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Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing

Christine Neylon O'Brien*

A division among the federal circuits arose concerning the impact of after-acquired evidence of employee wrongdoing upon an employer's liability for statutory employment discrimination. When pre-trial discovery unveiled a separate nondiscriminatory reason for termination, numerous circuits allowed such previously unknown information to constitute a legitimate basis for the employment decision, following the model of a mixed-motive discharge. A trend developed among several other circuits that after-acquired evidence of employee misconduct should not prevent the establishment of employer liability, but should be considered when addressing the remedy. The United States Supreme Court recently affirmed the latter approach in McKennon v. Nashville Banner Publishing Co.

"So absolutely good is truth, truth never hurts the teller."
Robert Browning
Fifine at the Fair (1872), st. 32

I. INTRODUCTION

In what has been touted as the most closely watched labor case on the Supreme Court's 1994 docket,[1] *McKennon v. Nashville Banner Publish-*

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1. *First Monday in October Shows Shrunken Supreme Court Case Load*, Daily Lab. Rep. (BNA) No. 186, at C-1 to C-2 (Sept. 28, 1994).

ing Co.,[2] Christine McKennon, a former secretary at the defendant newspaper, the Nashville Banner, filed a lawsuit alleging that her employment termination at age sixty-two constituted age discrimination.[3] Mrs. McKennon's performance evaluations were consistently excellent during her thirty-nine years with the newspaper.[4] She served as a secretary to six different individuals over the course of her employment with the defendant, having recently worked for Jack Gunther, Executive Vice President, for over seven years when, in March 1989, Mr. Gunther's job assignment changed.[5] Thereafter, the newspaper relocated Mrs. McKennon to the position of secretary to the Comptroller, Ms. Imogene Stoneking.[6] The newspaper discharged Mrs. McKennon on October 31, 1990 and she filed suit in May 1991.[7]

Within the normal discovery process, Mrs. McKennon was deposed on December 18, 1991, at which time the newspaper learned that she had copied several confidential documents that she had access to during her final position at the company.[8] Mrs. McKennon took these items home where she showed them to her husband, ostensibly to insure and protect herself "in an attempt to learn information regarding [her] job security concerns."[9]

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2. 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994), *rev'd and remanded*, 115 S. Ct. 879 (1995).

3. *McKennon*, 9 F.3d at 540. Plaintiff averred violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1988 & Supp. V), and the correlative state statute, the Tennessee Human Rights Act (THRA), TENN. CODE ANN. §§ 4-21-101 to 806 (1991 & Supp. 1994). McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 605 (M.D. Tenn. 1992), *rev'd*, 115 S. Ct. 879 (1995). Because the district court and Sixth Circuit refer to the plaintiff as Mrs. McKennon, this same mode of reference is used herein to discuss the opinions from these courts.

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

5. *McKennon*, 797 F. Supp. at 605.

6. *Id.* Since a secretary's status and position are often tied to that of her/his supervisor, it is noteworthy that the reassignment of Mrs. McKennon from secretary to an executive vice president to secretary to a comptroller in all likelihood was a demotion of sorts, one that seemingly was not based upon poor work performance. *See id.*; *supra* note 4 and accompanying text.

7. *McKennon*, 797 F. Supp. at 605.

8. *Id.* at 605-06. These included a payroll ledger and a profit/loss statement. *Id.* at 605.

9. *Id.* at 606. The plaintiff obviously sought her husband's counsel about her employment situation. This is not so unusual in light of her regressed situation at the newspaper. *See supra* note 6 and accompanying text. In addition, Mrs. McKennon was required to sign an acknowledgment of receipt of an employee handbook, dated February 28, 1990, which was subsequently appended to the newspaper's memorandum in support of its successful motion for summary judgment. *McKennon*, 797 F. Supp. at 605. Unlike other precedent cited with approval by the Sixth Circuit in support of its affirmance of the defendant's motion for summary judgment, the facts in the *McKennon* case involved a sharing of information between husband and wife, a

Ironically, Mrs. McKennon's conduct, which she attributed to caution, coupled with her honest admission to these acts, operated to bar recovery on her age discrimination complaint at the federal district court and the Sixth Circuit Court of Appeals.[10] The newspaper issued her a "termination letter" just two days after the deposition was taken establishing that she had copied the documents—this despite the fact that she had been effectively discharged nine months earlier.[11]

While there are many legal issues present in the *McKennon* case, the primary issue of interest here is whether evidence acquired after employment termination should constitute a complete bar to a former employee's age (or other statutorily protected characteristic) discrimination complaint, or whether such after-acquired evidence should merely alter the remedy. May an employer's showing that it discovered another basis for dismissal (other than age or another protected characteristic), a basis of which it had *no knowledge* at the time when the decision to terminate was made, operate to preclude the plaintiff from proceeding with her claim? Should such after-acquired information bar liability for the defendant employer?[12] Will after-acquired evidence prevent discrimi-

privileged communication that wrought no real injury or damaging publication upon the defendant. *Id.*; *cf.* O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1467-70 (D. Ariz. 1992) (involving employee's removal of confidential management files from supervisor's desk, photocopying, and showing them to a co-worker where court upheld summary judgment for employer based upon the after-acquired evidence doctrine.).

10. *McKennon*, 797 F. Supp. at 608; McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 542 (6th Cir. 1993). A very important public policy is served when the law encourages parties and witnesses to tell the truth.

11. *McKennon*, 797 F. Supp at 605-06. It is likely that the employer's letter of termination amounted to the defendant's attempt to cut off any potential back pay liability as of the date when the after-acquired evidence became known. *But see* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995) (remanding to Third Circuit in light of *McKennon*). The Third Circuit had provided guidance that backpay should not be cut off at the moment the employer obtains the after-acquired evidence, rather a backpay award should be awarded up to the date of judgment unless the defendant establishes it would have discovered the after-acquired evidence anyway, absent the litigation. *Mardell*, 31 F.3d at 1238-40; *see infra* notes 319-57 and accompanying text; *see also* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992) (rejecting an alternative approach that would end the backpay period on the day the after-acquired evidence is learned during the litigation), *vacated and reh'g granted*, 32 F.3d 1489 (11th Cir. 1994), *aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995); *infra* notes 280-300 and accompanying text.

12. *See* Linda Greenhouse, *Justices Appear to Favor Employees on a Job-Discrimi-*

nation claims from ever "see[ing] the light of day," as Justice Ruth Bader Ginsburg reflected during oral arguments in the *McKennon* case?[13]

This article analyzes the Supreme Court's *McKennon* decision and evaluates the previous disposition of the federal courts on the weight of after-acquired evidence in employment discrimination cases in light of the liability and remedial treatments afforded in *McKennon*. As will be discussed, the *McKennon* opinion in a straight forward manner clarifies the liability issue,[14] but falls short of delineating the remedial ramifications in a manner that would fully restore the plaintiff to the position that she/he would have been in absent the defendant's discrimination.[15] Thus, a discussion of projected interpretations of *McKennon's* limited guidance on remedies is in order.[16] Recommendations as to how the federal courts should now deal with after-acquired evidence in employment discrimination cases, based upon the egregiousness of the violations of the parties and the importance of the public policy and private interests involved, are set forth.[17]

The following survey of cases from the federal courts outlines the legal issues and the context within which after-acquired evidence developed into a serious threat to plaintiffs in employment discrimination litigation. The *McKennon* decision is discussed first, including its resolution by the Supreme Court. Thereafter, other relevant precedent from the Sixth Circuit is examined.[18] The Supreme Court also granted certiorari on another Sixth Circuit after-acquired evidence employment discrimination case

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nation Issue, N.Y. TIMES, Nov. 3, 1994, at A22 (discussing oral arguments in *McKennon* case and reporter's interpretation that Supreme Court Justices disapprove of employers escaping liability for discrimination by unearthing after-the-fact evidence that employee otherwise deserved dismissal); *Justices Debate After-Acquired Evidence as Device to Defeat Job Bias Liability* Daily Lab. Rep. (BNA) No. 211, at AA-1 to AA-3 (Nov. 3., 1994) [hereinafter *Justices Debate*] (summarizing issues discussed at Supreme Court oral arguments in *McKennon*).

13. *See Court Hears Case of Justified Firing After a Bias Suit*, BOSTON GLOBE, Nov. 3, 1994, at 8. This result reflects upon the grant of summary judgment for employers prior to the development of the employment discrimination claim pursuant to the rule in the Sixth and other circuits that permit a "short-circuit" based upon after-acquired evidence. *See also Justices Debate*, *supra* note 12 at AA-3. (discussing plaintiff's loss of day in court); Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?* 9 LAB. LAW. 43, 63 (1993) (criticizing *Summers* rationale that allows jettison of plaintiff's case by summary judgment). The Supreme Court in *McKennon* ultimately answered Justice Ginsburg's query in the negative. *See infra* notes 74-113 and accompanying text.

14. *See infra* notes 74-87 and accompanying text.

15. *See infra* notes 88-103 and accompanying text.

16. *See infra* notes 379-422 and accompanying text.

17. *See infra* notes 423-28 and accompanying text.

18. *See infra* notes 121-53 and accompanying text.

last year, but the certiorari was voluntarily dismissed because the parties settled the case.[19] The cases illustrate the many competing interests and the legal and business issues involved in resolving these cases.

The approaches approved within the other federal circuits are then discussed, beginning with the Tenth Circuit because of its paramount role in the ascendance of the after-acquired evidence doctrine.[20] Correlative situations under the National Labor Relations Act are also considered within the analysis and discussion.[21] The remedies afforded in equal employment discrimination cases under federal precedent are also compared to a recent common law decision from the State of Connecticut regarding after-acquired evidence in a wrongful termination case.[22] This case is instructive in that it provides a unique treatment of the burden of proof on damages.[23] The article concludes with recommendations for remedies beyond the brief guidelines set forth by the Supreme Court in *McKennon*.

II. THE SIXTH CIRCUIT CONVEYS THE QUESTION OF AFTER-ACQUIRED EVIDENCE TO THE SUPREME COURT

"Old age: the crown of life, our play's last act."
Marcus Tullius Cicero, *De Senectute XXII*

A. McKennon v. Nashville Banner Publishing Co.

19. Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993).

20. *See infra* notes 54-91 and accompanying text.

21. *See* Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees'* [sic] *Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 3-16 (1990), for an excellent discussion of the after the fact defense under the NLRA. *See also infra* notes 57-73 and accompanying text discussing ABF Freight Systems, Inc. v. NLRB, 114 S. Ct. 835 (1994).

22. *See infra* notes 392-403 and accompanying text.

23. Preston v. Phelps Dodge Copper Products Co., 647 A.2d 364 (Conn. App. 1994) (discussing evidentiary value of after-acquired evidence of employee misconduct, appropriate jury instructions upon remand, and placing burden of proving that he would have remained employed after discovery of the misconduct upon plaintiff as part of his proof of damages of future lost pay). *See infra* notes 392-403 and accompanying text. While the case is of limited precedential value, it contains an interesting fact pattern and illustrates the extension of statutory remedies to common law causes of action.

1. The Lower Courts

The Sixth Circuit's decision in *McKennon v. Nashville Banner Publishing Co.* represented the culmination of a series of after-acquired evidence cases that affirmed amongst several judicial circuits a serious inroad into the make-whole remedial intent behind the federal antidiscrimination statutes.[24] The facts in *McKennon* illustrate the importance of federal statutory protections against age discrimination. The tendency of some managers to prefer young women for secretarial positions and to treat older experienced women unfairly is well-documented in the case law, even though such practices are curbed to some extent by legislative prohibitions.[25]

Mrs. McKennon, at age sixty-two, with thirty-nine years of service and consistently excellent performance evaluations, was dismissed due to a purported "staff reduction," while two days prior to McKennon's dismissal, the Banner hired a twenty-six-year old secretary.[26] The plaintiff's age-discrimination claim was defeated because, during discovery, she admitted having improperly copied several confidential company documents and showing them to her husband.[27] The district court granted summary

24. 9 F.3d 539 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994), *rev'd and remanded*, 115 S. Ct. 879 (1995). Several commentators discussed the Sixth Circuit's opinion in the *McKennon* case, even prior to the Court's grant of *certiorari*. *See* Samuel A. Mills, Note, *Toward an Equitable After-Acquired Evidence Rule*, 94 COLUM. L. REV. 1525, 1534-55 & 1534 n.3 (1994) (criticizing *McKennon* opinion as "best example yet of the unjust consequences that routinely follow the application of *Summers*" and reflecting that "proof" that McKennon would have been fired anyway was based upon affirmation of company president); Kenneth G. Parker, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 404 (1993) (citing *McKennon* as a case where employer who discriminated got a "free ride because of . . . fortuitous discovery of useful information"); 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, 200-01 & 200 n.193 (1993) (importing breach of contract analysis into Title VII cases where later-discovered misconduct operates as "just cause" for discharge, resulting in dismissal of petitioner's claim is inappropriate translation of public statutory right into "purely private interests").

25. *See* Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993), discussed *infra* notes 301-18 and in accompanying text. The facts in that case involved a woman who was terminated after forty years of service to a company not because of poor performance, but because the president wanted a young secretary. The confluence of age with gender discrimination in these cases seems clear. Older *women* in particular appear subject to discrimination based upon stereotypic perceptions of occupational image, i.e., that the ideal secretary should look young. Nonetheless, McKennon's complaint alleged only age discrimination. *McKennon*, 9 F.3d at 540.

26. *McKennon*, 9 F.3d at 540; Ana Puga, *Supreme Court Will Hear an Age Bias Case with a Twist*, BOSTON GLOBE, Nov. 2, 1994, at 7; Greenhouse, *supra* note 12, at A22; *see supra* notes 1-11 and accompanying text (discussing facts in *McKennon*).

27. *McKennon*, 9 F.3d at 540. And, as Justice John Paul Stevens noted at the end

judgment to the defendant based upon this after-acquired evidence of Mrs. McKennon's misconduct.[28]

The district court relied upon the rule in *Summers v. State Farm Mutual Auto Insurance Co.*,[29] a precedent from the Tenth Circuit that is generally credited as creating the after-acquired evidence doctrine, also at times referred to as the *Summers* doctrine or defense.[30] This doctrine permits after-acquired evidence of employee misconduct (or resume or application fraud) to bar an employer's liability for employment discrimination.[31] In most instances, the after-acquired evidence is unrelated to the reason(s) proffered for the discharge, and by its definition, the information was not known to the employer at the time of the discharge or negative employment decision.[32] Thus, the after-acquired reason cannot be deemed a causal factor in the employment decision, unlike the motivating factors in mixed-motive cases where the defendant possesses both legal (valid) and illegal (discriminatory) reasons for an employment decision.[33]

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of oral arguments in *McKennon*, her wrongdoing "did not cause even a nickel of damages for the Banner. At worst, she told a corporate secret to her husband . . . ." *Justices Debate*, *supra* note 12, at AA-3.

28. *McKennon*, 797 F. Supp. at 608.

29. 864 F.2d 700 (10th Cir. 1988); see *infra* notes 155-73 and accompanying text (discussing *Summers*).

30. *McKennon*, 797 F. Supp. at 606-08; *see, e.g.*, William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims*, 9 LAB. LAW. 31, 35 (1993) (discussing *Summers* defense); Jason M. Weinstein, *No Harm, No Foul?: The Use of After-Acquired Evidence in Title VII Employment Discrimination Cases*, 62 GEO. WASH. L. REV. 280, 293-96 (1994) (discussing *Summers* doctrine); *see also* James G. Babb, Comment, *The Use of After-Acquired Evidence as a Defense in Title VII Employment Discrimination Cases*, 30 HOUS. L. REV. 1945, 1952-61 (1994) (discussing *Summers* as beginning of after-acquired evidence and complete denial of relief).

31. *McKennon*, 9 F.3d at 541.

32. A good definition of after-acquired evidence in an employment discrimination case is provided in Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994) where the court states it:

> denotes evidence of the employee's or applicant's misconduct or dishonesty which the employer did not know about at the time it acted adversely to the employee or applicant, but which it discovered at some point prior to, or, more typically, during, subsequent legal proceedings; the employer then tries to capitalize on that evidence to diminish or preclude entirely its liability for otherwise unlawful employment discrimination.

Id. at 1222.

33. *See* Babb, *supra* note 30, at 1947-56 (discussing framework of Title VII claims

The grant of summary judgment in the *McKennon* case effectively prevented the plaintiff from having her day in court to prove that she was discriminated against. The district court noted that the Sixth Circuit adopted the *Summers* doctrine in *Johnson v. Honeywell Information Systems, Inc.*,[34] a case decided earlier the same year.[35] Mrs. McKennon argued that her conduct (in copying several confidential documents) was for her protection in light of her concern about her job.[36] The district court found that the "nature and materiality" of the misconduct was the central issue regarding the applicability of the after-acquired evidence doctrine.[37] The defendant established to the court's satisfaction that it would have terminated plaintiff if it had known of her misconduct by introducing an affidavit to that effect from the president of the company.[38] Thus, the employer's testimony was pivotal to barring all relief for

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in mixed-motive situations, application of after-acquired evidence in context of constitutional claims of former employee, and the onset of *Summers* and progeny). *See generally* Jennifer M. Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 660-68 (1993) (criticizing *Summers* approach, categorized as majority view on after-acquired evidence, and use of mixed-motive analysis since after-acquired information not a motivating factor).

34. 955 F.2d 409 (6th Cir. 1992).

35. McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 606-07 (M.D. Tenn. 1992).

36. *Id.* at 607.

37. *Id.* (citing *Johnson*, 955 F.2d at 413).

38. *Id.* at 608. The district court deemed petitioner's misconduct, in light of her "status as a confidential secretary . . . adequate and just cause for her dismissal *as a matter of law.*" *Id.* (emphasis added). The district court characterized the president's affidavit as "undisputed evidence" and later noted that plaintiff did not produce any evidence that the company would have retained her if it had known of her misconduct. *Id.* The Sixth Circuit also mentioned the testimony of other officers of the defendant that supported the court's finding. 9 F.3d 539, 541 at n.3.

It seems unfair to grant summary judgment for defendant based upon the defendant's own conclusory and self-serving statement of what it would have done had it known of petitioner's misconduct. In employment discrimination cases, where the defendant's real reasons for an employment decision have yet to be flushed-out, and may be suspect in light of statutory protections, it is inappropriate for a court to allow employer speculation (as to what it would have done if it had known about after-acquired information) to preclude a full examination of the relevant evidence. What petitioner did may have been wrong and an unprotected activity, but her allegations concerning the defendant's actions deserve to be developed so that the entire context of both parties' actions may be envisaged.

In particular, petitioner's concerns about the destruction of documents that she felt would buttress her discrimination claim appear to have been based upon factual occurrences that might be deemed to ameliorate her breach of duty. *See* Reply Brief for Petitioner at 19, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995) (No. 93-1543) (discussing that respondent did not deny that documents may contain evidence supporting petitioner's discrimination claim and that respondent conceded that company officials had sought to destroy several of the documents and

petitioner.

The Sixth Circuit affirmed the district court's grant of summary judgment to the Banner.[39] The appellate court's determination also relied upon the employer's evidence that it would have fired petitioner had it known of her misconduct.[40] At the Supreme Court oral arguments, Justice Ruth Bader Ginsburg remarked that the issue of whether McKennon would have been fired for taking the documents is a fact question that was inappropriately determined at the summary judgment stage.[41] The company affidavits that carried the motion for summary judgment were depositions, which, as Justice Ginsburg cautioned, are not the same as presenting a witness in court with an opportunity for cross-examination.[42] Nonetheless, the Supreme Court chose not to rule on the propriety of that process in *McKennon*, perhaps because that issue was not specified in the question presented in the petition for certiorari.[43]

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had directed petitioner to shred them); *see also McKennon*, 9 F.3d at 540 n.1. The company documents that Mrs. McKennon improperly copied and showed to her husband included: a fiscal period payroll ledger dated 9/30/89; a profit and loss statement dated 10/30/89; a note from Elise McMillan to Simpkins; a memo from I. Stoneking (the comptroller and Mrs. McKennon's supervisor) to Irby C. Simpkins, Jr., dated 2/3/89; a handwritten note dated 2/8; and an agreement between the company and one of its managing employees, notarized 3/1/89. *Id.*

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

40. *Id.* at 541. The petitioner even admitted under questioning in her deposition that she would have been terminated for her actions. *Id.* at 541 n.3. The court refers to the fact that petitioner did not dispute the company's assertions to the effect that her conduct would have led to discharge if known to the employer. *Id.* at 540-41. Petitioner's counsel appeared to concede this issue when indicating that "employee misconduct might forfeit a right to reinstatement and front pay." *Justices Debate*, *supra* note 12, at AA-1 (discussing oral arguments before Supreme Court in *McKennon*). It should be noted, however, that absent the alleged discrimination and subsequent litigation, the misconduct probably would not have been discovered in the ordinary course of business.

41. *Justices Debate*, *supra* note 12, at AA-3. Justice Anthony Kennedy specifically objected to questioning on the issue since the Court accepted the case based upon the conclusion that Mrs. McKennon would have been fired for her misconduct. *Id.* Justice John Paul Stevens also clearly desired to confine the oral arguments to the issue of liability presented in the petition. *Id.* at AA-1. Also, according to the Sixth Circuit, this "would have been fired anyway" finding was not disputed. *McKennon*, 9 F.3d at 540-41.

42. *Justices Debate*, *supra* note 12, at AA-3.

43. *See generally id.* Despite the seemingly narrow question, the issue of what relief might be appropriate, if any, appears to be a subset of the question. *See* Brief for the United States and EEOC, McKennon v. Nashville Banner, (U.S.) No. 93-1543, Daily Lab. Rep. (BNA) No. 140, D-1, at D-4 (July 25, 1994) [hereinafter U.S. & EEOC

The Sixth Circuit narrowed its consideration to a "sole issue in after-acquired evidence cases . . . whether the employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct."[44] The appellate court refused to acknowledge that Mrs. McKennon's copying and removal of the confidential documents may have had a nexus or connection to her allegations of discrimination against the company, at least not a nexus that would be relevant to the application of the after-acquired evidence doctrine.[45] Petitioner's argument that her activity was protected, in that it fell within opposition to the employer's unlawful practice under the "opposition clause" of the ADEA, was similarly not persuasive to the court.[46]

In *McKennon*, the Sixth Circuit affirmed its earlier wholesale adoption of the *Summers* doctrine in *Johnson v. Honeywell Information Systems, Inc.*[47] and later in *Milligan-Jensen v. Michigan Technological University*.[48] A discussion of these cases and others from the Sixth Circuit fol-

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Brief] ("The issue that this case presents is *what relief* remains appropriate under the ADEA and Title VII when, after an employee is unlawfully discharged, evidence of employee misconduct is subsequently discovered.") (emphasis added).

It should be noted that petitioner maintains in her brief that defendant's evidence on the "would have been fired anyway" issue is inadequate and something that would be subject to objective determination upon remand once petitioner has established the merits of her discrimination claim. Brief for Petitioner at 49-50, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995) (No. 93-1543).

44. *McKennon*, 9 F.3d at 543 (citing Milligan-Jensen v. Michigan Technological Univ., 975 F.2d at 304-05 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993)).

45. *Id.*

46. *Id.* The court noted that "copying and removing confidential documents is clearly not protected conduct." *Id.* at 543 n.7. Both cases cited by the Sixth Circuit in support of this holding differ from *McKennon* in important respects. In Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980), the employer terminated the petitioner *because of* her copying and internal dissemination of confidential documents. *See infra* notes 383-90 and accompanying text discussing *Jefferies*. In O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz 1992), the petitioner also disseminated the confidential information to a co-employee, and this later-acquired information was used to bar petitioner's relief. *See infra* notes 259-75 and accompanying text discussing *O'Day*. The petitioner in *McKennon* only showed the documents to her husband, not a fellow-employee of the company, and thus similar managerial concerns were not implicated. *See McKennon*, 9 F.3d at 540. *O'Day* also relied upon supportive language in an employee handbook that was not present in *McKennon*. *See infra* note 266 and accompanying text. The employment handbook in *McKennon* merely set out that the employment was "at will." *See* McKennon v. Nashville Banner Publishing Co., 797 F. Supp 604, 605 (M.D. Tenn. 1992).

47. 9 F.3d at 541-42 (citing Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992)); *see infra* notes 142-53 and accompanying text discussing *Johnson*.

48. 9 F.3d at 542 (citing *Milligan-Jensen*, 975 F.2d 302 (6th Cir. 1992)).

lows the discussion of the Supreme Court's opinion in *McKennon.*[49] However, it should be highlighted at this juncture that the after-acquired evidence doctrine applied by the Sixth and other circuits suffered from serious shortcomings in terms of traditional legal theory and analysis. The negative consequences of the doctrine heavily impact upon members of protected classes under federal statutes, while providing a complete and arguably undeserved defense to discriminators. The primarily common law "counterclaims" that employers may assert are allowed to carry the day and bar important relief provided by federal statutes that generally preempt the lesser claims. This presents a problematic paradigm wherein collateral or subordinate matters obstruct the development of a primary claim.

It is also a concern that the courts seem to jumble the common law and statutory causes of action together so that a theory such as "wrongful discharge," that often describes a contractual claim under state law or the arbitral standard of review under a collective bargaining agreement, is used to support a "just cause defense" to "state civil rights claims."[50] From there it is a short trip to suppress federal statutory rights, as well, based upon the plaintiff's own, and at the time, unknown misconduct.[51] It is very telling that the district court in *McKennon* used the terms of art for nonstatutory claims in summarizing its position:

> The Court does not hold that any or all misconduct during employment constitutes *just cause* for dismissal or serves as a complete defense to a *wrongful discharge action.* The Court concludes, however, that Mrs. McKennon's misconduct, by virtue of its nature and materiality and when viewed in the context of her status as a confidential secretary, provides adequate and *just cause* for her dismissal as a matter of law, even though her misconduct was unknown to the Banner at the time of her discharge.[52]

While the courts *seem* to rely upon theories and defenses from nonstatutory civil claims in cases applying the after-acquired evidence doctrine, they are overlooking critical elements of traditional legal theories. For how can courts say that a plaintiff has suffered "no legal damage" or injury,[53] when, but for the defendant's discrimination, the after-acquired information that provides a "valid" reason for termination may never

49. *See infra* notes 121-53 and accompanying text.
50. *See McKennon*, 797 F. Supp. 604, 607 (M.D. Tenn. 1992) (discussing *Johnson*, 955 F.2d at 410-12).
51. *Id.* at 608.
52. *Id.* (emphasis added).
53. Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 305 (6th Cir. 1992).

have been discovered? The approach sanctioned by the Sixth Circuit is particularly problematic because it provides no inquiry into an element that should, at a minimum, be established by the employer in order for the doctrine to vindicate the defendant's responsibility: that the after-acquired information would have been discovered absent the lawsuit engendered by the defendant's alleged discrimination.[54] Otherwise, the defendant's conduct may be, if one refers to tort theory, the proximate cause of the injury to the plaintiff. That is, but for the defendant's (illegal) conduct, plaintiff's misconduct (or application fraud) would never have been known to the defendant and would not have provided a valid reason (that is to say, a nondiscriminatory reason, albeit after-the-fact) for the discharge.[55] In some instances, as was alleged by McKennon, the defendant's discrimination may also have instigated the offensive conduct on the part of the plaintiff.

And yet, the employer also has legitimate business interests that deserve protection under the legal system. Employee misconduct, disloyalty, or dishonesty should not be ignored by the courts as they balance the equities amidst the wrongdoing present on both sides. Interestingly, the United States Supreme Court decided a case in 1994 that involved employee dishonesty in the context of an unfair labor practice case before the National Labor Relations Board.[56]

A. *Balancing an Unfair Labor Practice Against Employee Dishonesty*

In *ABF Freight System, Inc. v. NLRB*,[57] the Supreme Court affirmed an NLRB order that an employer reinstate a complainant with backpay based upon the Board's finding of an unfair labor practice, despite the fact that the former employee had lied about a reason for his tardiness.[58] While the Supreme Court granted certiorari in *ABF Freight* to

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54. The Seventh, Eighth, and Tenth Circuits are also in accord with the Sixth Circuit's approach. *See infra* notes 154-245 and accompanying text. The author argues that a "would have been discovered anyway" standard should apply before remedies are curtailed, assuming that the plaintiff establishes that the defendant is liable for the discrimination. This would permit the employer to prove that the after-acquired evidence would have been discovered even absent the discrimination litigation in order to cut off future wage liability as of the date when the evidence would have been discovered anyway.

55. *See generally* Zemelman, *supra* note 17, at 201 (discussing courts increasing use of "tort law rhetoric" in Title VII cases and tendency to hinge Title VII liability upon proof the defendant's conduct *caused* the plaintiff's injury).

56. *See infra* notes 57-73 and accompanying text.

57. 114 S. Ct. 835 (1994).

58. *Id.* at 837-40. The petitioner's "car trouble" excuse to the employer, which he restated under oath at the Board hearing, was not credited by the Administrative Law Judge. *Id.* at 837-38.

consider whether the complainant's own misconduct should prevent the Board's relief,[59] the Court affirmed that the absence of a legitimate excuse for tardiness provided only a pretext for the discharge.[60] This finding supported the Board's order and the court of appeals' enforcement decision.[61]

In the opinion of the court of appeals in *ABF Freight*, the employer's contention that the employee's lie should bar his reinstatement and backpay was rejected.[62] The Supreme Court affirmed, placing great weight on Congress' delegation to the NLRB of remedial decisions in unfair labor practice cases.[63] The Court expressed the question presented as whether the Board *must* adopt a rule barring reinstatement when a former employee testifies falsely, "not whether the Board *might* adopt such a rule."[64] Despite the fact that false testimony was deemed "intolerable" and that "[p]erjury should be severely sanctioned in appropriate cases," the Court concluded that such a case was not a "discharge for cause" where the statute limits the remedial power of the Board.[65]

The concurring opinions authored by Justice Kennedy[66] and Justice Scalia[67] in *ABF Freight* are instructive as to the justices' concerns about the conflict inherent in granting relief to an employee who has exhibited dishonesty.[68] Justice Kennedy reflected that "honesty" and "the integrity

59. *Id.* at 838-39.

60. *Id.* at 838. Justice Stevens authored the opinion of the Court, in which Chief Justice Rehnquist, and Justices Blackmun, Kennedy, Souter, Thomas and Ginsburg joined. *Id.* at 836-40. Justice Kennedy provided a separate concurring opinion. *Id.* at 840 (Kennedy, J., concurring). Justice O'Connor joined with Justice Scalia in a concurring opinion. *Id.* at 841 (Scalia, J., concurring).

61. *Id.* at 838.

62. *Id.* This conclusion was due in part to the Board's wide discretion to further the policies of the National Labor Relations Act. *Id.*

63. *Id.* at 839-40.

64. *Id.* at 839.

65. *Id.* at 839 n.9; *see* 29 U.S.C. § 160(c). The Court referred to long-standing precedent regarding the "relation of remedy to policy [being] peculiarly a matter for administrative competence." *ABF Freight*, 114 S. Ct. at 840 (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941)). It should be noted that after-acquired evidence cases generally would not be categorized as discharges for cause either. After-acquired evidence cases fall outside the mixed-motive paradigm, as will be discussed.

66. *ABF Freight*, 114 S. Ct. at 840 (Kennedy, J., concurring).

67. *Id.* at 841 (Scalia, J., concurring).

68. The preliminary matter indicated that Justice Souter filed a concurring opinion in which Justice Kennedy joined, but at the close of the syllabus and at the start of the concurrences, only Justice Kennedy is listed. *See id.* at 840 (Kennedy, J., concurring).

of the Board's process" are important interests that the Board has discretion to "take into account in fashioning appropriate relief."[69]

Justice Scalia feared that the Board was growing too tolerant of perjury in its adjudicatory hearings, as evidenced by the Board's failure to expressly consider the possibility of denying relief in light of the petitioner lying under oath.[70] Justice Scalia took issue with the Board's "understand[ing]" of the petitioner's lie in light of his "'history of mistreatment.'"[71] He found the Board's order "at the very precipice of the tolerable," because the Board failed to "consider and discuss" the option of limiting relief.[72]

The *ABF Freight* decision dealt with some issues separate from those presented in *McKennon*. The concerns in *ABF Freight* in part relate to the significance of maintaining the integrity of the administrative agency process, and the facts in the case are more analogous to mixed-motive than to after-acquired evidence cases. And yet, *ABF Freight* provides a clear precedent on the issue of the infringement of legitimate employer interests where those interests are subservient to important federal statutory policies. The Supreme Court in *ABF Freight* permitted the enforcement of an award of reinstatement with backpay to a discriminatee who had engaged in numerous acts of dishonesty because the NLRB determined that the *real* reason for the discharge was a discriminatory reason.[73] Following similar logic in after-acquired evidence cases would grant a plaintiff the right to establish an employer's liability for discrimination, and only admit after-acquired evidence to influence the remedy.

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69. *Id.* at 840 (Kennedy, J., concurring). Justice Kennedy also expressed agreement with Justice Scalia's separate opinion. *Id.* (Kennedy, J., concurring).

70. *Id.* at 841-42 (Scalia, J., concurring). This case contrasts with the facts in *McKennon* where the plaintiff told the truth about her misconduct in depositions. *See supra* notes 8-10 and accompanying text.

71. *ABF Freight*, 114 S. Ct. at 841 (Scalia, J., concurring). Justice Scalia terms the Board's failure to adequately consider the false testimony "insouciance." *Id.* (Scalia, J., concurring).

72. *Id.* at 842 (Scalia, J., concurring). Justice Scalia hypothesized that posting a notice indicating that the petitioner would have been reinstated "but for his false testimony" would have made clear "that perjury does not pay." *Id.* at 843 (Scalia, J., concurring).

73. *Id.* at 838, 840.

2. The United States Supreme Court

> "A right which goes unrecognized by anybody is not worth very much."
> Simone Weil,
> *The Need for Roots* (1952)

a. *Liability*

In an unexpected showing of unanimity, the Supreme Court reversed the Sixth Circuit in *McKennon*.[74] The opinion, authored by Justice Anthony M. Kennedy, broadly reinforced the important public policies embodied in federal equal employment legislation, policies that are supported by deterrence and compensation for injuries.[75] The Court noted the conflicting views among the courts of appeals as its motivation for resolving the question "whether all relief must be denied when an employee 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."[76]

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74. *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995); Susan R. Kneller, *Discrimination: Supreme Court Says Employee Misdeeds Don't Shield Employers from Bias Claims*, Daily Lab. Rep. (BNA) No.15 at AA-1 (Jan. 24, 1995) (describing the claimant's attorney as "very pleased with decision and surprised by the [C]ourt's [sic] unanimity").

75. *See McKennon*, 115 S. Ct. at 884. While the question was phrased in terms of the ADEA, the opinion discussed the "common substantive features" and "common purpose" that the ADEA shares with Title VII. *Id.* Commentators immediately interpreted the decision as applying broadly to job discrimination proscriptions. *See, e.g.*, Linda Greenhouse, *Justices Rule for Employees in a Bias Suit*, N.Y. TIMES, Jan. 24, 1995, at A1; Kneller, *supra* note 74, at AA-1.

76. *McKennon*, 115 S. Ct. at 883. The Supreme Court grouped the two major "camps" on the question of after-acquired evidence barring relief by comparing the major precedents. *Id.* The first camp held that after-acquired evidence may bar relief. *Id.* (citing Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994); O'Driscoll v. Hercules Inc., 12 F.3d 176 (10 Cir. 1994); *McKennon*, 9 F.3d 539 (6th Cir. 1993) (case below); Washington v. Lake County, 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); Smallwood v. United Air Lines, Inc., 728 F.2d 614 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984)). The second camp held that after-acquired evidence does not bar relief. *Id.* (citing Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994); Kristufek v. Hussman Foodservice Co., Toastmaster Division, 985 F.2d 364 (7th Cir. 1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *rev'd in part*, 62 F.3d 374 (11th Cir. 1995)).

All of these decisions are discussed in detail in parts I.B - IV of this article. The

The Supreme Court held that the district court and court of appeals that reached the "legal conclusion . . . that after-acquired evidence of wrongdoing which would have resulted in discharge bars employees from any relief . . . [were] incorrect."[77] Where the Sixth Circuit deemed the presence of discrimination "irrelevant" in light of McKennon's misconduct that was categorized as "supervening ground[s] for termination," the Supreme Court concluded "that a violation of the ADEA cannot be so altogether disregarded."[78] The statutory scheme of the ADEA was examined by the Court in the context of Congress' broad program to eliminate workplace discrimination, and the enforcement of remedies was elevated as serving more than the interest of the private plaintiffs.[79] The Court found that "[i]t would not accord with this [statutory] scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief."[80]

Each individual case provides an opportunity to elucidate "patterns of noncompliance," making the "efficacy of its enforcement mechanisms . . . one measure of the success of the Act."[81] Remedies were similarly ennobled in the Court's view in that they "serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination."[82]

The Supreme Court addressed the inappropriate reliance of the Sixth and Tenth Circuits upon the case of *Mt. Healthy City Board of Education v. Doyle*.[83] The Court deemed *Mt. Healthy* "inapplicable" to the *McKennon* case in that *Mt. Healthy* involved a mixed-motive termination where the employer's legitimate reason alone would have served to justify the discharge.[84] This was not the case in *McKennon* because the evidence of misconduct could not have motivated the employer's decision

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Court effectively compared those employment discrimination decisions that barred relief based upon after-acquired evidence with those that permit the plaintiff to establish the defendant's liability, and then allow the after-acquired evidence to alter the remedy where appropriate. It is interesting that the Court framed the question "whether all relief *must* be denied" very similarly to the question in *ABF Freight* where the issue was whether the Board *must* adopt a rule precluding reinstatement and back pay. *Id.* (emphasis added); *see supra* notes 57-73 and accompanying text discussing ABF Freight System, Inc. v. NLRB, 114 S. Ct. 835, 839 (1994).

77. *McKennon*, 115 S. Ct. at 883.

78. *Id.* at 883-84 (citing *McKennon*, 9 F.3d at 542).

79. *Id.* at 884-85.

80. *Id.* at 884.

81. *Id.* at 885.

82. *Id.* at 884 (alterations in original and internal quotations marks and citations omitted) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).

83. *Id.* at 885 (citing Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)).

84. *Id.* (citing *Mt. Healthy*, 429 U.S. at 284-87).

since the employer did not learn of the misconduct until after the termination.[85]

The Tenth Circuit precedent upon which the Sixth Circuit relied, *Summers v. State Farm Mutual Automobile Insurance Co.*, involved facts in which the employer had some knowledge of the employee's wrongdoing prior to the decision to terminate.[86] This may have provided the genesis for the Tenth Circuit's inappropriate reliance upon the mixed-motive analysis in *Mt. Healthy*. In any event, the Supreme Court in *McKennon* makes clear that evidence acquired after the employment decision was made simply cannot be deemed causal and will not provide a complete defense to liability.[87] This outcome follows both precedent and basic logic.

b. Remedies

> "There is always a time to make right what is wrong."
> Susan Griffin,
> *I Like to Think of Harriet Tubman,*
> *Like the Iris of an Eye (1976)*

The *McKennon* opinion also responded to a number of important questions about the impact of after-acquired evidence upon the remedies available in employment discrimination cases. The Court reinforced the potential for equitable relief despite a defendant's assertion of the plaintiff's unclean hands.[88] This potential exists because of the "important national policies . . . [and] public purposes" embodied in the legislation and the actual language of the ADEA.[89]

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85. *Id.* The Supreme Court referred to language from Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989), where the plurality noted the distinction between "proving that the same decision would have been justified . . . [which] is not the same as proving that the same decision would have been made." *Id.* For an expanded discussion of the *Price Waterhouse* decision, see Gerard A. Madek & Christine N. O'Brien, *Women Denied Partnerships: From "Hishon" to* "Price Waterhouse v. Hopkins," 7 HOFSTRA LAB. L.J. 257 (1990).

86. 864 F.2d 700, 702-03 (10th Cir. 1988). *See infra* notes 155-73 and accompanying text discussing *Summers*.

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

88. *Id.*

89. *Id.* at 885-86. The Court quoted the following remedial language from the ADEA:

> [T]he court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including

And yet, the misconduct of a plaintiff may be relevant to the available remedies in light of the employer's legitimate interests.[90] The Court concluded that an "employee's wrongdoing must be taken into account . . . lest the employer's legitimate concerns be ignored."[91] Justice Kennedy noted that the proper remedies must be determined case by case in light of the varying facts and equities involved.[92] Nonetheless, the Court set out as a general rule that would apply to the *McKennon* case, that reinstatement and front pay would not be appropriate where the employer "would have terminated [the employee] . . . in any event and upon lawful grounds."[93]

Progressing to the determination of backpay, the Court acknowledged that this posed "a more difficult problem."[94] While the concept of restoring a plaintiff "to the position he or she would have been in absent the discrimination" was acknowledged as an important goal,[95] the Court expressed its concern that this "principle is difficult to apply with precision where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it."[96] The Court "cannot require the employer to ignore the information, even if it . . . might have gone undiscovered absent the suit."[97]

The Supreme Court provided trial courts with the following remedial guidance—that "[t]he beginning point . . . should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered."[98] The Court also instructed that "extraordinary equitable circumstances that affect the legitimate interests of either party" may be considered in fashioning the relief.[99] The Court cautioned

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> without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for [amounts owing to a person as a result of a violation of this chapter].

Id. at 886 (quoting 29 U.S.C. § 626(b) (1988 & Supp. V)).

90. *See id.* at 886.

91. *Id.*

92. *Id.*

93. *Id.* Such an order would be "inequitable and pointless." *Id.* This rule clearly does not prohibit the use of reinstatement and front pay in cases where the employee wrongdoing does not amount to a dischargeable offense. *See id.* The Court otherwise framed the issue of relief as permitting discretion to the court that is familiar with the facts in each case. *Id.*

94. *Id.*

95. *Id.* (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976)).

96. *Id.*

97. *Id.*

98. *Id.* This starting point accords with calculations used by the National Labor Relations Board. *See* John Cuneo, Inc., 298 NLRB Dec. (CCH) ¶ 16, 123 (1990) (terminating back pay as of the date when the respondent acquired knowledge of the discriminatee's falsification of his employment application and history).

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

that it would undermine the statutory objectives if backpay was barred pursuant to an "absolute rule."[100]

The Supreme Court left the remedial determination largely to the discretion of the trial courts.[101] There is an invitation here to vary the calculation of damages based upon the equities of the situation.[102] Within the parameters of the appropriate statute(s), courts are instructed to award relief that will meet the objectives of the public policy behind the statute(s), while also considering the legitimate interests of both parties in the litigation.[103]

Finally, the Court outlined that in order for an employer to use after-acquired evidence, "it must *first* establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."[104] Thus, the process places a prerequisite burden of proof on the defendant prior to its introduction of the after-acquired information.[105] Implicitly, it would seem that after-acquired evidence of lesser misconduct (not enough to give rise to termination) is suppressed, at least until relief is considered.

Arguably, if the offensive acts are not dischargeable, the employer would be required to reinstate the plaintiff if such relief is requested. Thereafter, the employee would be subjected to appropriate discipline, meted out by the employer in a nondiscriminatory manner. The courts need not involve themselves regarding these internal penalties in most instances, as long as the discipline is consonant with other similar incidents at the company and is not retaliatory. Where a grievance-arbitration process is in effect, such would be the usual route for an employee to object to the severity or perceived unfairness of the punishment.

The Supreme Court's decision in *McKennon* will encourage employers to proceed to discovery promptly when defending an employment discrimination case because *McKennon* confirms that new and damaging information regarding the plaintiff may sever the continuing accumulation of backpay as of the date of the discovery.[106] The Court under-

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100. *Id.*
101. *See supra* notes 90-100 and accompanying text.
102. *See supra* note 99 and accompanying text.
103. *See supra* notes 88-100 and accompanying text.
104. *Id.* at 886-87 (emphasis added).
105. *See id.* at 886.
106. *See id.* This strategy of prompt investigation of an employment discrimination charge because of the possibility that the after-acquired evidence would cut off

scored that the federal courts may prevent employer abuse of discovery through Rule 11 of the Federal Rules of Civil Procedure and by invoking the award of attorney's fees.[107]

The *McKennon* opinion does not specifically comment on the trial court's use of summary judgment to resolve the "would have been fired anyway" question. Judge Ginsburg reflected at the oral arguments that the use of summary judgment to determine this fact issue was inappropriate, but Justices Kennedy and Stevens successfully sought to confine the Court's consideration of the case to the question presented in the petition for certiorari.[108] The Court's substantive rule that all liability is not barred by the discovery of after-acquired evidence relegates the defendant's burden of proving that the plaintiff "would have been fired anyway" to the relief stage.[109] The breadth of the remedy is thus confined where the plaintiff engaged in a dischargeable offense.[110] There may also be instances where the plaintiff's damages are merely nominal, and yet the discriminatee's right to establish the defendant's liability protects the important public policies underlying the federal statutes.

McKennon squarely rebuts the general premise that after-acquired evidence of employee wrongdoing bars evaluation of a plaintiff's employment discrimination claim.[111] In its discussion of the issues presented, the Court avoided creating boundaries that would inhibit the federal courts from designing remedial relief appropriate to the facts found in each case.[112] This resolution allows the circuits to adopt somewhat varying formulae at the remedial stage.[113]

This article next outlines pertinent decisions from the federal courts that portend the inclination of the circuits regarding the importance of after-acquired evidence in employment discrimination cases.[114] While the question of liability is countermanded by the Supreme Court's decision in *McKennon* in numerous instances, the disposition of the courts

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backpay liability has of course been advocated for employers prior to the *McKennon* decision. *See* James A. Burstein & Steven L. Hamann, *Better Late Than Never-After-Acquired Evidence in Employment Discrimination Cases*, 19 EMPLOYEE REL. L.J. 193, 203 (1993).

107. *McKennon*, 115 S. Ct. at 887 (citing 29 U.S.C. §§ 216(b), 626(b) (1988 & Supp. V)).

108. *See supra* notes 40-43 and accompanying text discussing oral arguments before the Supreme Court in *McKennon* and the question in the petition for certiorari.

109. *See McKennon*, 115 S. Ct. at 886.

110. *See id.*

111. *Id.*

112. *Id.*; *see also supra* notes 91-92 and accompanying text.

113. *McKennon*, 115 S. Ct. at 886; *see also supra* notes 90-100 and accompanying text.

114. *See infra* notes 121-378 and accompanying text.

when faced with determining the remedy in future cases is illuminated.[115]

The following discussion of pre-*McKennon* precedent from the circuits groups the camps in accordance with the Supreme Court's reference to the conflict among the circuits as briefly set out in *McKennon*.[116] The remaining Sixth Circuit decisions are analyzed here immediately after *McKennon*.[117] Thereafter, opinions from the Tenth, Eighth, Seventh (through 1992), and Fourth Circuits, and a district court case from the Ninth Circuit complete the discussion of cases permitting after-acquired evidence to create a bar to liability.[118] Then, decisions of the Eleventh, Seventh (1993), and Third Circuits present the view, now binding by Supreme Court precedent, that after-acquired evidence may not automatically bar liability for employment discrimination.[119] Cases involving related issues from the First and Fifth Circuits and the State of Connecticut are also analyzed.[120]

B. Milligan-Jensen v. Michigan Technological University[121]

> "I don't think secrets agree with me;
> I feel rumpled in my mind since you told me that."
> Louisa May Alcott
> *Little Women* (1868)

In *Milligan-Jensen*, the plaintiff falsified her employment application with the defendant by omitting a prior DUI conviction.[122] She was hired

115. *See infra* notes 121-378 and accompanying text.
116. *See supra* note 76.
117. *See infra* notes 121-53 and accompanying text.
118. The district court decision from the Ninth Circuit, O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992), was not referenced by the Court in *McKennon*, but is discussed *infra* in notes 259-79 and accompanying text.
119. *See supra* note 76; *see also infra* notes 319-57 and accompanying text.
120. *See infra* notes 335-403 and accompanying text; Sabree v. United Bhd. of Carpenters and Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990) (holding after-acquired evidence had to be known at the time of termination); Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025 (5th Cir. 1980) (holding employer's confidentiality interests outweighed employee's right to oppose alleged employer discrimination); Preston v. Phelps Dodge Copper Prod. Co., 647 A.2d 364 (Conn. App. 1994) (holding front-pay and future wages were against public policy when employee would have been fired anyway).
121. 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993).
122. *Milligan-Jensen*, 975 F.2d at 303.

as a public safety officer by the university where, according to the district court's findings, she suffered discriminatory treatment due to her gender.[123] In the course of preparing to defend itself against the plaintiff's Title VII lawsuit, the university discovered plaintiff's omission on her application.[124] The district court found that this was a material falsification and one that would have resulted in termination.[125] The trial court analyzed the case as one of mixed-motive and determined that the employer did not establish that its decision to discharge Milligan-Jensen "would have been the same absent the unlawful motives.[126]

The district court struck a remedial compromise by awarding the plaintiff fifty percent of the normal recovery.[127] The Sixth Circuit rejected this approach in light of its decision in *Johnson v. Honeywell Information System, Inc.* in which the court granted summary judgment to the defendant because of the plaintiff's resume fraud.[128] The court affirmed its commitment to the *Summers* rule, which it interpreted as one of causation.[129] Because plaintiff would not have been hired or would have been fired if the university had become aware of her material omission on her employment application, the Sixth Circuit concluded that "the plaintiff suffered no legal damage by being fired."[130] The issue of whether Milligan-Jensen was discriminated against thus became "irrelevant."[131]

The Clinton Administration, seeking a ruling that after-acquired evidence does not bar liability for discrimination, urged the Supreme Court to grant review of the *Milligan-Jensen* decision.[132] The Court granted

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123. *Id.* (citing Milligan-Jensen v. Michigan Technological Univ., 767 F. Supp. 1403, 1406-10 (W.D. Mich. 1991), *rev'd*, 975 F.2d 302 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993)).

124. *Id.*

125. *Id.* at 303-04 & 304 n.1 (citing *Milligan-Jensen*, 767 F. Supp. at 1410 (indicating that plaintiff would have been terminated because of the falsification rather than the prior conviction)).

126. *Id.* at 303.

127. *Id.* at 304. Judge Hillman balanced the equities in what the Sixth Circuit deemed a "Solomon-like" approach. *Id.*

128. *Id.* (citing Johnson v. Honeywell Info. Sys. Inc., 955 F.2d 409 (6th Cir. 1992)). See *infra* notes 142-53 and accompanying text discussing the *Johnson* case.

129. *Milligan-Jensen*, 975 F.2d at 304.

130. *Id.* at 305.

131. *Id.* at 304-05. The trial court found the employer liable on plaintiff's charges of sex discrimination and retaliation for filing an EEOC complaint. *Id.* at 302-03. The evidence of overt discrimination was pervasive because Milligan-Jensen was repeatedly treated disparately on everything from job assignments to evaluations and a disciplinary action for a uniform code violation. *Id.* at 303. In addition, she received a badge number that had previously been allocated to a woman because she was a woman and was told that her duties and shift went along with the lady's job. *Id.*

132. *See* Burstein & Hamann, *supra* note 106, at 193.

certiorari in the case, but a subsequent settlement resulted in the dismissal of the petition, leaving the conflict among the circuits unresolved.[133]

Two other relevant court of appeals decisions from the Sixth Circuit are discussed herein, with the more recent discussed first.

C. Dotson v. United States Postal Service[134]

The *Dotson* case involved the post-termination discovery of employment application fraud.[135] On his written application forms, the plaintiff omitted prior health and employment information including reasons for previous dismissals and his current use of prescription drugs.[136] Also, Dotson lied in an interview about his back problem, indicating that there was no current problem when in fact he had received treatment and medication just three days earlier.[137] The Sixth Circuit followed the *Summers* rule and affirmed the district court's dismissal of the plaintiff's handicap discrimination charges upon the defendant's motion for summary judgment.[138]

The court, in a per curiam opinion, noted that the plaintiff was not qualified for the position because he "lacked the honesty and trustworthiness required."[139] The employer would not have hired the plaintiff had it known of his application fraud, and thus, this evidence, even though discovered post-termination, was admissible and "relevant to his claim of injury."[140] The Sixth Circuit followed *Summers* and *Johnson*, permitting the after-acquired evidence to "'preclude[ ] the grant of any present relief or remedy.'"[141]

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133. *See supra* note 19 and accompanying text.
134. 977 F.2d 976 (6th Cir. 1992), *cert denied*, 113 S. Ct. 263 (1992).
135. *Dotson*, 977 F.2d at 977.
136. *Id.*
137. *Id.*
138. *Id.* The employer terminated the plaintiff based upon his inability to carry the mail. *Id.* The plaintiff's suit charged the employer with handicap discrimination. *Id.* *See infra* notes 155-73 and accompanying text discussing *Summers*.
139. *Dotson*, 977 F.2d at 977-78.
140. *Id.* at 978.
141. *Id.* (quoting Summers v. State Farm Mut. Auto. Inc. Co., 864 F.2d 700, 708 (10th Cir. 1988), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. (1995)); *see also* Johnson v. Honeywell Info. Sys., 955 F.2d 409 (6th Cir. 1992).

D. Johnson v. Honeywell Information Systems, Inc.[142]

The *Johnson* decision is the circuit precedent relied upon in the *McKennon* and *Milligan-Jensen* Sixth Circuit opinions.[143] Interestingly, plaintiff's causes of action in *Johnson* alleged a breach of contract because her discharge was allegedly not for just cause and also alleged a violation of Michigan's Elliott-Larsen Civil Rights Act.[144] Johnson's wrongful discharge claim included allegations that she was terminated in retaliation for her efforts to achieve affirmative action goals, but no violations of federal statutes were plead.[145] Johnson's performance came under criticism more than a year before her discharge.[146]

During discovery, "glaring misrepresentations" from Johnson's employment application were uncovered, including false educational credentials and work experience.[147] The application made clear that false information "may be cause for immediate discharge."[148] The Sixth Circuit, "exercising diversity jurisdiction," noted that Michigan law would permit the use of after-acquired evidence of employee wrongdoing to defend a wrongful discharge claim.[149] The court further held that the employer was entitled to summary judgment because Johnson's application misrepresentations amounted to just cause for discharge as a matter of law.[150]

As to whether relief under the Michigan Civil Rights Act should be similarly barred by Johnson's misrepresentations, the Sixth Circuit held that it should, agreeing with the *Summers* rationale.[151] The court found that the employer established that "it would not have hired Johnson and that it would have fired her had it become aware of her resume fraud."[152] In addition, the Sixth Circuit concluded that plaintiff's allega-

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142. 955 F.2d 409 (6th Cir. 1992).

143. *See supra* notes 26, 38-39 and accompanying text.

144. *Johnson*, 955 F.2d at 411; *see also* MICH. COMP. LAWS ANN. §§ 37.2101 to 37.2804 (Elliott-Larsen Civil Rights Act (West 1985)).

145. *Johnson*, 955 F.2d at 411.

146. *Id.* Both Johnson's supervisors and those managers that she worked with "complain[ed] of her unavailability by phone, lack of cooperation, and ineffectiveness." *Id.* Despite this criticism, the plaintiff admittedly failed to alter her work habits because she considered her work satisfactory. *Id.*

147. *Id.* at 411-12.

148. *Id.* at 411.

149. *Id.* at 412-13.

150. *Id.* at 413. The Sixth Circuit reasoned that the misrepresentations were material and that the employer relied upon them because the employer would not have hired the plaintiff without the requisite educational credentials. *Id.* at 414.

151. *Id.* at 415.

152. *Id.*

tions would not have amounted to the statement of a violation of the "opposition clause" under the Michigan Act.[153]

II. THE TENTH CIRCUIT CREATES AND CONFIRMS THE DOCTRINE THAT AFTER-ACQUIRED EVIDENCE MAY BAR LIABILITY FOR EMPLOYMENT DISCRIMINATION

In this section, the Tenth Circuit's *Summers* decision is discussed prior to its 1994 interpretation of the *Summers* doctrine in *O'Driscoll v. Hercules Inc.*[154]

A. Summers v. State Farm Mutual Automobile Insurance Co.[155]

In the decision that is generally credited with creating the affirmative defense of after-acquired evidence,[156] the Tenth Circuit was faced with an employment discrimination case that the court claimed "should have been weeded out before any trial."[157] Plaintiff Summers' work history as a field claims representative was riddled with falsification of records and reports.[158] His allegations of age and religious discrimination were viewed by the court in the context of his repeated erroneous reports and claims that eventually gave rise to warnings and to Summers' probation for two weeks without pay.[159] Thereafter, Summers resumed work but

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153. *Id.* at 415-16; *see also* MICH. COMP. LAW ANN. § 37.2701(a) (West 1985) (stating the "opposition clause" of the Elliott-Larsen Civil Rights Act).

154. 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); O'Driscoll v. Hercules Inc., 12 F.3d 176 (10th Cir. 1994), *vacated and remanded*, 115 S. Ct. 1086 (1995), *rev'd and remanded*, 52 F.3d 294 (10th Cir. 1995).

155. *Summers*, 864 F.2d at 700.

156. *See* Gian Brown, *Employee Misconduct and the Affirmative Defense of "After-Acquired Evidence,"* 62 FORDHAM L. REV. 381, 394 (1993) (discussing *Summers* as first articulation of affirmative defense); Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 163 (1993) (discussing *Summers* as "first in a series of after-acquired evidence cases that approve of a total denial of relief based on the plaintiff's lack of injury"); Pauline Yoo, *The After-Acquired Evidence Doctrine*, 25 COLUM. HUM. RTS. L. REV. 219, 220 (1993) (same); *see also* Babb, *supra* note 30.

157. *Summers*, 864 F.2d at 709. The court also noted that "obvious cases should be weeded out before trial." *Id.*

158. *See id.* at 702, 709.

159. *Id.* at 702. Summers was 56 years old at the time of his discharge and was also a member of the Mormon church. *Id.*

was discharged seven months later by his employer, purportedly because of a "poor attitude" and problems with interpersonal relations.[160]

The employer's characterization of the reasons for plaintiff's termination was critical to the development of the after-acquired evidence doctrine. State Farm discovered a fair amount of damaging information about Summers prior to his discharge, but rather than expressly relying upon this objective evidence, the employer offered other fairly subjective reasons as the cause for termination.[161] State Farm later defended its action with information gathered almost four years after the termination.[162] This information reflected over 150 instances of falsified records by Summers, eighteen of which occurred after the plaintiff returned from probation and received a warning that future falsifications would have dire consequences.[163] Notably, the plaintiff did not deny any of these falsifications.[164]

The severity and persistence of Summers' misconduct provided the Tenth Circuit with a dilemma because there were valid, nondiscriminatory reasons for the plaintiff's termination that were *known* to the defendant at the time of discharge.[165] Many more instances of falsifications were discovered after the termination, in a sense buttressing the facts originally available to the employer prior to Summers' termination.[166] However, because the employer did not assert plaintiff's falsifications as a motivating reason for its decision, the court was left in the unhappy predicament of either ignoring evidence, both pre-existing and after-acquired, that the plaintiff did not deserve continued employment or allowing those facts to affect plaintiff's claim.[167] The Tenth Circuit chose the latter route.[168]

The *Summers* court analogized the case to one in which a company doctor alleges a discriminatory termination and is then discovered to be unqualified as a doctor.[169] The court asserted that this "masquerading

160. *Id.* at 702-03.

161. *Id.* Thus, the fact pattern in *Summers* resembled one of mixed-motive, which may have accounted for the Tenth Circuit's analytical excursion in that direction. *See id.* at 705-08. The Tenth Circuit summarized the employer's prior knowledge of Summers' wrongdoing and noted that the "reason given [for his discharge] was Summers' generally unsatisfactory job performance." *Id.* at 708. The court also noted that rather than discharging Summers when it first learned of his falsifications, the employer placed him on probation. *Id.*

162. *Id.* at 703.

163. *See id.* at 702-03.

164. *Id.* at 703.

165. *Id.* at 702.

166. *Id.* at 703.

167. *Id.* at 703-05.

168. *Id.* at 705-09.

169. *Id.* at 708.

doctor" would not be entitled to relief, and "Summers [was] in no better position."[170] Despite the court's admission that after-acquired evidence could not be deemed a "cause" for the discharge, the court found it relevant to the plaintiff's claim of "injury" and allowed it to "preclude the grant of any present relief or remedy."[171] The Tenth Circuit upheld the district court's grant of summary judgment for the employer.[172] While this outcome may have appeared equitable in light of the facts in *Summers*, it created a dangerous precedent that violated basic precepts of employment discrimination law.[173]

B. O'Driscoll v. Hercules Inc.[174]

A three-judge panel for the Tenth Circuit revisited its *Summers* decision in the *O'Driscoll* case.[175] In *O'Driscoll*, the plaintiff alleged numerous federal civil rights violations, including age discrimination, and violations of state law involving breach of employment contract and wrongful termination.[176] Prior to trial, the defendant discovered that plaintiff's employment application contained a number of misstatements.[177] The plaintiff misrepresented her age, her date of high school graduation, her educational attainment, her children's ages, and her prior work history (which was also incomplete) on the application form.[178] She also lied about her age on a federal government security clearance form and misrepresented her son's age on the health insurance membership applica-

170. *Id.*
171. *Id.*
172. *Id.* at 709.
173. It is often stated that "hard cases make bad law." Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). The Supreme Court in *McKennon* overruled the *Summers* decision, declaring that *Summers*' reliance on Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), was inappropriate because *Mt. Healthy* addressed a mixed-motive case. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885 (1995). *See supra* notes 83-85 and accompanying text.
174. 12 F.3d 176 (10th Cir. 1994), *vacated and remanded*, 115 S. Ct. 1086 (1995), *rev'd and remanded*, 52 F.3d 294 (10th Cir. 1995).
175. 12 F.3d at 179. Circuit Judge Baldock wrote the *O'Driscoll* opinion, which was also heard by Judges Barrett and Ebel. *Id.* at 177.
176. *Id.* at 177. Plaintiff was discharged after more than six years of employment at the defendant company. *Id.*
177. *Id.* at 177-78.
178. *Id.* The plaintiff represented that she was five years younger than she actually was. *Id.* at 177.

tion, thus making him eligible for coverage when his true age would have disqualified him.[179]

The employment application form and the security clearance form both contained a warning about misrepresentations directly above the plaintiff's signature.[180] The employment application form warned that any misrepresentation may result in termination of employment without liability to the employer, and the security clearance form further warned of criminal penalties.[181] The defendant company provided evidence that the plaintiff would have been terminated had the company been aware of this application fraud.[182]

The district court granted summary judgment to the employer, relying upon the *Summers* decision.[183] The plaintiff appealed, arguing that her misconduct was neither serious nor pervasive, that the misrepresentations were not material, and that a genuine issue of material fact remained as to whether the employer would have terminated the plaintiff had it known of her misconduct.[184]

As the *O'Driscoll* panel reviewed the *Summers* decision, it stated its belief that "Summers was terminated for reasons unrelated to the claim falsifications."[185] While this statement is not actually incorrect, it ignores the complex texture of the facts in *Summers*, thus allowing for a bold statement of the *Summers* rule.[186] The court in *O'Driscoll* responded to the plaintiff's argument on appeal, stating that for the *Summers* rule to apply:

> [T]here is no threshold requirement of serious and pervasive misconduct. Rather, for after-acquired evidence of employee misconduct to bar relief in a termination case, *Summers* merely requires proof that (1) the employer was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the misconduct.[187]

The plaintiff's misrepresentations were repeated and, in the court's view, "demonstrated a pattern of dishonesty and disregard for the truth."[188] In reaction to the plaintiff's assertion that her misrepresen-

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179. *Id.* at 178.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* The headnote to the case indicated that partial summary judgment was granted. *Id.* at 176.
184. *Id.* at 178.
185. *Id.* at 179 (citing Summers v. State Farm Mut. Auto. Inc. Co., 864 F.2d 700, 702-03) (10th Cir. 1988).
186. *See supra* notes 155-73 and accompanying text discussing *Summers*.
187. *O'Driscoll*, 12 F.3d at 179 (citing *Summers*, 864 F.2d at 708); *see also* Johnson v. Honeywell Info. Sys. Inc., 955 F.2d 409 (6th Cir. 1992).
188. *O'Driscoll*, 12 F.3d at 180.

tations were not material, the court noted that the misrepresentations were serious and numerous.[189] In light of the sensitivity of the plaintiff's former position as a quality control inspector, and the employer's explicit reservation of right to terminate an employee who makes a misrepresentation on the employment application, the court determined that the "[p]laintiff's misconduct would have justified her termination."[190] The *O'Driscoll* court concluded that no genuine issue of material fact remained regarding whether the employer would have terminated plaintiff had it known of her misconduct and affirmed the district court's grant of summary judgment.[191]

III. THE EIGHTH CIRCUIT

A. Welch v. Liberty Machine Works, Inc.[192]

In *Welch v. Liberty Machine Works, Inc.*, the Eighth Circuit chose to follow the rule adopted by the Tenth Circuit in the *Summers* case.[193] The court noted that the *Summers* rule was better applied than that of the Eleventh Circuit's rule in *Wallace v. Dunn Construction Co.*[194] to the context of the application fraud with which the court was faced in *Welch*.[195] In *Welch*, the petitioner misrepresented his prior job history by excluding his most recent job as a machinist where he was terminated after one month for unsatisfactory performance; thus, the Eighth Circuit would forbid recovery for an unlawful (discriminatory) discharge "if the

189. *Id.* at 179-80.

190. *Id.* at 180. The court's phraseology is of interest here. The conclusion avoids the fact that the misconduct was discovered after the termination. As the Supreme Court in *McKennon* quoted from Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion), "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 885 (1995).

191. *O'Driscoll*, 12 F.3d at 180-81. Subsequent to the Supreme Court's decision in *McKennon*, the *O'Driscoll* judgment was vacated. *See* O'Driscoll v. Hercules Inc., 115 S. Ct. 1086 (1995). The Tenth Circuit then reversed the district court's grant of summary judgment for the defendant and remanded to the district court for further proceedings consistent with the Supreme Court's *McKennon* decision. 52 F.3d 294 (1995).

192. 23 F.3d 1403 (8th Cir. 1994).

193. *Id.* at 1405 (citing Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988), *overruled by* McKennon v. Nashville Publishing Co., 115 S. Ct. 1086 (1995)).

194. 968 F.2d 1174 (11th Cir. 1992); *see infra* notes 280-300 discussing *Wallace*.

195. *Welch*, 23 F.3d at 1405.

employer establishes that it would not have hired the employee had it known of the misrepresentation."[196]

Nonetheless, the court deemed the district court's grant of summary judgment improper because it was based upon the company president's self-serving affidavit.[197] The court reasoned that the employer "bears a substantial burden of establishing that the policy [dictating that an applicant would not be hired who misrepresented his employment history] pre-dated the hiring and firing of the employee in question and that the policy constitute[d] more than mere contract or employment application boilerplate."[198] The employer's affidavit did not establish the material fact that the employer would not have hired the petitioner but for his misrepresentation of his employment history; thus the court remanded the case to the district court for development of this factual determination.[199]

Judge Arnold dissented in *Welch*, clearly stating that the Eleventh Circuit's *Wallace* decision "has the better argument on the issue of after-acquired evidence."[200] In a well-reasoned analysis, Judge Arnold underscored the important public policy concerns that generated the antidiscrimination statutes.[201] When a defendant employer has no knowledge of an employee's fraudulent misrepresentation, the fraudulent activity "could not have provided any part of the defendant's motive."[202] Judge Arnold quoted a passage from T.S. Eliot—"'To do the right deed for the wrong reason'"—and concluded that the objects of deterring discrimination and compensating those who have suffered from discriminatory acts require that the court "examine a defendant's mind for what it contained, not what it might have contained."[203]

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196. *Id.* The court specifically mentioned that its reference to the hiring situation did "not vitiate the 'would have fired' prong of the *Summers* rule." *Id.* at 1405 n.2.

197. *Id.* at 1406.

198. *Id.* Arguably, the Eighth Circuit's characterization of the weight afforded the employer's affidavit is relevant to the similar issue raised in the *McKennon* case.

The *Welch* opinion, authored by Chief Justice Beam, referred to other circuits that *have* upheld summary judgments in the application fraud context based primarily upon employer affidavits. *Id.* (citing Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992) and Washington v. Lake County, 969 F.2d 250, 256-57 (7th Cir. 1992)). Yet, the *Welch* court found the employer's affidavit insufficient. *Id.*

199. *Id.* at 1406.

200. *Id.* (Arnold, C.J., dissenting).

201. *Id.* (Arnold, C.J., dissenting).

202. *Id.* (Arnold, C.J., dissenting). Judge Arnold's rationale accords with the Supreme Court's *McKennon* opinion. *See id.* (Arnold, C.J., dissenting).

203. *Id.* (Arnold, C.J., dissenting). Judge Arnold would place the petitioner where he would have been absent the discrimination, thus compensating for losses suffered between the time of discriminatory discharge and "the time he would have been fired on account of the discovery of relevant facts." *Id.* (Arnold, C.J., dissenting).

The dissent also compared the instant case to one in which a plaintiff is a tortfeasor, noting that the plaintiff's tortious conduct "could not possibly excuse the commission of a tort against him."[204] The dissent could have noted that this would be particularly true in cases where the torts of plaintiff and defendant are temporally unrelated, as in the *Welch* and other after-acquired evidence cases; the employment discrimination is separated in time, and often in fact, from the reason for the employment decision. Judge Arnold aptly infers that a defendant would not be exempt from a penalty for battering a plaintiff "on the ground that he would not have been available for battering but for his misrepresentations."[205] The dissenter saw this example as analogous to the case at bar.[206] This logic implies that although a plaintiff commits a wrong, that does not place the plaintiff completely outside the protection of the law.

IV. THE SEVENTH CIRCUIT ADHERES TO THE *SUMMERS* DOCTRINE THROUGH 1992

Two earlier Seventh Circuit decisions are briefly discussed herein, followed by the discussion of *Washington v. Lake County*,[207] which the Supreme Court in *McKennon* referenced as being in accordance with the Sixth and Tenth Circuits.[208] The Seventh Circuit's later turnabout in *Kristufek v. Hussman Foodservice Co.*[209] is analyzed in part VII of this article, amidst the harmonious Eleventh and Third Circuits, which also refused to allow after-acquired evidence to bar all relief.[210] The *Kristufek* decision is not such a surprise in light of the Seventh Circuit's decision in *Smith v. General Scanning, Inc.*, which is discussed next.[211]

204. *Id.* (Arnold, C.J., dissenting).
205. *Id.* (Arnold, C.J., dissenting).
206. *See id.* (Arnold, C.J., dissenting). Judge Arnold further noted that "even a trespasser is entitled to the benefit of the rule that the offended landowner may not intentionally injure him." *Id.* (Arnold, C.J., dissenting). Analogously, even when a plaintiff would not have been hired except for misrepresentations that misled the defendant employer, the plaintiff would still be entitled to the basic protection of nondiscriminatory treatment in the workplace. *Id.* (Arnold, C.J., dissenting). However, a wrongdoing plaintiff's right to reenter the offending workplace could not be legally mandated because the plaintiff did not lawfully possess that right. *Id.* (Arnold, C.J., dissenting).
207. 969 F.2d 250 (7th Cir. 1992).
208. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 883 (1995).
209. 985 F.2d 364 (7th Cir. 1993).
210. *See infra* notes 280-357 and accompanying text.
211. *See infra* notes 212-20 and accompanying text.

A. Smith v. General Scanning, Inc.[212]

In *Smith*, a reduction in force precipitated the termination of a sixty-year-old sales engineer.[213] The Seventh Circuit found that the petitioner failed to establish a prima facie case of discrimination because he did not effectively rebut the employer's proffered legitimate business reasons for selecting him for termination.[214] Additionally, sales in petitioner's region (in which he was the sole sales engineer) were down 21.6% compared to a decrease of 13.5% nationally.[215] In light of escalating sales department expenses, a new vice-president for marketing decided to reorganize by eliminating that office along with petitioner's position.[216] The court interpreted the above grounds as lawful, refusing to "second-guess" the employer.[217]

The court's opinion contained strong language, albeit dicta, concerning the irrelevance of after-acquired evidence of the petitioner's application fraud.[218] The court of appeals faulted the district court's focus on petitioner's qualifications (or absence of credentials) in light of his false declaration of bachelor's and master's degrees in mechanical engineering.[219] In addressing the question of liability, the court noted: "At issue is the lawfulness of Smith's termination. His resume fraud clearly had nothing to do with that .... Whether GSI discriminated against Smith must be decided solely with respect to the reason given for his discharge .... His resume fraud is, for this purpose, irrelevant."[220]

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212. 876 F.2d 1315 (7th Cir. 1989).

213. *Id.* at 1316.

214. *Id.* at 1320-21. The petitioner's seniority was less than that of the retained employees and his performance evaluations were also less favorable. *Id.*

215. *Id.* at 1320.

216. *Id.*

217. *Id.* at 1321.

218. *Id.* at 1319-20.

219. *Id.*

220. *Id.* at 1319. The Seventh Circuit reflected that the evidence of application fraud would be relevant at the relief stage, indicating that an employee who committed a dischargeable offense should not be reinstated and that backpay should not accumulate after the discovery of the fraud. *Id.* at 1319 n.2. This dicta was cited in support of the Seventh Circuit's later and broader adoption of the *Summers* rationale. *See* Washington v. Lake County, 969 F.2d 250, 253, 256 (7th Cir. 1992); *infra* notes 227-45 and accompanying text. It should be noted that Smith's job description stated a requirement of a Bachelor of Science that he did not possess. *Smith*, 876 F.2d at 1319. Since Smith was employed in sales, he would not have been subject to the rigorous certification requirements of a practicing professional engineer, and thus his false credentials were not revealed until the employment litigation. *See id.* at 1319-20.

B. Reed v. Amax Coal Co.[221]

In a case decided just one month before *Washington v. Lake County*, the Seventh Circuit granted summary judgment to the defendant employer because the petitioner did not make out a prima facie case of race discrimination.[222] The court previously refused to grant summary judgment on the basis of after-acquired evidence indicating that the petitioner lied on his employment application because the employer never proved that it "would have fired" the petitioner for that misconduct.[223] The Seventh Circuit asserted that the *Summers* rule required this proof, as opposed to establishing that the defendant employer "could have fired" the petitioner due to the falsification of his application.[224] The "would have fired" standard may have been met with evidence established by the employer "that other employees were fired in similar circumstances."[225] The court noted that this standard exists "to prevent employers from avoiding Title VII liability by pointing to minor rule violations which may technically subject the employee to dismissal but would not, in fact, result in discharge."[226]

C. Washington v. Lake County[227]

In *Washington*, decided one month after *Reed*, the Seventh Circuit noted that it had yet to "squarely" adopt the *Summers* rationale, despite its references to *Summers* in both *Smith v. General Scanning, Inc.* and *Powers v. Chicago Transit Authority*.[228] In *Washington*, the plaintiff Washington was hired in 1986 as a jailer at the Lake County Sheriff's Department where he was terminated after less than one year due to numerous violations of department policy, including insubordination and breaches of jail security.[229] Washington's letter of termination also re-

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221. 971 F.2d 1295 (7th Cir. 1992).
222. *Id.* at 1299.
223. *Id.* at 1298. The court analyzed the case using the *Summers* rationale, even though it distinguished the facts from those in *Reed* and found that defendant failed to establish that it "would have fired" the petitioner. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. 969 F.2d 250 (7th Cir. 1992).
228. *Washington*, 969 F.2d at 253 (citing Smith v. General Scanning, Inc., 876 F.2d 1315 (7th Cir. 1989) and Powers v. Chicago Transit Auth., 890 F.2d 1355, 1360 (7th Cir. 1989)).
229. *Id.* at 251-52.

ferred to his recent arrest for criminal sexual assault as bringing discredit upon the department.[230] Despite these assertions, petitioner received positive performance appraisals, labeling him as either "excellent" or "proficient" rather than merely "adequate" or "marginal."[231]

When Washington contested his discharge, it came to light that he lied on his employment application by indicating that he had no criminal convictions of a serious nature when in fact he pled guilty to criminal trespass in 1974 and in 1981 had been convicted of a separate third-degree assault.[232] The employment application clearly stated that the applicant understood that "'if any misrepresentation has been made . . . employment [may be] terminated immediately.'"[233] No other cases of application fraud had previously been detected or acted upon by the employer.[234]

The district court in *Washington* granted summary judgment to the defendants based upon the rationale of *Summers*.[235] The Seventh Circuit reviewed the after-acquired evidence case precedent within the circuit, pointing out the important distinction between two hypothetical questions: whether the employer would have *hired* an applicant as compared to whether an employer would have *fired* an incumbent employee (based upon after-acquired evidence of application fraud *or* misconduct on the job).[236] The court distinguished Washington's application fraud from the "gross misconduct on the job" involved in *Summers*, and further discounted the "masquerading doctor" hypothetical from *Summers* as "similarly unhelpful, since it is obvious that a 'doctor' without a license would never be hired and also would be fired immediately upon discovery of this fact."[237]

The *Washington* court next analogized a mixed-motive discharge case to a case in which the employer introduced after-acquired evidence to defend an employment discrimination case.[238] The court stated that in

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230. *Id.* at 252. The charge of criminal sexual assault was dropped shortly thereafter. *Id.*

231. *Id.*

232. *Id.* at 251-52.

233. *Id.* at 252. The court noted that the "may be" terminated language in the application form did not establish that the same decision would have been made, which is the appropriate standard under *Summers*. *Id.* at 257 n.7. The form also informed applicants that "[a] conviction record is not an automatic bar to employment and the nature, recency, and disposition of an offense will be considered only as it relates to the job for which you are applying." *Id.* at 252.

234. *Id.* This is not unusual because employers frequently do not detect such application irregularities until they seek to defend an employment discrimination charge.

235. *Id.* (citing Summers v. State Farm Mut. Auto. Inc. Co., 864 F.2d 700 (10th Cir. 1988)).

236. *Id.* at 253.

237. *Id.* at 254.

238. *Id.* at 255; *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (discussing

both cases "the issue . . . 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."[239] According to the *Washington* court, both mixed-motive and after-acquired evidence cases require the employer to prove that it would have fired the plaintiff anyway, and thus the "same evidentiary framework is . . . appropriate."[240] The Seventh Circuit refused to bar relief to a petitioner because of that petitioner's application fraud, although the court admitted that this "may have some merit if the employment decision challenged is the refusal to hire."[241] Despite the court's acknowledgment that, in mixed-motive cases, the "temporal focus is on the time of the adverse employment decision," the Seventh Circuit approved the same decision absent the unlawful reason standard for either scenario.[242]

The *Washington* court summarized the key issue presented as "whether the employer, acting in a race-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."[243] In light of the facts, the court affirmed summary judgment for the defendant because the court asserted that the defendant would have terminated Washington had it known of his convictions.[244] Thus, the Seventh Circuit allowed the *Summers* doctrine to carry the day. The Seventh Circuit's defection to the opposite rule is discussed in part VII of this article.[245]

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mixed-motive discharge). The *Washington* court also noted that an employer may be less likely to terminate an employee who "has proven himself to be capable" despite later-discovered information regarding his application fraud, whereas an individual whose misrepresentations are discovered *prior* to hire would be in a less advantageous position and would less likely be hired. *See Washington*, 969 F.2d at 254.

239. *Washington*, 969 F.2d at 255.

240. *Id.*

241. *Id.* at 256.

242. *Id.* The court supported this analysis by simply asserting that it saw "no reason why this [mixed-motive] approach should not be used in *Summers*-type cases." *Id.*

243. *Id.* The court specifically assumed, without further consideration, that the rationale of *Summers* remained viable despite the 1991 amendments to the Civil Rights Act. *Id.* at 256 n.6.

244. *Id.* at 256. The court found that no genuine issue of material fact was raised on this issue because the petitioner did not produce evidence to rebut the employer's assertions. *Id.* at 256-57.

245. *See infra* notes 301-18 and accompanying text.

V. THE FOURTH CIRCUIT

"Do not deprive me of my age.
I have earned it."
May Sarton,
The Poet and the Donkey (1969)

A. Smallwood v. United Air Lines[246]

In a pre-*Summers* decision from the Fourth Circuit involving after-acquired evidence, the court separated the issue of liability for age discrimination from the issue of the plaintiff's damages.[247] Since the plaintiff concealed that he was fired for good cause from his former job as a pilot,[248] and this fact would have been discovered later in the application process anyway,[249] the Fourth Circuit held that the petitioner had not himself suffered from the defendant's illegal rule of denying employment to applicants over age thirty-five.[250] This was true because the defendant company established that even without the age discrimination it would not have hired anyone guilty of such misconduct.[251]

The company's exclusionary hiring rule was not protected by a bona fide occupational qualification exemption, and thus the court's grant of injunctive relief against the application of the rule withstood the defendant's after-the-fact rationale.[252] While the petitioner was disqualified from relief because he would not have been hired anyway, the lawsuit established liability and effectively eliminated future application of the defendant's discriminatory rule.[253]

This result, in contrast to many of the cases decided after *Summers*, at least resolved the question of whether a statutory violation occurred. In a

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246. 728 F.2d 614 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984).

247. 728 F.2d at 618.

248. *Id.* at 620-22. The facts revealed that petitioner had, at the former job, claimed moving expenses for which he knew he was not entitled and had engaged in "deliberate deception" to support his false claim. *Id.* at 621-22. He also abused his company card to purchase transportation for his children. *Id.* An impartial board, which the plaintiff requested pursuant to the collective bargaining agreement, upheld the plaintiff's discharge from his former employer. *Id.* at 620-22. The court of appeals adopted facts from the referee's report as it was part of the trial record. *See id.* at 620-21. The plaintiff did not object to the statements in the report, only to the severity of the employer's penalty, as upheld by the referee. *Id.* at 621.

249. *Id.* at 624, 626.

250. *Id.* at 625, 627.

251. *Id.* at 624. The facts regarding the petitioner's prior employment and discharge would have been discovered during the application process; thus, he would not have been hired, even without the discriminatory rule. *Id.* at 626.

252. *Id.* at 617-18.

253. *Id.* at 627.

positive sense, *Smallwood* remedied the pattern or practice of discrimination, but it excluded the plaintiff from enjoying individual relief because of the after-acquired evidence of his wrongdoing.[254] Since the court concluded that Smallwood would not have been hired anyway,[255] if one followed the Supreme Court's logic in *McKennon*,[256] a plaintiff such as Smallwood would probably only be entitled to receive backpay for the period when he would have been hired absent the discriminatory rule until the date when the evidence of his application fraud would have been discovered in the course of processing his application.[257]

While the remedy that would follow here from the *McKennon* court's guidance may seem small, the principle enunciated there is truly significant. For even where the remedy is nominal, it vindicates the individual's injury as well as the overriding public policies embodied in the equal employment opportunity statutes.[258]

A federal district court decision from within the Ninth Circuit will conclude the analysis of this line of cases, the precursors and followers of the *Summers* doctrine. The following case is of particular interest because of some factual similarities that it shares with the *McKennon* case.

VI. THE FEDERAL DISTRICT COURT IN ARIZONA, FROM THE NINTH CIRCUIT

A. O'Day v. McDonnell Douglas Helicopter Co.[259]

In a case of first impression, a federal district court in the Ninth Circuit ruled that after-acquired evidence of employee misconduct should bar a former employee's discrimination claim when the conduct in question would have constituted grounds for discharge if the employer had been aware of it.[260] In *O'Day*, the plaintiff, a forty-six-year-old engineer, alleged, *inter alia*, that his layoff and previous denial of promotion vio-

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254. *Id.*
255. *Id.*
256. *See supra* notes 74-105 and accompanying text discussing *McKennon*. This supposes an inference that the backpay remedy in *McKennon* that involved a discharge should also apply to the failure to hire as in *Smallwood*.
257. *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).
258. *See generally McKennon*, 115 S. Ct. at 884-85 (discussing broad public policy purposes behind legislation and role of individual relief).
259. 784 F. Supp. 1466 (D. Ariz. 1992).
260. *Id.* at 1468, 1470.

lated federal and state statutes prohibiting age discrimination in employment.[261] Two days prior to his layoff, O'Day secretly extracted his confidential personnel file from his supervisor's desk and photocopied portions, which he then removed from the premises.[262]

Within O'Day's personnel file were individual engineer's rankings ("totems") that became the basis for numerous employment decisions.[263] O'Day maintained that he showed the totems to his co-worker to "warn him of his low ranking."[264] Nonetheless, plaintiff's conduct, when discovered during a deposition by defendant employer, was deemed a "direct violation" of company rules.[265] The rules in question were classified under "Group I" infractions, which are "extremely serious and . . . normally result in discharge unless extenuating circumstances are present."[266]

Thus, the company converted O'Day's "layoff" status to a termination after its discovery of his misconduct.[267] The employer's motion for summary judgment based upon the after-acquired evidence doctrine was granted.[268] The district court relied upon *Summers*,[269] the precedent-setting case from the Tenth Circuit.[270] The evidence that the employer discovered in *Summers* while preparing to defend itself against the plaintiff's charges of employment discrimination involved much more pervasive misconduct than that involved in *O'Day*.[271] In *Summers*, the

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261. *Id.* at 1467. O'Day had filed a complaint with the EEOC 10 days prior to his layoff and filed a second charge three months later. *Id.* He filed a private lawsuit before the EEOC resolved the issue. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 1468.

266. *Id.* at 1468 n.1. The company handbook detailed the rules in question as prohibiting "deliberate or negligent destruction, damage or misuse of Company property or property of others" and theft or unauthorized removal from premises of company property or property of others." *Id.* The purpose of the company rules was stated in the preamble:

> In order to ensure a safe, orderly, and productive work environment and protect the rights of all employees, the Company has established rules of personal conduct. Infractions requiring corrective action are described below. The Company, [sic] must reserve the right to take corrective action for unacceptable conduct not specifically described.

Id.

267. *Id.* at 1468.

268. *Id.* at 1470.

269. Summers v. State Farm Mut. Auto. Inc. Co., 864 F.2d 700 (10th Cir. 1988).

270. *See id.*

271. *See O'Day*, 784 F. Supp. at 1468. The misconduct in the *McKennon* case could be more easily grouped with that in *O'Day* than with that in *Summers*. See McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 540-41 (6th Cir. 1993),

falsification of over 150 records by a field claims representative of an automobile insurance company must surely be seen as egregious activity that directly related to the viability of the business, even if the employer expressly stated other reasons for the termination.[272]

The *O'Day* court specified that for an employer to make use of the after-acquired evidence doctrine, it must prove that the employee would have been discharged for the misconduct.[273] The court explained that O'Day would have been fired for his misconduct anyway, and his acts were not classified as protected activity under the "opposition clause" of the Age Discrimination in Employment Act.[274] Thus, the court found that no reasonable jury would find O'Day's conduct reasonable.[275]

The facts and allegations in *O'Day* are strikingly similar to those in *McKennon*.[276] Certainly in future cases like *O'Day*, the federal courts, following the *McKennon* precedent, will merely allow such evidence of wrongdoing to affect the remedy once the employer's liability for discrimination is established.[277] The remedy of reinstatement will be barred

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rev'd and remanded, 115 S. Ct. 879 (1995). However, because McKennon showed the confidential documents to her husband, rather than to a co-worker, there seemed to be less impact upon the workplace in *McKennon* than in *O'Day*.

272. *See Summers*, 864 F.2d at 702-03.

273. *O'Day*, 784 F. Supp. at 1468. This burden was met by evidence of direct violation of a company policy that the employee handbook set out as an "extremely serious" infraction that would "normally result in discharge." *Id.* & n.1. The court was not convinced that a material issue of fact remained to prevent the motion for summary judgment, despite plaintiff's effort to establish that the defendant's firing practices were inconsistent. *Id.* at 1469. This ruling has been questioned by at least one commentator. *See* Parker, *supra* note 23, at 438 (discussing that written policies not always consistently enforced).

274. *O'Day*, 784 F. Supp. at 1469; *see* 29 U.S.C. § 623(d) (1988). The district court noted that "opposition" must be lawful and "reasonable in light of the employer's interest in maintaining a harmonious and efficient operation." *O'Day*, 784 F. Supp. at 1469-70 (citations omitted).

275. *O'Day*, 784 F. Supp. at 1470.

276. *See supra* notes 2-11, 24-28 and accompanying text discussing facts in *McKennon*. The misconduct in both cases occurred immediately preceding the employee's termination, so that arguably there was a nexus between the alleged discrimination and the wrongdoing of the plaintiffs in both cases.

277. *See* McKennon v. Nashville Publishing Co., 115 S. Ct. 879 (1995). A later case decided by the Ninth Circuit Court of Appeals refused the introduction of after-acquired evidence by a defendant in an employment discrimination case because the issue was raised for the first time on appeal. EEOC v. Farmer Bros. Co., 31 F.3d 891, 900-02 (9th Cir. 1994). Thus, the defendant failed to reserve the issue which would require factual as well as legal development. *Id.* at 901. In dicta, the court noted that "if we were to decide this issue, it would be inequitable to hold that af-

if the employer provės that it would have terminated the plaintiff anyway because of the wrongdoing.[278] The plaintiff's right to backpay would generally be curtailed as of the date of discovery of the wrongdoing.[279]

VII. AFTER-ACQUIRED EVIDENCE DOES NOT BAR LIABILITY FOR EMPLOYMENT DISCRIMINATION

A. *The Eleventh Circuit Leads the Charge*

1. *Wallace v. Dunn Construction Co.*[280]

A case of first impression in the Eleventh Circuit generated a trend away from the *Summers* doctrine.[281] In *Wallace v. Dunn Construction Co.*, a divided panel held that evidence of an employee's application fraud, discovered by the employer in the course of defending an employment discrimination lawsuit, may not be used by that employer as an affirmative defense to Title VII liability.[282] The Eleventh Circuit took issue

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ter-acquired evidence of misrepresentations in a job application should preclude an otherwise successful plaintiff from recovering damages." *Id.* While not a binding statement of precedent, this decision indicates that the Ninth Circuit appeared to be clearly moving away from the *Summers* doctrine even before the Supreme Court's *McKennon* decision.

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

279. *Id. But cf. infra* notes 319-57 and accompanying text discussing backpay to date of judgment as remedy in Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3rd Cir. 1994), *judgment vacated and case remanded*, 115 S. Ct. 1397 (1995), *aff'd in part and rev'd in part*, 1995 U.S. App. LEXIS 18611 (10th Cir. July 20, 1995) (affirming opinion but limiting backpay to date of discovery absent exceptional circumstances in light of *McKennon's* binding precedent). The extension of backpay to the date of judgment as in *Mardell* makes good sense in some respects because the date of discovery of the wrongdoing has no true significance to the calculation of relief. Rather, the date of when after-acquired evidence would have been discovered absent the defendant's discrimination, while nebulous to establish, would be a more accurate measure of a plaintiff's legally supportable relief. *See also infra* notes 280-300 and accompanying text, discussing Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated and reh'g granted*, 32 F.3d 1489 (11th Cir. 1994), *aff'd in part, rev'd and remanded in part*, 62 F.3d 374 (11th Cir. 1995). The Eleventh Circuit initially rebelled against the termination of backpay as of the date of discovery of the after-acquired evidence because it places the member of a protected class in a worse position than if she were not a victim of discrimination. *See Wallace*, 968 F.2d at 1182.

280. 968 F.2d 1174 (11th Cir. 1992), *vacated and reh'g granted*, 32 F.3d 1489 (11th Cir. 1994), *aff'd in part, rev'd and remanded in part*, 62 F.3d 374 (11th Cir. 1995).

281. 968 F.2d 1174 (11th Cir. 1992). As will be discussed, the First Circuit decided an earlier after-acquired evidence discrimination case, coming to much the same conclusion as the *Wallace* and *McKennon* Supreme Court decisions in a union hiring hall context. *See* Sabree v. United Bhd. of Carpenters and Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990); *infra* notes 358-78 and accompanying text discussing *Sabree*.

282. *Wallace*, 968 F.2d at 1176-77, 1181. The allegations with respect to plaintiff-

with *Summers*' use of after-acquired evidence as a basis for avoidance of liability.[283] The court reasoned that this rule permits the defendant to prove "that it would have discharged the plaintiff absent any unlawful motives *if* it had possessed full knowledge of the circumstances existing at the time of the discharge."[284] According to the court, such a rule "ignores the lapse of time" and "clashes with the *Mt. Healthy* principle . . . that the plaintiff should be left in no worse a position than if she had not been a member of a protected class or engaged in protected opposition to an unlawful employment practice."[285]

The *Wallace* court noted that the Supreme Court's decision in *Price Waterhouse v. Hopkins* confirmed that *Mt. Healthy*'s principles may be extended to Title VII mixed-motive cases if the plaintiff proves "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."[286] The Eleventh Circuit objected to the use of a legitimate motive discovered after the unlawful act.[287] The court reasoned that the "law governing after-acquired evidence . . . should not replicate the law applicable to mixed motives."[288]

appellee Joyce Neil also included violations of the Equal Pay Act, 29 U.S.C.A. §§ 206(d)(1), 215 (a)(2) (West 1978), and tort claims under state law. *Wallace*, 968 F.2d at 1176.

283. *Wallace*, 968 F.2d at 1178-79. *See generally* William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by* Wallace v. Dunn Construction Co., 72 NEB. L. REV. 330, 343-48 (1993) (explaining the court's decision in *Wallace*).

284. *Wallace*, 968 F.2d at 1178.

285. *Id.* at 1179 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977)). The plaintiff objected *inter alia*, to (alleged) sexual harassment and equal pay violations and the causes of action relating to her discharge included retaliation under both Title VII and the Equal Pay Act. *Id.* at 1176. The Eleventh Circuit noted that the plaintiff in *Summers* was placed "in a worse position than if he had not been a member of a protected class . . . [because he] would have remained employed for at least some period of time after he was actually discharged." *Id.* at 1179-80.

286. *Id.* at 1180 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 261, 276 (1989) (O'Connor, J., concurring)). *But see* Civil Rights Act of 1991, Pub L. No. 102-166, 107, 105 Stat. 1071, 1075-76 (1991) (amending Title VII to limit *Price Waterhouse* holding).

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

288. *Id.* at 1181.

According to the *Wallace* decision, "after-acquired evidence is relevant to the relief due a successful Title VII plaintiff."[289] The court recommended a case-by-case determination of the remedies and advised that when the after-acquired evidence would independently cause a discharge, then neither reinstatement nor front pay would be ordered.[290] The Eleventh Circuit would not terminate the backpay period upon the discovery of the after-acquired evidence, however, preferring to require the employer to establish "that it would have discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and [the] litigation."[291] This approach places the victim "in no worse a position" than if she had not been discriminated against.[292]

The facts in *Wallace* clearly indicated that the plaintiff Neil would never have been hired if she had told the truth on her application, and that she would have been fired once the company became aware of her false application.[293] Prospective remedies of reinstatement, front pay, and injunctive relief were consequently unavailable to plaintiff under both Title VII and the Equal Pay Act.[294] The Eleventh Circuit refused to grant summary judgment on the question of when backpay and other damages should be cut off.[295] The dissenting Judge Godbold would have dismissed the suit on the basis of a lack of standing since the plaintiff's fraudulent employment application was the reason why she obtained the position.[296]

The Eleventh Circuit vacated the above-discussed panel opinion and ordered a rehearing *en banc*.[297] The vacated opinion has greatly influ-

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289. *Id.*

290. *Id.*

291. *Id.* at 1182.

292. *Id.*

293. *Id.* at 1184.

294. *Id.* Such remedies were cut off as a matter of law on Neil's federal claims. *Id.*

295. *Id.*

296. *Id.* at 1185 (Godbold, J., dissenting). Judge Godbold viewed the plaintiff as a "false claimant" and would distinguish false application cases from those cases in which an employee rightfully obtained employment, but later engaged in wrongdoing once the employee was "rightfully a member of the workforce." *Id.* at 1188-89 (Godbold, J., dissenting).

297. Wallace v. Dunn Constr. Co., 32 F.3d 1489 (11th Cir. 1994). The *en banc* decision in *Wallace* was recently rendered. 63 F.3d 374 (11th Cir. 1995). The Court of Appeals for the Eleventh Circuit reversed the district court's denial of summary judgment to the employer with respect to front pay, reinstatement, and injunctive relief because the employer sufficiently demonstrated that the plaintiff would have been fired anyway when the misrepresentation came to light. *Id.* at 380-81. The district court's denial of summary judgment as to backpay, unpaid wages and liquidated damages was affirmed because "the after-acquired evidence does not bar recovery, but merely affects the remedy." *Id.* at 381. The Eleventh Circuit cited *McKennon*'s guid-

enced this area of the law. *Wallace* set forth the reasons why the *Summers* doctrine is incorrect in a manner that has since been followed in other cases, including *McKennon.*[298] In addition, *Wallace* provides broader relief than that sanctioned by the Seventh Circuit's turnaround case, *Kristufek*, which will be discussed next.[299] Furthermore, the Third Circuit in *Mardell* adopted a backpay formula that aligns with *Wallace.*[300]

B. *The Seventh Circuit Abandons the* Summers *Doctrine*

1. *Kristufek v. Hussmann Foodservice Co.*[301]

The most recent after-acquired evidence case from the Seventh Circuit involved a pair of discharges in violation of the Age Discrimination in Employment Act.[302] Mary McPherson, a fifty-nine-year-old executive secretary to the president, with forty years of service to the company, was terminated in 1986 because the president at that time preferred a young secretary.[303] Less than two months later, Arthur Kristufek, the Director of Employee and Community Relations, who had opposed the president's planned replacement of McPherson, also was terminated.[304] In the course of the litigation, Kristufek admitted that he overstated his educational credentials when he interviewed for his position.[305]

In light of this after-acquired information, the district court entered

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ance that the usual rule on backpay is to calculate it "'from the date of unlawful discharge to the date the new information was discovered . . [but that] . . . the court can consider taking into further account extraordinary equitable circumstances.'" *Id.* at 380 (citing McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879, 886 (1995)).

298. McKennon v. Nashville Publishing Co., 115 S. Ct. 879, 885 (1995).

299. *See infra* notes 301-18 discussing *Kristufek.*

300. *See infra* notes 319-57 and accompanying text discussing *Mardell.*

301. 985 F.2d 364 (7th Cir. 1993).

302. *Id.* at 365; *see* 29 U.S.C. § 621-624 (1988).

303. *Kristufek*, 985 F.2d at 366-67. The president in question was new to the company as of 1984. *Id.* at 366.

304. *Id.* Kristufek was 57 years old at the time of his termination. *Id.*

305. *Id.* at 366. Kristufek was employed for five years at the defendant company, during which time his education claims were never verified. *Id.* Kristufek testified that his relationship with the president deteriorated after he counseled against terminating McPherson and that the president dismissed many prospective replacements based upon their age, or criteria that correlated with age, such as school graduation date. *Id.* at 367.

judgment for the defendant notwithstanding the verdict (JNOV).[306] The court of appeals, however, stated that it could not "apply discrimination law so forthrightly, regardless of the admitted fraud."[307] The court noted that the district court relied upon *Smith v. General Scanning, Inc.*,[308] which the appellate court cited with its approval as having made clear "that the only issue is the lawfulness of the termination for the reasons given."[309] Just as in *Kristufek*, the *Smith* case involved resume fraud that was not related to the reasons proffered by the defendant in support of its decision to discharge.[310] In both instances, the *Kristufek* opinion noted that "[t]he after discovered alternate reason comes too late."[311]

Distinguishing the facts in *Summers*, where the employer knew of some of the later-discovered misconduct even though it asserted other reasons for the termination, the court refused to bar backpay relief to Kristufek.[312] In *Kristufek*, the petitioner's "one time falsification was not known until after discharge" so it did not influence the defendant's decision, nor did the defendant prove that it would have fired him absent his protected conduct in protesting McPherson's discriminating discharge.[313] The Seventh Circuit thus deemed it error that the district court granted JNOV to the employer based upon the after-acquired evidence of petitioner's false resume.[314]

Nonetheless, the court, in its remand, directed that backpay would be cut off from the date when the fraud was discovered.[315] The court justified this decision by simply stating that it saw "nothing to be gained by further penalizing [the employer] after this resume fraud came to

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306. *Id.* at 369.

307. *Id.*

308. 876 F.2d 1315 (7th Cir. 1989); *see supra* notes 212-20 and accompanying text discussing *Smith*.

309. *Kristufek*, 985 F.2d at 369 (citing *Smith*, 876 F.2d at 1319). The court in *Kristufek* reaffirmed the concept that the sole issue in a discriminatory discharge case are the reasons or "known circumstances" that led to the discharge. *Id.*

310. *Id.*

311. *Id.* (citing *Smith*, 876 F.2d at 1319). The *Kristufek* court stated that this remained the court's view of the law. *Id.*

312. *Id.* (citing Summers v. State Farm Mut. Auto. Inc. Co., 864 F.2d 700 (10th Cir. 1988)); *see supra* notes 155-73 and accompanying text. In *Summers*, the employer warned petitioner that future falsifications could lead to his discharge, yet further violations occurred. 864 F.2d at 702. The employer eventually placed the petitioner on probation for two weeks without pay prior to his eventual discharge. *See Kristufek*, 985 F.2d at 369-70 (discussing continuing extensive misconduct of petitioner in *Summers* and why that rule is inapplicable to the *Kristufek* case).

313. *Kristufek*, 985 F.2d at 370.

314. *Id.* The jury made its determination despite the false resume information, and the appellate court found that absent an adequate showing by the employer that the petitioner would have been fired, it was error to eradicate the jury's verdict. *Id.*

315. *Id.* at 371.

light."[316] It would seem that this reduction in backpay should have been justified by proof that Kristufek would have been terminated because of his resume fraud.[317] The court could have proceeded a step further in terms of protecting employees from retaliatory discharges and required that the employer prove that it would have discovered the resume fraud even without the litigation and, assuming that fraud warranted discharge, permitted backpay up until the point when the fraud would have been discovered absent defendant's discrimination.[318] Such a scheme would accord with the remedy provided in the recent decision from the Third Circuit, discussed next.

C. *The Third Circuit Encourages More Complete Relief as in* Wallace

1. *Mardell v. Harleysville Life Ins. Co.*[319]

Judge Edward Becker authored a strong opinion delineating the division among the circuits on the issue of the effect of after-acquired evidence in employment discrimination cases.[320] In addressing what has been characterized as "one of the most contentious issues in employment discrimination law today,"[321] the Third Circuit criticized the Tenth Circuit's *Summers* rule and its application in the Sixth, Seventh, and Eighth Circuits.[322] Following the lead of the Eleventh Circuit in *Wallace*, the Third Circuit also provided backpay to the date of judgment rather

316. *Id.*

317. *See id.* at 370.

318. Such a prerequisite would square with the *Wallace* and *Mardell* remedies, *see supra* notes 280-300 and accompanying text discussing *Wallace*; *infra* notes 319-57 and accompanying text discussing *Mardell*, but is not required by the Supreme Court in *McKennon*, *see supra* notes 94-105 and accompanying text. The court in *Kristufek* determined that Kristufek's falsifications "were not of a critical nature" and noted that he functioned well without the missing degree which did not appear to be a job prerequisite. *Kristufek*, 985 F.2d at 370.

319. 31 F.3d 1221 (3d Cir. 1994), *vacated and remanded*, 115 S. Ct. 1397 (1995), *aff'd original opinion in large part, vacated in part*, (the portion on backpay in light of *McKennon*), 1995 U.S. App. LEXIS 18611 (10th Cir. July 20, 1995).

320. 31 F.3d at 1222-40.

321. *Employee Wrongdoing Doesn't Immunize Employers from Employment Bias Charges, Third Circuit Says*, Daily Lab. Rep. (BNA) No. 150, at D3 (Aug. 8, 1994).

322. *Mardell*, 31 F.3d at 1226-27.

than to the date when the employer discovered the evidence of a prior obstacle to employment.[323]

After-acquired evidence of deceit or misconduct was characterized as constituting lesser claims of the employer that, while not admissible at the liability stage, could be asserted and considered at the remedies stage.[324] In contrast, the protection afforded employees against workplace discrimination is clearly a federal right that public policy dictates should not be ignored or submerged, even when knowledge of misconduct or shortcomings later come to light.[325] The employer should not "get off scot-free despite its blameworthy conduct."[326]

The Third Circuit emphasized a point often glossed over by the circuits following the *Summers* rule, that the employer "may never have discovered the evidence" if it were not for the legal proceedings engendered by the employer's illegal conduct.[327] This, and the overriding public interest in restoring the victim to the position that he or she would have been in absent discrimination, resulted in the court's insistence that the after-acquired evidence would not affect liability but would be admissible to guide the remedy.[328]

The *Mardell* case involved the differential treatment and termination of a fifty-two-year-old woman who was an accomplished life insurance agent with Prudential Life Insurance Company.[329] She was recruited by defendant Harleysville where she found herself not only in the ignominious position of being the first employee to be placed on probation, but also subject to dismissal for failure to meet monthly sales quotas.[330] Significantly, her male peers commonly failed to meet the standards that the employer set for the plaintiff.[331] After two years, Mardell was discharged and replaced by a forty-year-old male.[332]

Disparate treatment of the plaintiff was also evidenced by her supervisor's comments and attitudes that indicated both gender and age

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323. *Id.*

324. *Id.* at 1238.

325. *See id.* at 1234-37 (discussing statutory purposes and how non-liability undermines same). "[T]o maintain that a victim of employment discrimination has suffered no injury is to deprecate the federal right transgressed and to heap insult . . . upon injury." *Id.* at 1232.

326. *Id.* at 1237.

327. *Id.*

328. *Id.* at 1238-40 (discussing the relevance of employee misconduct to relief and that after-acquired evidence may bar equitable remedy like reinstatement).

329. *Id.* at 1222-23.

330. *Id.* at 1223.

331. *Id.*

332. *Id.*

bias.[333] He had higher expectations of the plaintiff than of her male peers, making remarks reflecting his regret that she "'wasn't one of the boys'" and that he "'would never have another female regional director.'"[334]

The after-acquired evidence against plaintiff involved application resume fraud.[335] In essence, Mardell represented that she had a B.S. degree when she had two courses left to complete.[336] She exaggerated her professional experience in terms of duties and by indicating that some experiences were remunerated that were not.[337] Also, the petitioner misstated the dates of performance.[338] All of these items substantially predated plaintiff's hiring by the defendant since, in the interim, she had spent eleven years with Prudential.[339] Additionally, the defendant did not require a college degree for the position in question, stating that it would hire the "'mental equivalent' of a college graduate."[340] Thus, the after-acquired evidence against Mardell did not seem to conclusively establish that she would not have been hired or would have been fired had the employer known of her misrepresentations, although the employer provided testimony regarding negative impact that the fraud would have had on her employment.[341]

The district court granted the employer's motion for summary judgment because Mardell "suffered no legally cognizable injury."[342] The

333. *Id.*

334. *Id.* Other objectionable remarks by plaintiff's supervisor included that her job was not one "'for a woman'"; that many of her agents would consider her "'a wife'"; that he expressed that she "'just wanted to stay home and watch the soaps'"; and "'should be home playing with [her] grandchildren.'" *Id.*

335. *Id.*

336. *Id.* She indicated that she received her degree in 1977, but it was not fully earned until she completed five credits in 1992. Mardell v. Harleysville Life Ins. Co., 854 F. Supp. 378, 381 (W.D. Pa. 1993), *rev'd*, 31 F.3d 1221 (1994), *and vacated*, 115 S. