Discrimination, Deceit, and Legal Decoys: The Diversion of After-Acquired Evidence and the Focus Restored by *McKennon v. Nashville Banner Publishing Company*

ELISSA J. PREHEIM*

"[I]t was a gold mine or a godsend. All you have to do is take an employee and find out something that they have done wrong, some misconduct that you never knew about and, boom, there goes their civil rights claim."[1]

INTRODUCTION

Christine McKennon worked for almost forty years as a confidential secretary for the newspaper *The Nashville Banner* (the "Banner"), with consistently excellent evaluations.[2] However, after McKennon had received warnings that she may be laid off because the Banner was experiencing financial problems, the Comptroller instrncted Mrs. McKennon to shred records containing information about the firm's financial status.[3] "[I]n an attempt to learn information regarding [her] job security concerns' and for her 'insurance' and 'protection,'"[4] McKennon surreptitiously copied ten pages of the confidential documents, took them home, and showed them to her husband.[5] Without knowledge of this breach of confidentiality, the Banner discharged sixty-two-year-old McKennon in October 1990 as part of an alleged workforce reduction instituted for financial purposes.[6] Nevertheless, during that year, the Banner hired two new secretaries, ages thirty-six and twenty-six.[7]

Mrs. McKennon subsequently filed a lawsuit under the Age Discrimination in Employment Act ("ADEA"),[8] and, during Mrs. McKennon's deposition in the ensuing litigation, the Banner first discovered her previous actions involving the financial documents.[9] Had the Banner known of her misconduct, it would have discharged her immediately.[10] Consequently, the Banner filed a motion for summary judgment arguing that McKennon was not entitled to any relief from the allegedly discriminatory discharge; thus, the *Banner* was relieved of all liability.[11] Finding that the nature and materiality of her misconduct justified her dismissal as a matter of law, a Tennessee district court

---

* J.D. Candidate, 1996, Indiana University-Bloomington; B.A., 1993, Northwestern University. I wish to thank Dean Julia Lamber for her helpful comments on an earlier draft of this Note.

1. Michael Terry, attorney for Christine McKennon, relating a statement made by a management lawyer who described the operation of the after-acquired evidence doctrine. *Supreme Court Issues Two Important Decisions* (National Public Radio broadcast, "All Things Considered," Jan. 23, 1995), *available in* LEXIS, Nexis Library, Script File.

2. McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 540 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995).

3. Brief for Petitioner at 4, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995) (No. 93-1543).

4. *McKennon*, 9 F.3d at 540.

5. Brief for Petitioner at 4-5, *McKennon* (No. 93-1543).

6. McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 605 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995); Brief for Respondent at 4, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995) (No. 93-1543).

7. Brief for Petitioner at 3, *McKennon* (No. 93-1543).

8. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

9. *McKennon*, 797 F. Supp. at 605-06.

10. *Id.* at 608.

11. *Id.* at 606.

entered summary judgment for the newspaper on the basis that McKcnnon sustained no injury from the alleged ADEA violation.[12] The Sixth Circuit Court of Appeals affirmed.[13]

This harsh result is a product of the "after-acquired evidence" doctrine that sevcral federal circuits have applied in employment discrimination litigation. Establishcd by the Tenth Circuit in 1988,[14] thc doctrine permits employers chargcd with discriminatory praetices to escape liability by showing that the plaintiff-cmployee engaged in misconduct of her own—a fact the employcr discovered only after the alleged discrimination occurred and often as a direct result of the litigation commencod to redress that discrimination. Upon discovery of the employee's prior wrongdoing, courts have entered summary judgment against employces based on the rationale that the cmployee would have been discharged due to her own misconduct. Employee misconduct, particularly instanccs of résumé fraud, is prevalent in the American workplace[15] and employers have argued that the after-acquired evidence doctrine properly prevents employees from reaping unjust benefits from their wrongdoing.[16] The Supreme Court disagreed.

In the unanimous decision of *McKennon v. Nashville Banner Publishing Co.*,[17] the Supreme Court restored the underlying principles and enforcement mechanisms of fcderal antidiscrimination statutes threatened by the after-acquired evidence doctrine.[18] As the Court recognized, allowing after-acquired evidence to act as a complete bar to liability is unsupported by existing law and legal principles, and is antithetical to the provisions and goals of federal civil rights law. Furthermore, courts must limit the use of after-acquired evidence to the remedial stage of litigation if the fcderal antidiscrimination statutes are to continue to function as effective devices for eradicating discrimination in employment. Providing guidelines as how properly to apply after-acquircd evidence in the remedial phase of the litigation, the Supreme Court declared, as a general rule, that neither reinstatement nor front pay[19] would be available to elaimants.[20] Courts may award backpay, but only to the point at which the after-acquired evidcnce was discovered.[21] Finally, the Court authorized the lower courts to "consider taking into further account extraordinary equitable circumstances that affect the legitimate intercsts of cither party."[22]

---

12. *Id.* at 608. .

13. McKcnnon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995).

14. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

15. A 1988 Equifax, Inc. study revealed that almost one-third of 200 randomly selected résumés misstatcd dates of employment by at least three months, presumably to conceal disfavorable and brief employment tenures. Of the applicants, 11% gave false reasons for leaving previous positions, 4% misrepresented job titles, 3% fabricated employers, 3% listed jobs never held, and 3% falsely claimed college degrees. Joan E. Rigdon, *Deceptive Resumes Can Be Door-Openers but Can Become an Employee's Undoing*, WALL ST. J., June 17, 1992, at B1.

16. George D. Mesritz, *"After-Acquired" Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims*, 18 EMPLOYEE REL. L.J. 215, 226 (1992) ("Employcrs are well-positioned to argue that, as a matter of public policy, the courts should not condone dishonesty and permit employees who fraudulently obtain jobs the opportunity to recover 'windfall' jury awards . . . .").

17. 115 S. Ct. 879 (1995).

18. The Court was prepared to address the issue two years ago, but the parties settled before the case could bc heard. Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993).

19. For an explanation of "front pay," see *infra* note 189.

20. *McKennon*, 115 S. Ct. at 886.

21. *Id.*

22. *Id.*

Writing for the Court, Justice Kennedy's succinct opinion belies the fierce debate and circuit split that the issue of after-acquired evidence has engendered.[23] Though the length of the opinion mirrors the brief existence of the doctrine, only a thorough examination of the doctrine's origin and development can frame the wealth of issues and legal arguments generated by after-acquired evidence. With this background, one can better identify inconsistencies in the Court's opinion and remaining uncertainties as lower courts apply the remedy-specific approach.

This Note concludes that, while the Court appropriately limited consideration of after-acquired evidence to the remedial phase of liability, the remedy-specific approach articulated by the Eleventh Circuit is more faithful to the goals of federal antidiscrimination law. Part I outlines the current frameworks allocating burdens of proof in disparate treatment litigation, giving special attention to the mixed-motives analysis—which shares its origin with the after-acquired evidence doctrine—and the impact of the Civil Rights Act of 1991. Part II traces the emergence of the doctrine and the development of the variations delimiting the split in the federal circuit courts. Part III analyzes *McKennon* and the various approaches of the circuits. Finally, Part IV proposes the treatment of after-acquired evidence which is most faithful to the purposes and goals of antidiscrimination statutes, and which can provide guidance to lower courts as they apply *McKennon*'s remedy-specific approach.

I. PROVING EMPLOYMENT DISCRIMINATION: DISPARATE TREATMENT ANALYSIS

Congress enacted Title VII of the Civil Rights Act of 1964[24] to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[25] In addition to this "primary, prophylactic objective," it is also the purpose of

---

23. *See infra* notes 57-63 and accompanying text. Apparently, little debate raged on the high bench. During oral arguments before the Supreme Court on November 2, 1994, seven Justices appeared hostile to the concept that an employer may avoid liability in an otherwise valid discrimination suit. *High Court Hears Arguments in Age Discrimination Suit* (National Public Radio broadcast, "All Things Considered," Nov. 2, 1994), *available in* LEXIS, Nexis Library, Script File.

Not surprisingly, attorneys for employers groups were disappointed with the *McKennon* decision, while civil rights attorneys were relieved. *Supreme Court Issues Two Important Decisions*, *supra* note 1. The reactions of others were more mixed. Judith Flickman, Women's Legal Defense Fund Director, characterized the decision as "a very bad win," since "victims of discrimination will now be allowed to pursue the [legal] remedies and rights without fear that employers are going to just go on fishing expeditions." *Id.* Laurence Gold, AFL-CIO General Counsel, stated "'it's not clear who won the war,'" although the "'employee did not win on the issue of remedies.'" *Attorney Finds Supreme Court More Pro-Employee than Appeals Courts*, DAILY LAB. REP., March 16, 1995 (statement by Laurence Gold at the District of Columbia Bar's annual program on the Supreme Court's labor and employment docket).

24. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e to e-17 (1988 & Supp. V 1993)).

25. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)).

Section 703 of the Civil Rights Act states:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

Retaliatory discharge is also prohibited in § 704:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . .

Title VII to make persons whole for injuries suffered from employment discrimination.[26] A private individual who files an individual claim acts as "a private attorney general" to advance the societal interest in enforcement.[27] Because the ADEA shares with Title VII the purpose of eradicating discrimination in the work place[28] by prohibiting the "arbitrary age discrimination in employment,"[29] and since the ADEA prohibitions "were derived *in haec verba* from Title VII," examination of Title VII cases is appropriate when interpreting the ADEA provisions.[30]

Three classes of disparate treatment claims have evolved under Title VII: pure discrimination, pretext, and mixed motives.[31] *McDonnell Douglas Corp. v. Green*[32] introduced an analytical model of the shifting burdens of proof in the first two classes. The Court later refined this model in *Texas Department of Community Affairs v. Burdine*[33] and *St. Mary's Honor Center v. Hicks*.[34] *Price Waterhouse v. Hopkins*,[35] as modified by the Civil Rights Aet of 1991 ("1991 Act"),[36] governs claims based on the theory of mixed motives—the allegation that both legitimate and illegitimate motives were present at the time of an employment decision. Both the *McDonnell Douglas* framework and the *Price Waterhouse* theory of mixed motives significantly affect the legal premise upon which the after-acquired evidence doctrine was founded. Thus, a brief discussion of their mechanics, underlying policies, and judicial and legislative modifications will provide the procedural context in which to examine the after-acquired evidence doctrine.

A. The McDonnell Douglas *Framework*

In cases of employment discrimination, plaintiffs often lack direct evidence to prove an unlawful motive; rather, they must rely on circumstantial evidence from which courts may infer discriminatory intent.[37] The *McDonnell Douglas* framework originally developed standards for establishing a prima facie case of employment discrimination based on eircumstantial evidence in hiring and promotion decisions. Courts subsequently

---

Id. § 2000e-3(a).

26. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

27. Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam).

28. Lorillard v. Pons, 434 U.S. 575, 577, 584 (1978); Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1096-97 (1993) (noting the similarity of statutory language and the joint doctrinal evolution of Title VII and the ADEA).

29. 29 U.S.C. § 621(b) (1988 & Supp. V 1993). Under the ADEA, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.* § 623(a)(1).

30. *Lorillard*, 434 U.S. at 584; *see also* Whitten v. Farmland Indus., Inc., 759 F. Supp. 1522 (D. Kan. 1991). The remedial provisions differ between the two acts and will be considered separately. *See infra* notes 178-87 and accompanying text.

31. While "disparate treatment" is one theory of liability, a second theory of liability under Title VII is "disparate impact." Proof of discriminatory motive is not required, for this theory involves "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Although this Note focuses primarily on disparate treatment claims, the issue of after-acquired evidence can arise under a theory of disparate impact. The ramifications are addressed *infra* text accompanying notes 170-71.

32. 411 U.S. 792 (1973).

33. 450 U.S. 248 (1981).

34. 113 S. Ct. 2742 (1993).

35. 490 U.S. 228 (1989) (plurality).

36. Pub. L. No. 102-166, § 107, 105 Stat. 1074 (1991) (codified at 42 U.S.C. § 2000e-2 (Supp. V 1993)). The Act's effect on *Price Waterhouse* is addressed *infra* notes 52-56, 118 and accompanying text.

37. *Burdine*, 450 U.S. at 252-54.

adapted this framework for discharge cases[38] and also applied it to analogous claims under the ADEA.[39] A plaintiff may establish a prima facie case by showing (1) that the plaintiff belongs to a protected class; (2) that she applied and was qualified for a vacant position; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained vacant and the employer continued to seek applicants with qualifications similar to those of the plaintiff.[40] A prima facie case creates an initial inference of discriminatory discharge or failure to hire and shifts the burden to the employer to "articulate some legitimate, nondiscriminatory reason" for the termination.[41] The employer need not prove that this proffered reason *actually* motivated the employment decision; it must only produce evidence that supports an inference of lawful motivation.[42] The plaintiff retains the burden of proving by a preponderance of evidence that the true reason was intentional discrimination.[43]

B. The Mixed-Motives Analysis of Mt. Healthy *and* Price Waterhouse

The *McDonnell Douglas* framework is inapplicable in the context of mixed motives, for "[w]here a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was '*the* "true reason"' for the decision . . . ."[44] Consequently, *Price Waterhouse* sets forth a separate

---

38. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.44 (1987).

39. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1707 (1993); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); *see also* LEE M. MODJESKA, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1988 & Supp. 1992) (listing recent federal court cases); Eglit, *supra* note 28, at 1097.

40. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

41. *Id.*

42. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 254; *see generally* PLAYER, *supra* note 38, § 5.44, at 393-95.

43. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993) (requiring plaintiffs in pretext cases to show that an employer's proffered legitimate reason for an employment decision was pretextual *and* that the actual reason was discriminatory). Under the *McDonnell Douglas* framework prior to *Hicks*, to prove a discriminatory motive a plaintiff needed only to prove that an employer's explanation was pretextual. *Hicks*' recent refinement—or, more properly, revision—of the *McDonnell Douglas* scheme has been the source of widespread controversy, prompting a bill proposed by the Senate to restore the burdens of proof as they were prior to *Hicks*. S. 1776, 103d Cong., 1st Sess. (1993). The requirement that a plaintiff claiming disparate treatment prove a discriminatory motive in addition to proving pretext is an undue burden on the plaintiff and a contravention of *McDonnell Douglas*' purpose to provide a means of proving discrimination absent direct evidence. *Hicks*, 113 S. Ct. at 2756-66 (Souter, J., dissenting); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

This additional procedural obstacle of proving discriminatory motive for victims of discrimination seeking redress may discourage these victims from pursuing valid claims. *Hicks*, 113 S. Ct. at 2763 (Souter, J., dissenting) (anticipating that the burdens and uncertainties of the majority's scheme will chill Title VII litigation and frustrate the legislative purpose of the Act); *see generally* Jody H. Odell, Comment, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and Its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251 (1994). This potential effect raises questions as to the Court's perception of the need for antidiscrimination enforcement. *See* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1310 (1990) (explaining the 1988 term as the result of a "Supreme Court that is apparently intent upon substantively narrowing protections against discrimination"); Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 924 (1993) (recalling eight weeks in 1989 during which the Supreme Court handed down seven decisions interpreting civil rights statutes in ways restrictive to plaintiffs).

44. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989) (emphasis in original) (citing Petitioner's brief). For several different descriptions of the "mixed-motive" case, see Lisa Sivley, Note, Price Waterhouse v. Hopkins: *The "Same-Decision" Test Adopted for "Mixed-Motive" Disparate Treatment Employment Discrimination Cases*, 28 HOUS. L. REV. 413, 414 (1991).

standard to govern this class of Title VII claims. A complainant has the burden of producing evidence that an unlawful factor played a motivating part in an employment decision.[45] With the burden thereby shifted to the employer, the employer may avoid liability only by proving by a preponderance of the evidence that it would have made the same decision absent the impermissible motive.[46] This standard was derived from a principle articulated over a decade earlier in *Mt. Healthy City School District Board of Education v. Doyle*,[47] which directed that "an employee [be] placed in no worse a position" than had no unlawful conduct occurred.[48]

Price Waterhouse adapted the *Mt. Healthy* standard to Title VII cases, in particular, to a sex discrimination claim brought by a female partnership candidate in an accounting firm. Price Waterhouse argued that even absent considerations of gender it would have refused to make the candidate a partner because of her interpersonal skills.[49] The Court stressed two components of the employer's burden of proving that it would have made the "same decision" for this legitimate reason.[50] First, objective evidence must show that the legitimate reason would have itself justified the termination. Second, the employer cannot prevail if the proffered lawful reason was not a motivating factor "*at the time of the decision.*"[51]

The Civil Rights Act of 1991 has since repudiated the aspect of *Price Waterhouse* which barred recovery for a proven discriminatory motive if the same employment decision would have been reached absent any illegal animus. Instead, it provides recovery if the complainant demonstrates that an impermissible motive was "*a* motivating factor . . . even though other factors also motivated the practice."[52] The 1991 Act retains the "same decision" standard but limits its relevance to the determination of the appropriate remedy for employment discrimination.[53]

Congress passed the 1991 Act to eliminate the "inevitable effect of the *Price Waterhouse* decision . . . to permit prohibited employment discrimination to escape sanction under Title VII."[54] As Congress underscored:

---

45. *Price Waterhouse*, 490 U.S. at 239-45.

46. *Id.* at 258.

47. 429 U.S. 274 (1977).

48. *Id.* at 285-86. *Mt. Healthy* involved a constitutional tort claim brought by an untenured teacher who was not rehired in part for engaging in conduct protected by the First Amendment. The school board provided two reasons for its decision not to renew his contract: (1) the teacher disclosed the contents of an internal memorandum regarding a possible faculty dress code to a radio station which subsequently aired the news; and (2) the teacher made obscene gestures to female students. *Id.* at 282-83. Although the first proffered reason involved protected conduct, the Supreme Court held that remedial action was unwarranted if the school board would have discharged the teacher for the obscene gestures, regardless of the radio station incident. *Id.* at 285. Even if the protected conduct played a "substantial part" in the employment decision, no constitutional violation would have occurred. *Id.* The Court explained: "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Id.* at 285-86.

49. *Price Waterhouse*, 490 U.S. at 233-35.

50. *Id.* at 244-45. This "same decision" test is a rebuttal to the employee's demonstration of the presence of an impermissible motive. Also referred to as the "harmless error" doctrine, Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 293 (1982), it involves an inquiry into "but for" causation. A successful rebuttal constitutes, in effect, an affirmative defense. *Price Waterhouse*, 490 U.S. at 246.

51. *Price Waterhouse*, 490 U.S. at 252 (emphasis added). "The very premise of a mixed-motives case is that a legitimate reason was present." *Id.* This immediate temporal requirement is an important point of departure in the context of after-acquired evidence. *See infra* text accompanying notes 116-19 and sources cited therein.

52. 42 U.S.C. § 2000e-2(m) (emphasis added).

53. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (explaining § 203 of the new legislation).

54. *Id.* at 46, *reprinted in* 1991 U.S.C.C.A.N. at 584.

> If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. . . . Legislation is needed to restore Title VII's comprehensive ban on *all* impermissible considerations of race, color, religion, sex or national origin in employment.[55]

The adverse congressional response to *Price Waterhouse* is significant[56] and particularly relevant in evaluating the after-acquired evidence doctrine operating in the context of federal statutory law.

II. THE HISTORICAL TREATMENT OF AFTER-ACQUIRED EVIDENCE: A FRAGMENTED CIRCUIT

The after-acquired evidence doctrine emerged in 1988 as a complete defense in the Tenth Circuit's seminal decision of *Summers v. State Farm Mutual Automobile Insurance Co.*[57] It was later adopted by Courts of Appeals in the Sixth and Eighth Circuits.[58] The Eleventh Circuit, in *Wallace v. Dunn Construction Co.*,[59] expressly rejected the *Summers* per se rule and limited the use of after-acquired evidence to the remedies stage of litigation.[60] The Third Circuit joined the *Wallace* camp,[61] while the Second and Ninth Circuits never squarely addressed the issue but indicated an alliance with the Eleventh Circuit's position.[62] The Seventh Circuit neither embraced nor rejected the *Summers* rule. Instead, it produced a trail of decisions fraught with inconsistencies and an approach which is uncertain at best.[63]

---

55. *Id.* at 47, *reprinted in* 1991 U.S.C.C.A.N. at 585 (emphasis in original).

56. Congress also reacted adversely to *Hicks*. Although only *Price Waterhouse* was legislatively modified, *Price Waterhouse* was more offensive to the principles of Title VII in its tolerance of discrimination, while *Hicks* arguably only added to the plaintiff's burden of proof. The congressional and scholarly reactions to *Hicks* are summarized *supra* note 43.

57. 864 F.2d 700 (10th Cir. 1988), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

58. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994); Johnson v. Honeywell Info. Sys., 955 F.2d 409 (6th Cir. 1992). In addition, the Tenth Circuit itself cited decisions rendered by District of Columbia and Fourth Circuit Courts of Appeals which approved the use of after-the-fact rationales in failure-to-hire claims. *Summers*, 864 F.2d at 706-07. The District of Columbia Circuit approved as a valid defense an alternative holding that the applicant "wouldn't have been hired anyway" because he was not qualified for flight office. *Id.* at 707 (citing with approval Mumane v. American Airlines, 667 F.2d 98 (D.C. Cir. 1981) (ADEA claim), *cert. denied*, 456 U.S. 915 (1982)). Similarly, the Fourth Circuit approved the defense that the applicant would not have been hired absent his age since he was previously discharged by another airline under disfavorable circumstances, a fact unknown by the defendant at the time it rejected the application. Smallwood v. United Airlines, Inc., 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 469 U.S. 832 (1984).

59. 968 F.2d 1174 (11th Cir. 1992), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part* and *rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994).

60. *Id.* at 1181.

61. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993).

62. Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29 (2d Cir. 1994) (expressing doubt as to the validity of an after-acquired rationale as a defense to liability given its incensistency with Title VII goals); EEOC v. Farmer Bros. Co., 31 F.3d 891, 901 (9th Cir. 1994) (stating that, although employer failed to preserve the after-acquired evidence defense on appeal, "it would be inequitable to hold that after-acquired evidence of misrepresentations in a job application should preclude an otherwise successful plaintiff from recovering damages"); Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994) (opining that the Ninth Circuit would reject the *Summers* rule and refusing to limit the remedy because of after-acquired evidence proven immaterial by the employee's satisfactory job performance over the course of 22 years).

63. *See infra* notes 97-115 and accompanying text.

A. After-Acquired Evidence as a Complete Defense: The Summers *Rule*

The Tenth Circuit promulgated the after-acquired evidence doctrine in a case of repeated instances of employee misconduct. Summers, a field claims representative, maintained a satisfactory work record during his first seven years of employment with State Farm. State Farm discovered in 1980, however, that Summers had previously falsified a document, whereupon it warned him that it could terminate him if he made more falsifications.[64] Instead, when State Farm uncovered another falsified record and numerous other "suspicious" claims, it placed Summers on probationary status for two weeks without pay.[65] Summers returned to work and was discharged in 1982, allegedly for his poor attitude.[66]

Summers subsequently filed age and religious discrimination claims under the ADEA and Title VII, respectively.[67] In preparation for trial, State Farm examined all documents prepared by Summers and discovered more than 150 falsified records, eighteen of which Summers prepared after his return from probation. As a result of this discovery, State Farm moved for summary judgment stating that, since it would have fired Summers had it known of his misconduct, Summers was entitled to no remedy.[68] The Tenth Circuit affirmed summary judgment by relying upon and extending the rationale established in *Mt. Healthy*.[69]

Summers, decided before *Price Waterhouse*, pushed the *Mt. Healthy* principle one step further by importing an additional, hypothetical factor into an already hypothetical inquiry: whether the employer would have made the same employment decision if the later discovered, lawful reason had been present at the time of discharge. Recognizing that the evidence of misconduct acquired four years after Summers' termination was not the *cause* of the discharge, the court assumed for purposes of summary judgment that State Farm's action was discriminatorily motivated.[70] However, the eourt maintained that the after-acquired evidence "[wa]s relevant to Summers' claim of 'injury,'and d[id] itself preclude the grant of any present relief or remedy to Summers."[71] It reasoned that Summers suffered no injury since previous misconduct justified his discharge, and a grant of relief would therefore place him in a better position than had State Farm not engaged in discrimination.[72] The court punctuated its reasoning with the since oft-quoted hypothetical:

> To argue, as Summers does, that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company

---

64. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 702 (10th Cir. 1988), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

65. *Id.*

66. *Id.* at 702-03.

67. *Id.* at 702.

68. *Id.* at 704.

69. *Id.* at 705-06.

70. *Id.* at 708.

71. *Id.* Although the court recognized a general reluctance to grant summary judgment in employment discrimination cases, it stated that the "obvious cases should be weeded out before trial." *Id.* at 709. This conclusory statement was later replaced by the materiality standard. *See, e.g.*, Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992) (requiring that after-acquired evidence must establish "valid and legitimate reasons" for the discharge). The employer's burden of proof is discussed *infra* notes 74-85 and accompanying text.

72. *Summers*, 864 F.2d at 708; *cf.* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977).

> doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.[73]

This image of an unscrupulous employee perhaps made it easier for the court to deny antidiscrimination remedies traditionally perceived to be due to victims, not victimizers. In *Summers*, the description may have been easy to ascribe, given the 150 instances of falsification. As courts following *Summers* realized, however, not all employees can be accurately characterized so negatively. Accordingly, modifications of the *Summers* rule focused on standards ensuring that employers did not manipulate to their undeserved advantage the stereotype of deceitful employees.

The employer's burden of proof is measured by standards of "would not have hired" or "would have fired" for claims of failure to hire and wrongful discharge, respectively.[74] The sufficiency of proof differs under these two standards. For example, an employer is unlikely to hire an applicant who lied on her résumé or employment application. The misrepresentations may expose an unqualified candidate, or at the least "demonstrate[] a pattern of dishonesty and disregard for the truth."[75] Once an employer hires an applicant and invests training in her, however, an employer may be less likely to terminate and seek a replacement for an employee who has proven herself to be quite capable in the position.[76] Accordingly, some courts applied the "would have fired" standard to discharge cases involving résumé fraud and employee misconduct.[77]

The Sixth Circuit required elements of proof to satisfy this version of the "same decision" standard.[78] In defense of a wrongful termination claim, the after-acquired evidence must establish "valid and legitimate reasons" for the discharge.[79] In an instance of application or résumé fraud, the misrepresentation or omission must be "material, directly related to measuring a candidate for employment, and . . . relied upon by the employer in making the hiring decision."[80]

A showing that the employment decision would have been justified, that is, the employer *could* have fired or not hired the individual, is insufficient to invoke the

---

73. *Summers*, 864 F.2d at 708.

74. *See* Washington v. Lake County, 969 F.2d 250, 255 n.5 (7th Cir. 1992) ("Generalizing, the hypothetical inquiry should correspond to the time of the allegedly discriminatory employment decision."). *Summers* refused to distinguish between claims of failure to hire and of wrongful discharge. Concerned with fashioning an appropriate remedy instead of determining the cause of termination, the court did not find a meaningful distinction between application-rejection and discharge. *Summers*, 864 F.2d at 707 n.3. For a listing of courts' application of "would have hired" and "would not have hired" standards, see *Washington*, 969 F.2d at 254 n.3.

75. O'Driscoll v. Hercules, Inc., 12 F.3d 176, 179 (10th Cir. 1994), *vacated*, 115 S. Ct. 1086 (1995).

76. *Washington*, 969 F.2d at 254; Bonger v. American Water Works, 789 F. Supp. 1102, 1106 (D. Colo. 1992); James G. Babb, *The Use of After-Acquired Evidence As a Defense in Title VII Employment Discrimination Cases*, 30 HOUS. L. REV. 1945, 1957-58 (1994) (summarizing *Bonger*); *cf.* Smith v. General Scanning, 876 F.2d 1315, 1320 (7th Cir. 1989) (stating that in the *McDonnell Douglas* burden-shifting analysis, the "'more appropriate' inquiry" in discharge cases "is job performance, into which the question of qualifications merges" (citing Oxman v. WLS-TV, 846 F.2d 448, 452 n.2 (7th Cir. 1988)).

77. *See Bonger*, 789 F. Supp. at 1106 (applying the "would have fired" standard since an employer may not necessarily terminate an employee if application fraud was discovered after hiring).

78. Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992).

79. *Id.*

80. *Id.* (finding employee's numerous misrepresentations on her application, including a false claim of a college degree when the employer expressly required one, established materiality and reliance); *see* Churchman v. Pinkerton's, Inc., 756 F. Supp. 515, 520 (D. Kan. 1991).

defense.[81] Disagreement exists as to the sufficiency of admonitory language printed on the employment application stating that misrepresentations would result in termination.[82] In contrast, an employer may be unable to prevail on a motion for summary judgment if its sole supporting evidence is its conclusory statement that the employee's misconduct would have resulted in the same employment decision: "[b]y itself, [the] affidavit is a self-serving document and does not establish the material fact that [the employer] would not have hired [the employee] but for the misrepresentation."[83]

The requirement of materiality and reliance prevents employers from engaging in "fishing expedition[s]"[84] into employee conduct and records to uncover trivial misrepresentations as a means to avoid liability for a discriminatory discharge.[85] However, these burdens will not prevent fishing expeditions to discover nontrivial information. The limitation of such a preventative measure belies any claim that the per se rule will not create perverse incentives for employers. This policy concern, as well as competing legal analyses, prompted other circuits to reject the *Summers* treatment of after-acquired evidence altogether.

B. The Remedy-Specific Use of After-Acquired Evidence

The Eleventh Circuit rejected the *Summers* doctrine in *Wallace v. Dunn Construction Co.*[86] and held after-acquired evidence to be relevant only in the remedial phase of the suit.[87] The court criticized *Summers* as inconsistent with the mixed-motive analysis and with the primary objective of Title VII.[88] First, it reasoned that the Tenth Circuit misinterpreted *Mt. Healthy* by ignoring the lapse of time between the employment

---

81. Kristufek v. Hussmann Foodserv. Co., 985 F.2d 364 (7th Cir. 1993) (finding company policy that employees are subject to discharge for application fraud is insufficient); *cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (stating that in a mixed-motives case, the employer must show that the same decision would have been made based on the legitimate reason standing alone). *But see* O'Driscoll v. Hercules, Inc., 12 F.3d 176, 180 (10th Cir. 1994) (granting summary judgment where employer showed employee's termination was justified, and plaintiff failed to produce evidence that employer would not have fired her), *vacated*, 115 S. Ct. 1086 (1995).

82. Welch v. Liberty Mach. Works, 23 F.3d 1403 (8th Cir. 1994). The employment application stated that "any misstatement or omission of fact on this application shall be considered cause for dismissal," *id.* at 1404, but the court required more substantial evidence that the warning reflected actual company policy: "[T]he employer bears a substantial burden of establishing that the policy pre-dated the hiring and firing of the employee in question and that the policy constitutes more than the mere contract or employment application boilerplate." *Id.* at 1406; *accord* Washington v. Lake County, 969 F.2d 250, 257 n.7 (7th Cir. 1992) (stating that language, "may," in dismissal clause is not dispositive). For a related but weaker test, see *O'Driscoll*, 12 F.3d at 180 (making no inquiry into materiality since the language in the employment application, coupled with severity and number of misrepresentations justified her termination and plaintiff failed to produce evidence that employer would not have done so); *Johnson*, 955 F.2d at 414 (holding that an admonitory warning in the employment application, nature and number of misrepresentations, and company's express requirement of college degree was sufficient).

83. *Welch*, 23 F.3d at 1406 (refusing to grant summary judgment to an employer when its affidavit was the only proffered evidence to support claim that employee would not have been hired for failing to disclose prior employment). *Contra O'Driscoll*, 12 F.3d at 176 (holding that warning on application and employer's affidavit shifted burden to employee to produce evidence of disparate treatment of other employees for misconduct *equivalent* to her own); *Washington*, 969 F.2d at 256-57 (holding that employee has burden to produce affirmative evidence rebutting employer's uncontradicted affidavits).

84. *Washington*, 969 F.2d at 256.

85. *Johnson*, 955 F.2d at 414.

86. 968 F.2d 1174 (11th Cir. 1992), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994).

87. *Id.* at 1181.

88. *Id.* at 1180.

decision and the discovery of a legitimate reason for the action.[89] Excusing liability for a motive not present at the time of discharge, and indeed often discovered as a result of a discriminatory act itself, contravened the *Mt. Healthy* principle that a plaintiff be placed "in no worse a position than if she had not been a member of a protected class."[90] Second, considering the perverse incentivcs creatcd by a complete defense approach,[91] the *Wallace* court determined that the *Summers* rule subvcrted the primary purpose of Title VII to create incentives for employers to *eradicate* employment discrimination.[92] Consequently, the court concluded that after-acquired evidence had no bearing on the qucstion of liability.

The Eleventh Circuit did not disregard after-acquired evidcnce entirely, however. While irrelevant to the question of liability, the court held that evidence of employee fraud or misconduct was relevant to the rcmedies afforded a successful plaintiff. This approach seeks to balance "the preservation of the employer's lawful prerogatives and the restoration of the discrimination victim," a balance advocatcd by Title VII itself.[93] Wallace Construction reasoncd that the imposition of these prospcctive remedies would go beyond making the victim whole and would impair an employcr's freedom to make lawful employment decisions.[94] Therefore, if after-acquired evidence provides a legitimate reason for termination, relief such as reinstatemcnt, front pay, and injunction are unavailable to a successful plaintiff.[95] On the other hand, an award of backpay—calculated to the point at which an employer proves it would have legitimately discovered the evidence—provides a make-whole remedy to a victim of discrimination without denying employer prerogatives.[96]

C. Confusion in the Seventh Circuit

Although the Seventh Circuit's position is unclear, its most rccent decision, at least in its outcome, is most comparable to the Elevcnth Circuit's approach in *Wallace*.[97] The circuit first addressed the issue of after-acquired evidcnce in *Smith v. General Scanning, Inc.*,[98] a case of application fraud. Smith rejected the *Summers* doctrine, holding that the embellished educational credentials discovered during litigation under the ADEA were irrelevant to the issue of lawful termination.[99] The court did suggest in dicta that the later discovered fraud may be "highly relevant" in fashioning an appropriate remcdy.[100]

---

89. *Id.* at 1179. The factual premise of mixed-motive cases—the presence of legitimate and illegitimate factors at the time of the employment decision—renders its analysis inapplicable to after-acquired evidence cases where the legitimate motive by dcfinition was not present at the moment in question. *Id.* at 1180-81.

90. *Id.* at 1179 (citing *Mt. Healthy*, 429 U.S. at 285-86).

91. See *infra* notes 120-29 and accompanying text for a discussion of the perverse incentives created by the *Summers* doctrine.

92. *Wallace*, 968 F.2d at 1180.

93. *Id.* at 1181.

94. *Id.* at 1182; *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973) (noting that Title VII does not vitiate lawful employment decisionmaking: "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it."); *cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 242-43 (1989) (noting that allowing the employer to avoid liability by showing the same decision would have been made absent a discriminatory motive prescrves Title VII's balance between employee rights and employer prerogatives).

95. *Wallace*, 968 F.2d at 1184.

96. *Id.* at 1182. For a detailed discussion of backpay calculation, see *infra* notes 213-34 and accompanying text.

97. Kristufek v. Hussmann Foodserv. Co., 985 F.2d 364 (7th Cir. 1993), *reh'g and reh'g en banc denied*, No. 91-3487, 91-3552, 1993 U.S. App. LEXIS 9919 (7th Cir. Apr. 29, 1993).

98. 876 F.2d 1315 (7th Cir. 1989).

99. *Id.* at 1319.

100. *Id.* at 1319 n.2.

The Court's next encounter with after-acquired evidence yielded a different analysis, however. In *Gilty v. Village of Oak Park*,[101] it granted summary judgment in favor of the employer, reasoning that a police officer who had misrepresented his educational background failed to meet the "quasi-standing elements" of the *McDonnell Douglas* prima facie case; that is, Gilty was not a "qualified" employee.[102] Applying an objective standard to determine that Gilty was unqualified, the court relied not upon his lack of academic credentials, but upon his lack of honesty.[103] Similar to the *Summers* approach, and contrary to the approach articulated in *Smith*,[104] this objective standard ignored the fact that his character trait was unknown to those evaluating candidates for promotion and could not have been an influencing factor in the decision.[105] Finally, even if Gilty could have established a prima facie case of disparate treatment, his claim would have failed for lack of injury.[106] Again, the perceived negation of injury by after-acquired evidence parallels the reasoning in *Summers*. Two years later, the Seventh Circuit retreated from its alignment with the Tenth Circuit by concentrating on the employer's burden of proof[107] and by explicitly adopting the "would have fired" standard in instances of résumé fraud.[108] Without adopting the reasoning of *Summers*, the court applied the *Price Waterhouse* evidentiary framework and held in *Washington v. Lake County* that a defendant employer was entitled to summary judgment if it would have fired the employee upon discovery of the application fraud.[109]

The Seventh Circuit's most recent decision of *Kristufek v. Hussmann Foodservice Co.*[110] only added to its confusing and inconsistent treatment of after-aequired evidence. Citing its initial position in *Smith*, the court advanced a position that closely paralleled the remedy-specific approach of *Wallace*. Addressing the retaliatory discharge claim in *Kristufek*, the court reasoned that after-acquired evidenee did not alter the deterring statutory penalty for retaliation because the issue concerned the circumstances known at the time of discharge.[111] Pursuant to *Smith* dicta, the court considered the later discovered résumé falsification in determining damages, but it declined to deny all relief on a

101. 919 F.2d 1247 (7th Cir. 1990).

102. *Id.* at 1251. The officer claimed that his promotion denial was racially motivated. His employer subsequently discovered that Gilty had enhanced his academic credentials, whereupon Gilty was terminated. Gilty then amended his complaint to include retaliatory discharge. *Id.* at 1248-50.

103. *Id.* at 1251. This argument involving the prima facie case is discussed *infra* notes 131-38 and accompanying text.

104. Nowhere in the *Gilty* opinion is *Smith* distinguished or even mentioned.

105. *Gilty*, 919 F.2d at 1251 ("[A]n employer's knowledge or lack of knowledge is of no relevance at the prima facie stage of the case.").

106. *Id.* at 1253. Even absent the purported disparate treatment, Gilty would not have been among the two candidates selected for promotion. *Id.* at 1252. Significantly, the court equated an employment discrimination claim and a tort: "As in any tort case, statutory or otherwise, a plaintiff cannot win a discrimination case if the harm to him would have been the same whether or not the defendant had discriminated." *Id.* at 1253. For a complete discussion of the historical developments leading to the view espoused in *Gilty* but urging adoption of an approach similar to *Wallace*, see Cheryl K. Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175 (1993).

107. Reed v. AMAX Coal Co., 971 F.2d 1295 (7th Cir. 1992) (per curiam). *Reed* was distinguishable from *Summers* by the fact that the employer, although it *could* have fired the plaintiff for application fraud, never proved that it *would* have done so. *Id.* at 1298. The question of fact as to the materiality of the misconduct rendered the district court's grant of summary judgment based on *Summers* erroneous. *See id.* Summary judgment was nevertheless affirmed since the plaintiff-employee in *Reed* failed to establish the *McDonnell Douglas* prima facie element of disparate treatment. *Id.*

108. Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992).

109. *Id.* The court imposed upon an employer a preponderance of the evidence standard in proving that the same decision would have been made. *Id.* at 255.

110. 985 F.2d 364 (7th Cir. 1993).

111. *See id.* at 369.

Summers rationale since the two cases were factually distinguishable.[112] Instead, the court reduced the judgment by the amount of backpay accumulating after the employer discovered the fraud so as not to penalize the employer.[113] While the court did not dismiss the possibility that all relief could be denied in other circumstances, the academic qualifications that Kristufek claimed to possess "were not so critical as to cancel out the statutory penalty for a discriminatory firing."[114]

The Seventh Circuit adopted neither the complete defense nor the remedy-specific approach. Instead, it treated after-acquired evidence on a truly case-by-case basis, thereby producing an enigmatic chain of decisions and carving a middle ground between *Summers* and *Wallace*. The threshold requirement of qualification under *McDonnell Douglas* seems to have been subsumed within the "would have fired" standard imposed on employers. There was a potential bar to all relief if the severity of the misrepresentation outweighed the deterrent goals of antidiscrimination law, a highly subjective and unpredictable analysis. Also, the circuit adhered to the date of actual discovery as the terminating point of the recoverable backpay period.[115] Otherwise, recent Seventh Circuit jurisprudence followed the *Wallace* approach.

Perhaps the uncertainty within the Seventh Circuit best illustrates the entanglement of policy concerns and factual permutations in complete defense claims. The infusion of evidence of an employee's own wrongdoing into the already complex and emotionally charged context of employment discrimination blurs the traditional notions of victim and victimizer, those to be deterred and those deserving remedial relief. The adverse reaction to employee misconduct diverted attention away from the aim of antidiscrimination statutes in jurisdictions which treated after-acquired evidence as a complete bar to liability. The Supreme Court has recently restored focus in employment discrimination litigation. However, the remedy-specific approach enunciated in *McKennon*, particularly with respect to backpay, is internally inconsistent and may perpetuate the fragmented approach among the lower courts in fashioning appropriate remedies authorized by the numerous federal statutory schemes.

III. ANALYSIS

A. The Invalidity of the Complete Defense Approach

Striking down the complete defense approach to after-acquired evidence, the Supreme Court in *McKennon* refuted the analogy to mixed-motives which formed the central premise of *Summers*. The Tenth Circuit constructed the *Summers* per se rule upon an unjustifiable extension of *Mt. Healthy* to incongruous factual situations. By disregarding the lapse of time between the time of the employment decision and the time at which the

112. Kristufek's single falsification was not discovered prior to termination. The degrees he claimed to possess were not prerequisites for the job, and he functioned well without them. *Id.* at 369-70. Summers, on the other hand, falsified multiple documents, conduct which affected his job performance. *See supra* notes 64-66 and accompanying text.

