ARTICLE

A BRIEF ANALYSIS OF AFTER-ACQUIRED EVIDENCE IN EMPLOYMENT CASES: A PROPOSED MODEL FOR ALASKA (AND POINTS SOUTH)

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This Article examines the role of after-acquired evidence in employment cases, and in which instances such evidence, found after an employer has already disciplined the employee, may bar suit or preclude some form of relief. The Article begins by defining and explaining the governing principles of after-acquired evidence, and continues by contextualizing and applying these principles in both employment discrimination and wrongful termination cases. This Article progresses by finding fault with the present treatment of after-acquired evidence, and continues by presenting its own comprehensive approach for how such evidence should be treated in employment law cases in Alaska. The author concludes by suggesting that the Alaska judicial system should attempt to develop a uniform method to deal appropriately with after-acquired evidence in employment cases.

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I. INTRODUCTION

What effect should after-acquired evidence have in employment litigation? No clear rules have emerged in Alaska. In cases alleging employment discrimination claims under federal law, it is now well established that after-acquired evidence limits damages but does not bar suit.[1] However, in cases not implicating unlawful discriminatory motive, state courts have not articulated consistent principles. The developing weight of authority holds that after-acquired evidence bars suit in ordinary wrongful termination cases,[2] but contrary authority does exist.[3] In addition, corollary questions remain unanswered. For example, courts do not agree on the applicable burden of proof. Some courts hold that employers may establish the existence of after-acquired evidence by a preponderance of the evidence.[4] Other courts require proof by clear and convincing evidence.[5] Still other courts are silent on the issue.[6] Courts also differ on whether an employer's decision to impose discipline based on after-acquired evidence should be governed by an objective "reasonable employer" standard or whether employ-

1. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361-62 (1995).

2. *See, e.g.*, O'Day v. McDonnell Douglas Helicopter Co., 959 P.2d 792, 795 (Ariz. 1998) [hereinafter "O'Day II"]; Lewis v. Fisher Serv. Co., 495 S.E.2d 440, 444-45 (S.C. 1998); Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc., 933 P.2d 743, 745-46 (Kan. 1997) [hereinafter "Gassman II"]; Crawford Rehabilitation Serv., Inc. v. Weissman, 938 P.2d 540, 547-48 (Colo. 1997).

3. *See, e.g.*, Mosley v. Truckstops Corp. of Am., 891 P.2d 577, 582-84 (Okla. 1993) (holding after-acquired evidence inadmissible in case alleging retaliatory discharge for filing workers' compensation claim); Flanigan v. Prudential Fed. Sav. & Loan Ass'n, 720 P.2d 257, 264 (Mont. 1986); *see also* Southern Med. Health Sys., Inc. v. Vaughn, 669 So. 2d 98, 100 (Ala. 1995) (by implication); 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, 719-21 (1995).

4. *See* O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 761 (9th Cir. 1996) [hereinafter "O'Day I"] (holding after-acquired evidence must establish by a preponderance of the evidence that employee's misconduct would have led to termination); *accord* 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).

5. *See Lewis*, 495 S.E.2d at 445 (holding that after-acquired evidence must prove by clear and convincing evidence that employee's wrongdoing was so severe as to justify termination had the employer known of the conduct at the time).

6. *See, e.g.*, *McKennon,* 513 U.S. at 361-62.

ers may rely upon their subjective discretion to interpret and apply their own work rules in imposing discipline.[7]

The Alaska Supreme Court has not addressed these issues. However, in *Brogdon v. City of Klawock*,[8] the court offered dicta suggesting that it may adopt a restrictive approach to the use of after-acquired evidence.[9] This stance would make it difficult for employers to invoke such evidence as a defense in employment litigation.[10] The court expressed concerns that employers might use after-acquired evidence to justify pretextual disciplinary decisions and stated its view that "[a]fter-the-fact justifications should be viewed with skepticism."[11] The court suggested, without holding, that it might be appropriate to require employers to establish the existence of after-acquired evidence by a heightened burden of proof, which would in effect be a clear and convincing standard, and it might restrict the use of after-acquired evidence only to instances where all reasonable employers would have imposed discipline in the first instance.[12] Three years have now elapsed since *Brogdon*, but the Alaska Supreme Court has not had the opportunity to revisit this issue during this time.

This Article examines after-acquired evidence in the context of Alaska law.[13] Part I and Part II briefly review the history of after-acquired evidence and outline its relevant principles in light of applicable case law and general policy concerns. Part III discusses problems with current analyses. This Article contends that courts have done little to define after-acquired evidence adequately and develop principles to apply it properly. As a result, courts often in-

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7. *See, e.g.*, *Crawford Rehabilitation Serv., Inc.*, 938 P.2d at 549 (holding after-acquired evidence is governed by a reasonable, objective employer standard). *But see O'Day I,* 79 F.3d at 761-62 (applying by implication a subjective standard by holding that employer's reliance on after-acquired evidence was established by unrebutted affidavit submitted by employer attesting it would have terminated O'Day had it discovered his misconduct); *accord* Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc., 921 P.2d 224, 233-34 (Kan. Ct. App. 1996) [hereinafter "Gassman I"] (establishing reliance on after-acquired evidence upon employer's proffer that it would have terminated Gassman had it known about her misconduct, thereby impliedly adopting a subjective standard), *aff'd and remanded*, *Gassman II*, 933 P.2d 743.

8. 930 P.2d 989 (Alaska 1997).

9. *See id*. at 992.

10. *See id*.

11. *Id.*

12. *See id.*

13. Although the focus is on Alaska law, the general principles may be applied in other jurisdictions subject to modifications necessary to reflect laws unique to each forum.

appropriately apply after-acquired evidence in employment cases. In the specific context of Alaska law, for example, this Article argues that the *Brogdon* court's dicta conflicts with existing legal principles, represents questionable policy, and needlessly fosters confusion in an already complicated area of law. Part IV of this Article offers a proposed model for analyzing and applying after-acquired evidence in Alaska.

This Article recommends that the Alaska Supreme Court decline to embrace the sweeping principles suggested by *Brogdon* when the court is next presented with the issue of after-acquired evidence. Instead, the court should analyze after-acquired evidence using existing contract and equity principles. In cases alleging ordinary wrongful termination claims under state law, this Article suggests that Alaska adopt the majority rule that after-acquired evidence bars suit. Where employees allege employment discrimination claims under state law, this Article concludes that a test patterned after the approach taken in federal discrimination cases should be used with a slight modification. In such cases, after-acquired evidence should limit available damages to a period between the date of wrongful discipline and the date when the employee committed the misconduct. In all cases, an employer should be required to establish by a preponderance of evidence that it reasonably believed the alleged misconduct was committed and that it would have imposed discipline had it discovered the misconduct at an earlier time.[14] By applying existing principles, Alaska courts will be able to develop a consistent and coherent body of law that protects the rights and interests of all concerned.

