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The After-Acquired Evidence Doctrine: Is there Life After *McKennon?*

*By James F. Elliott and Jessica M. Weisel**

Introduction

The after-acquired evidence doctrine has generated a storm of activity in the area of employment discrimination law since the Tenth Circuit decision in *Summers v. State Farm Mutual Auto Ins. Co.* (10th Cir. 1988) 864 F.2d 700. The doctrine allows an employer to assert evidence of an employee's misconduct discovered after the alleged unlawful employment decision as a defense against the employee's charge of wrongful termination. *Summers* expanded the doctrine to preclude an employee's claim of discriminatory treatment. In *Summers,* the employee's claim was held to be completely barred even though the court assumed that he was fired, at least in part, for unlawful reasons, i.e., because of his age and religion.

A swirl of conflicting federal court opinions followed *Summers,* leading to the recent United States Supreme Court decision in *McKennon v. Nashville Banner Publishing Co.* (1995) 130 L. Ed. 2d 852 [*see* discussion in 1995 CAL. EMPLOYMENT LAW REPORTER 51]. For the first time, the Court addressed the application of the after-acquired evidence doctrine

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to employment discrimination claims. The Court ruled that the after-acquired evidence does not bar completely a claim of discrimination, but limits the remedy available to an employee based on the time the evidence became known.

Although the conflicting federal circuit court opinions leading up to the *McKennon* decision might suggest otherwise, the principle underlying the after-acquired evidence doctrine is *not* new. It is based on longstanding principles of contract law, and it has been applied in the context of other aspects of employment law. As courts grapple with the after-acquired evidence doctrine primarily through the prism of employment discrimination claims, they have ignored the doctrine's applicability to a broad array of collateral tort and contract claims that typically arise in employment litigation.

The recent debate over application of the after-acquired evidence doctrine in employment discrimination actions has clouded the basic premises of the defense and generated a number of misconceptions. A review of the origins of the doctrine, its long history of application in contract actions, and the modern approaches to the defense taken in employment discrimination actions provides some guidelines for applying the doctrine outside the context of employment discrimination. A validation of these guidelines is then offered in the form of the California Supreme Court's recent decision in *Hunter v. Up-Right, Inc.* (1993) 6 Cal. 4th 1174. This article concludes that the real question for employment lawyers is not *whether* the after-acquired evidence doctrine applies in employment litigation generally, but the *extent* to which it applies to either bar a plaintiff's claim or limit available remedies.

Roots of the Doctrine

The after-acquired evidence doctrine is based on common law principles of contract law. Under the law of contract, the intent or motive of the breaching party is not relevant [*see* Patton v. Mid-Continent Systems, Inc. (7th Cir. 1988) 841 F.2d 742, 750 (liability for breach of contract is strict liability regardless of whether breach is deliberate)]. Contract law is not directed at compelling promisors to prevent breach, but rather it embodies the theory of "efficient breach" and encourages breach when nonperformance would result in a net gain by the breaching party [*see* Patton v. Mid-Continent Systems, Inc. (7th Cir. 1988) 841 F.2d 742, 750 (when promisor's performance is worth more to someone else, efficiency is promoted by allowing promisor to break promise as long as promisee's actual loss is covered); *see generally* 3 Farnsworth on Contracts, §§ 12.1, 12.3 (1990)]. If a party to a contract, including an employment contract, had cause to terminate the agreement, yet was unaware of that cause, principles of contract law will uphold a breach even if it was committed for an improper purpose [Restatement (Second) of Contracts, § 237, comment c, illus. 8 (1981)].

After-acquired evidence that justifies termination of a contract as a matter of law bars any recovery for breach of contract regardless of the defendant's ignorance of the justification at the time of the breach or the defendant's actual motive. The Restatement of Contracts states that "one party's material failure of performance has the effect of the

non-occurrence of a condition of the other party's remaining duties . . . even though that other party does not know of the failure" [Restatement (Second) of Contracts, § 237, comment c, illus. 8 (1981)]. This principle was long ago extended to the law of agency, with the result that when a principal has cause to discharge an agent, the fact that the principal is unaware of the cause at the time of the discharge is immaterial [*see* Restatement (Second) of Agency, § 409, comment e, illus. 5 (1958) (when employer discharges employee for improper grounds, but unbeknownst to employer, employee has embezzled from employer, employee has no cause of action for wrongful termination)].