113. *Kristufek*, 985 F.2d at 371. The court did not consider in *Washington v. Lake County* whether the plaintiff was entitled to backpay for the period of time between the discharge and the discovery of misconduct since the plaintiff did not raise the argument. *Washington*, 969 F.2d at 253 n.2.

114. *Kristufek*, 985 F.2d at 370. Kristufek, hired as Director of Employee and Community Relations, stated he had a bachelor's degree from Drake University and had taken graduate courses at Northwestern University. In fact, he had attended but never graduated from Drake, and he had taken courses at Northwestern, but not at the graduate level. *Id.* at 366.

115. An alternative calculation of the recoverable backpay period is explicated *infra* text accompanying notes 215-19.

employer possessed a legitimate reason for that decision, the per se approach places the employee in a worse position than if no discrimination had occurred. Furthermore, the Civil Rights Act of 1991 destroyed any legal support provided by *Price Waterhouse*. Finally, the *Summers* approach to after-acquired evidence contravenes the purpose of federal antidiscrimination laws by denying remedies to victims of discrimination and by failing to deter those employers who have engaged in the unlawful conduct these statutes seek to eradicate.

1. The Flawed and Refuted Foundation of the Mixed-Motives Analogy

a. The Inapplicability of Mixed-Motives Analysis

Summers purports to effectuate the *Mt. Healthy* principle of placing a victim of discrimination in the same position in which she would have been absent any impermissible motivating factor by applying the "same decision" test. However, allowing employers to consider information learned after the allegedly discriminatory act to prove that the same decision would have been made contravenes the very principle which justificd the *Summers* rule. Claims of mixed-motives assume the presence of both legitimate and illegitimate factors motivating the employer at the time of the employment decision.[116] As its name underscores, however, after-acquired evidence played no role in the employment decision, often assumed to be discriminatorily motivated for purposes of summary judgment.[117] The difficulty that controlled the *Mt. Healthy* dccision—determining an employer's dccisionmaking motive—is not present in cases of after-acquired evidence. This distinction rcnders *Mt. Healthy* inapplicable.[118] Refuting the legal premise of *Summers*, the *McKennon* Court clearly narrowed the inquiry in the liability phase of discrimination claims to employer, not employee, conduct. "Mixed motive cases are inapposite [in after-acquired evidence cases], except to the important extent they underscore the necessity of determining the employer's motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law."[119]

---

116. *See supra* notes 44-51 and accompanying text.

117. *See, e.g., Summers*, 864 F.2d at 708.

118. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885 (1995). In addition to resting on misinterpreted precedent, the *Summers* rule does not survive the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a (1988 & Supp. V 1993). For a comprehensive discussion of the modifications of and implications for the ADEA of the Civil Rights Act of 1991, see Eglit, *supra* note 28. Congress passed the Civil Rights Act of 1991 to expand the scope of civil rights statutes and to provide adequate protection to victims of discrimination. Pub. L. No. 102-166 § 3(1), (4), 105 Stat. 1071 (1991); *see supra* notes 52-55 and accompanying text. The 1991 Act entitles victims of discrimiinatory employment practices to relief upon a showing that an illegal animus was "a motivating factor" in the adverse employment decision, even if not a but-for or substantial factor. 42 U.S.C. § 2000e-2(m); *see* Rebecca H. White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Diserimination Litigation*, 35 B.C. L. REV. 49, 78 (1993). This statute put the "same position" rationale of *Mt. Healthy* into question and invalidated any reliance by after-acquired evidence courts upon the *Price Waterhouse* mixed-motives analogy. If remedial action is appropriate where an unlawful motive was merely present but was not necessarily a substantial motivating factor in an employment decision, relief is certainly appropriate where an illegal animus was the sole reason, as in most claims of after-aequired evidence. Therefore, allowiug after-acquired evidence to bar all liability also violates the congressional mandate of the 1991 amendment.

119. *McKennon*, 115 S. Ct. at 885.

b. Creating Perverse Incentives

The *Summers* per se rule also contravenes the deterrent purpose of Title VII, a purpose which the Civil Rights Act of 1991 reaffirmed.[120] Indeed, the Court recognized that the coneern of many commentators and eourts that the after-acquired evidence doctrine creates perverse incentives for employers was "not an insubstantial one."[121] Prior to its invalidation, practitioners were advised to implement procedures that maximized the availability of the after-acquired evidence defense.[122] For example, in a complete defense jurisdiction, crafting employment applications "to elicit even more specifie information"[123] would have provided useful evidence in the event of litigation, as would contacting educational institutions, previous employers, physical and mental health care professionals, and acquiring court files.[124] As a consequence, potential plaintiffs would have been discouraged from bringing discrimination claims, whether or not they have committed any wrong, if their closets contained any skeletons.[125] The Eleventh Cireuit recognized that *Summers* "invite[d] employers to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination" since they could "manufactur[e] a 'legitimate' reason for the discharge that fit[] the flaws in the employee's background."[126] Also created is the incentive to "sandbag."[127]

The treatment of after-acquired evidenee as a complete bar to liability is inconsistent with the deterrent goal of federal antidiscrimination statutes. Indeed, not only did the *Summers* approach fail to deter against discrimination in the workplace, it encouraged unlawful employment practices.[128] As the *McKennon* Court held, the complete defense

---

120. 42 U.S.C. § 1981a. Congress found that "additional remedies under federal law are needed to deter unlawful harassment and intentional discrimination in the work place." § 2(1), 105 Stat. at 1071.

121. *McKennon*, 115 S. Ct. at 887.

122. Mesritz, *supra* note 16, at 215.

123. *Id.*

124. *Id.* at 222-23; *see also* James A. Burstein & Steven L. Hamann, *Better Late Than Never—After-Acquired Evidence in Employment Discrimination Cases*, 19 EMPLOYEE REL. L.J. 193 (1993); Robert M. Shea, *Posttermination Discovery of Employee Misconduct: A New Defense in Employment Discrimination Litigation*, 17 EMPLOYEE REL. L.J. 103 (1991).

125. The prospect of a defendant's thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct, however, may chill the enthusiasm and frequency with which employment discrimination claims are pursued, even in cases where the victim of discrimination has nothing to hide, let alone cases where the potential plaintiff is not entirely blameless. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1236 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995); *see also* Schmidt v. Safeway, Inc., 864 F. Supp. 991, 994 (D. Or. 1994); Masscy v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323 (D.N.J. 1993); Douglas L. Williams & Julia A. Davis, *Title VII Update—Skeletons and a Double-Edged Sword*, C669 A.L.I.-A.B.A. 305 (1991); Samuel A. Mills, *Toward an Equitable After-Acquired Evidence Rule*, 94 COLUM. L. REV. 1525, 1531 (1994).

126. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180 (11th Cir. 1992), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994). Some employers argue that omissions or misrepresentations on job applications are always relevant in their reflection upon the applicant's honesty. *Schmidt*, 864 F. Supp. at 995. However, the relation between the omission, the job description, and the length of the employment tenure during which an employer can observe the employee's honesty may preclude any showing of matcriality and reliance. *Id.*

127. Sandbagging occurs when an employer hires someone despite a known, legitimate reason that the applicant should be rejected, conceals evidence of that knowledge, freely discriminates (for example, harassment or wage discrimination) until the employee objects, and then "discovers" the legitimate reason during litigation if need be. *Wallace*, 968 F.2d at 1180-81. One court suggests that the practice of sandbagging could itself violate Title VII and the ADEA, and the evidence thereby obtained would be inadmissible even in the remedies stage of litigation. *Mardell*, 31 F.3d at 1238 n.31 (dictum).

128. *Cf.* Brodin, *supra* note 50, at 318 (criticizing the lack of deterrent effect created by the *Mt. Healthy* "same decision" test: "Indeed, the refusal of the courts to take *some* action against such 'harmless' discrimination might actually encourage the continuation of such conduct." (emphasis in original)).

approach therefore fails on policy grounds, for antidiscrimination objectives are undercut by a doctrine that permits, and even encourages, an employer to escape sanction for discriminatory, statutorily prohibited practices:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act.[129]

2. The Failure of Subsidiary Arguments Under *Summers*

As alternatives to the mixed-motives reasoning of *Summers*, advocates of the complete defense approach advanced two arguments to justify the denial of relief to employees later discovered to have engaged in fraud or misconduct. The first argument is procedural and incorporates the *Summers* rationale: since the employee's own conduct would have resulted in the same adverse employment decision, the employee has suffered no legal injury, or is not qualified, and therefore lacks standing to pursue a claim. The second argument rests upon the equitable doctrine of "clean hands," a doctrine both addressed and dismissed in *McKennon*.[130] Both arguments misperceive the nature of the injury resulting from discrimination, and they ultimately fail under the language and purpose of federal antidiscrimination law.

a. Standing & "Injury"

Lack of standing has barred claims involving after-acquired evidence in some courts, although upon two different theories. The first of these is founded upon the "qualified" element of the *McDonnell Douglas* prima facie case. The employee is not qualified for the position for which she was hired, as evidenced by the material omissions or misrepresentation of her employment application. Consequently, she cannot establish a prima facie case of employment discrimination and therefore lacks standing.[131] The *McDonnell Douglas* prima facie case creates an inference of discriminatory intent since proof of an employer's state of mind is virtually impossible absent direct evidence.[132] Nevertheless, an employee is not confined to the prima facie case; the inference can also be created by other types of circumstantial evidence.[133] For instance, in after-acquired evidence cases, courts *assume* when considering a motion for summary judgment that the employer acted with discriminatory intent. "Thus, the four-prong *McDonnell-Douglas* test, used to establish a prima facie case, and designed to ferret out intentional discrimination, has no role to play."[134] Even the *Summers* court recognized the

---

129. *McKennon*, 115 S. Ct. at 885.

130. *Id.*

131. Dotson v. United States Postal Serv., 977 F.2d 976 (6th Cir. 1992) (finding that omission of health and employment history rendered plaintiff not qualified for the postal job and not entitled to discrimination relief); Gilty v. Village of Oak Park, 919 F.2d 1247 (7th Cir. 1990).

132. *See* Lanetot, *supra* note 43, at 66.

133. White & Brussack, *supra* note 118, at 63.

134. *Id.* at 64.

inapplicability of the *McDonnell Douglas* framework since the scheme "clearly presupposes a 'legitimate nondiscriminatory reason' *known* to the employer at the time of the employee's discharge."[135]

Demonstrating that an employee is qualified for the position eliminates the most logical reason for a legitimate adverse employment action.[136] The purpose of the "qualified" element of the prima facie case is to enable a plaintiff to raise the inference of discrimination, not for its objective truth. An argument to the contrary leads to illogical and unjust results. For instance, suppose an employer received the résumés of two applicants bearing the same name, only one of which reflected the necessary college degree to deem her qualified for the available position. However, the unqualified applicant was mistakenly hired, performed satisfactorily for several years, and was eventually fired for allegedly discriminatory reasons. Under the reasoning of courts applying *McDonnell Douglas*, the employee could not establish standing since she lacked the requisite degree to be "qualified." Certainly the prima facie element is not intended to prevent this type of discrimination claim.

Furthermore, the focus in *McDonnell Douglas* is on the employer's intent, which can only include his perception of the employee's qualifications—those reflected on the application or observed from job performance after hiring.[137] The employer hired and retained the employee because he believed her to be qualified. Objective and later discovered knowledge to the contrary should not preclude establishment of her prima facie case.[138]

Alternatively, some have argued in the context of application fraud that an employee lacks standing to advance a claim of employment discrimination because the employee did not "properly come into the status of employee."[139] Under this reasoning, a court cannot award relief because the enforcement provisions section of Title VII predicates remedial action on employee status.[140] This argument misunderstands the legal theory underlying Title VII claims. An employee filing a claim under Title VII does not assert a right to employment. Indeed, such a claim is without merit in the majority of states due to the employment at will doctrine. The right asserted by Title VII claimants is the right to be free from discriminatory action, a right that is statutorily guaranteed. Accordingly, Title VII and the ADEA confer standing on any person discriminated against by an employer.[141] Neither statute contains an exception or waiver of relief for employees who

---

135. Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700, 705 (10th Cir. 1988) (emphasis in original) (quoting *McDonnell Douglas*, 411 U.S. at 802), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

136. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) ("[T]he prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978))).

137. White & Brussack, *supra* note 118, at 63.

138. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1230 (3d Cir. 1994). The courts imposing the materiality and reliance standards in evaluating whether an employee would have been fired upon discovery of résumé fraud have themselves discredited this argument based on qualification. *See supra* notes 78-80 and accompanying text.

139. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1185 (11th Cir. 1992) (Godbold, J., dissenting), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994). Since this argument is premised on the fraudulent procurement of employment, claims of application rejection and wrongful discharge must be distinguished on the issue of standing.

140. *Id.* at 1188. The enforcement provisions section of Title VII limits remedies to "an individual *as an employee*." 42 U.S.C. § 2000e-5(g)(2)(A) (Supp. V 1993) (emphasis added).

141. 42 U.S.C. § 2000e-2(a) (1988); 29 U.S.C. § 623(a) (1988); *see* Warth v. Seldin, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."); *Mardell*, 31 F.3d at 1231.

have committed wrongful acts, or for those who are not qualified for the job.[142] The conferral of standing finds support in the common law as well: "Under general tort principles, even a trespasser is entitled to the benefit of the rule that the offended landowner may not intentionally injure him."[143]

The argument that such an exception or waiver exists under circumstances of after-acquired evidence improperly injects into a discrimination claim a theory of contractual wrongful termination.[144] Only an employee with an employment contract is entitled to a job absent just cause for termination, and Title VII and the ADEA assume the more common at-will employment arrangement.[145] An employee need not establish a property right in her job to demonstrate injury in an employment discrimination claim.[146]

Moreover, regardless of the circumstances under which an individual was hired, a victim of discrimination has suffered noneconomic injuries to self-esteem and dignity. The claim that no injury has been suffered ignores the stigmatic harm inflicted by discrimination,[147] and it emerges from a growing perception that discrimination is no longer a pervasive societal harm.[148] In addition, courts applying the after-acquired evidence defense disregard the psychological injury previously recognized in discrimination litigation.[149] Instead, the concept of injury has been confined to individual, economic injury.[150] This narrow definition of injury suffered as a result of discriminatory practices is inconsistent with the underlying purpose of federal antidiscrimination statutes and the reaffirmation by Congress that employment discrimination persists as a societal problem requiring continued efforts of eradication.