II. AFTER-ACQUIRED EVIDENCE

A. Definition and Governing Principles

After-acquired evidence is evidence independent of employee misconduct that the employer discovers after it has already disciplined the employee on different grounds.[15] For example, if an em-

14. An employer's decision adversely affecting terms and conditions of employment may encompass a wide range of actions including termination, demotion, salary reduction, job re-classification, transfer, and other actions. For simplicity's sake, this article refers to all such adverse decisions as "discipline" unless the specific context requires otherwise.

15. *See, e.g.*, Camp v. Jeffer, Mangels, Butler & Marmaro, 41 Cal. Rptr. 2d 329, 335 (Cal. Ct. App. 1995); *Gassman I*, 921 P.2d 226 ("The after-acquired evidence doctrine in its purest form allows an employer to be relieved of liability in a wrongful discharge lawsuit where it discovered, normally during litigation, that the employee was guilty of pre-discharge misconduct sufficient for termination that

ployer has sanctioned a worker for stealing company property and then subsequently discovered that the employee had lied on her employment application, evidence of the falsified employment application would constitute after-acquired evidence and would be independent grounds justifying discipline.

The after-acquired evidence doctrine finds its source in the common law of contract and equity.[16] Under general contract principles, breach of a contract is not actionable if a legal basis existed for excusing performance, even if the breaching party was unaware of that legal excuse.[17] In equity, the doctrine of unclean hands may bar a party from relief if that party has engaged in fraudulent, deceitful, or unfair conduct.[18] Implicit in the application of after-acquired evidence is the premise that an employee who has committed wrongdoing that would have led to her discipline if the employer discovered the misconduct cannot complain if the employer imposes discipline for some other reason.[19]

After-acquired evidence generally falls into two broad categories.[20] First, after-acquired evidence often arises when an employer discovers that an employee has made fraudulent misrepresentations in a job application or résumé submitted to the employer.[21] Second, after-acquired evidence sometimes involves pre-discipline misconduct that the employer did not discover until after the employee filed suit.[22] An additional category, post-discipline misconduct, logically fits within the concept of after-acquired evidence but has not found favor with the few courts that have addressed it.[23] It is possible to further classify after-acquired evidence by reference to whether the alleged misconduct is related to a violation of ordi-

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the employer was unaware of and was not relying upon for discharge.") (*citing* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988)); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362 (1995).

16. *See O'Day II*, 959 P.2d at 795-96 (emphasizing contractual nature of after-acquired evidence); *Gassman I*, 921 P.2d at 230 (noting that three theories support application of after-acquired evidence: legal excuse, unclean hands, and fraud).

17. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 237 cmt. c, illus. 8; 225 cmt. e; 385 cmt. a (1979).

18. *See Gassman I*, 921 P.2d at 230-31.

19. *See id.* at 226.

20. *See Camp*, 41 Cal. Rptr. 2d at 335.

21. *See* Crawford Rehabilitation Services, Inc. v. Weissman, 938 P.2d 540, 549 (Colo. 1997).

22. *See* Lewis v. Fisher Serv. Co., 495 S.E.2d 440, 441-42 (S.C. 1998).

23. *See, e.g.,* Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 627-29 (N.D. Iowa 1995).

nary work rules or pre-litigation activity.[24] A number of after-acquired evidence cases involve pre-litigation efforts by employees to gather evidence against their employers.[25] Other cases involve more typical violations of work rules that the employer did not discover until after suit was filed.[26]

In many cases, after-acquired evidence has little significance. Once an employer makes an adverse employment decision, the fact that a disciplined employee also engaged in other misconduct is not usually important. However, after-acquired evidence can become significant if the disciplined employee challenges the employer's decision. If the after-acquired evidence constitutes misconduct for which the employer would have also disciplined the employee, the after-acquired evidence may affect liability and damages.

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24. It would, of course, be possible for résumé or job application fraud to implicate pre-litigation efforts where individuals submitted materially false and misleading job applications. However, no known decision addresses such a situation, and issues pertaining to labor law and labor management are beyond the scope of this Article.

25. *See, e.g.*, McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 355 (1995) (finding plaintiff copied confidential financial documents in the year preceding her termination because she was afraid she was about to be fired because of her age); *O'Day I*, 79 F.3d at 758 (finding plaintiff rifled through supervisor's desk after being denied promotion, and discovered and stole confidential documents pertaining to the promotion decision and other sensitive personnel matters); Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 674-83 (S.D.N.Y. 1995) (refusing to limit plaintiff's recovery through use of after-acquired evidence where, in post-termination case, plaintiff was afforded office space to assist her re-employment efforts, and she discovered and copied her personnel file); *Lewis*, 495 S.E.2d at 441-42 (holding plaintiff surreptitiously taped management personnel).

26. *See, e.g.*, Preston v. Phelps Dodge Copper Prods. Co., 647 A.2d 364, 366 (Conn. 1994) (finding that employer discovered that approximately ten months before plaintiff was terminated, plaintiff placed poison ivy on toilet seat of restroom used by managers "because of his frustration and anger with his employer"); Walters v. United States Gypsum Co., 537 N.W.2d 708, 709 (Iowa 1995) (finding that employer discovered that plaintiff-employee who worked as heavy machinery operator had come to work on prior occasions under the influence of beer or marijuana); Schuessler v. Benchmark Mktg. and Consulting, Inc., 500 N.W.2d 529, 539-40 (Neb. 1993) (recognizing that an undiscovered incident of sexual harassment could, in theory, bar suit as after-acquired evidence, but remanding for determination as to whether harassment occurred).

B. After-Acquired Evidence in Employment Discrimination Claims under Federal Law

Prior to the United States Supreme Court's 1995 decision in *McKennon v. Nashville Banner Publishing Co.*,[27] federal courts adopted two dominant views as to the use of after-acquired evidence in employment discrimination claims. Under one approach, articulated by the Tenth Circuit in *Summers v. State Farm Mutual Automobile Insurance Co.*,[28] after-acquired evidence barred all claims by employees.[29] An alternate holding, advanced by the Eleventh Circuit in *Wallace v. Dunn Construction Co.*,[30] stated that, in the context of federal discrimination claims, after-acquired evidence could limit damages but not bar suit.[31]

In *McKennon*, the Court resolved this circuit split by upholding the Eleventh Circuit and holding that after-acquired evidence did not constitute a complete bar to an age discrimination claim.[32] The Court concluded that such evidence could limit an employee's remedy to back-pay between the date of unlawful discharge and the date when the after-acquired evidence was discovered.[33] However, the Court characterized this model as the "beginning point," which could be modified by "taking into . . . account extraordinary equitable circumstances that affect the legitimate interests of either party."[34] The Court reasoned that both the public interest in eradicating discrimination and the remedial nature of statutes prohibiting such discrimination would be frustrated by adopting a rule precluding all relief. But the Court additionally noted that, "as a general rule," prospective relief such as reinstatement or front-pay would be inappropriate.[35]

The *McKennon* Court distinguished after-acquired evidence from its line of mixed motive cases which, before enactment of the Civil Rights Act of 1991, held that if an employer possessed two motives, one legitimate and one not, the legitimate motive sufficed to bar suit.[36] The Court noted that mixed motive cases presented

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27. 513 U.S. 352 (1995).

