

## Employer Permitted to Use “After-Acquired” Evidence at Discrimination Trial

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In *Weber v. Fujifilm Medical Systems USA Inc.*, et al., case numbers 13-4891 and 14-0206, decided on October 9, 2014, the U.S. Court of Appeals for the Second Circuit held that a former executive’s employer could use “after-acquired” evidence – evidence of an employee’s misconduct during the period of employment which the employer discovers after the employee’s discharge on other grounds – to confirm the nondiscriminatory reason for his termination.

Weber claimed, among other things, that he was terminated by Fujifilm Medical Systems (“Fujifilm”) because of his race and national origin, namely that he was not Japanese, in violation of Title VII of the Civil Rights Act. At trial, Fujifilm sought to use “after-acquired” evidence that the former executive committed alleged misconduct while working for the employer and participated in irregularities related to a financing agreement among his former employer, a bank and consultant. Although Weber objected to the evidence, the District Court admitted it for two limited purposes: first, to show that Fujifilm’s purported non-discriminatory reason for terminating Weber – his mismanagement of finances – was true, and second, as a defense to his breach of contract claim, that Weber materially breached his employment contract first. After a jury found that Fujifilm was not liable for discrimination (despite a finding that Fujifilm breached Weber’s contract), Weber appealed to the Second Circuit arguing that the evidence should not have been admitted in to evidence.

Relying on Second Circuit authority and the U.S. Supreme Court’s holding in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), the Second Circuit ruled that Fujifilm was permitted to introduce evidence that came to light after Weber was fired to back up its contention that it terminated him for nondiscriminatory reasons. This decision confirms that employers may use, during the summary judgment phase or trial, evidence acquired after a termination to demonstrate the truth of the non-discriminatory or non-retaliatory reason for the termination decision. Such evidence also carries other practical and legal consequences as well, including the ability of a defendant employer to limit its potential damages if the employer would have terminated the employee for the conduct discovered after he or she had been terminated.

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