743, 745-46 (Kan. 1997); *Lewis v. Fisher Serv. Co.*, 495 S.E.2d 440, 444-45 (S.C. 1998); see also *Fisher*, *supra* note 2, at 272 n.2.

20. See *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761 (9th Cir. 1996); *Washington v. Lake County*, 969 F.2d 250, 255 (7th Cir. 1992); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 616 n.5 (4th Cir. 1984); *Preston v. Phelps Dodge Copper Prods. Co.*, 647 A.2d 364, 368-69 (Conn. 1994).

21. *O'Day*, 959 P.2d at 795.

22. *Brogdon*, 930 P.2d at 992.

23. U.S. CONST. art. I, § 10.

24. U.S. CONST. amend. XIV.

25. See, e.g., *Holland v. Union Oil Co. of Cal.*, 993 P.2d 1026, 1035-36 (Alaska 1999); *Bishop v. Municipality of Anchorage*, 899 P.2d 149, 153 (Alaska 1995).

The critique strays further afield by relying heavily on *McKennon* and *Brogdon* to provide answers for analyzing after-acquired evidence in common law employment actions.²⁶ It fails to study *McKennon*'s facts and holding and inexplicably ignores existing precedent concluding that *McKennon*'s holding has no place in common law employment actions.²⁷ *McKennon* analyzed after-acquired evidence in the context of civil rights claims.²⁸ The Court did not—indeed could not consistent with Article III powers—announce a general rule applying to all employment claims. Even in the context of civil rights claims, *McKennon* presented somewhat unusual facts: the employment relationship was undeniably established, and the employer conceded that it had impermissibly discriminated against the employee.²⁹ How many employers walk into court asking the judge to assume for purposes of a pending motion that a plaintiff-employee's civil rights were violated by unlawful discrimination? After-acquired evidence is often based on résumé or job application fraud, and therefore calls into question whether a valid employment relationship was ever established.³⁰ Moreover, employers do not often admit to discriminating impermissibly against an employee. Thus, the peculiar facts and circumstances that the Court faced in *McKennon* produced a rule that, in the specific context of remedial civil rights statutes, seems fair and fairly applied.

Even under the unique facts and special legal context of *McKennon*, the Court still did not announce a universal rule entitling plaintiffs to back pay damages in all cases. Instead, the Court emphasized that its model was a “beginning point” which could be modified by “extraordinary equitable circumstances that affect the legitimate interests of either party.”³¹ Outside the context of remedial civil rights statutes—or even in that context facing different

26. See Venneberg, *supra* note 1, at 64-66.

27. See, e.g., *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 795 (Ariz. 1998); *Crawford Rehab. Serv., Inc. v. Weissman*, 938 P.2d 540, 547-48 (Colo. 1997); *Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc.*, 933 P.2d 743, 745-46 (Kan. 1997); *Lewis v. Fisher Serv. Co.*, 495 S.E.2d at 444-45 (S.C. 1998).

28. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 354, 356 (1995) (analyzing after-acquired evidence in an age discrimination claim).

29. *Id.* at 359-60.

30. See William D. Fisher, *Employment Law: McKennon v. Nashville Banner Publishing Co. and After-Acquired Evidence—A Convincing Resolution to Employer/Employee Misconduct or an Incomplete Assessment of the Issue?*, 50 OKLA. L. REV. 135, 146 (1997) (citing and discussing studies and cases of pre-employment fraud). I should perhaps clarify that I am not related to Mr. Fisher.

31. *McKennon*, 513 U.S. at 362.

facts—*McKennon*'s holding is less persuasive.³² Indeed, persuasive arguments exist that *McKennon*'s rule is counter-productive.³³ Recognizing that *McKennon*'s holding was affected by its unique facts in the context of a remedial civil rights statute, most courts conclude that *McKennon*'s holding should not be extended to common law employment actions.³⁴

Thus, the critique adopts minority views without frankly conceding that point. The critique argues that courts should adopt *McKennon*'s rule for common law employment cases, declaring with no helpful analysis that “[t]he approach outlined in *McKennon* should be applied to all cases where the employer seeks to invoke the after-acquired evidence rule.”³⁵ The critique also recommends that courts adopt a “clear and convincing” burden of proof to govern admissibility of after-acquired evidence.³⁶ There is nothing inherently flawed in advocating minority positions. Indeed, some of the most important rules governing our society began as minority views. Furthermore, consistent with concepts related to federalism, one could argue that the law’s development is best served by dynamic state court activity testing the limits of legal principles, an exercise necessarily dependent upon some state courts adopting minority positions. However, to maintain academic integrity, such positions should be identified and explained. The critique implies that its reasoning accords with the majority view by failing frankly to acknowledge that it espouses minority views. By implying that *McKennon* is the seminal case on the use of after-acquired evidence,³⁷ it suggests that *McKennon*'s holding has equal analytical force and effect when applied to all employment cases.³⁸ It does not. By implying that its conclusions fit comfortably within the majority rule, the critique leaves the reader with a misleading and inaccurate picture of the law.