28. 864 F.2d 700 (10th Cir. 1988).

29. *See id.* at 708.

30. 968 F.2d 1174 (11th Cir. 1992), *reh'g granted, opinion vacated*, 32 F.3d 1489 (11th Cir. 1994), *and decision en banc*, 62 F.3d 374 (11th Cir. 1995).

31. *See id.* at 1180-81.

32. *See McKennon*, 513 U.S. at 358.

33. *See id.* at 362.

34. *Id.*

35. *Id.* at 361-62.

36. *See id.* at 359-61 (discussing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (plurality

situations where the employer possessed both motives at the time the disciplinary decision was made and actually relied upon both motives.[37] In contrast, the "express assumption" before the holding in *McKennon* was that the employer only had one unlawfully discriminatory motive, which was "the sole basis for the firing."[38] The Court perceived this distinction as being critical within the context of unlawful discrimination.[39]

The Court's holding was underpinned by four important interrelated considerations. First, *McKennon* involved pre-termination misconduct, not résumé or job application fraud. The case therefore presented circumstances where the employment relationship was established undeniably before the alleged misconduct occurred. Second, *McKennon* presented a situation where the employer conceded that it had discriminated unlawfully against the plaintiff. There was, accordingly, no question but that the employer had, in fact, violated the law in its initial disciplinary decision. Third, *McKennon* arose in the context of a remedial federal statute enacted to combat impermissible discrimination, giving the case important public policy implications. Fourth, although the Court held that after-acquired evidence could not constitute an absolute bar to all relief, it did not hold that relief must be awarded. Instead, as noted earlier, the Court emphasized that its model for determining damages was a "beginning point" which could be modified by "extraordinary equitable circumstances that affect the legitimate interests of either party."[40] Although *McKennon* has not been adopted expressly by the Alaska Supreme Court in the context of state anti-discrimination laws, it may be assumed that the Alaska court will adopt the same or a similar form of the *McKennon* rule when the issue is raised.[41]

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opinion), 260-61 (White, J., concurring), 261 (O'Connor, J., concurring) (1989). *See also* Section 107 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075 (reversing that aspect of *Price Waterhouse* that barred relief in mixed motive cases). A more comprehensive review of mixed motive cases and the Civil Rights Act of 1991 is beyond the scope of this article.

37. *See McKennon*, 513 U.S. at 359.

38. *Id.*

39. *See id.* at 359-60.

40. *Id.* at 362.

41. The Alaska Supreme Court has consistently explained that, although state law prohibiting employment discrimination affords individuals somewhat greater protection than Title VII, state law should be interpreted and applied in a manner generally consistent with federal law. *See, e.g.*, French v. Jadon, Inc., 911 P.2d 20, 28 n.8 (Alaska 1996); Wondzell v. Alaska Wood Prods., Inc., 601 P.2d 584, 585 (Alaska 1979).

C. After-Acquired Evidence in Wrongful Termination Claims

The *McKennon* Court's analysis was driven principally by the Court's concern that laws prohibiting impermissible discrimination should be broadly interpreted to achieve their remedial goals and further the public interest. The Court understandably was reluctant to permit employers who acted with an impermissibly discriminatory motive to shield themselves from liability by relying on some lesser-form of wrongdoing committed by the employee. However, in ordinary employment disputes, no such special concerns exist. Instead, employers' decisions to discipline an employee usually implicate nothing more than the contractual terms and conditions of employment. No overriding public interest is involved, and no remedial statutes govern such routine employment decisions. With this distinction in mind, the majority of courts hold that after-acquired evidence bars suit in ordinary wrongful termination cases.[42]

For example, in *Gassman v. Evangelical Lutheran Good Samaritan Society, Inc.*,[43] the Kansas Court of Appeals held that after-acquired evidence constituted a complete bar to suit in wrongful discharge cases not implicating public policy or discriminatory motive.[44] The court reviewed existing contract and equity principles, and reasoned that ordinary employment disputes did not implicate any of the special concerns of anti-discrimination statutes that animated the *McKennon* Court.[45] Although the Kansas court determined that *McKennon* should not govern ordinary contract cases, it nevertheless found *McKennon*'s approach to after-acquired evidence instructive. The court construed *McKennon* as setting out a three-part test for determining whether after-acquired evidence should be admissible: (1) the employee must have committed misconduct of which the employer was unaware; (2) the misconduct would have justified discharge; and (3) the employer would have discharged the employee had it known of the misconduct.[46] The court concluded that this was an appropriate test that, if satisfied,

42. *See, e.g.*, O'Day II, 959 P.2d 792, 795 (Ariz. 1998); Lewis v. Fisher Serv. Co., 495 S.E.2d 440, 444-45 (S.C. 1998); Crawford Rehabilitation Servs., Inc. v. Weissman, 938 P.2d 540, 548-49 (Colo. 1997); Camp v. Jeffer, Mangels, Butler & Marmaro, 41 Cal. Rptr. 2d 329, 337-40 (Cal. Ct. App. 1995); *see also* Kerns, Inc. v. Wella Corp., 114 F.3d 566, 570 (6th Cir. 1997) (applying New York law and holding that *McKennon* is inapplicable in governing after-acquired evidence in an ordinary contract dispute).

43. 921 P.2d 224 (Kan. Ct. App. 1996).

44. *See id.* at 232.

45. *See id.*

46. *See id.*

should bar suit in ordinary employment contract disputes.[47] On appeal, the Kansas Supreme Court affirmed.[48] The court accepted the court of appeals' reasoning that ordinary contract claims were not imbued with any special concerns and hence not governed by *McKennon*. The "overwhelming majority" of courts have reached similar results.[49]

However, courts do not always apply the same standards and analysis. By way of illustration, in *Lewis v. Fisher Service Co.*,[50] the South Carolina Supreme Court agreed that after-acquired evidence barred all relief in ordinary wrongful termination cases.[51] Yet, the court expressed concern that "less-than-principled" employers might scour an employee's file to find evidence of misconduct to avoid liability.[52] The court therefore established two prerequisites to govern admissibility of after-acquired evidence.[53] First, after-acquired evidence would be admissible only if it was "significant" in the sense that it would have resulted in the employee's termination.[54] Second, the court specified that such evidence would have to be established by clear and convincing evidence.[55] Other than generally linking the "significance" of a decision to its end result, the court offered no guidance for determining when after-acquired evidence should be considered "significant," and left unanswered whether an objective or subjective standard or both should govern in examining the employer's motives.