Although the Court did not directly address the issue of standing in *McKennon*, it emphasized the compensatory objective of the ADEA and Title VII, and it equated discrimination with injury.[151] The Court's focus on the purpose of federal antidiscrimination statutes, and its conclusion that their objectives "are furthered when even a single employee establishes that an employer has discriminated against him or her,"[152] eliminates arguments that after-acquired evidence creates a lack of standing or injury.[153] In short, these subsidiary arguments cannot bar recovery for the same policy reasons that the Court dismissed the application of unclean hands.

---

142. *Mardell*, 31 F.3d at 1231; Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323 (D.N.J. 1993) ("There is nothing in the statute itself to support a requirement that the job had been acquired honestly."); Kenneth G. Parker, Note, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 428 (1993).

143. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1406 (8th Cir. 1994) (Arnold, J., dissenting).

144. *Mardell*, 31 F.3d at 1231 n.16 (noting that fraudulent inducement renders a contract voidable); *see also* White & Brussack, *supra* note 118, at 59-61.

145. *Mardell*, 31 F.3d at 1233.

146. Washington v. Lake County, 969 F.2d 250, 256 (7th Cir. 1992) (noting at-will employment throughout many states).

147. Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring).

148. Zemelman, *supra* note 106, at 194.

149. *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring) (discussing the harms caused by discriminatory evaluation processes); *see also* White & Brussack, *supra* note 118, at 75-76; Zemelman, *supra* note 106, at 200 (observing the trend toward perceiving discrimination cases as contract and tort actions that involve economic loss).

150. Zemelman, *supra* note 106, at 200; *see* White & Brussack, *supra* note 118, at 75-76 ("That the discrimination may result in no out-of-pocket loss makes it no less painful an affront."); *cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) ("[A] worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'").

151. *See McKennon*, 115 S. Ct. at 884 ("Compensation for injuries caused by the prohibited discrimination is another [objective].").

152. *Id.* at 885.

153. *Accord* Wallace v. Dunn Constr. Co., 62 F.3d 374 (11th Cir. 1995).

b. The Clean Hands Doctrine

Some proponents of the *Summers* rule, including the Nashville Banner Publishing Company, raised the equitable principle of "clean hands" as a secondary reason to deny all relief.[154] The doctrine is based on the following principle: "He that hath committed iniquity shall not have equity."[155] A plaintiff whose own hands are stained by misconduct related to the litigated matter will be denied otherwise recoverable relief.[156] Although originating and being most frequently applied in the context of fraudulent contracts, the maxim includes any unconscionable conduct, even if legal.[157] However, to ensure that the doctrine is "not a license to destroy the rights of persons whose conduct is unethical,"[158] courts impose the "same transaction" limitation: the conduct giving rise to the defense of unclean hands must be connected to the controversy at bar.[159] Furthermore, the doctrine of clean hands is applied at the court's discretion and may be overridden by important public policy concerns.[160]

In the context of after-acquired evidence, the clean hands defense fails on two levels. First, the "same transaction" threshold cannot be satisfied. The subject matter of the litigation is an allegedly discriminatory employment decision made with no knowledge of that which the employer now claims dirties the plaintiff's hands. The stumbling block in the *Summers* mixed-motives analogy—the lapse in time between the employment decision and the acquisition of legitimate justification—constitutes an insurmountable obstacle to the subsidiary clean hands doctrine as well, for the plaintiff's acquisition or retention of employment through inequitable conduct had no bearing on the action for which the plaintiff seeks redress. The doctrine is founded on the principle that a plaintiff should not "reap the benefit of his misconduct," and, consequently, if "the right claimed in the suit did not accrue because of [the misconduct], the misconduct will be held to be collateral and not to defeat the right to affirmative relief."[161] Application of the equitable principle in the context of after-acquired evidence assumes, again inappropriately, an assertion of a property right in one's job instead of a right to be free from discrimination.

---

154. Brief for Respondent at 40-42, *McKennon* (No. 93-1543); *see also* Welch v. Liberty Mach. Works, 23 F.3d 1403, 1405 (8th Cir. 1994) ("We do not believe that an employee should benefit from his or her misrepresentation."); Washington v. Lake County, 969 F.2d 250, 256 (7th Cir. 1992) ("There is some equitable appeal for the conclusion that someone who would not have been hired but for his own fraudulent conduct should not receive any relief from employment discrimination laws for a later employment decision.").

155. JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 397 (Spencer W. Symons ed., 5th ed. 1941); *see* WILLIAM F. WALSH, A TREATISE ON EQUITY 283 n.9 (1930). *See generally* HENRY L. MCCLINTOCK, MCCLINTOCK ON EQUITY (2d ed. 1948).

156. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.4 (1973); MCCLINTOCK, *supra* note 155, at 26; POMEROY, *supra* note 155, §§ 397-404; WALSH, *supra* note 155, at 283 n.9. The clean hands doctrine is applied not for the benefit of the defendant but for the protection of the court; judicial intervention should not permit one to profit from one's own misconduct. MCCLINTOCK, *supra* note 155, at 60.

157. MCCLINTOCK, *supra* note 155, at 59-61; POMEROY, *supra* note 155, § 401.

158. DOBBS, *supra* note 156, § 2.4, at 46. The principle seeks to preclude a plaintiff from benefiting from his misconduct. "'What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts.'" *Id.* (quoting Republic Molding Corp. v. B.W. Photo Utils., 319 F.2d 347, 349 (9th Cir. 1963)).

159. MCCLINTOCK, *supra* note 155, at 63; POMEROY, *supra* note 155, § 399.

160. DOBBS, *supra* note 156, § 2.4, at 46; POMEROY, *supra* note 155, § 411 (discussing the public policy exception in cases of plaintiff's illegal, not merely unethical, conduct). Cheryl Zemelman discusses the capacity of public policy to trump the clean hands doctrine as illustrated in other contexts. She also observes that the defense of unclean hands was not used in Title VII litigation in the 1960's and early 1970's when discrimination was perceived as a wrong against society instead of a wrong against an individual. Zemelman, *supra* note 106, at 197-98.

161. MCCLINTOCK, *supra* note 155, at 64.

An alternative reasoning is equally flawed. To apply the doctrine in cases of after-acquired evidence on the basis that an employee would otherwise benefit from her wrongdoing presumes the unlikely prospect that the employee engaged in misconduct with the anticipation of unlawful employment practices and a subsequent (and favorable) discrimination claim.[162] It is not credible to suggest that an employee acted in anticipation of civil rights damages, and the denial of otherwise appropriate remedies thus serves no deterrent against dishonesty or other wrongdoing.[163]

To illustrate, consider a man who exaggerated his academic credentials and who worked until he was terminated, forty years later, in violation of the ADEA. It is unlikely that at the time of his wrongdoing he even considered his employer's actions four decades hence. Any potential deterrent effect created by applying the clean hands doctrine was nullified, for his thoughts never included the possibility that his misrepresentation may preclude recovery for an uncontemplated discriminatory discharge. Consequently, neither the elements nor the purpose of the clean hands doctrine is satisfied in the context of after-acquired evidence. The misconduct comprising the asserted defense of unclean hands is collateral to the plaintiff's claim of discrimination, and the plaintiff did not calculate to profit by that legal claim.

Another incongruity exists: the clean hands doctrine as applied to after-acquired evidence cases may itself produce inequity. For example, the damage the employer suffered in *McKennon* consisted of limited financial and personnel information revealed to an employee's husband. Mrs. McKennon, however, suffered the loss of a job and the psychological injuries sustained from inferior treatment based on age. The disparity in degrees of injury or wrongdoing undercuts the equitable rationale of the clean hands doctrine.

Second, the strong public policy underlying federal antidiscrimination law overrides any application of the equitable maxim as a complete defense.[164] The *McKennon* Court quickly dismissed the equitable argument, noting that it has "rejected the unclean hands defense 'where private suit serves important public purposes.'"[165] Even if denied an equitable remedy under the doctrine of clean hands, the plaintiff still has a legal

---

162. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 n.25 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995).

163. *Id.* at 1235-36 n.25 ("The applicant's incentive not to be dishonest, and the employee's incentive not to breach his or her duties of truthfulness, loyalty, and obedience, stem from the fact that he or she is always subject to disciplinary measures if the employer learns of the wrong outside the context of discovery in an employment discrimination case."); Massey v. Trump's Hotel & Casino, 828 F. Supp. 314, 323 n.10 (D.N.J. 1993) ("We find it preposterous that an employee would refrain from lying because she anticipates that she may be illegally discriminated against later and wants to preserve her right to recover damages.").

164. The *Wallace* court rejected the clean hands doctrine because its application ignored the effect of Title VII. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181 n.10 (11th Cir. 1992) (dictum), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994). The court opined that, even if applicable, the doctrine was limited by the remedial goals of the federal statute. *Id. But see* Women Employed v. Rinella & Rinella, 468 F. Supp. 1123 (N.D. Ill. 1979) (applying clean hands doctrine as defense to sexual harassment where the employee harassed the employer after her discharge), *cited in* Jay P. Krupin, *Law of the Workplace*, LEGAL TIMES, Oct. 24, 1994, at 29.

165. *McKennon*, 115 S. Ct. at 885 (quoting Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 138 (1968)). As the *Mardell* court had stated earlier, to reason that an employee who was subject to discriminatory acts of an employer yet himself engaged in wrongdoing suffered no legal injury "defie[d] common sense." *Mardell*, 31 F.3d at 1231.

> Put more dramatically, to maintain that a victim of employment discrimination has suffered no injury is to deprecate the federal right transgressed and to heap insult ("You had it coming") upon injury. A victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw.

Id. at 1232 (citation omitted).

remedy—a remedy unaffected by the equitable doctrine, provided by Title VII, and indeed, mandated by its policy goals.[166]

3. Separating Issues of Liability and Remedy

The Supreme Court has elsewhere recognized the need to separate the liability and remedial phases in employment discrimination litigation. These cases also illustrate the potentially broad and damaging application of the *Summers* rule.

Class action suits are the best example of the private attorney general model of Title VII enforcement. In *Franks v. Bowman Transportation Co.*,[167] the district court found racially discriminatory practices to exist, but the sole named class representative was subsequently fired for cause. On appeal, the employer argued mootness since the class representative was not entitled to relief and thus no longer had a personal stake in the outcome.[168] However, the Court separated the issues of liability and remedy, holding that the rights of the class members were the subject of further litigation.[169] If the facts had included after-acquired evidence and the clean hands doctrine were to apply, the class representative would have been denied the opportunity to vindicate the rights of his class members. Therefore, those class members would have received no remedy for their otherwise recoverable injuries.

Similarly, a potential complete bar to liability could have serious implications in disparate impact cases. Courts impose liability under a disparate impact theory to redress and eradicate systemic discrimination. For instance, the requirement that employees possess a high school diploma or pass a standardized intelligence test unrelated to successful job performance as a condition for employment or transfer was found to be discriminatory, although facially neutral.[170] Suppose the complainant has falsely claimed to possess a high school degree in order to obtain employment and was denied a transfer years later upon failure to pass the standardized test. As part of its preparation to defend against a discrimination claim, the employer learned of the employee's true educational background. In a court following the *Summers* rule, the employer would escape liability for racial discrimination, and many other employees and applicants would be subject to the continued discriminatory practice. Comparable to the class representative, the disparate impact complainant would be denied the opportunity to act as private attorney general and the goal of eradicating discrimination in the workplace would be frustrated.[171]

The failure of the *Summers* per se rule to provide any relief to a victim of proven discrimination, whether under legal, procedural, or equitable arguments of causation, standing, or injury, respectively, renders the rule inconsistent with federal antidiscrimination policy and statutory provisions. The arguments wielded in support of the complete defense approach are fundamentally similar, for they are constructed upon

---

166. *See* DOBBS, *supra* note 156, § 2.4, at 45-46 (recognizing that the remedial defense may operate substantively due to res judicata rules). Professor Chafee believed that this principle of equity was unnecessary since the cases to which it was applied were always capable of solution under some more specific rule. Zechariah Chafee, Jr., *Coming Into Equity with Clean Hands*, 47 MICH. L. REV. 876, 1065 (1949).

167. 424 U.S. 747 (1976).

168. *Id.*

169. *Id.*; *cf.* Sivley, *supra* note 44, at 424-25 (stating that *Mt. Healthy* can be read as addressing remedy, not liability).

170. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The disparity in test performances was attributed to the inferior education received as a result of prior discrimination. *Id.* at 430.

171. In the *McKennon* opinion, Justice Kennedy alluded to the threat that such a defense poses to class action and disparate impact suits. *See supra* text accompanying note 129.

a legal fiction: the denial of all remedies assumes an absence or negation of discriminatorily created injury due to the existence of employee wrongdoing. Before *McKennon*, courts rejecting the doctrine of *Summers* and its progeny recognized the problem of employee misconduct but not at the exclusion of redressing the real and serious damage resulting from discriminatory practices. Determining *which* remedies are appropriate in the context of mutual wrongdoing was the focus of these jurisdictions.

B. Measuring Appropriate Damages in Light of Employee Misconduct

Refusing to allow after-acquired evidence to act as a bar to all liability, the Supreme Court limited the consideration of this evidence to the remedial phase of litigation.[172] In so holding, the Court sought both to preserve employer prerogatives and to grant make-whole relief to a victim of discrimination. It also recognized the fact-sensitive nature of after-acquired evidence litigation.[173]

The Court provided general guidelines as to appropriate types of relief, but it did not address as thoroughly as did the Eleventh Circuit the various remedies, nor the standard of proof required for the employer to present the after-acquired evidence. The Court denied remedies of front pay and reinstatement, awarded backpay, mentioned attorney's fees only briefly, and did not discuss injunctive relief. The materiality standard operating in the lower courts resurfaced in the Court's requirement that an employer first establish that the employee's wrongdoing was "of such severity that the employee in fact *would have been terminated* on those grounds alone."[174]

In comparison, under the Eleventh Circuit's approach, the employer must prove by the preponderance of the evidence whether and in what manner the after-acquired evidence would have legitimately influenced the employment relationship.[175] The court then fashions the relief accordingly. *Wallace* held that reinstatement, front pay, and injunctive relief are unavailable if the employer proves that the after-acquired evidence provides a legitimate reason for termination, but that backpay, declaratory relief, attorney's fees, and nominal damages remain available.[176] Although not without its flaws, the *Wallace* approach is more consistent with the Civil Rights Act of 1991 and better preserves the goals of federal antidiscrimination law.[177] A brief outline of the remedial provisions of Title VII and the ADEA furnishes the background necessary to evaluate the features of the Supreme Court's and the Eleventh Circuit's remedy-specific treatment of after-acquired evidence.