Courts have applied the after-acquired evidence doctrine as a defense in employment disputes for more than a century, and by 1892 it was considered well-settled law [*see, e.g.*, Crescent Horseshoe & Iron Co. v. Eynon (1897) 95 Va. 151 (when sufficient cause for discharge exists, it justifies discharge although not employer's inducing motive); Odoneal v. Henry (1892) 70 Miss. 172 (when good and sufficient reasons for discharge exist, employer may use them as defense even if employer had no knowledge of them at time of discharge)]. By 1932, the rule had earned a place in the Restatement of Contracts. The Restatement stated that discharge of an employee for inadequate reason is not wrongful when an employer is unaware of an employee's material breach of the duty to give efficient service [*see* Restatement of Contracts, § 278, comment c, illus. 1 (1932)].

As a creature of contract and agency law, the doctrine of after-acquired evidence has been very much at home in wrongful termination cases [*see* 53 Am. Jur. 2d, *Master and Servant,* § 46 (1970) ("It is not material whether the employer knew of grounds which in fact existed at the time of discharge; notwithstanding his ignorance, he may avail himself thereof")]. The extension of the doctrine to the employment discrimination area, however, has resulted in a clash of policy concerns and confusion.

After-Acquired Evidence as a Defense to Employment Discrimination

The recent debate surrounding the applicability and effect of the after-acquired evidence doctrine has developed in the wake of the Tenth Circuit's decision in *Summers v. State Farm Mutual Auto Ins. Co.* The Supreme Court's decision in *McKennon v. Nashville Publishing Co.* was the Court's second attempt to resolve the conflicting rulings that developed between the various federal circuits. The Court previously granted certiorari in *Milligan-Jensen v. Michigan Technological University* (6th Cir. 1992) 975 F.2d 302 , *cert. granted,* 113 S. Ct. 2991, *cert. dismissed,* 114 S. Ct. 22 (1993). *Milligan* settled, however, while review was pending, depriving the Court of the opportunity to reach a determination [*see* "Supreme Court Drops From Docket Case Involving After-Acquired Evidence," Daily Lab. Rep. (BNA) Aug. 12, 1993, at A1].

Although the United States Supreme Court's ruling in *McKennon* resolves the conflict that arose between the circuits, a review of the conflicting positions taken by the Courts of Appeals is illustrative for the purpose of noting how the doctrine may be applied to other areas of employment law [*see generally* Connell, "Emerging Defenses to Employment Discrimination Claims: After-Acquired Evidence and Stray Remarks," *Employment Discrimination Litigation* (1993; PLI Litig. & Admin. Practice Course Handbook Series No. H-464)]. Although a thorough survey of cases applying this defense in employment discrimination actions is beyond the scope of this article, it is safe to say without too much oversimplification that the law in this area developed into a three-way split among the United States Courts of Appeals.

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***Summers* Rule.** Before the *McKennon* decision, the *Summers* rule represented one side of the debate over the application of after-acquired evidence. *Summers* was fired from his position handling claims for an insurance company. The employer asserted that *Summers* had been discharged because of his poor attitude and problems dealing with the public and coworkers. *Summers* brought an action for discrimination on account of age and religion. At trial, the employer asserted a defense based on evidence discovered nearly four years after the termination that *Summers* had falsified insurance company records. The employer conceded that *Summers'* misconduct was not the cause of the termination, but argued that in view of the employee's falsifications, Summers should not be given any relief for the employer's unlawful conduct. The Court agreed and granted summary judgment.

Summers was not the first case to allow an after-acquired evidence defense in the area of federal employment discrimination law. The Tenth Circuit relied in part on a decision from the Fourth Circuit in which it had accepted the defense in an action brought pursuant to the ADEA [Smallwood v. United Air Lines, Inc. (4th Cir. 1984) 728 F.2d 614, 626-627, *cert. denied,* 469 U.S. 832]. The *Summers* court, however, took a giant step by allowing after-acquired evidence to defeat the plaintiff's discrimination claims at the summary judgment stage regardless of whether triable issues of employment discrimination existed.

The *Summers* court bypassed the fact-intensive issue of employer motivation and for purposes of its summary judgment ruling assumed the employer's discriminatory intent [Summers v. State Farm Mutual (10th Cir. 1988) 864 F.2d 700, 708]. The *Summers* court did not address any material factual issues regarding the alleged discriminatory treatment because it held that the after-acquired evidence of employee misconduct precluded any remedy even if the plaintiff could prove discriminatory treatment [Summers v. State Farm Mutual (10th Cir. 1988) 864 F.2d 700, 708].