In *Crawford Rehabilitation Services, Inc. v. Weissman*,[56] the Colorado Supreme Court determined that after-acquired evidence should be governed by a "reasonable, objective employer" standard, and would bar an employee's claims only if the evidence was material and, in the specific context of résumé fraud, "undermined the very basis upon which [the employee] was hired."[57] Conversely, in *Gassman,* the Kansas Court of Appeals by implication adopted a subjective standard based on the employer's proffer that it would have terminated Gassman had it known of her misconduct.[58] The

47. *See id.*
48. *See* Gassman II, 933 P.2d 743, 745 (Kan. 1997).
49. *O'Day II*, 959 P.2d at 795 (discussing principles and citing authority).
50. 495 S.E.2d 440 (S.C. 1998).
51. *See id.* at 444-45.
52. *Id.*
53. *See id.*
54. *See id.*
55. *See id.*
56. 938 P.2d 540 (Colo. 1997).
57. *Id.* at 549.
58. *See* Gassman I, 921 P.2d 224, 233 (Kan. Ct. App. 1996).

Kansas Supreme Court by implication affirmed the same standard.[59] In *Camp v. Jeffer, Mangels, Butler, & Marmaro*,[60] the California Court of Appeal analyzed the use of after-acquired evidence as an outgrowth of the doctrine of unclean hands.[61] This analysis led the court to adopt a subjective standard emphasizing "the [specific] subject matter [of the after-acquired evidence] involved and . . . the equitable relations between the litigants."[62] Neither *Gassman*, *Weissman*, nor *Camp* discusses the quantum of proof necessary to prove after-acquired evidence.

However, notwithstanding the developing weight of authority, some courts have implied that no uniform rule can be declared, thereby leaving the possibility open that different rules would develop depending upon the specific nature of claims and the after-acquired evidence involved. For example, in *O'Day v. McDonnell Douglas Helicopter Co.*,[63] the Arizona Supreme Court held that after-acquired evidence bars an employee's common law breach of contract claim, but only limits the available remedies for the employee's separate, tortious, wrongful termination claim.[64] In *Camp*, the court held that résumé fraud barred a claim alleging that the termination violated public policy because the particular fraudulent misrepresentation, failing to disclose prior felony convictions on their job applications, concerned eligibility requirements imposed by the federal government.[65] By failing to disclose these convictions, plaintiffs not only lied to the employer but also placed their employer at risk of falsely certifying to the federal government that no employees in the affected positions had felony convictions.[66] It was this added consequence of the misrepresentations that persuaded the court to rule in favor of the employer.[67] However, the court appeared to suggest that a different result might be reached if the fraudulent misrepresentation only implicated an employer's internal guidelines or self-imposed requirements.[68] In *Horn v. Department of Corrections*,[69] the Michigan Court of Appeals held that the after-acquired evidence would not bar all claims, but would

59. *See* Gassman II, 933 P.2d 743, 747-48 (Kan. 1997).
60. 41 Cal. Rptr. 2d 329 (Cal. Ct. App. 1995).
61. *See id*. at 338-40.
62. *Id.* at 340.
63. 959 P.2d 792 (Ariz. 1998).
64. *See id*. at 795-97.
65. *See Camp*, 41 Cal. Rptr. 2d at 337-39.
66. *See id.*
67. *See id*.
68. *See id.* at 337.
69. 548 N.W.2d 660 (Mich. Ct. App. 1996).

simply limit available remedies in a lawsuit alleging sexual harassment, constructive discharge, and retaliation.[70] The court reached this holding even though only some of the plaintiff's claims implicated discriminatory motive.[71]

D. General Principles of Alaska Employment Law

Before reviewing how Alaska courts treat after-acquired evidence, it is necessary to review some relevant principles defining employment relationships in Alaska. The following section summarizes the most commonly encountered principles defining the terms and conditions of employment relationships under Alaska law. Special considerations related to public employment or collective bargaining relationships are beyond the scope of this article.

1. *Implied Covenant of Good Faith and Fair Dealing*. In Alaska, the covenant of good faith and fair dealing is implied in every employment relationship.[72] The covenant provides that neither party will act in bad faith to deprive the other of the benefits of the employment relationship. It includes both an objective and a subjective prong.[73] The subjective prong prohibits an employer from taking adverse action to deprive an employee of a contract benefit.[74] The objective prong obligates employers to act in a manner that a reasonable person would regard as fair.[75] This covenant of good faith and fair dealing obligates employers to treat similarly situated employees in a like manner.[76] The covenant gives effect to the parties' reasonable expectations but does not alter those expectations.[77] It does not prohibit what would otherwise be permitted expressly by an existing employment contract.[78]

2. *Contract Formation and Interpretation*. Terms and conditions of employment may be defined by an express employment contract or by implication through policies or

70. *See id.* at 664-65.

71. *See id.*

72. *See* Mitford v. Ferdinand de Lasala, 666 P.2d 1000, 1007 (Alaska 1983); *see also* Chijide v. Maniilaq Ass'n of Kotzebue, 972 P.2d 167, 172 (Alaska 1999).

73. *See Chijide,* 972 P.2d at 172.

74. *See id.*

75. *See* Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220, 1224 (Alaska 1992).

76. *See id.*; *see also* Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783, 789 n.6 (Alaska 1989); Rutledge v. Alyeska Pipeline Serv. Co., 727 P.2d 1050, 1056 (Alaska 1986).

77. *See Mitford*, 666 P.2d at 1007.

78. *See* Ramsey v. City of Sand Point, 936 P.2d 126, 133 (Alaska 1997).

employment manuals disseminated by the employer.[79] In Alaska, contract interpretation presents a question of law for the court.[80] The court's duty is to give effect to the parties' reasonable expectations.[81] In order to ascertain the parties' reasonable expectations, the court examines the language of the disputed provision, other terms and provisions in the contract, relevant extrinsic evidence, and case law interpreting similar provisions.[82] Under Alaska contract law, the court may examine relevant extrinsic evidence even if the contract is unambiguous,[83] including evidence that bears on the parties' intention[84] and the parties' subsequent conduct.[85] If a contract is unambiguous, its meaning presents a question of law for the court to resolve.[86] However, if the parties present extrinsic evidence to clarify an ambiguous contract, the contract's meaning should be determined by the trier of fact.[87] A contract is ambiguous when it supports two different, but reasonable interpretations.[88]

3. *Employers' Decisions to Impose Discipline*. Determining the substantive limits of an employer's right to impose discipline is ordinarily but not exclusively a question of identifying and interpreting an applicable contract. If the terms and conditions of employment are defined by express or implied contract, the employer may not impose discipline in a manner contrary to that contract.[89] If no contract exists, the employer's ability to discipline employees is still constrained by the implied covenant of good faith

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79. *See id.* (holding that the contract expressly provided for termination); *see also Jones,* 779 P.2d at 787 (recognizing that employment contracts may be formed by operation of employer's personnel manual).

