Employee Dishonesty and the After-Acquired Evidence Doctrine: Why Honesty Is the Best Policy

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I. INTRODUCTION

Traditionally, employees have lost lawsuits or grievances when they have been terminated as a result of their dishonesty.¹ There is something novel, however, about an employer defending an alleged discrimination suit on the basis of employee dishonesty that was unknown to the employer at the time of the discharge. Increasingly, employers are using evidence discovered after an employee's termination to defend against discrimination suits brought by those employees.²

Under the doctrine of after-acquired evidence, an employer may avoid total liability for its illegal discriminatory conduct if it can establish either that an employee participated in misconduct before he or she was discharged, or that

an employee misrepresented information in his or her application for employment.3

The first federal case to address the issue of after-acquired evidence and its application to employment discrimination is the Tenth Circuit's decision, Summers v. State Farm Mutual Automobile Insurance Co.4 Since Summers, employers have been armed with a powerful weapon in defending employment discrimination claims brought in the federal courts.5 The Summers decision established that if an employee has engaged in some form of predischarge misconduct, and the employer can demonstrate that it would have fired the employee had the employer known of such misconduct, then a plaintiff will be barred from recovering for an employer's discrimination.6

There are presently varying applications of the Summers rule in the federal circuits. The Tenth, Sixth and Ninth circuits have followed Summers wholeheartedly and have completely barred recovery based on after-acquired evidence.7 The Seventh Circuit appears to have modified the Summers rule but it too has completely barred recovery under certain circumstances.8 The Eleventh Circuit has criticized the Summers rule and has refused to completely bar recovery to a claimant based on after-acquired evidence altogether.9

The circuits that apply after-discovered evidence as a complete defense subscribe to the principle that an employee is not entitled to complain about his or her discharge or other adverse employment action if the employee obtained the job either by lying on his or her application, or by violating the

3Id. To illustrate, suppose a black female who has an impeccable work record is terminated from her employment. She files a Title VII action pursuant to 42 U.S.C. § 2000e against her employer for race and sex discrimination. The evidence overwhelmingly supports the conclusion that the employee was terminated solely because she was a woman. The employer, however, files a motion for summary judgment presenting evidence (which was discovered one year after the termination and which the employer had no knowledge of at the time of the employee's termination) that the employee misrepresented her educational background on her employment application. The employer argues that based on the employee's misrepresentations, she is barred from recovering under Title VII regardless of the employer's illegal motives to terminate her. Under the after-acquired evidence doctrine, the court would hold that the employer has asserted a legitimate affirmative defense which completely bars plaintiff relief under Title VII and would grant summary judgment for the employer. Due to the employee's misrepresentations, which had nothing to do with the cause of the employee's termination, the employee is awarded nothing, and the employer has escaped all liability.

4864 F.2d 700 (10th Cir. 1988).
5Witus, supra note 1, at 50.
6864 F.2d at 708.
7See discussion infra part II.B.c.
8See discussion infra part II.B.d.
employer's trust by engaging in misconduct during employment.\textsuperscript{10} The general belief in these circuits is that to allow an employee to recover under such circumstances would reward the employee's deceit or fraudulent concealment.\textsuperscript{11} This defense, however, rewards employers who may now avoid total liability for their unlawful employment practices.\textsuperscript{12}

The Eleventh Circuit has stated that application of the after-acquired evidence doctrine as a complete defense is too rigid and that it produces harsh, inequitable results. At the same time, the Eleventh Circuit has voted to rehear the case setting forth this view. Until the rehearing, the Eleventh Circuit's principles are sound.\textsuperscript{13} Specifically, the Eleventh Circuit has criticized Summers as being antithetical to the principal purposes of Title VII,\textsuperscript{14} which are to achieve equality of employment opportunity and make whole, so far as is possible, the individual or class affected by the discrimination.\textsuperscript{15} The Eleventh Circuit and arbitral forums, such as the National Labor Relations Board (hereinafter NLRB) and the Equal Employment Opportunity Commission (hereinafter EEOC), have applied after-acquired evidence as a partial defense which will bar an employee's reinstatement, but will award limited injunctive and back pay relief.

Part II of this note will review certain federal decisions adopting or rejecting the Summers rule to illustrate where claimants stand in different jurisdictions across the nation. By closely examining the case law addressing after-acquired evidence, the intent of Part II is to expose how the courts have misinterpreted mixed-motive principles and how they have erroneously extended these principles in denying relief to discrimination claimants.

Part III of this note will discuss why application of the after-acquired evidence doctrine, as a complete defense barring total recovery, frustrates the principal purpose of Title VII. Part III will also discuss how the EEOC's

\textsuperscript{10}Hitus, supra note 1, at 50. Falsification of employment applications is a serious problem facing employers today. Rubenstein, supra note 2, at 1 n.1 (citing Dobranski, A Memo on Falsifications of Employment Applications: An Arbitral Perspective, 59 CHICAGO-KENT L.REV. 997, 997 (1983)). One survey indicated that one in ten firms found applicants lying on resumes. Id. Eighty percent of executives have stated that they would fire employees for this reason. Id. Only one third of the companies polled, however, always verify resume information. Id. The most common form of employment application falsification, at least in the arbitral forum involves criminal records and medical histories. Id. (citing J. REDEKER, EMPLOYEE DISCIPLINE POLICIES AND PRACTICES 219 (1989)).


\textsuperscript{12}Rubenstein, supra note 2, at 5.

\textsuperscript{13}See discussion infra part II.B.d.


\textsuperscript{15}Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180 (11th Cir. 1992), vacated, 32 F.3d 1489 (1994) (rehearing en banc also granted).
approach, a more fair and equitable approach, balances the respective rights of both the employer and employee under Title VII.

II. THE SUMMERS DECISION AND ITS APPLICATION AMONG THE FEDERAL CIRCUITS

The roots of the after-acquired evidence defense are deeply seeded in common law principles of fraud and the equitable "clean hands" doctrine. "Equity will not grant relief to a party who as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party, in prior conduct, has violated conscience or good faith..." Similarly, the law with respect to master and servant has long recognized that, "in order for an employer to justify a dismissal, it is not necessary for the employer to show that in dismissing [an] employee, [the employer] in fact acted upon some proper ground of dismissal." According to these traditional views, "it is not material whether the employer knew of the grounds which in fact existed at the time of discharge; notwithstanding his ignorance, he may avail himself thereof..." One of the central issues surrounding the after-acquired evidence doctrine is whether these common law principles should be extended to rights which are statutorily mandated. Title VII was enacted to prohibit an employer from unlawfully discharging, or otherwise discriminating against, any individual because of such individual's race, color, religion, sex, or national origin. Yet, in most cases where the after-acquired evidence defense is raised, courts have granted summary judgment without examining the motive of the employer's actions. Such rulings are contrary to the intent of Title VII and the rights

16 Witus, supra note 1, at 1; see also, RESTATEMENT (SECOND) OF AGENCY § 409(1) cmt. e (1958) (if a principal has cause for the discharge of an agent and discharges him, the fact that the principal is not at the time aware that he has cause for discharge is immaterial).

17 BLACK'S LAW DICTIONARY 250 (6th ed. 1990). But see Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181, n.10 (11th Cir. 1992), vacated, 32 F.3d 1489 (11th Cir. 1994) (rejecting the argument that the doctrine of clean hands bars relief under Title VII, the court concluded that even if the doctrine were applicable to after-acquired evidence cases, the doctrine would be limited by the remedial goals of Title VII).


19 Id.


21 Rubenstein, supra, note 2, at 4. Once an employer has asserted the after-the-fact defense, summary judgment will be hard to oppose for the employee. The majority of cases have resulted in summary judgment being granted for the employer. See e.g., George v. Meyers, No. 91-2308-0, 1992 WL 97777, at *11, 1992 U.S. Dist. LEXIS 6419, at *2-*3 (D. Kan. April 24, 1992)(granting summary judgment for the employer); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992)(granting summary judgment under a "would have fired" standard). An employee is usually hard pressed to present evidence that will refute the employer's assertion that it would have either not hired the employee had it known of his or her misrepresentations or would have fired the employee immediately upon discovery of the employee's misrepresentations.
afforded therein. The focus of this section is to explain how the federal courts have rationalized the denial of relief on the basis of after-acquired evidence.