Before *McKennon,* the great majority of cases that applied the after-acquired evidence doctrine to employment discrimination claims followed the *Summers* approach. More recent cases permitted an employer to introduce after-acquired evidence as a defense to liability in cases alleging discrimination on the basis of race, gender, and disability [*see e.g.* Washington v. Lake County (7th Cir. 1992) 969 F.2d 250 (race); Milligan-Jensen v. Michigan Technological Univ. (6th Cir. 1992) 975 F.2d 302 (gender); Reigel v. Kaiser Foundation Health Plan (E.D.N.C. 1994) 859 F. Supp. 963 (disability)]. Courts also extended the doctrine to bar claims where the employee falsified a resume or application materials [*see e.g.* O'Driscoll v. Hercules, Inc. (10th Cir. 1994) 12 F.3d 176, 177-178, *petition for cert. filed,* 62 U.S.L.W. 3757 (Apr. 1, 1994) (No. 93-1728); Dotson v. United States Postal Service (6th Cir. 1992) 977 F.2d 976, 978 (per curiam), *cert. denied,* 113 S.Ct. 263 (1992).

Wallace v. Dunn Construction Co. *Wallace v. Dunn Construction Co.* stood at the opposite end of the pre-*McKennon* debate. The Eleventh Circuit expressly rejected the *Summers* rule that after-acquired evidence barred recovery as a matter of law [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1180-1181, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)]. The *Wallace* court, however, agreed with the abstract proposition espoused in *Summers* that after-acquired evidence of employee misconduct is relevant to the relief due to a successful Title VII plaintiff [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1181, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)]. As such, under *Wallace*, an employer could not prevail on summary judgment merely by presenting undisputed evidence of employee misconduct. Rather, a court needed to determine the effect of after-acquired evidence on Title VII remedies on a case-by-case basis [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1181, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)]. As long as an employee established that the employment decision was unlawfully motivated under the antidiscrimination laws, the employee was entitled to a presumption that a backpay award was appropriate [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1182 n.12, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)]. Under *Wallace*, in order to terminate a backpay period based on after-acquired evidence, an employer was required to prove that evidence of the employee's misconduct would have come to light even in the absence of the employer's unlawful acts and the ensuing litigation [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1182, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)]. The discovery of after-acquired evidence prior to what would otherwise be the end of the backpay period would limit the employer's liability for backpay [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1184, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)]. In short, if an employer could prove it would have learned of the employee's misconduct in the regular course of events, then the defense would have limited the employee's remedy, but would not have barred the claim altogether.

Notwithstanding the Eleventh Circuit's decision to vacate *Wallace* pending an en banc determination, the principal was adopted by other courts seeking an alternative to the *Summers* rationale. The Third Circuit specifically adopted the *Wallace* reasoning, and the Ninth Circuit rejected *Summers* without deciding the effect after-acquired evidence would have on damages [*see* Mardell v. Harleys-

ville Life Ins. Co. (3d Cir. 1994) 31 F.3d 1221, *petition for cert. filed,* 63 U.S.L.W. 3427 (Oct. 24, 1994) (No. 94-742) (applying after-acquired evidence to remedies, not liability); E.E.O.C. v. Farmer Brothers Co. (9th Cir. 1994) 31 F.3d 891, 901-902 (declaring it "inequitable" to permit after-acquired evidence to insulate an employer from liability)]. In *Cooper v. Rykoff-Sexton, Inc.*, one of the first California appellate decisions to consider the application of after-acquired evidence, this was apparently the favored rationale [*see* Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 618-619 (noting that "neither sound public policy nor the general law of contract" permitted after-acquired evidence as a defense to liability)]. In *Cooper*, the court of appeal held that application of the doctrine to the liability phase would undermine antidiscrimination statutes since the doctrine "would allow a fact that played no part in the firing decision to bar any recovery" [Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 618]. This is also the position advanced by the Equal Employment Opportunity Commission ("EEOC"). The EEOC urged its regional attorneys, in response to after-acquired evidence defenses, to argue that the evidence was "relevant only to the issue of appropriate remedy" and was "not a defense to liability" [EEOC Notice No. 173 (March 1, 1993), *discussed in* Russell v. Microdyne Corp. (E.D. Va. 1993) 830 F. Supp. 305].