80. *See* Zuelsdorf v. University of Alaska, Fairbanks, 794 P.2d 932, 933 (Alaska 1990).

81. *See* Municipality of Anchorage v. Gentile, 922 P.2d 248, 255 (Alaska 1996).

82. *See* Peterson v. Wirum, 625 P.2d 866, 872 n.10 (Alaska 1981).

83. *See* Fairbanks North Star Borough v. Tundra Tours, Inc., 719 P.2d 1020, 1024 n.6 (Alaska 1986) (citing Peterson v. Wirum, 625 P.2d 866, 871-72 n.9 (Alaska 1981)).

84. *See* Wright v. Vickaryous, 598 P.2d 490, 497 n.22 (Alaska 1979).

85. *See Tundra Tours*, 719 P.2d at 1024.

86. *See* Johnson v. Schaub, 867 P.2d 812, 818 n.12 (Alaska 1994).

87. *See* Little Susitna Constr. Co. v. Soil Processing, Inc., 944 P.2d 20, 23 (Alaska 1997).

88. *See* McMillan v. Anchorage Community Hosp., 646 P.2d 857, 863 (Alaska 1982).

89. *See, e.g.*, Rutledge v. Alyeska Pipeline Serv. Co., 727 P.2d 1050, 1056 (Alaska 1986).

and fair dealing, which governs all employment relationships even if there is no contract.[90] In traditional terminology, employment relationships generally are defined as being "at will" or "for cause."[91] An "at will employee" may be terminated for any reason that does not violate the implied covenant of good faith and fair dealing.[92] A "for cause employee" may be disciplined only if the employer has a reasonable basis that is not arbitrary, capricious, or unlawful, that is supported by substantial evidence, and that is reasonably believed by the employer to be true.[93] Substantial evidence is defined by the court as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[94] An employer's good faith belief is all that is necessary to justify an employment decision.[95] The employer need not establish that the alleged misconduct actually occurred,[96] as it is sufficient if the employer reasonably believes in good faith that the employee committed the alleged misconduct.[97] Yet, bad faith is not established simply because the employer chooses to disbelieve the employee's version of events.[98] The Alaska Supreme Court has emphasized that employers' management discretion should be respected.[99]

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90. *See* Alaska Marine Pilots v. Hendsch, 950 P.2d 98, 109 (Alaska 1997).

91. *See, e.g.*, Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130-31 (Alaska 1989).

92. *See* ERA Aviation, Inc. v. Seekins, 973 P.2d 1137, 1139 (Alaska 1999).

93. *See* Braun v. Alaska Commercial Fishing and Agric. Bank, 816 P.2d 140, 142 (Alaska 1991) (quoting Baldwin v. Sisters of Providence in Washington, Inc., 769 P.2d 298, 304 (Wash. 1989)).

94. Smith v. Sampson, 816 P.2d 902, 904 (Alaska 1991) (quoting Storrs v. State Med. Bd., 664 P.2d 547, 554 (Alaska 1983)).

95. *See* Van Huff v. Sohio Alaska Petroleum Co., 835 P.2d 1181, 1186 (Alaska 1992).

96. *See* Holland v. Union Oil Co. of Cal., 993 P.2d 1026, 1035-36 (Alaska 1999).

97. *See Braun*, 816 P.2d at 142; *see generally* Simpson v. Western Graphics Corp., 643 P.2d 1276, 1278 (Or. 1982).

98. *See Holland*, 993 P.2d at 1035-36.

99. *See, e.g.*, *id*. at 1034-36; Bishop v. Municipality of Anchorage, 899 P.2d 149, 153 (Alaska 1995).

E. Alaska Law Regarding After-Acquired Evidence

The Alaska Supreme Court has not decided what effect, if any, after-acquired evidence would have in employment litigation. However, in *Brogdon v. City of Klawock*,[100] the court offered some preliminary views that may have predictive value and may affect trial courts' resolution of these issues. In *Brogdon*, the City of Klawock terminated Brogdon from his position with its Department of Public Safety.[101] Brogdon filed suit alleging wrongful termination.[102] Thereafter, Klawock discovered evidence of other misconduct and moved for summary judgment on the basis of this after-acquired evidence.[103] The trial court denied Klawock's motion, but opined that "such evidence may be admissible to limit damages."[104] After a motion to limit damages, the trial court ruled that after-acquired evidence would be admissible only "if it is evidence that [the City] would reasonably have discovered if Brogdon had not been terminated."[105]

On appeal, the Alaska Supreme Court reversed the trial court's limitation on introduction of after-acquired evidence.[106] The court held that the trial court erred in concluding that after-acquired evidence could be relied upon only if it was evidence that would have been discovered had the termination not occurred.[107] However, the court went further to offer some insights into the use of after-acquired evidence in employment discipline cases. The court expressed its concern that employers might base "new reasons for termination" on pretext.[108] The court stated its view that "[a]fter-the-fact justifications should be viewed with skepticism."[109] As a safeguard for potential abuses, the 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."[110] Additionally, the court suggested that it might be appropriate to impose

100. 930 P.2d 989 (Alaska 1997).
101. *See id*.
102. *See id*. at 990.
103. *See id.* at 991.
104. *Id.*
105. *Id.*
106. *See id.* at 992.
107. *See id*.
108. *Id.*
109. *Id.*
110. *Id.*

a heightened burden of proof upon employers seeking to rely on after-acquired evidence.[111] The court also recognized that after-acquired evidence may bar all damages instead of merely limiting available remedies.[112] Having flagged these issues for future consideration, the court reserved ruling on these issues.[113] Although undeniably dicta, it may be assumed that trial courts in Alaska will accord the *Brogdon* court's comments some deference.

III. PROBLEMS WITH EXISTING ANALYSES

Courts examining prospective evidence in litigation have failed to define adequately when and whether evidence of undiscovered pre-discipline misconduct should be considered after-acquired evidence. In addition, they have been unable to offer clarifying guidance under which standard such evidence should be evaluated. This section briefly discusses these problems.