A. The Summers Decision

Plaintiff, V. Ray Summers, was a field claims representative for State Farm Mutual Automobile Insurance Company for nineteen years before he was fired from the company on May 19, 1982. For seventeen of those years, Summers had a satisfactory employment record with State Farm. In July 1980, however, State Farm discovered that Summers had falsified a document. Summers did not deny his falsification of the document and he was warned that the recurrence of such conduct could result in his discharge. In September 1981, State Farm discovered that Summers had falsified other documents dating back to 1977. Summers was again warned about the ramifications of any future falsifications.

As a result of discovering this second batch of falsified documents, State Farm randomly selected and then audited 90 files which contained claims handled by Summers. State Farm decided that seven or eight of these records seemed "suspicious." Summers was again confronted with the latest-discovered falsifications and again instructed not to falsify company records. Instead of terminating Summers's employment, State Farm placed

or misconduct. An employer can usually satisfy its burden of proof by way of affidavit. Plaintiffs have tried to argue that such affidavits are "self serving" and should not be accepted as conclusive by the court. See O'Driscoll v. Hercules, Inc., 745 F. Supp 656 (D. Utah 1990), aff'd, 12 F.3d 176 (10th Cir. 1994). The courts, however, have rejected this argument when a plaintiff cannot sufficiently rebut the sworn testimony of a company officer contained in an affidavit. See, e.g., Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992)(fact that employer only suspended a female officer who was involved in a hit and run and arrested for DUI, not sufficient evidence to refute the employer's assertion that it would have fired the plaintiff upon learning of his prior convictions). 


23Id. at 702.
24Id. Summers forged the signature of a company representative to a "loss-of-wages" claim made by one of the company employees.
25Id.
26Id. Summers falsified various medical and pharmacy bills for medical services.
27Summers, 864 F.2d at 702.
28Id.
29Id.
30Id.
Summers on probationary status for two weeks without pay.\textsuperscript{31} Summers's employment continued until May 19, 1982, when he was discharged \textit{not} due to his falsification of company records, but instead, based on Summers's poor attitude and failure to get along with customers and co-employees.\textsuperscript{32} Summers brought suit against State Farm alleging age and religious discrimination.\textsuperscript{33} Summers was a 56 year old member of the Mormon Church at the time of his discharge.\textsuperscript{34}

In State Farm's preparation for trial in 1986, the company uncovered more than 150 falsifications after thoroughly examining all records prepared by Summers.\textsuperscript{35} Eighteen of the falsifications were made subsequent to Summers' return to work from probation.\textsuperscript{36} Summers did not deny making the falsifications when he was deposed for trial.\textsuperscript{37} Subsequently, Summers sought to bar State Farm from introducing evidence of the newly-discovered falsifications by filing a motion \textit{in limine}.\textsuperscript{38} Summers contended that these falsifications were irrelevant and inadmissible because they were not discovered until 1986, four years after he had been discharged. He further contended that State Farm should only be allowed to present evidence relating to the reasons it had given for Summers's termination back in 1982.\textsuperscript{39}

State Farm opposed Summers' motion and filed a motion for summary judgment based upon the 150 newly discovered falsifications.\textsuperscript{40} State Farm conceded that the additional falsifications discovered in 1986 could not have been a cause or reason for Summers' termination in 1982, as they were unknown to State Farm at the time.\textsuperscript{41} Nevertheless, State Farm argued that the additional falsifications should be considered in determining what relief or remedy was available to Summers and that under the circumstances, no relief should be granted.\textsuperscript{42} Before the district court could rule on Summers' motion n

\textsuperscript{31} Id.
\textsuperscript{32} Summers, 864 F.2d at 702-703.
\textsuperscript{33} Id. Summers brought his age discrimination claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (as amended), and his religious discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), 3(a) (as amended).
\textsuperscript{34} Summers, 864 F.2d at 702.
\textsuperscript{35} Id. at 703.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Summers, 864 F.2d at 704.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
in limine, it granted State Farm's motion for summary judgment finding Summers was entitled to no relief due to his misconduct. On appeal, the Tenth Circuit agreed with the lower court that, although later evidence of Summers’ misconduct was not the "cause" of his termination, it was relevant to Summers’ claim of "injury," and did itself preclude the grant of any present relief or remedy to Summers. In reaching its decision, the Tenth Circuit relied on the mixed-motive principles first established in Mt. Healthy City School District Board of Education v. Doyle.

Mt. Healthy involved a Title VII action for discrimination where a teacher was fired for criticizing a possible dress code for teachers to a local disc jockey (which was thereafter announced on the air), and for making obscene gestures toward two students who failed to obey his commands in his capacity as cafeteria supervisor. In finding for the teacher, the lower courts determined that the call to the radio station was protected by the First Amendment and ordered reinstatement and back pay, despite the obscene gesture incident. On grant of certiorari, the United States Supreme Court reversed, finding that the fact that protected First Amendment conduct played a substantial part in the school district’s decision not to rehire the teacher did not mean that the teacher was entitled to remedial action. The Supreme Court held that if the school district could have dismissed the teacher for the obscene gesture, and in fact would have done so even if the radio incident had never come to its attention, it did not matter that protected First Amendment conduct played a substantial part in the school district’s decision. The Court in Mt. Healthy established that an employer will not be liable under Title VII if it can prove that it would have made the same employment decision absent an impermissible motive.

43 Id. at 703.

44 Summers, 864 F.2d at 708.

45 429 U.S. 274 (1977). The Tenth Circuit also found persuasive the decision in Smallwood v. United Air Lines, 728 F.2d 614 (4th Cir. 1984), which was cited by State Farm in support of its motion for summary judgment. In Smallwood, the plaintiff sued United under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, for United’s refusal to process his application because he was 48 years of age. 728 F.2d at 615. On appeal to the Fourth Circuit, the Court of Appeals accepted United’s argument that it should not be liable for its discrimination of Smallwood because they would not have hired Smallwood, regardless of his age, due to his prior discharge by another airline. (United was not aware of this discharge at the time it refused to process Smallwood’s application with United.) Id. at 627; see also, Murnane v. American Airlines, Inc., 482 F. Supp. 135 (D.D.C. 1979), aff’d, 667 F.2d 98 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982).

46 Mt. Healthy, 429 U.S. at 281.

47 Id. at 283.

48 Id. at 285.

49 Id.

The Tenth Circuit adopted and applied this same reasoning to Summers. The court opined that even assuming State Farm was motivated, at least in part, if not substantially, because of Summers' age and religion, the falsifications discovered after his termination "established serious and pervasive misconduct", which if known by State Farm at the time of Summers' discharge, would have justified his termination. Because State Farm established in its motion for summary judgment that it would have indeed discharged Summers had it known of the additional falsified documents, the Court of Appeals affirmed the lower court's grant of summary judgment. To explain its holding, the court likened the Summers situation to a "hypothetical wherein a company 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." The court stated that, "in our view the masquerading doctor would be entitled to no relief, and Summers is in no better position."

B. Application of the Summers Rule by the Circuits

Although the federal courts have almost unanimously adopted the Summers rule, they have been neither uniform nor clear in their application of its principles. Frequently, courts have failed to distinguish between fraud-in-application cases and on-the-job misconduct cases and have applied the Summers rule equally to both situations. At times the grounds for decisions are no more than conclusory statements that a plaintiff is not entitled to relief or has not been injured.

The extension of the Summers rule to fraud-in-application cases has led to disagreement among the circuits as to the correct application of the Summers rule in after-acquired evidence cases. In reviewing federal case law, however, one fact is apparent: a majority of the federal circuits are committed to barring recovery to a plaintiff who is not wholly innocent.

52 Id.
53 Id.
54 See, e.g., Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1188 (11th Cir. 1992) (Godbold, J., dissenting), vacated, 32 F.3d 1489 (1994) (rehearing en banc granted). As a case in point, a majority of the judges of the Eleventh Circuit Court of Appeals have recently voted to hold a rehearing of the case en banc. See discussion infra, part II.B.d.
55 Id. The term "fraud-in-application" has been used by the courts when referring to after-acquired evidence cases which involve a plaintiff that has misrepresented information either on his or her resume or application for employment, or has made misrepresentations to the prospective employer during the interview process. "On-the-job" misconduct cases involve an employee who has, during the course of his employment, committed some fraudulent or illegal action against the company while in the employ of the company.
56 Id.
The first Tenth Circuit case to apply the *Summers* defense to a fraud-in-application case was *Mathis v. Boeing Military Airplane Co.*57 Despite the fact that *Summers* did not address the issue of application fraud, the district court nonetheless held that the *Mathis* case fell "squarely within the [*Summers*] holding."58

In *Mathis*, the United States District Court for the District of Kansas granted summary judgment for the employer in a race and sex discrimination suit brought under Title VII.59 The plaintiff, Mathis, alleged race discrimination based on remarks made by her co-workers and supervisors regarding her race claiming she was denied overtime pay based on her race.60 She further alleged that her employer's failure to consider reasonable alternatives to placing her on involuntary maternity leave constituted sex discrimination.61 A year after her termination, Boeing discovered that Mathis had omitted certain employment history and a prior felony conviction on her resume.62 In its motion for summary judgment, the employer denied the existence of any racial or sexual discrimination and argued that even if Mathis was discriminated against summary judgment would be proper in light of the Tenth Circuit's recent holding in *Summers*.63

Relying on *Summers*, Boeing argued that if Mathis had truthfully disclosed the complete information regarding both her employment history and felony conviction she would not have been hired.64 Boeing further argued that employees had been discharged on a consistent basis for such falsifications and if Boeing had known of Mathis's misrepresentations then Mathis would have been terminated immediately.65

Mathis argued that in her case, the application falsifications did not rise to the level of wrongdoing present in *Summers*, and, therefore, *Summers* should not apply. She further attempted to persuade the court that a rigid application of the *Summers* rule would lead to "extreme results."66 The district court concluded that the difference in the number of falsifications between the two cases had little impact on the court's decision and that it lacked the authority

58 Id. at 995.
59 Id. at 994.
60 Id. at 993.
61 Id. at 994.
63 Id. at 994.
64 Id.
65 Id.
66 Id.
to modify or limit the Tenth Circuit's ruling in *Summers*. The court held that because the omissions made by Mathis on her employment application were material to her employment, as were the plaintiff's falsifications in *Summers*, Mathis's fraudulent actions precluded relief under Title VII.

Similarly, the United States District Court for the District of Utah also granted summary judgment for an employer in a fraud-in-application case. The Utah court in reaching its decision, however, followed the *Summers* holding more closely than the district court of Kansas.

In *O'Driscoll v. Hercules*, plaintiff was employed at Hercules' Bacchus Works in Magna, Utah, from January 1980 to April 1986. O'Driscoll filed an action in the district court alleging that her termination violated the Age Discrimination in Employment Act, Title VII and the Fair Labor Standards Act. When preparing for trial, defendant Hercules learned that O'Driscoll had misrepresented her age and other items on three separate forms: a pre-employment examination, an employment application, and an U.S. Government "Application and Authorization for Access to Confidential Information." O'Driscoll admitted to falsifying these documents. Hercules also alleged that it had discovered many other misrepresentations made by O'Driscoll during her employment. Again, O'Driscoll did not deny these misrepresentations.

Based on *Summers*, Hercules argued that even if the plaintiff could demonstrate that the company discriminated against her, O'Driscoll was still entitled to no relief because it had a legitimate independent basis for her termination. Hercules asserted that had it known the extent and nature of O'Driscoll's misrepresentations, she would have been terminated.

As did the plaintiff in *Mathis*, O'Driscoll tried to counter this attack by arguing that the *Summers* rationale was inapplicable because O'Driscoll's misconduct was not as "serious and pervasive" as the conduct in *Summers*.

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68 *Id*.

69 745 F. Supp. 656 (D. Utah 1990), *aff'd*, 12 F.3d 176 (10th Cir. 1994).

70 *Id.* at 657. O'Driscoll also alleged her discharge violated Utah's Antidiscrimination Act and filed several violations of state law, including breach of employment contract and wrongful discharge.

71 *Id*.

72 *Id.* at 657.

73 *Id*.

74 *O'Driscoll*, 745 F. Supp. at 657.

75 *Id.* at 658.

76 *Id*.

77 *Id.* at 658. O'Driscoll asserted many of the misrepresentations alleged by Hercules were mere "misunderstandings" on her part. *Id.* at 657.
The district court rejected this argument and held that, while O'Driscoll's threshold argument was not totally excluded from the Summers analysis, the focus should not be on determining whether certain conduct is "severe and pervasive." The true focus, according to the Utah court, should be on whether the employee would have been terminated had the employer known of the misconduct in question at the time of the discharge. Finding that Hercules would have indeed fired O'Driscoll had it known of her misrepresentations, the district court granted summary judgment in Hercules favor.

The glaring problem evident in decisions such as Mathis and O'Driscoll is that the employer is able to shift the focus in a discrimination suit from the alleged wrongdoing of the employer to the wrongdoing of the employee/plaintiff. What was once a complaint to examine the motives of an employer's actions instead becomes an inquisition into an employee's past misconduct—misconduct which admittedly had nothing to do with the employee's termination. Although the truthfulness of the employee may be relevant in determining what relief should be awarded to a complaining plaintiff, the courts, by application of the Summers rule, are totally eliminating the need to investigate the employer's true motivations. Instead of determining whether the employer has violated a federal statute, a plaintiff is forced to defend some previously unrelated misconduct; misconduct which admittedly, had nothing to do with the termination of the employee. Under Summers, an employer can freely discriminate against an individual and never have his motives examined provided that he can find some misconduct in the employee's past. Surely, the legislature never intended Title VII and/or other federal statutes to be circumvented in such a way. Nor does such a rule of law comport with general principles of equity.

b. Sixth Circuit

By relying primarily on the Tenth Circuit cases which have been decided since Summers, the Sixth Circuit also has denied relief in fraud-in-application cases. In Johnson v. Honeywell, the Sixth Circuit joined the other circuits committed to upholding the Summers rule when it denied relief to a plaintiff who had misrepresented her educational background on her employment application.

78 Id. at 659.

79 O'Driscoll, 745 F. Supp. at 660. The Court also applied the Summers rule to O'Driscoll's claims under Utah's Antidiscrimination Act and her common law wrongful discharge claim. Id. Finding no indication in Utah's state law that the Utah State Supreme Court would either adopt or reject the principles set out in Summers, the federal court opined that the Utah Supreme Court "would apply Summers because of the soundness of its approach." Id.; see also Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992) (federal court applied Summers rule to Michigan's Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS §§ 37.2101-37.3804 (1977)).