Kristufek v. Hussmann Foodservice Co. A third line of cases found a middle ground between *Summers* and *Wallace*. One example of this approach was seen in *Kristufek v. Hussmann Foodservice Co.* (7th Cir. 1993) 985 F.2d 364. As in *Wallace*, the Seventh Circuit held that the effect of after-acquired evidence on a plaintiff's recovery is a question of fact, and the defense does not bar recovery as a matter of law when employment discrimination is established [Kristufek v. Hussmann Foodservice Co. (7th Cir. 1993) 985 F.2d 364, 369-370 (analyzing nature of employee's fraudulent conduct, its impact on employee's job performance, and circumstances of its discovery)]. Unlike *Wallace*, however, an employer did not need to prove that it would have discovered the employee misconduct in the absence of the litigation in order to terminate backpay. Rather, *Kristufek* provided that an employer's backpay liability was curtailed as of the date the employer actually discovered the employee misconduct [Kristufek v. Hussmann Foodservice Co. (7th Cir. 1993) 985 F.2d 364, 371].

Policy Basis for Varied Approaches

The focus of the *Summers* ruling was solely on the employee's entitlement to a remedy rather than on the cause of the dismissal [Summers v. State Farm Mutual (10th Cir. 1988) 864 F.2d 700, 707 n. 3]. In this regard, the *Summers* analysis reverted back to early cases applying after-acquired evidence to justify wrongful termination based on contract or agency law principles. In cases predating the imposition of antidiscrimination rules in the workplace, no importance was attached to the employer's motive in making a dismissal if legal grounds for the dismissal otherwise existed [*see* Masonite Corp. v. Handshoe (1950) 44 So. 2d 41, 45 (if legal grounds for dismissal existed during term of employment, no importance attached to employer's actual motive); Kilian v. Ferrous Magnetic Corp. (1935) 280 N.Y.S. 909, 910 (bad motive for strict insistence on legal rights did not preclude defendant from justifying discharge of employee)].

Since it found the employer's intent to be irrelevant to its ruling on summary judgment, the *Summers* court applied the after-acquired evidence doctrine in the employment discrimination context to bar the plaintiff's claim altogether. On the other hand, the *Wallace* court recognized the importance of the intent element in antidiscrimination law and held that the doctrine cannot preclude Title VII liability. *Wallace* expressly stated that the *Summers* rule allowing after-acquired evidence to bar a plaintiff's claim entirely was antithetical to the principal purpose of Title VII of achieving equality of opportunity in employment [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1180-1181, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)]; *see also* Mardell v. Harleysville Life Ins. Co. (3d Cir. 1994) 31 F.3d 1221, 1235, *petition for cert. filed,* 63 U.S.L.W. 3427 (Oct. 24, 1994) (No. 94-742) (noting "the *Summers* approach disregards that canon of construction and frustrates the paramount objective of Title VII and ADEA, to deter violations of the law")]. The *Wallace* court further reasoned that the law had an interest in preventing employment decisions based on discriminatory intent. In such a context, *Wallace* found that after-acquired evidence of legitimate cause for an employment decision did not allow an employer to escape all liability for unlawful conduct [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1180-1181, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)].The *Mardell* court agreed, finding that the admonitory function of antidiscrimination legislation was not served if an employer could avoid liability for discriminatory actions by asserting after-acquired evidence as a defense [Mardell v. Harleysville Life Ins. Co. (3d Cir. 1994) 31 F.3d 1221, 1231-1235, *petition for cert. filed,* 63 U.S.L.W. 3427 (Oct. 24, 1994) (No. 94-742) (describing the "strong deterrence policy [as] the needed stimulus to propel otherwise indifferent employers into taking affirmative steps to educate and discipline members of their workforce insensitive to or disdainful of their co-workers' civil rights")].

For these reasons, the *Wallace* court concluded that the doctrine needed to balance conflicting policies. The court was required to preserve an employer's lawful prerogatives under agency and contract law, yet at the same time it had to give effect to Title VII's remedial purpose and restore the discrimination victim unlawful conduct [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1181, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)]. In asserting the after-acquired evidence defense, the employer bore the burden to show whether and in what manner the after-acquired evidence would have legitimately altered the employment relationship, and, therefore in what manner it would have affected the employee's relief [Wallace v. Dunn Construction Co. (11th Cir. 1992) 968 F.2d 1174, 1181 n.11, *vacated, on reh'g en banc,* 32 F.3d 1489 (11th Cir. 1994)].