Courts have done little to define after-acquired evidence adequately. Some courts insist that after-acquired evidence be "significant" or "material" and that the alleged misconduct be such that it would have led to the imposition of significant discipline, such as termination.[114] However, no attempt has been made to elaborate when misconduct is "significant" or "material." Instead, courts often appear willing to let employers, while in the midst of litigation, explain by way of affidavit or testimony that the recently discovered misconduct was significant and that they would have disciplined the employee had they uncovered the misconduct earlier.[115] The general tendency of courts to refrain from defining after-acquired evidence may arise from courts' reluctance to second-guess management decisions or to intrude needlessly upon the business judgment of corporate officers.[116] However, if employers are accorded unbridled discretion to determine the level of misconduct that is significant enough to constitute a serious offense, employers may invoke after-acquired evidence to impose discipline for minor violations of work rules or company policies for which discipline is not ordinarily imposed. As the *Brogdon* court suggested, there is a tension between recognizing an employer's right

111. *See id.*

112. *See id.*

113. *See id.*

114. *See, e.g.*, Lewis v. Fisher Serv. Co., 495 S.E.2d 440, 445 (S.C. 1998); Crawford Rehabilitation Servs., Inc. v. Weissman, 938 P.2d 540, 549 (Colo. 1997).

115. *See, e.g.*, Trico Technologies Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997); O'Day I, 79 F.3d 756, 761-72 (9th Cir. 1996).

116. *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).

to discipline employees and guarding against pretextual discipline. Employees are concerned that unscrupulous employers facing suit may fabricate after-acquired evidence in an attempt to preclude suit or limit damages, but employers are troubled by the implication that employees may escape all punishment because they were clever or duplicitous enough to conceal their wrongdoing. Employers cannot know what all employees are doing at all times and often do not learn about after-acquired evidence until they are forced by a lawsuit to investigate a particular employee's work history. These competing and legitimate concerns are not being addressed by existing analyses.

Furthermore, by insisting that after-acquired evidence be "significant" or "material," courts appear to have signaled a preliminary view that after-acquired evidence should be considered only if it would have resulted in the employee's termination.[117] But given that other forms of discipline may well affect damages such as reinstatement or front-pay, there does not seem to be any discernible reason in law, policy, or logic to restrict after-acquired evidence to evidence of misconduct that inevitably leads to termination.

An analogous question concerns post-termination misconduct as opposed to post-discipline misconduct. Where an employee is terminated and then commits misconduct that would have led to discipline had she still been employed, the developing trend seems to suggest that such post-termination misconduct is not admissible.[118] However, here again, it is not clear why an employee's post-termination misconduct would not be relevant to damages.[119]

As *Brogdon* implies, courts have offered no clearly articulated guidance concerning how an employer may establish that alleged misconduct is significant or how an employee may rebut the employer's after-acquired evidence.[120] Moreover, courts appear to have concluded mechanically that the *McKennon* test for damages should apply to all cases without thought or analysis. Under

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117. *See, e.g.*, *O'Day I*, 79 F.3d at 759 (stating the basic *McKennon* rule that the "employer must establish not only that it could have fired an employee for the later-discovered misconduct, but that it *would* in fact have done so").

118. *See, e.g.*, Carr v. Woodbury County Juvenile Detention Ctr., 905 F. Supp. 619, 628-29 (N.D. Iowa 1995); Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 682-83 (S.D.N.Y. 1995); Ryder v. Westinghouse Elec. Corp., 879 F. Supp. 534, 537-38 (W.D. Pa. 1995).

119. *See* Christine Neylon O'Brien, *The Law of After-Acquired Evidence in Employment Discrimination Cases: Clarification of the Employer's Burden, Remedial Guidance, and the Enigma of Post-Termination Misconduct*, 65 U. MO. KAN. C. L. REV. 159, 167-74 (1996).

120. *See* Brogdon v. City of Klawock, 930 P.2d 989, 991-92 (Alaska 1997).

McKennon, back-pay is permissible and is calculated between the date of wrongful discharge and the date when the employer discovers the after-acquired evidence. Yet, although this is only a "beginning point" subject to modification if "extraordinary equitable circumstances [exist] that affect the legitimate interests of either party,"[121] courts have stopped at the "beginning point" without further inquiry. Arguably, awarding back-pay from the date of an initial unlawfully imposed discipline and the date when other misconduct is discovered rewards the stealthy wrongdoer who is capable of concealing her misconduct.

These are merely a few of the more significant evidentiary and procedural issues implicated by after-acquired evidence. They await further clarification from courts in general, including the Alaska Supreme Court.

IV. RECOMMENDED APPROACH

A. Defining After-Acquired Evidence

The significance or materiality of alleged misconduct should be evaluated by reference to both the employer's and the employee's reasonable expectations regarding whether the alleged misconduct constituted grounds for discipline. If the misconduct is not of the type for which all reasonable employers or employees would normally expect disciplinary action, any discipline should be grounded in a specific contractual relationship with the employee. Further, one should consider an employee's expectations based on the contractual nature of the employment relationship. However, when determining whether the employee committed the misconduct, Alaska courts should apply the general rules and principles governing employment discipline.

It is possible to evaluate misconduct under multiple standards. Under an objective standard, in extreme instances of gross misconduct, reasonable employers would be warranted in disciplining an employee after the discovery of the after-acquired evidence. For example, no reasonable employer would be expected to tolerate employees who steal valuable company property or who operate heavy machinery under the influence of controlled substances. However, if the misconduct is not of this type, the employer should have discretion to impose discipline only through a specific contractual relationship with the employee. This approach can be considered a subjective standard and is consistent with Alaska law. Under Alaska law, the parties' reasonable expectations are evalu-

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

ated in light of contractual terms, relevant extrinsic evidence, and case law.[122] In keeping with these principles, employers should be able to establish that discipline would have been imposed by analogizing to similar cases, relying on company policy, and submitting affidavits and additional evidence.

Equally important are an employee's expectations based on the contractual nature of the employment relationship. Employers should not be able to rely upon the after-acquired evidence if it cannot be established that the employee knew or reasonably should have known that the discipline would be imposed for the misconduct in question. The Alaska courts should therefore require employers to establish either that the employee had actual knowledge of the rule or policy in question or that the misconduct was of the type and nature that a reasonable employee in the employee's position would have realized could warrant disciplinary action. In reaching this assessment, employees should not be able to profess ignorance about established work rules, thereby shielding themselves from the consequences of misconduct. However, employers should not be permitted to invoke obscure little-known rules that rarely, if ever, serve as the basis of discipline.

Alaska courts should apply the general rules and principles governing employment discipline when determining whether the employee committed the misconduct. An employer's reasonable good faith belief, based on facts supported by substantial evidence, is all that is necessary to justify an employment decision.[123] Other employees' statements may be relied upon to establish a good faith belief.

It still remains to be seen if the Alaska courts will distinguish between misconduct consisting of pre-litigation activity and misconduct violating ordinary work rules and policies. Adopting an approach based in existing contract and equity principles as suggested here, however, would make such a distinction unnecessary. This recommendation is consistent with the Alaska Supreme Court's test for evaluating alleged breaches of the implied covenant of good faith and fair dealing in employment relationships.[124] Requiring a more specific explanation of the grounds for an employer's decision provides necessary safeguards and obviates the

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122. *See* Peterson v. Wirum, 625 P.2d 866, 827 n.10 (Alaska 1981).