80 955 F.2d 409 (6th Cir. 1992).
The plaintiff in Johnson filed an action against her employer alleging wrongful discharge and retaliatory discharge in violation of Michigan's Elliott-Larsen Civil Rights Act.\(^1\) Honeywell employed Johnson as a field relations manager. Between November 1976 and November 1984, Johnson was responsible for various employment matters, including providing assistance to branch managers in creating affirmative action programs, responding to Equal Employment Opportunity Commission charges and hiring.\(^2\) Johnson claimed the motivating factor in Honeywell's decision to fire her was not poor job performance, as asserted by the company, but was due to her conflicts with certain branch managers regarding establishing affirmative action goals and their resistance to her efforts to meet those goals.\(^3\)

During the course of discovery, Honeywell learned that Johnson had misrepresented certain aspects of her educational qualifications on her employment application.\(^4\) Honeywell moved for summary judgment on the breach of contract claim and retaliatory claim under Elliott-Larsen arguing that the misrepresentations in Johnson's employment application provided a complete defense to liability, even though Honeywell was totally unaware of such misrepresentations at the time of Johnson's discharge.\(^5\) In addressing whether evidence of employee misconduct unknown to an employer at the time of discharge should be admissible as substantive evidence, the Court of Appeals not only considered if Honeywell would have fired Johnson had it known of her misrepresentations, but also focused on whether Honeywell would not have hired Johnson in the first place, had it been aware of her true educational background.\(^6\)

With respect to the retaliatory discharge claim under Michigan's Elliott-Larsen statute, the court held that Johnson's misrepresentations as to her educational background barred her recovery.\(^7\) The Court stated, "we agree with the reasoning of the court in Summers, and hold that on these facts, even if we assume that Honeywell discharged Johnson in retaliation for her

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\(^1\) Id. at 411. Michigan's Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.270(a) (West 1992), forbids retaliation or discrimination against a person "because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." [citations omitted] The act is intended to provide similar protections as Title VII and Michigan courts look to Title VII in order to resolve questions under the Act. Johnson, 955 F.2d at 415 n.1.

\(^2\) Johnson, 955 F.2d at 415.

\(^3\) Id. at 411.

\(^4\) Id. Johnson claimed to have earned a Bachelor of Arts degree from the University of Detroit when in fact she had only completed four courses.

\(^5\) Id. at 412.

\(^6\) Id. at 413.

\(^7\) Johnson, 955 F.2d at 413.
opposition to violations of the Act, she is not entitled to relief." The Court concluded that Johnson was barred from relief even if she could prove a violation of Elliott-Larsen since Honeywell had shown that had it known about Johnson's resume fraud it would not have hired her and it would have fired her if it learned of the fraud during her employment.

Therefore, as a general rule, summary judgment will be appropriate in resume-fraud decisions in the Tenth and Sixth Circuits, where: (1) the misrepresentation or omission was material, (2) the misrepresentation was directly related to ascertaining a potential candidate's qualifications for employment, and (3) it was relied upon by the employer in rendering the hiring decision.

c. Seventh Circuit

Although the Seventh Circuit claims not to have "squarely adopted the Summers rule," a review of its case law proves otherwise. Generally, the Seventh Circuit will deny a plaintiff relief in after-acquired evidence cases. The Seventh Circuit has, however, deviated from other circuits in that it refuses to apply the "would not have hired" standard to fraud-in-application cases. Instead, according to the Seventh Circuit, the correct focus is on whether the employer would have fired the employee had it known of the application fraud or other misconduct. The Seventh Circuit has relied predominantly on the mixed-motive principles first iterated in Mt. Healthy, and later clarified in Price Waterhouse v. Hopkins, to guide its decisions. A review of Mt. Healthy and Price

88Id.
89Id. at 414.
90Id. Other Sixth Circuit cases following Johnson include Milligen-Jensen v. Michigan Tech. Univ., 975 F.2d 302 (6th Cir. 1992). The plaintiff in Milligen-Jensen filed a sex discrimination and retaliation complaint against Michigan Tech. Jensen omitted from her employment application a DUI conviction. Id. The Court of Appeals reversed the lower court's "Solomon-like" approach which did not totally bar plaintiff relief, but reduced the amount of her recovery by 50%. Id. at 304. Relying on Honeywell, the Court of Appeals held that because Jensen would not have been hired, or would have been fired if Michigan Tech. had known of her falsifications, Jensen had suffered no legal damage by being fired. Id. According to the court, Jensen's claim of discrimination was thereafter irrelevant. Id.
91Washington v. Lake County, Ill., 969 F.2d 250, 253 (7th Cir. 1992).
92Id.
93490 U.S. 228 (1989). Price Waterhouse clarified the role of Mt. Healthy and mixed-motive principles in the context of Title VII. The Court essentially confirmed the Mt. Healthy analysis applied to Title VII and held that in a mixed-motive case, if the plaintiff bears her burden of proving that an impermissible criterion was a "substantial factor" in the adverse employment decision, then the burden of persuasion shifts to the employer to establish, by a preponderance of the evidence that the same decision would actually have been made absent an unlawful motive. 968 F.2d at 1180 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). Price Waterhouse has subsequently been overturned by the enactment of Section 107 of the Civil Rights Act of 1991; however,
Waterhouse, however, leads to the conclusion that the Seventh Circuit has misconstrued mixed-motive principles and that the holding of Price Waterhouse has no application to after-acquired evidence.

In Washington v. Lake County, Illinois94 the plaintiff was an African-American who was fired from his position as a jailer at the Lake County Sheriff’s Department, allegedly in violation of Title VII of the Civil Rights Act of 1964, as well as 42 U.S.C Sections 1981 and 1983.95 The district court granted Lake County’s motion for summary judgment holding that, even if Washington was fired on account of his race, he was entitled to no relief because he lied on his employment application when he indicated he had no criminal convictions.96

On appeal, Washington argued that the district court erred in granting Lake County’s motion for summary judgment because there was a genuine issue of material fact as to whether the Sheriff’s department would not have hired him had it known of his prior convictions, or would have fired him had Lake County discovered them.97 The Court of Appeals affirmed the lower court decision holding that, even assuming Lake County had discriminated against Washington because of his race, a finding of discrimination would not matter because Lake County established that it would have fired Washington when it discovered his lie about not having any prior convictions.98

In reaching its decision, the Seventh Circuit Court of Appeals determined that it was improper to focus on whether Lake County would not have hired Washington had it known of his criminal convictions.99 In determining that the "would have fired" standard is most appropriately applied to cases like Washington, the court relied on the Supreme Court’s holding in Price Waterhouse.

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this section has no bearing on the law applicable to after-acquired evidence. For a full explanation, see infra note 117.

94969 F.2d 250 (7th Cir. 1992).
95Washington, 969 F.2d at 251.
96Id. Washington had in fact pled guilty to criminal trespass and was convicted of third degree assault, although he spent no time in jail for these crimes. Id.
97Id.
98Id. at 255.
99Id. at 256. Although the Court recognized that an employer will very likely decide not to hire somebody who misrepresents himself on an application, (especially if the misrepresentation concerns a material requirement for the position sought), the court also noted that an employer might be less willing to fire an employee if the misrepresentation is discovered after the employer has started the job and has proven himself to be capable. Id. at 254 (citing Bonger v. American Water Works, 789 F. Supp. 1102, 1106 (D. Colo. 1992)). The court determined that focusing on whether an applicant would not have been hired is an unjustified importation of property right concepts into employment discrimination law. 969 F.2d at 256. The court concluded that such a focus was improper because a property right in one’s job is not a requirement for showing injury in a federal discrimination claim. Id.
In reaching this conclusion. A review of *Price Waterhouse*, however, shows that reliance on mixed-motive principles is entirely misguided and has no place in after-acquired evidence cases.

In *Price Waterhouse*, the Supreme Court held that an employment decision motivated in part by discrimination does not violate Title VII if the employer can prove that the same employment decision would have been made without the discriminatory motive.101 The theory behind this holding is that an employee who would have been fired anyway, regardless of a discriminatory motive, cannot claim that he was actually injured by the discriminatory conduct.102

The respondent in *Price Waterhouse* was a female senior manager employed by a nationwide professional accounting firm.103 She was proposed for partnership in 1982.104 She was neither denied nor offered the partnership, but instead her candidacy was held for reconsideration the following year.105 When the partners later refused to repropose her for partnership, the respondent resigned and brought a Title VII action against the firm alleging sex discrimination.106 The district court held the firm liable finding it had unlawfully discriminated against the respondent by encouraging sexism and sexual stereotyping.107

In finding the firm liable, the district court also concluded that the firm could avoid paying equitable relief, such as back pay, by proving that it would have placed the respondent’s candidacy on hold even

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100 *490 U.S. 228 (1989).* The Court of Appeals, Seventh Circuit reasoned “that, as in a resume fraud case, the issue in a mixed-motive case is whether the plaintiff has actually been injured, and the court is required to undergo a hypothetical inquiry as to what the company would have done under different circumstances.” 969 F.2d at 255.