The critique also relies on the unsubstantiated premise that employers will abuse after-acquired evidence. In fact, it goes so far

32. W. Fisher, *supra* note 30, at 148-52.

33. See Jenny B. Wahl, *Protecting the Wolf in Sheep's Clothing: Perverse Consequences of the McKennon Rule*, 32 AKRON L. REV. 577, 596-602 (1999).

34. See, e.g., *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 795 (Ariz. 1998); *Crawford Rehab. Serv., Inc. v. Weissman*, 938 P.2d 540, 547-59 (Colo. 1997); *Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc.*, 933 P.2d 743, 745 (Kan. 1997); *Lewis v. Fisher Serv. Co.*, 495 S.E.2d at 444-45 (S.C. 1998); see also W. Fisher, *supra* note 30, at 148.

35. Venneberg, *supra* note 1, at 64-65.

36. *Id.* at 66-67.

37. See *id.* at 64-65.

38. See *id.* at 69.

as to suggest that it would be naive to conclude otherwise.³⁹ The problem with the critique's argument is that there is no evidence for this premise. Unsubstantiated premises offer questionable support. Unsubstantiated premises wielded by advocates are even more problematic. In this respect, the critique suffers from three flaws. First, the critique fails to account for the need to strike a delicate balance so as to protect both employees' and employers' interests. Second, the critique fails to explain why courts permit employers to rebut prima facie civil rights claims by *less* than a preponderance of evidence if, as assumed by the critique, employers routinely abuse employees' rights.⁴⁰ One would intuit a contrary rule if the critique's premise enjoyed a rational foundation. Third, the critique's premise opens a Pandora's Box of irrational assumptions that sweep away all pretense of reasoned analysis. One wonders why the critique stopped where it did. Indeed, why not dispense with any burden of proof, skip the trial, and jump straight to awarding the employee damages based on the premise that all employers wrongfully fire employees?

The "premise game" cuts both ways. Adopting the critique's reasoning would free courts to dismiss employees' claims based on the premise that employees materially misrepresent their qualifications on job applications, a premise that is at least supported by actual studies,⁴¹ unlike the critique's premise. When the Alaska Supreme Court confronts the issue of after-acquired evidence, it will adopt the rule of law that it believes is most consistent with reason, policy and precedent. Reason implies reasonableness. It may or may not be naive to reject the premise that all employers act with ill motives and will abuse after-acquired evidence, but I believe it is imprudent to accept the broad implications of that premise in the absence of any competent evidence or study supporting it.

Finally, like the point expressly stated in my article, the critique's assessment of after-acquired evidence of post-termination misconduct accords with the majority view.⁴² For reasons addressed in the article, however, I believe that evidence of post-termination misconduct should be relevant and admissible for damages and that courts should study this issue more carefully. For example, I do not believe that a child day care center should

39. *See id.* at 64.

40. Fisher, *supra* note 2, at 292.

41. W. Fisher, *supra* note 30, at 146 (discussing studies of pre-employment fraud).

42. Fisher, *supra* note 2, at 295 ("The few courts examining post-termination evidence of misconduct have held, under the particular circumstances presented, that such evidence should be excluded.").

have to reinstate an employee if it is discovered that, after the employee was terminated, he was convicted of trafficking in child pornography, or that a trucking firm should be required to reinstate a driver if it is discovered that, after the driver was terminated, she was convicted of multiple driving-related offenses. The critique adopts a contrary position based on its core premise that employers will abuse the rule. Because I do not find the critique's core premise especially helpful or persuasive, I am not able to reach the same conclusions. Ironically, my analysis is consistent with the *McKennon* Court's conclusion that its model was a "beginning point," which could be modified by "extraordinary equitable circumstances that affect the legitimate interests of either party."⁴³

One last observation is warranted. I do not believe we can fairly state that there is a "current state of the law" with respect to how after-acquired evidence is applied in employment cases. A careful reader will quickly realize that courts have adopted a variety of views that overlap in some respects and conflict in others. While it is possible to identify significant trends, it may not be possible or advisable to conclude that one model answers all problems or is air-tight in its analysis. Indeed, I frankly acknowledged in my article that my analysis "is not without its own flaws, and it does not address all of the implications of after-acquired evidence."⁴⁴ However, I maintain that my analysis "parallels existing Alaska law and thus offers uniform guidance with which the bench and bar are already familiar."⁴⁵ Until the Alaska Supreme Court provides us with more direct instruction, I do not believe we can or should presume to accomplish much more than that.

Knowing how much time and effort is involved in submitting an article for publication, I am honored that my article inspired a response. This Reply has attempted to clarify issues regarding after-acquired evidence in light of that response. I believe that my article and the critique competently survey the more significant issues. No brief study could do much more. If our collective efforts assist the Alaska Supreme Court, or any other court, in analyzing after-acquired evidence in employment cases, then we will have served the bench and bar. If not, we have at least provided our respective mothers with appropriate coffee table coasters.

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

44. Fisher, *supra* note 2, at 296.

45. *Id.*