---

172. *McKennon*, 115 S. Ct. at 886.

173. "The proper boundaries of remedial relief in [after-acquired evidence] cases . . . must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case." *Id.*

174. *Id.* at 886-87 (emphasis added); *see supra* notes 74-77 and accompanying text (discussing materiality standard).

175. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181 (11th Cir. 1992), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994).

176. *Id.* at 1181-83.

177. The *Wallace* court did not consider the Civil Rights Act of 1991 since the suit commenced prior to its passage and neither party argued its applicability. The court did note, however, that its opinion was consistent with the Act's treatment of mixed-motives litigation. *Id.* at 1184 n.17. The Seventh Circuit also recognized that the Act was "perhaps inconsistent with *Summers*," but did not address this tension since neither party cited the Act. Washington v. Lake County, 969 F.2d 250, 255 n.4 (7th Cir. 1992).

1. Remedies Available Under Title VII and the ADEA

The ADEA is a hybrid of Title VII and the Fair Labor Standards Act of 1938 ("FLSA");[178] its prohibitions are modeled after Title VII and its enforcement provisions incorporate by reference those of the FLSA.[179] As remedial and humanitarian legislation, the ADEA should be liberally construed to effectuate the legislative intent of eliminating age discrimination.[180] Making no exceptions in its conferral of standing, "[a]ny person aggrieved" may bring a claim under the ADEA.[181]

Both Title VII and the ADEA provide legal and equitable remedies to effectuate their purposes.[182] In fact, the ADEA incorporates the FLSA provision that employers "*shall* be liable" for unpaid wages, while backpay available under Title VII is a matter of equitable discretion.[183] Neither the FLSA nor the ADEA expressly provides for front pay damages, and many criticize its speculative nature.[184] However, front pay may be available under the ADEA as part of the discretionary equitable relief, and the factual circumstances of an ADEA claim—namely, that the years until retirement are few—diminish speculation.[185] Finally, the Civil Rights Act of 1991 makes available compensatory and punitive damages under Title VII,[186] while the ADEA provides liquidated damages in cases of "willful violations."[187]

---

178. 29 U.S.C. §§ 201-219 (1988).

179. Lorillard v. Pons, 434 U.S. 575, 582-84 (1978); Whitten v. Farmland Indus., Inc., 759 F. Supp. 1522 (D. Kan. 1991); H.R. REP. NO. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2218. The ADEA enforcement provision states: "The provisions of this chapter shall be enforced in accordance with the power, remedies and procedures provided in sections 211(b), 216 . . . and 217 of this title." 29 U.S.C. § 626(b) (1988) (listing FLSA enforcement provisions).

180. Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976) (holding that expiration of 180-day time limitation did not estop plaintiff from bringing suit under ADEA), *aff'd*, 434 U.S. 99 (1977), *reh'g denied*, 434 U.S. 1042 (1978).

181. 29 U.S.C. § 626(c)(1).

182. The Civil Rights Act of 1991 provides that where a plaintiff shows the presence of an impermissible motive and the employer proves that the same decision would have been made in the absence of the discriminatory factor:

> [T]he court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . .

42 U.S.C. § 2000e-5(g)(2)(B).

Remedies under the ADEA are as follows:

> [S]uch legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(b).

183. *Lorillard*, 434 U.S. at 584 (citing 29 U.S.C. § 216(b)) (emphasis added).

184. Kotkin, *supra* note 43, at 1377; Debra T. Landis, Annotation, *Award of "Front Pay" Under § 7 of Age Discrimination in Employment Act of 1967*, 74 A.L.R. FED. 745, 750 (1985 & Supp. 1994).

185. Landis, *supra* note 184, at 750-51. The courts are split as to the availability of front pay under the ADEA. It may be available in the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. The First, Third, and Fifth Circuits are unsettled. *Id.*

186. § 102, 105 Stat. at 1072-74; *see* Robert B. Fitzpatrick, *Damages Under the Civil Rights Act of 1991*, C932 A.L.I.-A.B.A. 773, 775 (1994). Under the new law, plaintiffs in Americans with Disabilities Act and Rehabilitation Act actions may also seek compensatory and punitive damages. *Id.* at 775-76.

187. 29 U.S.C. § 626(b).

2. The Denial of Prospective Remedies

a. Reinstatement and Front Pay

Concluding that after-acquired evidence is properly considered in the remedial phase of litigation, the *McKennon* Court denied as a general rule the prospective remedies of reinstatement[188] and front pay[189] if an employer demonstrates that it would have fired the employee had it known of the wrongdoing earlier.[190] This was the position of most courts following the remedy-specific approach,[191] as well as that of the EEOC.[192] The denial of these remedies is consistent with employer prerogatives preserved by federal antidiscrimination statutes.[193] The intent of Title VII and the ADEA to balance employee rights and employer privileges[194] must be considered in conjunction with their goal of make-whole compensation. If courts reinstate or award front pay to an employee, despite the knowledge of misconduct proven to justify rejection or discharge, they deny the employer the freedom to execute lawful employment decisions.[195] Notwithstanding the means by which the information was obtained, the employer now possesses a legitimate reason for the adverse employment decision. As the court observed: "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."[196]

Also, although irrelevant to the motive present at the time of discharge, the after-acquired evidence of fraud or misconduct will significantly affect any future relations between the two parties. Reinstatement in the context of after-acquired evidence is

---

188. For a good discussion of the history, developments, and limitations of reinstatement, see Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1.

189. Front pay is generally awarded when reinstatement is not feasible after a discriminatory discharge and the plaintiff has not secured comparable employment. The rationale for the remedy is to compensate for lost employment opportunities, thereby providing make-whole relief and deterrent effect. Kotkin, *supra* note 43, at 1376-77.

190. *McKennon*, 115 S. Ct. at 886. This decree adopts the "same decision" standard articulated earlier in Price Waterhonse v. Hopkins, 490 U.S. 228 (1989), and legislatively affirmed in the Civil Rights Act of 1991. *See* H.R. REP. NO. 40, *supra* note 53, at pt. 1, 48-49, *reprinted in* 1991 U.S.C.C.A.N. at 586-87 (explaining § 203 of the new legislation); *see also supra* text accompanying notes 78-79.

191. *See, e.g.*, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1240 (3d Cir. 1994) (dictum), *vacated*, 115 S. Ct. 1397 (1995); Schmidt v. Safeway, Inc., 864 F. Supp. 991, 995 (D. Or. 1994) (opining in dicta that a discharged "doctor" who never attended medical school would not be entitled to reinstatement); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993). *But see Mardell*, 31 F.3d at 1240 (suggesting in dicta that reinstatement may be barred only if the after-acquired evidence rendered it "particularly invasive" of the employer's prerogatives); EEOC v. Farmer Bros. Co., 31 F.3d 891, 901-02 (9th Cir. 1994) (suggesting that reinstatement may be appropriate if the fraud occurred decades earlier and under sympathetic circumstances).

192. Equal Employment Opportunity Commission Decision No. 915-002, Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, 1992 WL 189088 (July 14, 1992) [hereinafter EEOC Enforcement Guidance].

193. *Price Waterhouse*, 490 U.S. at 242 (underscoring that an "important aspect of [Title VII] is its preservation of an employer's remaining freedom of choice").

194. *Id.* at 243.

195. Federal laws limit the employment-at-will doctrine only to the extent necessary to achieve antidiscrimination goals. *Mardell*, 31 F.3d at 1233 n.20.

196. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 886 (1995); *cf.* Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2 (7th Cir. 1989) (dictum) ("[I]t would hardly make sense to order [a discharged employee] reinstated to a job which he lied to get and from which he properly could be discharged for that lie."). The denial of reinstatement and front pay is also consistent with the Civil Rights Act of 1991 enforcement provisions relating to mixed motives. Mandating the availability of legal damages if a discriminatory motive was present, the 1991 Act specifically denies reinstatement and front pay if the employer demonstrates that it would have taken the same action absent the impermissible motive. 42 U.S.C. § 2000e-5(g)(2)(B).

particularly impracticable given the animosity between the parties.[197] Title VII arose from an interest in promoting amicable, and therefore productive, working environments.[198] To compel reinstatement of an employee discovered to have deceived or even caused injury to the employer would only create hostility and be detrimental to both parties. Furthermore, as *Wallace* recognized, awarding reinstatement and front pay often places an employee in a *better* position than if no discrimination had occurred.[199] These remedies go beyond the make-whole objective of Title VII.[200] Therefore, when courts deny these remedies, they preserve the balance between employer and employee rights and demonstrate their unwillingness to condone employee misconduct.[201]

b. Injunctive Relief

The prospective remedy of injunctive relief,[202] a remedy less uniformly denied by subsequent courts,[203] was also unavailable in *Wallace*. With little discussion the Eleventh Circuit dismissed the possibility of injunctive relief as a logical result of its denial of reinstatement: an employee no longer working for the employer is not entitled to injunctive relief against further unlawful practices.[204] In support of its conclusion, the court cited its previous holding that if a Title VII plaintiff were not reinstated, injunctive relief was "unlikely" since such an injunction would not affect her.[205] Equitable relief requires the balancing of equities; the benefits of an injunction to the plaintiff must outweigh the harm to the defendant.[206] The court apparently reasoned that injunctive relief was inappropriate since no benefit inured to the discharged employee. Although the

---

197. *See* West, *supra* note 188, at 4. West argues that the remedy is ineffective since few employees accept reinstatement and those who do often resign or are discharged within two years of reinstatement. Her argument is strongly supported by empirical data noted in the National Labor Relations Act. *Id.* at 28-30.

198. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."); *see also* David A. Cathcart et al., *The Civil Rights Act of 1991*, C932 A.L.I.-A.B.A. 23, 41 (1994) (stating that Title VII was previously structured on a traditional labor model emphasizing employer-employee relations). However, the Civil Rights Act of 1991 bases Title VII and the ADEA on a tort model. *Id.* This transformation is consistent with the perceptual shift in discrimination litigation which more recently views discriminatory employment practices as tort-like injuries against individuals rather than wrongs against society. *See* Zemelman, *supra* note 106.

199. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994). One should note that in many cases the discovery of after-acquired evidence is a result of the discriminatory act and ensuing litigation. *See, e.g.*, McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993) (employee admitted to misconduct during deposition), *rev'd*, 115 S. Ct. 875 (1995); *Wallace*, 968 F.2d 1174 (employee admitted in deposition to prior conviction); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) (falsifications uncovered during and as part of trial preparation), *overruled by McKennon*, 115 S. Ct. 879; O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992) (unauthorized removal of files disclosed during deposition); Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992) (employee submitted copies of employer's confidential records in response to document production request). Had no discrimination occurred, the employer could quite possibly never have discovered the wrongdoing.

200. *Wallace*, 968 F.2d at 1182.

201. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1239 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995).

202. Injunctive relief may consist of requiring an employer to post notices informing its employees that one's protected status will not affect employment decisions, or to counsel and/or discipline those officials who acted with illegal animus. EEOC Enforcement Guidance, *supra* note 192, at *12 n.30.

203. *See, e.g.*, *Mardell*, 31 F.3d at 1240 n.35 (opining that injunctive relief may still be available even if no back pay were due); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 324 (D.N.J. 1993) (holding that all remedies except reinstatement and front pay remain available).

204. *Wallace*, 968 F.2d at 1182; *see also* White & Brussack, *supra* note 118, at 91 (stating that a plaintiff who is not entitled to reinstatement lacks the standing to enforce the terms of the injunction).

205. *Wallace*, 968 F.2d at 1182 (citing Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982)).

206. WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION 345 (1985).

court's remedy-specific approach itself recognizes the primary issue of employment discrimination in after-acquired evidence cases, its rationale for denying injunctive relief ignores the duality of purpose.

Injunctive relief will not contribute to make the victim of discrimination whole if the former employee is in no danger of further discrimination by the employer. However, this solely compensatory focus ignores the second, prophylactic objective of eliminating discrimination. Injunctive relief may in some circumstances prevent further injury to a successful plaintiff, yet it also has the potential to prevent future injury to others by an employer proven to have previously engaged in unlawful conduct.

Under Supreme Court doctrine, injunctive relief is precluded unless there is a reasonable expectation that discrimination will recur.[207] Courts are therefore more willing to grant injunctive relief if an employer has a pattern of discrimination or no policy implemented to combat discriminatory practices.[208] In such situations, a victim of discrimination acts in the interest of society as a private attorney general securing injunctive relief for the benefit of similarly situated employees. *McKennon* did not diseuss injunctive relief, leaving the lower court to determine if "extraordinary circumstances" warrants additional, equitable relief.[209] However, to deny injunctive relief in all after-acquired evidence cases would be inconsistent with federal statutory objectives.

Under the private attorney general model, even if a discrimination claim arose from a single incident involving an employer with no practice or pattern of unlawful conduct, injunctive relief creates little burden on the employer in comparison to the potential social benefits. Allowing after-acquired evidence to affect remedial relief at all may actually elevate the danger of recurring discrimination. An employer's ability to lessen the damages due by locating and presenting evidence of employee misconduct may diminish the incentive for them to evaluate their employment practices. Employers may instead view the potential of after-acquired evidence as a method of damage control if legal action should arise.

The deterrent effect of Title VII's provision of injunctive relief is diminished significantly if it is unavailable to plaintiffs who would receive no personal benefit.[210] More importantly, a Title VII litigant cannot act as a private attorney general if injunctive relief is denied simply because it serves no individualized remedial purpose.[211] For these

---

207. United States v. W.T. Grant Co., 345 U.S. 629 (1953) (denying injunction for violation of Clayton Act). "The necessary determination [to grant injunctive relief] is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Id.* at 633.