123. *See*, *e.g.*, Holland v. Union Oil Co. of Cal., 993 P.2d 1026, 1035-36 (Alaska 1999); Braun v. Alaska Commercial Fishing and Agric. Bank, 816 P.2d 140, 142 (Alaska 1991).

124. *See* Chijide v. Manilaq Ass'n of Kotzebue, 972 P.2d 167, 172 (Alaska 1999).

need for problematic solutions such as imposing a heightened burden of proof.

B. After-Acquired Evidence Should Bar Suit

After-acquired evidence should bar suit in all wrongful termination cases except those alleging employment discrimination or civil rights claims. At their core, employment relationships are contractual in nature and if an employee has breached her employment contract, she does not have a cause of action against her employer for wrongful termination. Additionally, an employee who has violated the equitable nature of an employment relationship should not be permitted to seek relief in derogation of the doctrine of unclean hands. Finally, the integrity of justice supports barring claims where after-acquired evidence exists. An employee who has committed and concealed misconduct for which she would have been disciplined should not be permitted to complain if the truth of that misconduct is discovered.

In some cases, after-acquired evidence may relate to misconduct which leads to an outcome less severe than termination, such as job re-classification, layoff, salary reduction, demotion, or transfer. In these situations, after-acquired evidence should bar prospective relief and limit the employee's remedy to damages between the date of wrongful discipline (if it is established that it was wrongful) and the date when the employee actually committed the misconduct related to the after-acquired evidence. This test differs from the test employed by some courts. Where courts hold that after-acquired evidence limits damages but does not bar suit, the limitation usually is described as running from the date of discipline to the date when the employer discovers the after-acquired evidence.[125]

Courts applying *McKennon*'s discovery date test without reflection ignore three principal flaws. First, it rewards a deceptive employee twice for violating work rules. An employee who has engaged in misconduct should not benefit from being able to conceal her misconduct. Such concealment is a breach of the duty of loyalty owed to the employer and therefore constitutes additional misconduct for which discipline could be imposed.[126] Second, it encourages litigation by rewarding the errant employee who files suit

125. *See, e.g.,* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362 (1995); O'Day I, 79 F.3d 756, 764 (9th Cir. 1996).

126. The Alaska Supreme Court has recognized an agent's or employee's duty of loyalty. *See* Calvo v. Calhoon, 559 P.2d 111, 116-17 (Alaska 1977). However, the duty has not been the source of much litigation, and consequently its contours have not been well-established in Alaska.

before the employer learns of the employee's misconduct. Third, in cases of résumé fraud, the discovery date model validates fraudulent conduct used to create an employment relationship, which thereby permits "an employee who intentionally misrepresents his or her qualifications, or lies on an application . . . to recover back pay . . . that would not have occurred without fraudulent actions."[127] A better approach would limit available remedies to the time between the date of wrongful discipline and the date of the misconduct constituting the after-acquired evidence. If the misconduct forming the basis of after-acquired evidence precedes the allegedly wrongful discipline, the employee should not be entitled to any damages.

In cases alleging employment discrimination, Alaska should adopt the *McKennon* standard with the modifications previously discussed. Instead of applying a standard that runs from the date of discipline to the date when the employer discovers the after-acquired evidence, the standard should run from the date of discipline to the date of the misconduct related to the after-acquired evidence. Since damages are not an element of a plaintiff's case under state or federal discrimination law, the suit would not be barred even if the date when the misconduct related to the after-acquired evidence occurred before the date of discipline. Thus, the employee would still be entitled to nominal damages and attorney's fees under Alaska law, the former vindicating the public interest and the latter ensuring that employers who impermissibly discriminated against employees would not gain an undeserved windfall. The court could further advance the public interest by ordering certain forms of injunctive and declaratory relief, such as requiring an employer to post notices acknowledging its culpability and assuring employees that it will comply with the law in the future. Measures of this nature are commonly employed by the National Labor Relations Board in related contexts, and there seems to be little reason in law or policy why courts could not impose similar penalties as a means of vindicating the public interest in eradicating unlawful employment discrimination.

C. Evidentiary and Procedural Issues

1. *Burden of Proof.* Alaska should require employers to establish after-acquired evidence by a preponderance of evidence.

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127. 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, 148 (1997).

The Ninth Circuit has adopted this standard to assess after-acquired evidence in the context of federal discrimination claims.[128] The *Brogdon* court tentatively suggested without holding that it might be appropriate to require employers to establish the existence of after-acquired evidence by a heightened burden of proof.[129] The burden of proof should not be raised to a clear and convincing standard for four reasons.

First, under the *McDonnell Douglas* burden-shifting analysis used to resolve employment discrimination claims alleging disparate treatment, where there is no direct evidence of the employer's allegedly unlawful intent,[130] a defendant may rebut a plaintiff's prima facie claim by "articulat[ing] some legitimate, nondiscriminatory reason" for the challenged decision.[131] This showing has been described as a "relatively light burden,"[132] and does not require the defendant-employer to support its avowed basis by a preponderance of the evidence.[133] The burden of proof remains at all times with the plaintiff.[134] If employers may shift the burden of production in civil rights and employment discrimination claims with minimal evidence, where courts are particularly solicitous of plaintiff's rights, it makes little sense to impose a greater burden of proof in assessing after-acquired evidence.

Second, an elevated burden of proof conflicts with basic principles of Alaska law that govern an employer's right to discipline employees. An employer's good faith belief is all that is necessary to justify an employment decision.[135] The employer need not establish that the alleged misconduct actually occurred;[136] it is sufficient if the employer merely believes in good faith that the em-

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128. *See O'Day I*, 79 F.3d at 761.

129. *See* Bragdon v. City of Klawock, 930 P.2d 989, 992 (Alaska 1997).

130. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

131. *Id.*

132. Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privitazation of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 178 (1993).

133. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56, 259-60 (1981). At least one Alaska Superior Court, however, required the employer to establish its legitimate, nondiscriminatory reason by a preponderance of the evidence. *See* VECO, Inc. v. Rosebrock, 970 P.2d 906, 919 n.29 (Alaska 1999) (quoting jury instruction given by trial court).

134. *See Burdine*, 450 U.S. at 253.

135. *See*, *e.g.*, Braun v. Alaska Commerical Fishing and Agric. Bank, 816 P.2d 140, 142 (Alaska 1991).

136. *See*, *e.g.*, *id.*; Holland v. Union Oil Co. of Cal., 993 P.2d 1026, 1035-36 (Alaska 1999).

ployee committed the alleged misconduct.[137] In addition, bad faith is not established simply because the employer chooses to disbelieve the employee's version of events.[138] To require employers to establish grounds through clear and convincing evidence would conflict with all of these basic principles. Moreover, it would invite error from juries struggling to reconcile two otherwise similar verdicts—one forming the basis for the initial and allegedly wrongful decision, and the second forming the basis for imposing discipline based on after-acquired evidence.

