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Supreme Court Passes On Chance To Apply Uniform Rules On After-Acquired Evidence

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When employers were looking for certainty in the ongoing debate about after-acquired evidence, the U.S. Supreme Court said, “No, thanks.” Instead, the high court let stand a Second Circuit court decision in which an employer was allowed to use evidence to support that it fired an employee for breaking work rules. In *Weber v. Tada*, 589 Fed. Appx. 563 (2d Cir. Oct. 9, 2014) the Supreme Court recently declined to grant certiorari, which means that the split among the lower courts is likely to stand for some time. And, thus, your ability to defend yourself depends, in part, on where you run your company. Evidence that is collected *after* an employee has been discharged (for example, proof that the employee had violated work rules) is commonly referred to as after-acquired evidence. Imagine that your company fired a worker because you *suspect* that the employee broke work rules. If you are later sued and you find evidence the employee had, in fact, broken work rules, will the court consider that evidence? As it now stands, the answer depends on where you are located and why you want to use it. In the Seventh Circuit – which is made up of Illinois, Indiana and Wisconsin – you would likely be prohibited from introducing the evidence. The only thing that matters is whether you honestly believed that the employee had violated the rules *at the time* you made the decision to discharge him. On the other hand, in the Second Circuit – which is made up of Connecticut, New York and Vermont – you might be allowed to rely on it. In the *Weber* case, the court allowed the company to submit the evidence to the jury because the evidence tended to show that the company’s decision was made in good faith. The Supreme Court’s non-decision decision allows this geographic split to persist, but good practices compels employers to keep looking for the evidence – and, just as importantly, reasons to convince courts to use it.

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