

# POST-TERMINATION MISCONDUCT OF CLAIMANT

## POWERFUL EVIDENCE FOR EMPLOYER TO LIMIT DAMAGES

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After termination of an employment relationship, the former employee sometimes makes a claim for discrimination or retaliation. While investigating the claim, the employer may discover the employee engaged in criminal or illegal activity, or other illicit misconduct. This information may surface through interviews of former co-workers, investigation of criminal court dockets, or formal discovery. However the information is discovered, the employer will try to use the information to limit the claim for damages.

Courts have long recognized the doctrine of "after-acquired" evidence in situations where the misconduct occurred while the employment relationship was still intact. This article addresses what happens when the former employee's misconduct occurs after termination.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), an Age Discrimination in Employment Act (ADEA) case, the United States Supreme Court confirmed an employer who discovers additional grounds for discharging a terminated employee may rely on newly found, or after-acquired, evi-

dence to minimize the claim for backpay and frontpay.

The Court concluded the misconduct could not be a total bar to recov-

ery because the evidence was not known at the time of the discharge. Therefore, it could not be deemed the reason for the discharge. However, the Court acknowledged the employee's misconduct must be considered in determining the appropriate remedial relief and ultimately held neither reinstatement nor frontpay is appropriate. The Court declined to preclude backpay as a remedy altogether, but concluded backpay should be subject to a shortened calculation, from the date of the actual termination to the date the after-acquired evidence was discovered. To take advantage of these limitations, the employer must establish the misconduct rose to a level that would have supported termination if the employer had found out about it. While *McKennon* was an ADEA case, the Court acknowledged its reasoning would apply to Title VII cases, as the laws share the goal of eliminating discriminatory acts in the workplace, and the "substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII."

In *McKennon*, and in most of the cases which followed, the employee's conduct occurred during the employment relationship. What happens when the employee's misconduct occurs after the termination? Federal Courts have ruled, under certain circumstances, employers may limit a former employee's claim for damages where the former employee engages in behavior *after* the termination if the behavior would have resulted in termination if it occurred while the employee was still employed. The Eighth Circuit Court of Appeals first considered the issue in the case of *Sellers v. Mineta*, 358 F.3d 1058 (8th Cir. Mo. 2004). In this case, Wendi Sellers, a former Air Traffic Controller with the FAA, sued the Secretary of Transportation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.



(2000), alleging sex discrimination and retaliation. The jury returned a verdict in favor of Sellers, and she moved for reinstatement or frontpay. The district court denied reinstatement but awarded frontpay. The government appealed on the basis that after Sellers' termination from the FAA, she was terminated from a subsequent position at a bank for attempting to process an unauthorized loan application. Sellers admitted to the improper conduct, explaining she completed the application to obtain her spouse's ex-wife's credit history. The government argued the district court abused its discretion in awarding Sellers frontpay because her post-termination conduct – falsification of a loan application for personal reasons – rendered her unsuitable for reinstatement (thereby precluding frontpay).

The Court in *Sellers* cited *McKennon* as having significant precedential value, as the Supreme Court in *McKennon* acknowledged an employee's misconduct is relevant to the question of remedies. The *Sellers* Court noted as particularly germane the Supreme Court's holding that where, after termination, it is discovered the employee engaged in wrongdoing, neither reinstatement nor frontpay is appropriate. The *McKennon* Court noted it would be both "inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *McKennon*, at 361-62.

The *Sellers* Court acknowledged few courts had addressed whether the *McKennon* rationale extends to situations of employee misconduct occurring *after* termination. The Tenth Circuit confronted the issue in *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir. 1999), where former employee Medlock was allegedly terminated in retaliation for pursuing a claim of race-based discrimination. At his unemployment benefits compensation hearing, Medlock verbally abused defendant's counsel. The Tenth Circuit recognized post-termination conduct could, arguably, limit a plaintiff's remedies, but declined to extend the logic of *McKennon* to *Medlock*, as the misconduct occurred as a direct result of the retaliatory discrimination. (See also, *McKenna v. City of Philadelphia*, 636 F. Supp. 2d 446 (E.D. Pa. 2009), wherein the Court held to cut off Title VII equitable damages, a plaintiff's post-termination wrongdoing must not be attributable to the defendant's conduct).