208. *See* Thomas v. Washington County Sch. Bd., 915 F.2d 922 (4th Cir. 1990) (finding employer engaged in discriminatory practices, court granted injunctive relief to one person who was denied employment but remained a prospective applicant); EEOC v. Gurnee Inn Corp., 914 F.2d 815 (7th Cir. 1990) (granting injunctive relief where discrimination limited to single person but employer continually tolerated such conduct and had no antidiscrimination policy); Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990) (denying injunction since single incident and employer implemented antidiscrimination policy); EEOC v. General Lines, Inc., 865 F.2d 1555 (10th Cir. 1989) (denying injunctive relief where the unlawful motive was a single incident, the employer had no pattern of discrimination, and there was no reason to expect recurrence); Johnson v. Brock, 810 F.2d 219 (D.C. Cir. 1987) (refusing injunction where those who had discriminated remained in supervisory positions but no other evidence of recurring discrimination existed). *But see* Hopkins v. Price Waterhouse, 737 F. Supp. 1202 (D.D.C.) (denying injunction since it was unreasonable to place court in monitoring role given the difficulties in ascertaining sexual stereotyping), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

209. In addition to compensatory damages, liquidated damages, back pay, and front pay, McKennon's complaint sought "other equitable relief to redress the unlawful dismissal." Brief for Petitioner at 4, *McKennon* (No. 93-1543).

210. EEOC Enforcement Guidance, *supra* note 192, at *7 n.22.

211. *See id.* ("Although the plaintiff might not personally benefit from an injunction when (s)he is no longer in the workforce, the Commission 'acts also to vindicate the public interest in preventing employment discrimination.'" (quoting General Tel. Co. of Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1980))).

reasons, courts should generally award injunctive relief even if the plaintiff is not entitled to reinstatement, and there is little reason to believe that the employer will repeat any discriminatory action.[212]

3. Measuring Backpay

The remedial issue which most clearly exposes the fine line between employer prerogatives and employee rights in cases of after-acquired evidence is that of backpay, in particular, the date from which to measure any award. The monetary remedy of backpay effectively advances the twin objectives of deterrence and compensation common to Title VII and the ADEA.[213] Unlike the noneconomic injunctive relief or the prospective equitable remedies of reinstatement and front pay, liability for backpay "'provide[s] the spur or catalyst whieh causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'"[214]

McKennon holds that backpay is properly awarded to a discrimination victim despite her previous misconduct,[215] but the method of calculating backpay differs from that advanced by the Eleventh Circuit. *McKennon* allows recovery of backpay only to the point the employer actually discovered the employee wrongdoing. In contrast, the *Wallace* decision limited the effect of after-acquired evidence on measuring backpay by extending the backpay period to the time when the employer proves it would have discovered the employee's misconduct.[216] In other words, backpay extends to the date of judgment unless the employer proves discovery would have occurred legitimately at an earlier date. This date, the date of inevitable discovery,[217] is the approach also advocated by the EEOC.[218] An employer must prove that it would have discovered evidence justifying the adverse employment decision absent any discriminatory conduct or product thereof, including legal proceedings or retaliatory actions.[219] In adopting this date, the Eleventh Circuit rejected an alternative approach whieh looks to the date of actual discovery for two reasons.[220] First, actual discovery often occurs during the course of

---

212. *Id.*

213. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1238 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995).

214. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973) (alteration in original, omission added)). *See also Mardell*, 31 F.3d at 1239 n.32. For a summary of the legislative history of the backpay remedy, see Kotkin, *supra* note 43, at 1312-27.

215. *McKennon*, 115 S. Ct. at 886.

216. Wallaee v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994).

217. *Mardell*, 31 F.3d at 1240. For example, the employer could reduce the potential backpay period by demonstrating its practice of annually investigating employee work products through which it inevitably would have discovered the misconduct—absent discriminatory conduct or activities pursuant to ensuing litigation. It is also conceivable that no backpay would be due in cases of application-rejection if discovery would have occurred prior to hiring. *Id.* at 1240 n.35 (dictum).

218. EEOC Enforcement Guidance, *supra* note 192, at *8. The EEOC suggests further that if the date of discovery is not known, the backpay award should be reduced by an appropriate percentage based on an assessment of the approximate date of discovery. *Id.*

219. *Mardell*, 31 F.3d at 1240; *Wallace*, 968 F.2d at 1182. The Third Circuit delineated as part of the employer's burden of proof two elements necessary to terminate prematurely the backpay period. The employer must establish with reasonable certainty, first, the date of inevitable or independent discovery, and, second, that the employer would have made the same employment decision at that time. *Mardell*, 31 F.3d at 1240 (dictum).

Given its fact-sensitive nature, the issue of premature termination of the backpay period will not often be properly disposed on summary judgment. *See Wallace*, 968 F.2d at 1184.

220. *Wallace*, 968 F.2d at 1182.

litigation, and absent discrimination, the evidence would not have become known to the employer at that time. Thus, applying the principle of *Mt. Healthy*, use of the actual date of discovery would place the employee in a worse position than had no discrimination taken place. Second, the date of discovery approach would provide a windfall to employers whose liability is reduced as a result of having engaged in unlawful conduct.[221]

The inverse is not true: the date of inevitable discovery will not provide a windfall to employees more skilled at concealing evidence of wrongdoing. While an employer may have never detected misconduct in the absence of a discrimination suit investigation, the denial of front pay and reinstatement precludes any windfall to the deceitful employee. Indeed, to permit after-acquired evidence to affect remedies at all, demonstrates an effort to balance the competing policies of eradicating employment discrimination and discouraging employee misconduct.

If the principle enunciated in *Mt. Healthy* and underlying federal antidiscrimination statutes—restoring the victim of discrimination to the position she would have occupied but for the employer's unlawful action—were applied in its purest form, even remedies of reinstatement and front pay would be available in many cases of after-acquired evidence. Absent discrimination, the employer would never have learned of the incriminating evidence discovered solely through litigation. Applying a strict "but-for" analysis, the court would restore the employee to her previous employment status without consideration of the misconduct, the fruit of the illegal activity. Courts would deny the employer the opportunity to act subsequently and lawfully upon the later learned information; they would compel the employer to resume the employment relationship as if no discovery had been made. For obvious reasons, this absolutist approach is impractical and unsavory. Aside from forcing an unavoidably hostile working environment and unduly infringing upon employer rights, this strict adherence to antidiscrimination principles provides a windfall for crafty employees who effectively shield traces of their misconduct from inevitable discovery.

Proponents of the date of actual discovery dislike the speculative inquiry inherent in proving when the after-acquired evidence would have been unearthed.[222] Others contend that full backpay should not be available if reinstatement is inappropriate since backpay covers the period prior to reinstatement in providing a make-whole remedy.[223] These advocates argue from an assumption-of-the-risk-rationale: "Anyone who contemplates bringing an employment discrimination action must weigh the risk that the defendant will uncover, in preparing for trial, information about the plaintiff that triggers a discharge policy."[224] The potential chilling effect of this argument is troubling.

Considering its potential impact, the date of actual discovery rule departs from the guidelines originally set forth with respect to awarding backpay.[225] Permitting an employer to terminate the period of backpay at the point of actual discovery will frustrate the central purposes of deterrence and backpay. For example, an employer who faces charges of discrimination may immediately scrutinize the employee's application with

---

221. *Id.*

222. *See* Mills, *supra* note 125, at 1548.

223. White & Brussack, *supra* note 118, at 84.

224. *Id.*

225. "[G]iven a finding of unlawful discrimination, backpay should be denied for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

the purpose of discovering material misrepresentations and a means of reducing potential liability.[226] The efficacy of such a damage control strategy is not inconceivable considering the prevalence of application fraud in this country.[227] Under the date of actual discovery measurement, information acquired one day after the suit is filed could reduce liability for backpay to nominal amounts. The deterrent effect of backpay is thereby virtually eliminated.

The negation of any deterrence is best illustrated by placing the above example in the context of an ADEA claim and applying the statutory formula for calculating liquidated damages.[228] If after-acquired evidence can reduce backpay to a nominal amount, the doubling of that negligible sum creates little deterrence. In such a situation, neither the make-whole nor prophylactic imperative of the ADEA has been effectuated. Likewise, the high standard for recovery of punitive damages under Title VII[229] renders the inevitable date of discovery for measuring the appropriate backpay period a necessary, complementary deterrent.

The date of inevitable discovery prevents abuse of the after-acquired evidence doctrine's capacity to reduce the period of recoverable backpay. The appropriate time for employers to scrutinize employment applications is at the time of hiring; yet, despite evidence to the contrary, employers presume the information contained in the application is accurate, and they conduct only limited verification procedures.[230] Even employers supporting the *Summers* rule recognize that it is in the employer's best interest to implement procedures to expose dishonest applicants[231] and to thoroughly examine an employee's job performance. These personnel policies would prevent much litigation as to whether the misconduct would have justified sanction or would have been discovered as a matter of routine procedure.

Moreover, employers who do not engage in such inquiries face potential liability for negligent hiring. Under this tort theory,

> an employer has the duty to use due care to avoid the selection and retention of an employee [when] it knows or should know he would endanger fellow employees on the job. This duty requires the employer to make reasonable inquiry and investigation into an employee's character and background both prior and subsequent to his employment.[232]

The employment procedures that would lessen the speculation of proving a date of inevitable discovery are already advisable to avoid liability for negligent hiring and retention. They also best deter against employee misconduct, for they deny the benefit sought by engaging in the misconduct, namely acquisition and retention of employment. Therefore, imposing upon the employer the burden of proving that it would have discovered the liability-limiting evidence legitimately and independently from any aspect of litigation is not undue, and it best preserves the important function of the backpay remedy.

In adopting the date of actual discovery approach, the Supreme Court advances a position inconsistent with its earlier analysis of employer liability. As discussed above,

---

226. *See supra* notes 120-27 and accompanying text.
227. *See supra* note 15.
228. *See infra* note 246 and accompanying text.
229. *See infra* note 237 and accompanying text.
230. Mesritz, *supra* note 16, at 215-16.
231. *Id.* at 223.
232. Magnum Foods, Inc. v. Continental Casualty Co., 36 F.3d 1491, 1499 (10th Cir. 1994) (citation omitted).

the Court's calculation of backpay creates an incentive for employers to search for evidence of prior wrongdoing if and when facing a discrimination claim. To reward these efforts by reducing a potential backpay award diminishes the deterrent effects of the statutory enforcement provision. The Court established a standard of materiality and opined that the alternative mechanisms of attorney's fees and Rule 11 sanctions would "deter most abuses."[233] However, these provisions deter abuses in the pleadings only. They may discourage the assertion of defenses based on trivial infractions, but they will not deter fishing expeditions for more severe misconduct.[234] Measuring backpay from the date of unlawful discharge to the date the employer would have legitimately discovered the discharge-generating evidence better redresses employee rights without infringing on employer prerogatives.

4. Compensatory and Punitive Damages

The Civil Rights Act of 1991 provides the additional remedies of compensatory and punitive damages in Title VII claims.[235] Compensatory damages include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[236] Punitive damages are now available upon a showing of "malice or . . . reckless indifferenee to the federally protected rights of an aggrieved individual."[237] Similarly, the ADEA provides liquidated damages in cases of willful violations.[238]

The *Wallace* suit commenced prior to the passage of the 1991 Act, and the court did not consider the effect of after-acquired evidenee on compensatory damages.[239] Consistent with its position respecting backpay, the EEOC advised that compensatory damages be limited by the date of actual discovery.[240] The flaw in this position is the same as discussed in reference to declaratory relief—the damage suffered due to discrimination is not minimized or negated by one's own previous wrongdoing.[241] Pecuniary loss (backpay) is properly limited by the inevitable date of discovery since employee misconduct, not discrimination, is the reason for continued unemployment.[242] In contrast, the employee's eonduct did not eontribute to the psychological harms

233. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 887 (1995).

234. Again, an employer's thorough review of an employee's performance is not, in itself, objectionable. To engage in these investigations as a post hoc defense strategy, however, violates the principles and nndermines the effectiveness of federal antidiscrimination law.

235. Fitzpatrick, *supra* note 186, at 775. The Act places caps on these damages based upon the size of the employer. *Id.* at 776.

236. 42 U.S.C. § 1981a(b)(3) (1988 & Supp. V 1993). Backpay is explicitly excluded from compensatory damages. Fitzpatriek, *supra* note 186, at 776.

237. 42 U.S.C. § 1981a(b)(2).

238. *See* 29 U.S.C. § 626(b). The Supreme Court recently reaffirmed that the *Thurston* definition of willful—that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [statute]"—applies to all disparate treatment cases under the ADEA. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993) (referring to Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)).

239. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1184 n.17 (11th Cir. 1992), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994).

240. EEOC Enforcement Guidance, *supra* note 192, at *8.

241. *See supra* notes 147-50 and accompanying text.

242. Admittedly, the initial unemployment results from discriminatory discharge or rejection, but absent the employee misconduct, reinstatement and full backpay would be available. Full backpay is measured to the date of judgment.

suffered as a result of inferior treatment.[243] Indeed, the employee's misconduct has no bearing on the degree of noneconomic injury, and a showing of inevitable discovery cannot prematurely terminate the compensatory damage award. Furthermore, these nonpecuniary harms may extend beyond the date of actual or inevitable discovery of after-acquired evidence. Therefore, courts should not reduce compensation for those nonpecuniary injuries.[244]

Wallace did not specifically address punitive damages; however, the majority noted the similarity between the remedial possibilities under Title VII and the Equal Pay Act ("EPA"),[245] and it thus applied its remedy-specific approach to claims under the EPA. The court's analysis with respect to the EPA liquidated damages provision is also applicable to the comparable provision in the ADEA. A successful ADEA complainant who proves willful discrimination is entitled to liquidated damages in the amount of twice the backpay award.[246] Although the court acknowledged that a liquidated damage remedy varies from the make-whole remedial purpose of Title VII, it found this distinction insignificant and determined that after-acquired evidence had no effect on the availability of liquidated damages.[247] The characterization of the liquidated damages provision as make-whole relief is inaccurate; it is more aptly described as punitive in nature.[248] Given its deterrent function, liquidated damages are directed at the *employer's* conduct and, therefore, after-acquired evidence of the *employee's* misconduct should not affect an award of punitive damages.[249]

McKennon simply authorizes the trial court to "consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party."[250] Although the formulation of remedial relief is necessarily fact specific, the Court's vague directive may do little to restore any degree of uniformity in litigation involving after-acquired evidence. Even a statement that compensatory and punitive damages are generally available would have reiterated the central concern of litigation under federal antidiscrimination statutes.