The Seventh Circuit articulated this same rationale in *Kristufek,* but found "nothing to be gained by further penalizing [the employer] after [the employee misconduct] came to light" [Kristufek v. Hussmann Foodservice Co. (7th Cir. 1993) 985 F.2d 364, 370-371]. Under this approach to the defense, the court determined that because the after-acquired evidence justified the employment decision at issue, the backpay period should end on the day the employer actually discovered the after-acquired evidence [Kristufek v. Hussmann Foodservice Co. (7th Cir. 1993) 985 F.2d 364, 370-371]. The *Kristufek* decision held that an award of backpay damages up until the time the employee's misconduct was actually discovered was sufficient to enforce the remedial purposes of Title VII [Kristufek v. Hussmann Foodservice Co. (7th Cir. 1993) 985 F.2d 364, 371].

The *McKennon* Decision

In determining the application of the after-acquired evidence doctrine to employment discrimination claims, the United States Supreme Court applied an approach similar to that evidenced by the Seventh Circuit in *Kristufek.* The Supreme Court concluded that after-acquired evidence limits the remedies available to the employee, but does not preclude the cause of action. In reaching this conclusion, it noted the critical role that the employer's motive plays in discrimination cases. The Court determined that the ADEA and Title VII not only serve to compensate an employee for injuries caused by discrimination, but also were intended to deter discriminatory conduct [McKennon v. Nashville Banner Publishing Co. (1995) 130 L. Ed. 2d 852]. Unlike a contract action, in which motive is irrelevant, in an employment discrimination context, public policy considerations require a court to examine the employer's discriminatory motive. These policy considerations led a unanimous Court to conclude that after-acquired evidence does not preclude the claim of discrimination, although it can limit the remedy available to the injured party.

In *McKennon,* the employee alleged that she was terminated in violation of the ADEA. At her deposition, however, the employee disclosed that she had removed and copied confidential documents which she maintained were for "insurance" and "protection" against what she expected would be a discriminatory discharge. When her employer learned of these admissions, it informed her that she was being terminated for this violation of her job responsibilities. The Court of Appeals granted summary judgment on the basis of *Summers,* but the Supreme Court reversed. On appeal from summary judgment, the Court noted "the case comes to us on the express assumption that an unlawful motive was the sole basis for the firing" [McKennon v. Nashville Banner Publishing Co. (1995) 130 L. Ed. 2d 852, 862]. Emphasizing the importance of the employer's discriminatory motive, the Court said: "The 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" [McKennon v. Nashville Banner Publishing Co. (1995) 130 L. Ed. 2d 852, 862]. Because the evidence of misconduct was not discovered until after the termination, it could not excuse the employer's unlawful motive for the discharge and could not preclude the employee's action [McKennon v. Nashville Banner Publishing Co. (1995) 130 L. Ed. 2d 852, 862].

The Supreme Court did not limit its determination to the question of liability, but also ruled on the applicability of after-acquired evidence to the remedy phase. Under principles of equity, the Court found that "as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy" where the employer seeking to rely on after-acquired evidence can "establish that the wrongdoing was of such severity that an employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge" [McKennon v. Nashville Banner Publishing Co. (1995) 130 L. Ed. 2d 852, 863-864]. These same equitable principles led the Court to conclude that, when after-acquired evidence is discovered in the course of litigation, if it would have resulted in termination, the date of discovery should be used to calculate any award of backpay [McKennon v. Nashville Banner Publishing Co. (1995) 130 L. Ed. 2d 852, 864].

Applying the Doctrine Beyond Employment Discrimination

In General. In *McKennon,* the Supreme Court made no reference to the historical development of the after-acquired evidence doctrine and did not discuss how the doctrine would be applied beyond the narrow scope of employment discrimination claims. This is understandable because the discussion of after-acquired evidence doctrine leading up to

McKennon focused predominantly on employment discrimination cases. By so focusing the issue, these discussions assumed that *McKennon* would govern the use of after-acquired evidence in all of its applications. This will not likely be the case because although the Court decided how after-acquired evidence affects employment discrimination, it did not address how the doctrine may limit other claims typically raised in employment disputes, including common-law contract and tort claims. Thus, there remains a need to seek principles governing the doctrine's application.