101 *490 U.S. at 242.*

102 The courts are in agreement that a claimant for back pay under Title VII must establish that he has suffered actual financial loss as a result of the discriminatory employment practice in question. See generally, Margaret Shulenberger, Annotation, *Award of Back Pay in Suit Under Title VII of Civil Rights Act of 1964, as Amended by Equal Employment Opportunity Act of 1972* (42 USCS §§ 2000e et seq.), *For Discriminatory Employment Practices*, 21 A.L.R. FED. 472, 534 (1974).

103 *Price Waterhouse*, 490 U.S. at 231.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* 237. In the initial proposal process, the firm solicited evaluations from all of its partners, nearly all of whom were men, in order to evaluate the respondent as a candidate. The evaluations split sharply on the question whether she should be granted or denied partnership. Her supporters strongly praised her abilities and record of securing major contracts for the firm, but a number of evaluations sharply criticized her inter-personal skills and accused her of being abrasive. Several of the evaluations on both sides made comments implying that the respondent was or had been acting masculine, and one partner stated she could improve her chances for partnership by walking, talking and dressing more femininely. 490 U.S. at 234-37.
absent the discriminatory motive. The court of appeals affirmed the lower court but held that the employer could avoid liability although, not merely equitable relief, by proving that the same employment decision would have been made had discrimination not played a role.

The issue on appeal to the United States Supreme Court was to determine the respective burdens of proof under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. The Supreme Court held that "once a plaintiff in a Title VII case shows that [discrimination] played a motivating part in an employment decision, the defendant may avoid liability only by proving it would have made the same decision even if it had not allowed [discrimination] to play such a role."

In applying this reasoning to Washington, the Seventh Circuit concluded that the "would have fired standard" should apply to all cases involving after-acquired evidence, e.g., fraud-in-application and predischarge misconduct. In reaching this conclusion, the court reasoned that because the temporal focus in a mixed-motive case is on the time of the adverse employment decision, a "would not have hired" approach is ultimately misguided. According to the court, such a standard hypothetically asks the employer what it would have done at the hiring level, which is totally irrelevant to a discrimination claim regarding a discriminatory discharge under Title VII. Rather, the court of appeals stated, "the inquiry in a discrimination case is whether the plaintiff has been treated differently than similarly situated employees because of forbidden grounds."

To summarize, the court stated, the appropriate issue in an employment discrimination case where the plaintiff lied on his application and was later fired for an unrelated reason is whether the employer, acting in a . . . neutral fashion, would have fired the employee upon discovery of the misrepresentation, not whether the employer would have hired the employee had it known the truth.

Under this rationale, which essentially mirrors the holding in Summers, an employer may avoid liability in an after-acquired evidence case if the employer can show, by a preponderance of the evidence, that, if acting in a neutral . . .

108 Price Waterhouse, 490 U.S. at 237.
109 Id.
110 Id. at 244.
111 Id.
112 Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992).
113 Id.
114 Id.
manner, it would have made the same employment decision had it known of the later discovered evidence.\textsuperscript{115}

By extending the same evidentiary framework in \textit{Price Waterhouse} to cases involving after-acquired evidence such as \textit{Washington}, one obvious factual distinction has been ignored. In \textit{Price Waterhouse}, the employer was able to assert a legitimate ulterior motive for discharging the employee that was present at the time of termination. The very premise of a mixed-motives case is that an employer may avoid liability if a legitimate reason was present at the time of the adverse employment decision.\textsuperscript{116} Although in an after-acquired evidence situation a legitimate reason for termination is "theoretically" present, because it is not discovered until sometime after the termination, it cannot be said to be "actually" or "practically" present. In other words, in an after-acquired evidence case, an employer cannot claim that his actions were realistically motivated by a reason which was not known to him at the time. In the words of the Supreme Court, "an employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."\textsuperscript{117} The Supreme Court explained in \textit{Price Waterhouse} that when saying a "factor" motivated an employment decision, "we mean that, if we asked the employer at the moment of the [employment] decision what its reasons were [for taking such an action,) and if we received a truthful response, one of those reasons would be that . . . [factor]."\textsuperscript{118} Therefore, the critical inquiry in determining whether an employer can avoid liability under Title VII, according to the Supreme Court in \textit{Price Waterhouse}, is whether a legitimate reason was a factor in the employment decision at the moment it was made.\textsuperscript{119}

\textsuperscript{115}Id.

\textsuperscript{116}Price Waterhouse, 490 U.S. at 252 (emphasis added).

\textsuperscript{117}Id. (emphasis added).

\textsuperscript{118}Id. at 250.

\textsuperscript{119}Id. at 241 (emphasis added). The Civil Rights Act of 1991 overturned the Supreme Court's holding in \textit{Price Waterhouse} to the extent that an employment action violates Title VII if discrimination was a motivating factor in that decision, regardless of whether lawful motives were also factored into the decision. Thomas J. Piskorski & Michael A. Warner, \textit{The Civil Rights Act of 1991: Overview and Analysis}, 8 LAB. LAW. 9 (1992). Title 42 U.S.C. § 2000e-2(m) (Supp. IV 1992), provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." This language, however, does not help to clarify the issue of what effect after-acquired evidence should have on the award of back pay, because under the new Act, the issue of whether an employer would have made the same decision in the absence of any discriminatory motive is still relevant to the remedial phase of the litigation. If the employer can demonstrate that it would have taken the same action even in the absence of the impermissible motivation, then the plaintiff is not entitled to damages or to be reinstated or hired. \textit{Id.} If courts continue to ignore the time lapse in after-acquired evidence cases and hold that a plaintiff should not be awarded any remedy under Title VII.
Although the Seventh Circuit may have believed it was clarifying the law with respect to after-acquired evidence, in actuality, it merely joined the other circuits that have erroneously applied mixed-motive principles and have misconstrued the holdings of Mt. Healthy and Price Waterhouse. The above discussion of Price Waterhouse convincingly proves that mixed-motive principles should not be extended to situations where a legitimate reason for termination was neither present nor known at the time of the employment decision.\textsuperscript{120} Therefore, courts should not distort the holding of Price Waterhouse by ignoring the temporal lapse between the unlawful act and the discovery of a legitimate motive.\textsuperscript{121} The law with respect to after-acquired evidence clearly should not replicate the law applicable to mixed-motives.\textsuperscript{122}

d. Eleventh Circuit

The Eleventh Circuit is one to have recognized that the Summers rule constitutes an unwarranted extension of mixed-motive principles.\textsuperscript{123} On September 6, 1994, however, this decision was vacated and the case is scheduled to be reheard en banc.\textsuperscript{124} Despite this rehearing, the Eleventh Circuit’s analysis in the originally-reported decision provides a viable alternative approach to the issue of after-acquired evidence.

In Wallace v. Dunn Construction Co., the Eleventh Circuit Court of Appeals refused to adopt the Summers rule finding instead that Mt. Healthy, Price Waterhouse and their related principles actually subvert, rather than support, the Summers decision.\textsuperscript{125} The court of appeals stated,

Whereas the Mt. Healthy rule excuses all liability based on what actually would have happened absent the unlawful motive, the Summers rule goes one step further: it excuses all liability based on what hypothetically would have occurred absent the alleged discriminatory motive assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge.\textsuperscript{126}

The court of appeals further found that such a proposition clashed with the Mt. Healthy principle that a plaintiff should be left in no worse a position than

\textsuperscript{120}Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181 (11th Cir. 1992), vacated, 32 F.3d 1489 (11th Cir. 1994) (rehearing en banc granted).

\textsuperscript{121}Id.

\textsuperscript{122}Id.

\textsuperscript{123}Id. at 1180.

\textsuperscript{124}Wallace, 32 F.3d 1489 (11th Cir. 1994).

\textsuperscript{125}Wallace, 968 F.2d at 1179.

