**10.16 Civil Rights—Title VII—Defense—After-Acquired Evidence**

The defendant contends that the defendant would have made the same decision to [discharge] [not hire] [not promote] [demote] the plaintiff because [*describe the after-discovered misconduct*]. If the defendant proves by a preponderance of the evidence that the defendant could have made the same decision and [would have discharged] [would not have hired] [would not have promoted] [would have demoted] the plaintiff because of [*describe the after-discovered misconduct*], you should limit any award of back pay to the date the employer would have made the decision to [[discharge] [not hire] [not promote] [demote]] the plaintiff as a result of [*describe the after-discovered misconduct*].

**Comment**

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, but 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 v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362 (1995); *see also Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1071 n.16 (9th Cir. 2004); *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761–62 (9th Cir. 1996). The employer must prove by a preponderance of the evidence that it would have fired the employee because of the after-acquired evidence. *O’Day*, 79 F.3d at 761.

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, as explained in Instruction 10.2 (Civil Rights—Title VII—Disparate Treatment—With Affirmative Defense of “Same Decision”). In both situations, the “same decision” theory is more a limitation on remedies than an affirmative defense that defeats a claim of employment discrimination. In the case of the “same decision” theory in a mixed motive case discussed in Instruction 10.2, information establishing a lawful basis for the employer’s decision is known to the employer at the time of the decision and limits a plaintiff’s remedies. In the case of “after-acquired evidence,” the information establishing a lawful basis for the employer’s adverse employment decision is acquired after the adverse decision and limits remedies.

The Ninth Circuit has concluded that “back pay” under various federal statutes, including Title VII, generally includes tips, holiday pay, and overtime pay. *See* *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1157 (9th Cir. 2001).

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