The above discussion points to two conclusions. First, in areas of the law in which the defendant's intent or motive is not at issue, for example, contract, agency, or licensing claims, the after-acquired evidence doctrine applies without debate to bar the cause of action [*see* Marnon v. Vaughan Motor Co. (Or. 1950) 219 P.2d 163, 167 (defendant in licensing dispute had legal cause to cancel contract because of after-acquired evidence of plaintiff's violation of agreement)]. Second, when intent or motive is relevant, the effect of after-acquired evidence will vary according to the public policies associated with the particular cause of action at issue. In any event, the doctrine will function as either an affirmative defense to bar the plaintiff's claim in toto or as a limit on recoverable damages.

With these principles in mind, the lesson learned from the *Summers-Wallace-Kristufek* debate should be useful in applying the after-acquired evidence doctrine to other areas of employment law. Thus, in a breach of contract case or agency dispute, when motive for the disputed conduct is not at issue, the defense based on after-acquired evidence should bar the plaintiff's claim. When motive or intent is at issue, as under principles of tort law or statutorily-created or public-policy-based causes of action, the court will likely look to competing policies to determine the extent of the doctrine's applicability. When fundamental public policies are implicated, after-acquired evidence will be considered only at the remedy phase. When fundamental public policies are not involved, after-acquired evidence will preclude the entire claim. In either context, the question is not whether the defense should apply, but rather the extent to which it will apply.

Public Policy Wrongful Termination. Thus, for example, since California recognizes that a claim for wrongful termination can lie when the termination is in violation of a public policy [Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 172 ("employer's traditional broad authority to discharge an at will employee may 'be limited by statute . . . or by considerations of public policy.'")], and the public policy considerations are statutory in nature [see, e.g., Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1095 ("courts in wrongful discharge actions may not declare public policy without a basis in either the constitution or statutory provisions")], adopting the reasoning espoused in *McKennon* governing its application to employment discrimination, after-acquired evidence would likely serve to limit the remedy, but not bar the claim in its entirety. Similarly, a claim for common-law sexual discrimination, like that recognized in *Rojo v. Kliger* (1990) 52 Cal. 3d 65, implicates a fundamental public policy. The doctrine's applicability to this type of cause of action should also follow the rule set in *McKennon* for statutory discrimination claims and limit the relief available to the plaintiff.

Fraud Claims. Although the *McKennon* analysis translates easily into the context of wrongful terminations in violation of public policy, it is not at all clear that the same reasoning will apply to tort claims brought in the context of a wrongful termination action. In tort claims such as fraud, after-acquired evidence may bar the plaintiff's claim in its entirety. In an action for false promise fraud, a defendant may be able to assert after-acquired evidence that the plaintiff was unable to perform under the agreement or had otherwise breached. The plaintiff's bar will argue that the defense should limit the plaintiff's remedy, rather than preclude the plaintiff's claim. Because of the policy to deter fraudulent conduct, the plaintiff's bar will argue that the defense should not be applied in a manner that undermines public policy or a statutory purpose [*cf.* Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30 (refusing to apply statute of frauds defense to aid perpetration of fraud because purpose of statute of frauds is to prevent fraud)]. Because of the policy to deter fraud, the plaintiff's bar will maintain that courts should decline to apply after-acquired evidence at the liability stage where it might assist the defendant's perpetration of a fraud, but that the court may consider the evidence in fashioning an appropriate remedy.

The defense bar will argue, however, that the state's interest in deterring fraud is not at the same heightened level as the interest in deterring employment discrimination, and that after-acquired evidence should bar a fraud claim altogether. Support for this position may be found in a recently decided California Supreme Court case. In *Hunter v. Up-Right, Inc.* (1993) 6 Cal. 4th 1174, the California Supreme Court held that a terminated employee may not sue his or her employer for fraud when the employee's termination was induced by a misrepresentation by the employer. In so holding, the Court in *Hunter* characterized the fraud claim at issue as "indistinguishable from an ordinary constructive wrongful termination" [Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1184]. The Court expressly minimized the state's interest in preventing fraud, opining that "[a] claim of fraud or deceit is essentially a private dispute seeking a monetary remedy, not an action to vindicate a broader public interest" [Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th