\textsuperscript{126}Id. at 1179 (emphasis original).
THE AFTER-ACQUIRED EVIDENCE DOCTRINE

if he or she had not been a member of a protected class or engaged in protected opposition to an unlawful employment practice. The court concluded that in Summers, the Tenth Circuit clearly placed the plaintiff in a worse position than if he had not been a member of a protected class, for absent his age and his religion, Summers would have remained employed for at least some period of time after he was actually discharged. Nevertheless, the Tenth Circuit denied him any relief for that lost period of employment.

The Eleventh Circuit further refused to follow the Summers rule because it considered the Summers approach antithetical to Title VII. A plaintiff is not compensated for his or her lost wages due to an employer’s illegal conduct, and the employer is not discouraged from committing illegal employment activities in the future. Rather, "it invites employers to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination." The Eleventh Circuit also recognized the potential in Summers-type cases for an employer to escape all liability by rummaging through an unlawfully-discharged employee’s background for flaws and then manufacturing a "legitimate" reason for the discharge that fits the flaws in the employee’s background.

In Wallace, the Eleventh Circuit defined an alternative approach to dealing with after-acquired evidence and concluded that such evidence is relevant only with respect to the amount of damages and type of relief that should be awarded to the claimant.

The plaintiff in Wallace filed a claim for retaliatory discharge under Title VII alleging that her numerous objections to sexual harassment caused her termination. During the plaintiff’s deposition, the employer learned that she had pled guilty to possession of cocaine and marijuana prior to filing her employment application. On her application, the plaintiff had checked "no" to the question, "Have you ever been convicted of a crime?" After discovering this information, the employer moved for summary judgment on the grounds that the after-acquired evidence of plaintiff’s narcotics convictions and application fraud served as a legitimate cause for terminating her employ-

127 Id. at 1180.
128 Id.
129 Id.
130 Wallace, 968 F.2d at 1180.
131 Id.
132 Id.
133 Id. at 1176.
134 Id.
135 Wallace, 968 F.2d at 1177 n.2.
ment irrespective of any alleged unlawful motives.\textsuperscript{136} The district court rejected
this theory as a matter of law.\textsuperscript{137}

On appeal, although the court of appeals did not totally bar the plaintiff
recovery, it did agree with the abstract proposition espoused in \textit{Summers} that
after-acquired evidence is relevant to the relief due a successful Title VII
plaintiff.\textsuperscript{138} The court held that a sufficient showing of after-acquired evidence
mandates the drawing of a boundary between the preservation of the
employer's lawful prerogatives and the restoration of the discrimination
victim.\textsuperscript{139} The court concluded that after-acquired evidence cases are best
decided on a case-by-case basis when determining the effects such evidence
should have on a plaintiff's remedies under Title VII.\textsuperscript{140}

In deciding what effect, if any, after-acquired evidence should have on a
plaintiff's recovery, the court took care to ensure that the respective rights of
the employer and employee were upheld. The court concluded that assuming
after-acquired evidence, in and of itself, would have caused an employer to
 discharge the employee, it would be inappropriate for a court to order
reinstatement or front pay in a Title VII discharge case.\textsuperscript{141} The court believed
that if an employer later discovers a legitimate motive that would establish
cause for an employee's discharge, then reinstatement or front pay would go
beyond making the plaintiff whole and would unduly trammel an employer's
freedom to lawfully discharge an employee.\textsuperscript{142} Also, because under these same
circumstances an employee would no longer be employed, the court concluded
that an employee would not be entitled to injunctive relief restraining the
employer from further unlawful practices.\textsuperscript{143}

With regard to the period of Title VII back pay that should be awarded, the
court found that the boundary between the competing concerns shifts such that
a plaintiff's back pay period should not terminate prematurely unless the
employer proves that it would have discovered the after-acquired evidence
prior to what would otherwise be the end of the back pay period in the absence
of the allegedly unlawful acts and the litigation.\textsuperscript{144} For example, in \textit{Wallace}, the
court of appeals held that because the employer introduced no evidence
indicating that it would have discovered the plaintiff's fraudulent concealment
if she had not asserted her rights under Title VII, the court denied summary

\begin{thebibliography}{9}
\bibitem{136} \textit{Id.} at 1177.
\bibitem{137} \textit{Id.}
\bibitem{138} \textit{Id.} at 1181.
\bibitem{139} \textit{Id.}
\bibitem{140} \textit{Wallace,} 968 F.2d at 1181.
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{Id.} at 1182.
\bibitem{143} \textit{Id.}
\bibitem{144} \textit{Id.}
\end{thebibliography}
judgment for the employer regarding premature termination of any period of back pay, lost wages or liquidated damages resulting from the employee’s termination.

In its discussion of the various approaches that could be applied to determine the limit of a plaintiff’s remedies, the Eleventh Circuit Court of Appeals rejected the alternative approach of ending the period of back pay on the day the employer actually learned of the after-acquired evidence. The court believed that such an approach overlooked the teachings of Mt. Healthy that a victim should be placed in no worse a position than if he or she were not a member of a protected class and had not engaged in protected conduct. The court also reasoned that such an approach would have the perverse effect of providing a windfall to employers who, in the absence of their unlawful act and the ensuing litigation, would have never discovered the evidence in the first place.

This “alternative” approach discussed in Wallace has been applied by the National Labor Relations Board in many instances, and has most recently been adopted by the EEOC in its Revised Guidelines of July, 1992. Such an approach seems to provide the courts with a fair and workable compromise that equitably balances the respective rights of employer and employee under Title VII. Under this approach, neither party can take advantage of their wrongful behavior and each party is properly compensated (or not compensated) for his or her respective misconduct. The EEOC’s approach strikes a fair and equitable balance between two individuals who are not wholly innocent and is most in accord with the purpose of Title VII and back pay relief.

145 Wallace, 968 F.2d at 1182.

146 Id.

147 The National Labor Relations Board (hereinafter NLRB) has addressed the issue of after-acquired evidence in discrimination cases long before the Tenth Circuit in Summers, yet generally the federal courts have not looked to NLRB decisions for guidance. But see Printon v. Sterling Nat’l Bank, 1990 U.S. Dist. LEXIS 912 (S.D. N.Y. Jan. 31, 1990)(Rejecting employer’s argument that because the plaintiff engaged in knowing misconduct during his tenure at the bank, such misconduct completely barred reinstatement and back pay. Relying on cases decided under the National Labor Relations Act, the court could not as a matter of law hold that the plaintiff was completely barred from recovering damages for the period prior to defendant’s discovery of the alleged misconduct.). The NLRB has treated the after the fact defense in three different ways and has constantly wavered on exactly how such evidence should either bar or limit a plaintiff’s remedies. Originally, the NLRB applied after acquired evidence as an "almost complete defense," denying reinstatement and back pay, but issuing cease and desist orders and ordering a notice be posted by the employer finding that an unfair labor practice was committed. Currently, the NLRB applies the after-the-fact defense as a partial defense, denying reinstatement but awarding partial back pay. Back pay will be awarded from the date of the unlawful discharge until the date that the predischarge misconduct was discovered. Rubenstein, supra, note 2, at 3, 4 n.9.
III. THE EEOC GUIDELINES—A FAIR AND EQUITABLE APPROACH IN ACCORD WITH THE PURPOSE OF TITLE VII

A. The Purpose of Title VII and Back Pay

The purpose of judicial relief in employment discrimination cases is to reimburse or, insofar as is possible, make whole the individual or class affected by the discrimination and to prevent employers from engaging in such illegal actions in the future. The remedial provisions of Title VII and other employment discrimination laws are intended to provide full corrective and preventive remedies for violations. By allowing an employer to escape all liability for his illegal conduct in an after-acquired evidence case, a plaintiff is neither made whole nor an employer properly deterred from committing such discriminatory actions in the future. However, to allow an employee to recover for lost wages beyond the period that his or her misconduct is discovered goes against traditional equitable principles.