The Court in *Sellers* agreed with the Tenth Circuit's reasoning in *Medlock*, despite its ultimate ruling, and held the logic of *McKennon* is applicable in the context of a Title VII plaintiff's post-termination conduct. Under appropriate circumstances, the

conduct may limit the remedial relief available to the plaintiff. The Court theorized a discharged employee may be convicted of a crime unrelated to his or her former position as a result of post-termination misconduct. In such a situation, the incarceration would render the former employee ineligible for reinstatement, and therefore, render an award of frontpay inequitable. A plaintiff's post-termination conduct is relevant in determining whether a frontpay award is available, and if so, in determining the extent of the award.

The *Sellers* Court expanded on the employer's burden in raising the defense. *McKennon* held the employer bears the burden of establishing, by a preponderance of the evidence, the wrongdoing was "of such severity that the employee in fact would have been terminated on those grounds alone." After *Sellers*, the employer must present evidence of actual employment practices to prove this point, and may not rely on standards articulated in employment manuals.

The *Sellers* Court did not specifically address backpay limitations where post-termination misconduct is at issue, presumably because the backpay award was not appealed in that case. However, the Court clearly extended the reasoning and holding of *McKennon* to instances involving post-termination misconduct. Therefore, it logically follows *McKennon's* holding limiting backpay would also apply in situations involving post-termination misconduct, and in fact, Courts have construed the *Sellers* opinion as establishing this concept. See *McKenna*, 636 F. Supp. 2d 446, 460, footnote 4. Therefore, an employer may successfully argue backpay calculations should be limited to the period of time between the date of the allegedly unlawful termination and the date the evidence of post-termination misconduct was discovered.

If a plaintiff is incarcerated after termination, the incarceration may be used to defend damages from a different angle. It is well established that a plaintiff must attempt to mitigate his or her damages to recover backpay or frontpay. See, *inter alia*, *Ellerbrook v. City of Lubbock*, 465 Fed. Appx. 324 (5th Cir. Tex. 2012); *Giles v. GE*, 245 F.3d 474 (5th Cir. Tex. 2001). An employer can win the mitigation issue by showing that the employee has withdrawn from the employment market. See *McKenna*. If a plaintiff is incarcerated, an employer may assert plaintiff failed to use "reasonable diligence" to obtain "substantially equivalent" employment during the period of time he or she was incarcerated, and has "withdrawn from the labor market." However, if the incarceration is causally linked to the alleged discrimina-

tion, these defenses will not apply. See *Medlock, McKenna*. If this argument is made, it logically opens the door for the employer to investigate the plaintiff's past behavior to ascertain whether he or she engaged in instances of similar behavior pre-dating the employment or the alleged discriminatory act. Obviously the information can and should be sought through formal discovery, but employers also may independently discover this information through online inquiries to local law enforcement agencies or public records requests.

Once evidence of an employee's misconduct is obtained, an employer should seek to limit damages. An employer may move for partial summary judgment asking the Court to limit Plaintiff's damages for backpay or to dismiss Plaintiff's claim for reinstatement or frontpay altogether. Another option for an employer is to seek a stipulation with plaintiff's counsel regarding recoverable damages. Depending on the nature of the misconduct, a plaintiff may be motivated to waive a claim for certain damages or concede to reduced damages in exchange for keeping potentially damaging evidence of misconduct from reaching a jury.

Regardless of whether an employer suspects a plaintiff has engaged in misconduct or criminal behavior since his or her termination, it should promptly investigate the issue as a matter of course in each case. The exercise is simple and discovering post-termination misconduct can yield an effective damages defense useful both at trial and in facilitating reasonable settlement negotiations.



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