1174, 1186]. Thus, it may be implied from the reasoning of the *Hunter* majority that the public policy concerns limiting the application of the after-acquired evidence doctrine in employment discrimination cases will only be duplicated in circumstances in which the alleged fraud is linked to a public policy specifically embodied in a statute or constitutional provision. It can therefore be expected that the defense bar will argue that, assuming there is no underlying public or statutory policy, there is no basis for limiting the effect of the after-acquired evidence doctrine as an affirmative defense in common law fraud claims. It should be noted that the scope of the *Hunter* decision and the degree to which false promise fraud is found to be contractual will be addressed by the Supreme Court, which has granted hearings and decertified an opinion in several different cases addressing the issue of fraud in the context of employment termination [*see* Notides v. Westinghouse Credit Corp., *rev. granted* Feb. 23, 1995, *superseded opinion at* 31 Cal. App. 4th 527; Lazar v. Superior Court, *rev. granted* Feb. 23, 1995, *superseded opinion at* 30 Cal. App. 4th 496; Brooks v. Bell savings & Loan Assn., *decertified* Feb. 23, 1995, *superseded opinion at* 29 Cal. App. 4th 485].

Breach of Implied Covenant of Good Faith and Fair Dealing. Causes of action for breach of the implied covenant of good faith and fair dealing should create a similar debate. The intent of the breaching party is clearly implicated in a claim for breach of covenant [*see, e.g.,* Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 697-698; *see also* Koehrer v. Superior Court (1986) 181 Cal. App. 3d 1155, 1171 (action for breach of implied covenant of good faith and fair dealing will lie where employer acts without a good faith belief that good cause for discharge exists); Khanna v. Microdata Corp. (1985) 170 Cal. App. 3d 250, 262 (breach of implied covenant of good faith and fair dealing when employer engages in bad faith act, combined with intent to frustrate employee's enjoyment of contract rights)]. Nevertheless, a claim for breach of the covenant only gives rise to contract damages [Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 682-700]. Moreover, extending *Hunter's* analysis, we may conclude that, like a claim for fraud, a breach of covenant claim is essentially a private dispute, serving no fundamental public interests [Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 690 ("covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes")]. Without fundamental public policies to be protected, a court applying the after-acquired evidence doctrine to a breach of the implied covenant claim should adopt the traditional rule of contract law and bar the claim altogether.

Interference With Existing or Prospective Economic Relations. In other torts that are raised in employment contexts, such as interference with existing or prospective economic relations, intent is an element of the cause of action [Witkin, Summary of California Law, vol. 5, *Torts* § 65 (9th ed. 1988)]. Nevertheless, those torts are hybrid causes of action in the sense that the plaintiff must also prove that the defendant's act caused the breach of contract or disrupted an existing or prospective business relationship [Witkin, Summary of California Law, vol. 5, *Torts* §§ 648, 652 (9th ed. 1988)]. Thus, relying on *Hunter,* a third-party defendant accused of interfering with an employment relationship between an employer and employee may defend the interference on the grounds that because the underlying employment relationship is private and does not implicate public policy concerns, after-acquired evidence that would have led to termination bars the employee from claiming tortious interference [*see, e.g.,* Restatement (Second) of Torts, § 766 comment f (for interference claim to arise, contract "must be in force and effect at the time of the breach that the actor has caused; and if for any reason is entirely void, there is no liability for causing its breach"); Bailey v. Banister (10th Cir. 1952) 200 F.2d 683, 685 ("right to recover for the unlawful interference with the performance of a contract presupposes the existence of a valid enforceable contract")]. The defense bar will contend that, unless the plaintiff can establish that the third-party defendants acted with a motive that contravenes a public policy rooted in statute or constitutional provision, a California court should allow after-acquired evidence to completely bar the plaintiff's claim against the third-party defendant, as well as the employer.

The plaintiffs' bar will respond that after-acquired evidence does not render a contract unenforceable, but merely makes it voidable. It will argue that a party to the contract could terminate the contract on the basis of the doctrine, but that may not excuse the actions of the third-party defendant who has interfered with the contractual relation [Restatement (Second) of Torts, § 766, comment f ("by reason of the statute of frauds, formal defects, lack of mutuality, infancy, unconscionable provisions, conditions precedent to the obligation or even uncertainty of particular terms, the third person may be in a position to avoid liability for any breach [but the] defendant actor is not, however, for that reason free to interfere with performance of the contract")]; *see also* Speegle v. Board of Fire Underwriters (1946) 29 Cal. 2d 34, 39 (tortious interference claim will lie even where contract is terminable at-will because fact that a contract is at the will of the parties does not make it at the will of others)].

The defense bar will counter by arguing that if the employer testifies that the employee would have been discharged had the employer known of the after-acquired evidence, there is no reason the after-acquired evidence doctrine should not apply as a complete defense to the claim itself.