In Albemarle v. Moody Paper Co., the Supreme Court set forth the appropriate standard that a federal district court should follow in deciding whether to award or deny back pay when an employee has lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice. The Court stated that "the power to award back pay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions." According to the Court, a court must exercise this power in light of the large objective of the Act - to achieve equality of employment opportunities and remove barriers that have operated in the past to favor one group of employees over another. In finding that back pay has an obvious connection with this purpose, the Supreme Court determined that if employers faced only the prospect of an injunctive order (or worse yet, could escape liability altogether), they would have little incentive to shun practices of dubious legality. "It is the reasonably certain prospect of a back pay award that provides the catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor

148 Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) ("This 'make whole' purpose of Title VII is made evident by its legislative history. The back pay provision of Title VII was expressly modeled after the back pay provision of the National Labor Relations Act. Under that Act, making workers whole for losses suffered on account of unfair labor practices is part of the vindication of the public policy.")


150 422 U.S. 405 (1975).

151 Albemarle Paper Co., 422 U.S. at 408.

152 Id. at 416.

153 Id. at 417.

154 Id.
to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.”

The Court in Albemarle held that a district court’s decision to award back pay must be measured against the purposes which inform Title VII. The Court believed that this was shown by Congress’s care in arming the courts with full equitable powers. The historic purpose of equity is to secure complete justice. "The term equity denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men." Justice is not secured under Title VII if courts continue to bar total recovery in after-acquired evidence cases. Not only will the purpose of making the plaintiff whole be thwarted, but the employer will not be encouraged whatsoever to cease his discriminatory conduct. The Supreme Court has stated that in discrimination cases, "back pay should be denied only for reasons which... would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered. . . ."

By the same token, however, an award of back pay is not automatic or mandatory. It is an equitable remedy which courts may invoke. Such discretionary choices are not to be left to a court’s inclination, but are to be guided by sound legal principles. Because after-acquired evidence cases deal with an imperfect situation of two wrongdoers, the EEOC’s policy to end back pay after the employee’s misconduct is discovered fairly balances the interests of employer and employee in accordance with the principles of Title VII.

B. The EEOC Guidelines of 1992

Although the EEOC has now adopted a fair and equitable approach in determining the appropriate remedies to be awarded a successful complainant, the EEOC first adopted the Summers approach and barred recovery where after-acquired evidence was present. This approach was set forth in the

155 Id.
156 Albemarle Paper Co., 422 U.S. at 421.
157 Id. at 418.
158 Id.
160 Albemarle Paper Co., 422 U.S. at 421.
161 Id. at 415.
162 Id.
163 “[B]ack pay award[s] [are] equitable and compensatory in nature, rather than a punishment or penalty assessed against wrongdoers. Shulenberger, supra note 97, at 485-86. Therefore, an employee should not be denied back pay as a penalty for a previous wrongdoing. Likewise, back pay should not be unfairly assessed an employer.

Section IV of this Policy stated that "in cases where discrimination is proved through circumstantial evidence, the employer may be able to limit relief available to the plaintiff by showing that after-the-fact lawful reasons would have justified the same action." 165 The EEOC concluded that if the charging party was terminated for discriminatory reasons, but the employer later discovered that he or she stole from the company, and the employer had an absolute policy of firing anyone who committed theft, then the employer would not be required to reinstate the charging party or provide back pay. 166

In July of 1992, however, the EEOC issued its Revised Enforcement Guide on Recent Developments in Disparate Treatment to clarify the Commission's position on the evaluation of indirect evidence, direct evidence, and evidence of mixed-motives under the disparate treatment theory of discrimination, in light of the amended Civil Rights Act of 1991. 167 In this Guide, the Commission overturned its 1991 policies and specifically distinguished after-the-fact cases and mixed-motive cases. The EEOC concluded that the two situations were not the same, and therefore, required two distinct approaches.

With respect to mixed-motive cases, the Commission concluded that in such cases, "[o]nce a complainant proves that discrimination was a motivating factor for an adverse employment action, the burden of proof shifts to the employer to establish that it would have taken the same action absent the discrimination." 168 If the employer makes this showing, then under the new Civil Rights Act, and as determined by the Commission, the employer will not be required to pay compensatory or punitive damages, or be subject to an order reinstating, hiring, promoting the complainant or be assessed back pay. 169

In its new policy guidelines, the EEOC devoted an entire section specifically addressing cases where evidence of a legitimate basis is discovered after-the-fact and the bearing this evidence would have on a plaintiff's remedies. The EEOC stated that '[i]n order for a case to be considered one of 'mixed-motives,' to which Section 107 of the new Act applies, both the legitimate and discriminatory motives must have been operating at the time of


165 Id. at 6999-136.


168 Id. at 405:6924.

169 Id.
the decision." The Commission concluded that when employers terminate employees based on discriminatory motives, but later discover legitimate bases for the terminations, the legitimate reason did not motivate the terminations.

Nevertheless, under the EEOC guidelines, if employers are able to produce proof of a justification discovered subsequently that would have induced them to take the same action, the employers will be shielded from orders requiring reinstatement of the complainants, or payment of the portion of back pay accruing subsequent to the date on which the legitimate bases for the adverse action were discovered, along with the portion of compensatory damages covering losses arising after that date. If the discovery date is unknown, then an appropriate percentage reduction should be made according to an assessment of the approximate discovery date.

Under Section 102 of the 1991 Civil Rights Act, a complainant is entitled to punitive damages if he or she established that the employer engaged in discrimination 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' If a complainant makes this showing, but the employer proves that a lawful reason which actually motivated it at the time of the decision would have induced it to take the same action, then the case is one of

170 Id. at 405:6926.
171 Id.
172 EEOC: Disparate Treatment, supra note 167, at 405:6926. To explain exactly the Commission would apply these findings, the Commission cited the following example: CP (Hispanic) produces direct evidence that R (employer) refused to hire her for a management position pursuant to a company policy not to hire or promote any Hispanics for management positions. R is unable to refute the evidence of the discriminatory policy, but asserts that CP had lied on her application when she stated that she had earned a Masters in Business Administration. The investigation confirms that CP lied on her application, but that R first discovered this in the course of gathering information to respond to the EEOC charge. The Commission, in these circumstances, would find that R has violated Title VII by discriminating against CP because of her national origin. It would seek injunctive and declaratory relief to prevent R from discriminating in a similar fashion in the future, and attorney's fees, if appropriate. The Commission would also seek back pay accruing prior to the date on which the application falsification was discovered, and compensatory damages for any losses that arose prior to that date. Punitive damages could be sought if the charge is based on post-1991 Act conduct, and if it is determined that respondent's conduct was sufficiently egregious to merit such relief. However, because after-the-fact lawful reasons would have justified the same action, the Commission will not pursue reinstatement or the remainder of the back pay or compensatory damages to which CP would have been entitled had she not falsified her application. . . .
173 Id. at 405:6926.
mixed motives, and according to Section 107 of the Act, punitive damages may not be awarded. However, if the employer's sole motivation was discriminatory and it acted with "malice or with reckless indifference" to the victim's rights, proof of an after-the-fact justification would not shield an employer from an order requiring it to pay punitive damages.174

Why the Commission waited until the passing of the Civil Rights Act of 1991 to change its view regarding after-acquired evidence is unclear. The amendment to the language of the 1991 statute was not intended to clarify the role that after-acquired evidence should play in discrimination suits brought under Title VII. Regardless of its reasons, however, the EEOC has now correctly recognized that mixed-motive principles should not apply to the law governing after-acquired evidence and that an employer should not escape total liability for its unlawful conduct.

IV. CONCLUSION

An employer should be considered a wrongdoer under Title VII if it has acted out of a motive that is declared illegitimate by the statute and should be held accountable for his actions. What is most disconcerting about the Summers rule is that it so strongly favors the employer in after-acquired evidence cases without regard to the employee's injury. One legal commentator has plainly stated, "[t]here is something wrong with a body of law which allows an employer to cover up its illegal activities by searching an employee's past for unknown falsifications."175

Ultimately, the split among the circuits will have to be resolved by the United States Supreme Court in order to have uniformity and consistency concerning the impact of after-acquired evidence on discrimination cases. On review, the Court should strictly apply its holding in Price Waterhouse and hold that the circuits have misapplied mixed-motive principles to cases involving after-acquired evidence. The Court should give due deference to the EEOC's findings and conclusions of law as stated in its policy guidelines. These policy guidelines provide a workable standard that fairly and equitably balance each party's rights under Title VII. Until the issue of after-acquired evidence is resolved, however, employers will continue to successfully avoid liability for their discriminatory actions, and courts will continue to remind employees that honesty is the best policy.