Third, imposing a heightened burden of proof ignores practical realities of the workplace. Aside from safety or security-related jobs, few employers closely scrutinize employee conduct because of considerations related to cost, morale, and productivity. If courts insist that employers establish proof of employee misconduct by clear and convincing evidence, employers will inevitably increase monitoring efforts. This will not only increase work-related costs, but will also implicate privacy-related concerns. On a related point, after-acquired evidence is often based on misrepresentations made in résumés or job applications. If courts insist on clear and convincing evidence of misconduct, screening and processing of job applications may also become more time-consuming and costly. One commentator persuasively notes that applying *McKennon* literally may result in unintended consequences of delaying job application processing and screening out otherwise qualified persons who would be protected by Title VII.[139]

Fourth, a clear and convincing standard would create inconsistencies in the law and would raise artificial distinctions that have no support in policy. After-acquired evidence often reflects an employee's fraudulent acts or omissions; for example, an employee may engage in résumé fraud or misappropriation of company property. In Alaska, fraud is established by a preponderance of the evidence;[140] thus, it would contradict law and policy to hold an employer to an elevated standard in this context. Under the pleading standard for fraud recommended by this Article, if courts require that employers establish particularized grounds for application of after-acquired evidence, it will be unnecessary to impose a heightened burden of proof on employers.

Some commentators, apparently under the assumption that any decision by an employer is inherently pretextual, have sug-

137. *See*, *e.g.*, *Holland*, 993 P.2d at 1035-36.

138. *See id.*

139. *See* Jenny B. Wahl, *Protecting the Wolf in Sheep's Clothing: Perverse Consequences of the McKennon Rule*, 32 AKRON L. REV. 577, 597-602 (1999).

140. *See* Gabaig v. Gabaig, 717 P.2d 835, 838-39 (Alaska 1986).

gested an analysis that effectively would impose a clear and convincing standard of proof on employers.[141] The problem with this view is that it ignores employers' management discretion and creates impermissible presumptions in the absence of any proof of wrongdoing. No study, empirical or otherwise, has established that employers use after-acquired evidence in an impermissible manner.

The only viable objection to employing a preponderance of the evidence standard as opposed to a clear and convincing standard is that an employer who is relying upon after-acquired evidence is unaware of any legitimate reason to impose discipline. Unlike "mixed motive" cases, where an employer possesses both a valid and invalid reason for imposing discipline, an employer who has to rely on after-acquired evidence has, allegedly, made an impermissible or unlawful decision to impose discipline.[142] This argument has persuasive force in the specific context of *McKennon*'s holding: an employer who conceded that its initial disciplinary decision was impermissible. However, closer scrutiny of the argument reveals that it rests on a premise that is untenable in many fact situations. Typically, employers relying on after-acquired evidence are unaware of any legitimate reason to impose discipline because the employee had successfully concealed her misconduct from the employer. Penalizing the employer for the employee's duplicity seems unsupportable in law, policy, or logic. Moreover, unlike *McKennon,* where the employer conceded that its initial decision was illegally motivated, most employers do not concede that their initial decision was unlawful. It is inappropriate to assume that an employer's initial disciplinary decision was unlawful when the employee bears the burden of proof.[143] Alaska courts should reject a clear and convincing evidence standard and instead impose a preponderance of the evidence standard in employment cases.

2. *Questions Related to the Admissibility of After-Acquired Evidence.* Few courts have ruled after-acquired evidence inadmissible as a blanket rule. However, other issues related to admissibility have been raised and merit brief comment. One issue that is slowly surfacing is whether post-termination or post-employment evidence of misconduct should be admissible.

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141. *See*, *e.g.*, Samuel A. Mills, *Toward an Equitable After-Acquired Evidence Rule*, 94 COLUM. L. REV. 1525, 1555-56 (1994); Zemelman, *supra* note 132, at 209-10 (arguing that a clear and convincing standard should apply "because . . . the employer's defense is inherently hypothetical").

142. *See* O'Day I, 79 F.3d 756, 765-68 (9th Cir. 1996) (Fletcher, J., dissenting in part and concurring in part).

143. *See*, *e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993).

The few courts examining post-termination evidence of misconduct have held, under the particular circumstances presented, that such evidence should be excluded. For example, in *Carr v. Woodbury County Juvenile Detention Center*,[144] Carr filed suit claiming that she was constructively discharged from her position from a county juvenile detention center due to a racially and sexually hostile work environment.[145] Yet, during routine discovery, the defendants learned that Carr had used marijuana three or four times a month after she resigned.[146] The youth center had a policy mandating discharge for any employee who used a controlled substance without seeking treatment.[147] It was therefore clear that if Carr had not quit her job, and if her drug use had been discovered, she would have been disciplined, if not terminated.[148] Nevertheless, the court ruled the evidence of the post-employment misconduct inadmissible.[149] The court first determined that an employer's policies and work rules could never be applied to a former employee.[150] Perhaps recognizing the tenuous nature of this rule, the court offered an additional rationale: the defendant could not establish that it would have terminated Carr, because termination was only mandated if the employee failed to seek treatment.[151] It was unknown, and could not be established, whether Carr would have sought treatment once evidence of her marijuana use was discovered.[152] Accordingly, any conclusions regarding what the employer would have done were speculative.

On its specific facts, the holding in *Carr* appears correct because it was never established that the employer would have imposed discipline for the post-employment misconduct. However, beyond this narrow holding, *Carr* seems unpersuasive. It is difficult to see how post-discipline misconduct is not relevant and should not be admissible because such misconduct directly relates to an employee's potential remedies. Employers usually may impose discipline for off-duty misconduct if the misconduct relates to the terms and conditions of employment. Carr's situation is illustrative. A youth center should not be expected to reinstate a former counselor who undeniably has used an unlawful, controlled sub-

144. 905 F. Supp. 619 (N.D. Iowa 1995).
145. *See id.* at 621.
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.* at 631.
150. *See id.* at 629.
151. *See id.*
152. *See id.*

stance. For similar reasons, a youth center should not be liable for front-pay for discharging an employee under such circumstances.

V. CONCLUSION

As trial courts continue to struggle more and more frequently with concepts governing employment relationships, after-acquired evidence will play an increasingly greater role in resolving disputes. Trial courts, and ultimately the Alaska Supreme Court, will have to decide when and whether after-acquired evidence should be permitted and what effect, if any, its use will have in employment litigation. The model suggested here is not without its own flaws, and it does not address all of the implications of after-acquired evidence. However, the model parallels existing Alaska law and thus offers uniform guidance with which the bench and bar are already familiar.