Intentional Infliction of Emotional Distress. The current debate over after-acquired-evidence suggests the doctrine may be applied to claims for intentional infliction of emotional distress that are able to survive workers' compensation preemption. The defense is advanced on the theory that a plaintiff should be barred from recovering for his or her employment-related injury since the plaintiff had no right to the employment in the first place. This reasoning, however, does not survive close scrutiny, and the few courts that have faced this issue have declined to apply the doctrine [*see, e.g.,* Baab v. AMR Servs. Corp. (N.D. Ohio 1993) 811 F. Supp. 1246, 1262 (refusing to bar intentional infliction of emotional distress claim); Furnish v. Merlo (D. Or. 1994) 1994 WL574137 pp. 8-9 (after-acquired evidence bars action for breach of contract, but not claim for intentional infliction)].

Battery. When examined in the context of a tort like battery, the problems with this application of the after-acquired evidence doctrine becomes evident. In the battery context, the contractual relationship between employer and employee is essentially collateral to the interest of bodily integrity protected by society. To permit an employer defending against a claim for battery to assert the defense would allow the employer to injure an employee with impunity solely because the employee engaged in misconduct unknown to the employer at that time. This result, as the *Mardell* court declared "flies in the face of reason and the whole body of tort law" [Mardell v. Harleysville Life Ins. Co. (3d Cir. 1994) 31 F.3d 1231, *petition for cert. filed,* 63 U.S.L.W. 3427 (Oct. 24, 1994) (No. 94-742)]. The fact that a plaintiff is committing a wrong at the time or place of the injury giving rise to his claim should not influence the determination of whether a tortious injury occurred [*see* Restatement (Second) of Torts, § 889 & comments a, b (1979) ("One is not barred from recovery for an interference with his legally protected interests merely because at the time of the interference he was committing a tort or a crime")]. As a result, after-acquired evidence should not be a defense to liability, nor should it be relevant to the remedies stage when damages arise from a physical or mental injury. These are interests society will protect irrespective of an employment relationship between the plaintiff and defendant.

Theoretically, a claim for damages from battery or any tort that results in disability, including intentional infliction of emotional distress, discussed above, would be influenced by lost employment. However, in most instances, such a claim would be predicated on a plaintiff being unable to perform any employment. This differs from a contract claim in which the employee has been discharged from a particular employment and is claiming economic damages solely from that discharge. In the battery claim, after-acquired evidence would not be relevant to the determination of damages because the employee is unable to perform substitute employment.

Defamation, Malicious Prosecution. After-acquired evidence also is raised routinely as a complete defense to liability against claims for defamation. Against these claims, the truthfulness of a statement is a defense to liability regardless of the speaker's knowledge of the truth or falsity at the time of the publication. The burden is on the libel plaintiff to show that an allegedly defamatory statement is false [Cox Broadcasting Corp. v. Cohn (1975) 420 U.S. 469; Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y. 2d 369, 380, *cert. denied,* 434 U.S. 969 (1977) (before "knowing falsity or reckless disregard for truth can be established, the plaintiff must establish that the statement was, in fact, false")]. Thus, even when the speaker acted maliciously, believing the publication to be false, after-acquired evidence that establishes the statement as true will bar the claim [*see* K. Parker, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray,* 72 Tex. L. Rev. 403, 416 (1993)].

Similarly, after-acquired evidence of the liability or guilt of a plaintiff will preclude his or her civil claim for malicious prosecution, even if the allegation was made maliciously and without reason [*see* K. Parker, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray,* 72 Tex. L. Rev. 403, 415-416 (1993)].

Conclusion

The foregoing discussion suggests that the key to asserting the after-acquired evidence doctrine is an awareness of the policies underlying the law giving rise to the plaintiff's cause of action and the role of the defendant's motive in generating that policy. In employment contexts, where a vital public interest is specifically embodied in a statutory scheme or constitutional provision, the assertion of after-acquired evidence to justify the defendant's conduct will limit the remedy, but will not bar the cause of action. The Supreme Court's resolution of the *Summers-Wallace-Kristufek* debate governing the doctrine's use in employment discrimination cases should determine the extent to which the doctrine will apply in any case in which a fundamental public interest exists. However, in cases where fundamental policies are not implicated, whether employment disputes involve common law contract, agency, or tort claims subject to a *Hunter* analysis, after-acquired evidence will bar the plaintiff's claim altogether.