---

243. *See* White & Brussack, *supra* note 118, at 87 (drawing the distinction between compensatory damages resulting from employer's discrimination and from plaintiff's status of being unemployed).

244. Mills, *supra* note 125, at 1556; *see also* Michael W. Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 414 (1993) (suggesting that since "[v]ictims of severe discrimination often suffer prolonged emotional and psychological harm," caps on compensatory damages may not adequately cover future medical expenses and pain and suffering).

245. 29 U.S.C. § 216(b).

246. *Id.* § 626(b).

247. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1183 (11th Cir. 1992), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994). After-aequired evidence has the same effect on the availability of liquidated damages as it does on the effect of the backpay period under Title VII. *Id.* Since the after-acquired evidence was "irrelevant to the mental state underlying [the employee]'s discharge," it follows that it does not affect the award of liquidated damages. *Id.* at 1183 n.14.

248. *See* Brief for Petitioner at 38-39, *McKennon* (No. 93-1543) (stating that the legislative history of the ADEA reveals the intent of Congress that liquidated damages "operate as 'an effective deterrent to willful violations'" (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125-26 (1985)).

249. *See* White & Brussack, *supra* note 118, at 87. "The employer who treats his victim 'as less than human' by maliciously discriminating against her on the basis of, for example, race or sex, is no less a wrongdoer in an after-acquired evidence case than is the employer's counterpart in a case where no such evidence is discovered." *Id.* (citation omitted).

250. *McKennon*, 115 S. Ct. at 886.

5. Attorney's Fees

Attorney's fees are available under both Title VII[251] and the ADEA[252] and are generally awarded in employment discrimination cases.[253] They serve a dual purpose of encouraging private enforcement of civil rights and providing additional assurance that employers will not deliberately ignore employees' rights.[254] Again, the issue of after-acquired evidence generates the debate concerning the appropriate period of recovery. *Wallace* discussed the effect of after-acquired evidence on attorney fee awards only indirectly in terms of its effect on the overall judgment. For example, a Title VII plaintiff must qualify as the "prevailing party" in order to recover attorney's fees.[255] The Supreme Court referred to the award of attorney's fees mandated by the ADEA only in the context of deterrence against abuse.[256]

The Seventh Circuit in *Kristufek* applied the actual date of discovery to its analysis and determined that the plaintiff could not recover attorney's fees for the period after which the employer discovered the incriminating evidence.[257] This limitation does not adequately consider the reason for the employment discrimination suit. A plaintiff alleging employer discrimination files suit to prove liability, not to discredit an affirmative defense or counterclaim based on after-acquired evidence. The discovery of information justifying an employee's dismissal, for instance, does not eliminate the need for legal representation. Additionally, this temporal consideration fails to draw a rational line between legal fees attributable to the liability phase versus those attributable to the remedial phase of the litigation.[258] Any reduction of attorney fee awards based on after-acquired evidence, regardless of when the employer did or legitimately would have discovered it, is inconsistent with the premise of the remedy-specific approach that after-acquired evidence is irrelevant to liability in employment discrimination.[259]

---

251. 42 U.S.C. § 2000e-5(k).

252. 29 U.S.C. § 216(b).

253. White & Brussack, *supra* note 118, at 91.

254. Brodin, *supra* note 50, at 323 n.129 (citing Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978)); *see also* Zemelman, *supra* note 106, at 189.

255. 42 U.S.C. § 2000e-5(k). A plaintiff who is awarded declaratory relief qualifies as a prevailing party if "at a minimum . . . the plaintiff [is] able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989) (citing Hewitt v. Helms, 482 U.S. 755, 760-61 (1987)) (awarding attorney's fees to petitioners who obtained judgment vindicating First Amendment rights in § 1983 action). Attorney's fees are denied if success on a legal claim was purely "technical or *de minimis*." *Id. But see* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1183 (11th Cir. 1992) (dictum) (suggesting that a plaintiff awarded judgment may not necessarily qualify as the "prevailing party"), *rev'g* No. CIV.A.90-AR-0983-S, 1991 WL 423977 (N.D. Ala. Mar. 11, 1991) (*aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995)), *vacated*, 32 F.3d 1489 (11th Cir. 1994).

The ADEA provides reasonable attorney's fees to plaintiffs granted "judgment." 29 U.S.C. § 216(b).

256. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 887 (1995).

257. Kristufek v. Hussmann Foodserv. Co., 985 F.2d 364, 371 (7th Cir. 1993).

258. *Cf.* White & Brussack, *supra* note 118, at 91 ("Because after-acquired evidence should have no effect on liability or on most forms of relief in employment discrimination cases, a prevailing plaintiff should be entitled to recover attorney's fees generated to prove liability and that the plaintiff's entitlement to these forms of relief exists, even if the fees are earned after the employer acquires discharge-generating evidence.").

259. *See id.*

IV. THE PROPER TREATMENT OF AFTER-ACQUIRED EVIDENCE

The proper treatment of after-acquired evidence considers the twin objectives of federal antidiscrimination law—deterrence and compensation—and determines liability and statutorily provided relief accordingly. *McKennon*'s invalidation of *Summers*' complete defense approach properly limits the effect of after-acquired evidence to appropriate remedies. Employment discrimination litigation seeks to determine the employer's intent,[260] and hypothetical inquiries into what would have happened does not alter what did occur. Discharge-generating evidence learned after the adverse employment decision could not have motivated the actual decision, and it should therefore have no effect on the issue of liability.

Furthermore, the Supreme Court's recent decision striking down after-acquired evidence as a bar to liability is consistent with legislative developments in the area of employment discrimination. The modification of *Price Waterhouse* to impose liability upon employers who acted under a discriminatory motive, regardless of whether the same decision would have been made in its absence, reaffirms the sole focus of Title VII liability as employment discrimination and not employee culpability. The Civil Rights Act of 1991 also reaffirms the principle that employee rights should not unduly impinge upon employer prerogatives.

Courts should impose on employers the "would have been fired" standard for all cases of after-acquired evidence, making no distinction between pre- and post-hiring misconduct. *McKennon* involved after-acquired evidence of employee misconduct, but as the Third Circuit has noted, the Supreme Court used the broad term "wrongdoing" when discussing the employer's burden of proof.[261] In addition to its relevance to the severity of the misconduct,[262] the Court's reasoning and language in *McKennon* suggests that the "would have been fired" standard should apply to cases of résumé fraud.[263] If an employer demonstrates that the evidence of misconduct alone would have resulted in termination or rejection, a court should not award reinstatement and front pay.[264]

The Court's remedy-specific approach—specifically, the calculation of backpay according to the actual date of discovery—is inconsistent with statutory objectives and with principles the Court articulated earlier in its *McKennon* opinion. The standard of inevitable discovery promulgated by *Wallace* better preserves the deterrent function of recoverable backpay.[265]

---

260. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1977).

261. Mardell v. Harleysville Life Ins. Co., No. 93-9258, 1995 U.S. App. LEXIS 18611, at *2 (3d Cir. July 20, 1995) (per curiam).

262. *See supra* notes 74-77 and accompanying text.

263. Nevertheless, disagreement as to the proper standard has already emerged in the lower courts. *See, e.g.*, Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106 (5th Cir. 1995) (applying "would have fired" standard to after-acquired evidence of résumé fraud); Wallace v. Dunn Constr. Co., 62 F.3d 374 (11th Cir. 1995) (same); Quillen v. American Tobacco Co., 874 F. Supp. 1285 (M.D. Ala. 1995) (applying "would not have hired" standard to after-acquired evidence of résumé fraud).

264. The Sixth Circuit recently interpreted the Court's language regarding reinstatement simply as a general rule. *See* Wehr v. Ryan's Family Steak Houses, Inc., 49 F.3d 1150 (6th Cir. 1995). Accordingly, it remanded the issue of reinstatement "for further factual determination and a balancing of equities in light of . . . *McKennon*." *Id.* at 1155.

265. *See supra* notes 213-34 and accompanying text.

As lower courts follow the Supreme Court's vague directive to consider "extraordinary circumstances" when fashioning the order for relief,[266] after-acquired evidence should not preclude injunctive relief nor have any effect on awards of compensatory and punitive damages. Injunctive relief and punitive damages serve important deterrent functions, and compensatory damages are necessary to make the victim of discrimination whole.[267]

Neither full recovery of attorney's fees nor the reduction based on an actual discovery standard is consistent with the balance between employee rights and employer prerogatives. An alternative approach will most appropriately allocate attorney's fees, albeit in an administratively more difficult manner. Plaintiffs against whom employers make claims of after-acquired evidence should record which fees are generated by the liability phase and which result from the remedial phase of litigation. If an employer can show that it would have fired the employee had it known of the information it later discovered, only those fees attributable to the liability claim are recoverable.

The Supreme Court has approved of and even suggested similar allocation schemes in the context of Title VII litigation. In complex civil rights claims where the plaintiff may have limited success in identifying some unlawful practices or conditions, the Court advised district courts to use equitable discretion and suggested that they identify specific hours that should be eliminated from an award of attorney's fees.[268] Similarly, a plaintiff may base her claims on different facts and legal theories, and may prevail on only some of those claims. "The congressional intent to limit [fee] awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim."[269] The method of allocation proposed in the context of after-acquired evidence in effect treats the liability and remedial phases of the litigation as separate lawsuits.

This proposed scheme balances employer prerogatives with employee rights by focusing on the reason rather than the time for which the fees are necessitated. Additionally, predicating the reduction of attorney fee awards upon satisfaction of the "same decision" standard avoids creating perverse incentives for employers. To deny recovery of all fees generated by the litigation of after-acquired evidence would encourage employers to offer minor infractions as legitimate reasons for discharge or rejection. First, an employer may have little to lose by taking advantage of any opportunity to reduce its liability. As a related consequence for the employee, the threat of incurring substantial attorney's fees in defending against claims of after-acquired evidence may discourage potential plaintiffs from filing meritorious discrimination claims. If an employer is liable for the plaintiff's attorney's fees only if it fails to establish that the misconduct provides a legitimate basis for the employment decision, an employer will advance only the more credible claims of after-acquired evidence.

Finally, regardless of whether proof of inevitable discovery significantly reduces the damage award to a nominal amount, a victim of proven employment discrimination is

---

266. Sending a case back to the district court for a determination of backpay consistent with *McKennon*, the Third Circuit made "no effort at this juncture to adumbrate the contours of the 'extraordinary equitable circumstances' doctrine." Mardell v. Harleysville Life Ins., No. 93-3258, 1995 U.S. App. LEXIS 18611, at *4 n.4 (3d Cir. July 20, 1995) (per curiam) (quoting *McKennon*, 115 S. Ct. at 886).

267. *See supra* notes 202-212, 235-50 and accompanying text.

268. Hensley v. Eckerhart, 461 U.S. 424, 436-37 (1983). "The plaintiff often may succeed in identifying some unlawful practices or conditions," but "the range of possible success is vast;" the status of a prevailing party "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Id.* at 436.

269. *Id.* at 435.

entitled to declaratory relief.[270] Declaratory relief may generate adverse public reaction, and the public record of the violation is available to future complainants to establish a pattern of the employer's unlawful decisionmaking.[271] "It is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest."[272]

CONCLUSION

The Supreme Court's decision in *McKennon* has restored focus in employment discrimination claims involving after-acquired evidence. As the Court's unanimous ruling underscored, the *Summers'* complete defense approach cannot be reconciled with the mandates and objectives of federal antidiscrimination statutes. The original purpose of Title VII provides the touchstone to resolving the issues generated by after-acquired evidence. The per se rule and the procedural and equitable arguments offered in its support diverted attention away from the violative behavior of employers which the federal statutes seek to redress and eradicate. The enforcement of the statutorily guaranteed right to be free from discrimination should not be erroneously qualified upon collateral issues of employee culpability. These issues are more properly addressed in the hiring and evaluation procedures of individual employers.

If proper enforcement of these statutes is inadequate to address the problem of employee misconduct, *McKennon* may prompt a legislative response. For example, Congress may incorporate after-acquired evidence considerations into the enforcement or remedial provisions of the statutes, or may provide separate avenues of relief for employers who have been objects of employee misconduct.[273] However, courts should not dilute the enforcement mechanisms of federal statutes by denying in instances of after-acquired evidence the award of injunctive relief or compensatory and punitive damages otherwise available. As they apply *McKennon*'s remedy-specific approach of after-acquired evidence, federal courts must preserve the Supreme Court's restoration of antidiscrimination principles. Only the most strict judicial enforcement of an employee's statutory rights can advance the individual and societal interest in eradicating discrimination in the workplace.

---

270. *See* White & Brussack, *supra* note 118, at 91. The entitlement to declaratory relief renders moot any question of ordering trials involving after-acquired evidence. Justice Ginsburg during oral argument questioned whether remedial issues were to be litigated first, to determine—based upon the amount of recoverable damages—whether litigation of liability was necessary. *High Court Hears Arguments in Age Discrimination Suit*, *supra* note 23.

271. Brodin, *supra* note 50, at 324 n.129.

272. H.R. REP. NO. 40, pt. 1, *supra* note 53, at 47, *reprinted in* 1991 U.S.C.C.A.N. at 584-85 (testimony of Jane Lang, a Washington, D.C. attorney and former General Counsel of the U.S. Department of Housing & Urban Development).

273. Currently, Title VII contains no reference to after-acquired evidence. *See* White & Brussack, *supra* note 118, at 88 n.184 ("The legislative history of the 1991 Civil Rights Act is silent in all respects on the question of after-acquired evidence.").