V. ADDENDUM

On January 23, 1995, the United States Supreme Court rendered its decision in McKennon v. Nashville Banner Publishing Co.176 which finally resolved the split

174Id. at 405:6927.
175Rubenstein, supra note 2, at 28.
among the circuits regarding the impact of after-acquired evidence in employment discrimination cases. The question before the Court in McKennon was "whether an employee discharged in violation of the Age Discrimination in Employment Act of 1967 (hereinafter ADEA) is barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds." Although McKennon involved a claim brought under the ADEA, the Court's decision appears to be equally applicable to claims brought under the various antidiscrimination statutes including, Title VII, the Americans with Disabilities Act of 1990, the Fair Labor Standards Act, the Equal Pay Act of 1963 and the National Labor Relations Act.

McKennon involved an employee who sued her employer, Nashville Banner Publishing Company, for violating the ADEA. In her suit, McKennon sought a variety of legal and equitable remedies available under the Act, including backpay. McKennon had worked for the Nashville Banner for approximately 30 years. She was discharged, the Banner claimed, as part of a reduction in force necessitated by cost considerations. McKennon was 62 years old at the time of her discharge.

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177 The Court specifically stated, "We granted certiorari, [citation omitted] to resolve conflicting views among the Courts of Appeals on the question whether all relief must be denied when an employee who has been discharged in violation of the ADEA and the employer later discovers some wrongful conduct that would have led to discharge if it had been discovered earlier." 115 S. Ct. at 883 (citing O'Driscoll v. Hercules, Inc., 12 F.3d 176 (10th Cir. 1994); Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988)).

178 McKennon, 115 S. Ct. at 882.

179 See McKennon, 115 S. Ct. at 884, wherein the Court recognized that: [The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. . . . The ADEA incorporates some features of both Title VII and the Fair Labor Standards Act, which has led us to describe it was 'something of a hybrid.' [citation omitted] The substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII. [citation omitted] Its remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938. [citation omitted]

180 McKennon, 115 S. Ct. at 883.

181 Id.

182 Id. at 882.

183 Id.

184 Id. at 882-83.
During pre-trial discovery, McKennon admitted in her deposition that she copied several confidential documents bearing upon the company’s financial condition.\textsuperscript{185} A few days after her deposition, the Banner sent McKennon a letter declaring that her removal and copying of the records was in violation of her job responsibilities and again advised her that she was terminated.\textsuperscript{186} The Banner then filed a motion for summary judgment conceding that it had discriminated against McKennon but argued that McKennon’s misconduct was grounds for her termination and that neither backpay nor any other remedy was available to her under the ADEA.\textsuperscript{187} Both the district court and the court of appeals agreed with this argument and, relying on cases such as Honeywell and Summers, granted summary judgment in the Banner’s favor.\textsuperscript{188}

Upon review, the United States Supreme Court reversed the court of appeals and held that an employee discharged in violation of the ADEA is not barred from all relief when, after her discharge, her employer discovers evidence of wrongdoing that, if discovered, would have led to her termination on lawful and legitimate grounds.\textsuperscript{189} The Court questioned the legal soundness of the lower courts’ rulings which held that the misconduct of McKennon rendered it irrelevant whether or not the Banner discriminated against her.\textsuperscript{190} In response to the lower courts’ determination, the Court concluded that “a violation of the ADEA cannot be so altogether disregarded.”\textsuperscript{191}

One of the primary bases for the Court’s reversal in McKennon was the recognition that decisions such as Summers and its progeny undermine the very purpose and objective of the federal antidiscrimination statutes.\textsuperscript{192} The Court in McKennon noted that:

Deterrence is one object of these statutes. Compensation for injuries caused by the prohibited discrimination is another. . . . The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA. . . . It would not accord with this scheme if after-acquired evidence of wrongdoing

\textsuperscript{185}McKennon, 115 S. Ct. at 883.
\textsuperscript{186}Id.
\textsuperscript{187}Id.
\textsuperscript{188}Id. The Court of Appeals for the Sixth Circuit considered McKennon’s misconduct, in effect, to be supervening grounds for termination and reaffirmed that it "firmly endorsed the principles that after acquired evidence is a complete bar to any recovery by the former employee where the employer can show it would have fired the employee on the basis of the evidence." \textit{Id.} at 883-84.

\textsuperscript{189}Id. at 881 (syllabus).
\textsuperscript{190}McKennon, 115 S. Ct. at 883-84.
\textsuperscript{191}Id. at 884.
\textsuperscript{192}See \textit{id.} at 884-85.
that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act.\textsuperscript{193}

Moreover, the Court also confirmed that decisions like \textit{Summers}, which rely on the holdings of \textit{Mt. Healthy} and \textit{Price Waterhouse}, are ultimately misguided.\textsuperscript{194} The Court in \textit{McKennon} stated that "our decision in [\textit{Mt. Healthy}] . . . is inapplicable here. . . ." and confirmed that mixed-motive principles are inapposite to after-acquired evidence cases.\textsuperscript{195} The Court correctly observed that in an after-acquired evidence case "[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason."\textsuperscript{196} The Court also emphasized that the only relevance mixed-motive cases have in after-acquired evidence cases is that "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."\textsuperscript{197} Other than for that limited purpose, mixed-motive principles should not be extended to after-acquired evidence cases. For in the words of the Court, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made."\textsuperscript{198}

Although the Court in \textit{McKennon} held that predischarge employee misconduct will not act as a complete bar to recovery, the Court was unwilling to disregard an employee's misconduct altogether. Rather, the Court held that after-acquired evidence of the employee's wrongdoing must be taken into account to determine the appropriate remedy, "lest the employer's legitimate concerns be ignored."\textsuperscript{199} The Court emphasized that:

\textit{The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging employees. [citation and parenthetical omitted] In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern 'for the relative moral worth of the parties,' [citation omitted] but to take due account of the lawful prerogatives of the employer in the usual course of its

\textsuperscript{193}\textit{id.} at 884.

\textsuperscript{194}\textit{See} \textit{id.} at 885.

\textsuperscript{195}McKennon, 115 S. Ct. at 886.

\textsuperscript{196}Id.

\textsuperscript{197}Id.

\textsuperscript{198}Id.

\textsuperscript{199}Id.
business and the corresponding equities that it has arising from the employee's wrongdoing.\textsuperscript{200}

Therefore, the Court determined that the proper boundaries of remedial relief in cases involving after-acquired evidence must be addressed on a case-by-case basis.\textsuperscript{201} However, as a general rule, neither reinstatement nor front pay is an appropriate remedy.\textsuperscript{202} According to the Court, the beginning point in formulating a remedy should, therefore, be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered. A court can also consider any extraordinary equitable circumstances that affect the legitimate interests of either party.\textsuperscript{203}

In order to limit the relief afforded a plaintiff, however, it is not enough for an employer merely to discover and offer as evidence instances of predischarge employee misconduct. "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, [as a defense to limiting relief], it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone had the employer known of it at the time of the discharge."\textsuperscript{204} By placing this burden of proof on the employer, the Court believes that such a standard will help to prevent employers from routinely undertaking extensive discovery into an employee's background or job performance to resist claims.\textsuperscript{205}

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\textsuperscript{200}\textit{McKennon}, 115 S. Ct. at 886.
\textsuperscript{201}\textit{Id}.
\textsuperscript{202}\textit{Id}.
\textsuperscript{203}\textit{Id}.
\textsuperscript{204}\textit{Id}.
\textsuperscript{205}\textit{McKennon}, 115 S. Ct. at 886-87.