

11.9 Age Discrimination—Defenses—After-Acquired Evidence

Comment

The ADEA applies the after-acquired evidence doctrine in the same manner as Title VII. See *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358-59 (1995); *O'Day v. McDonnell Douglas Helicopters Co.*, 79 F.3d 756, 759-60 (9th Cir. 1996). Thus, the parallel Title VII instruction, Instruction 10.18 (Civil Rights—Title VII—Defense—After-Acquired Evidence), should be given with appropriate modifications.

If an employer takes an adverse employment action such as discharging an employee for a discriminatory reason, later-discovered evidence that the employer could have used to discharge the employee for a legitimate reason does not immunize the employer from liability; however, the employer does not have to offer reinstatement or front pay and only has to provide back pay “from the date of the unlawful discharge to the date the new information was discovered.” *McKennon*, 513 U.S. at 362 (ADEA case); see also *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1071 n.16 (9th Cir. 2004); *O'Day*, 79 F.3d at 761-62. The employer must prove by a preponderance of the evidence that it would have fired the employee because of the after-acquired evidence. *Id.* at 761.

In Title VII cases, the defense of after-acquired evidence is similar to, but not the same as, an employer's affirmative defense to a charge that a protected characteristic was a “motivating factor” in an adverse employment decision, because both defenses provide limitations on remedies without absolving an employer of liability. In the case of “after-acquired evidence,” the information establishing a lawful basis for the employer's adverse employment decision is not acquired until after the adverse decision and thus only limits remedies as set forth in Instruction 10.18.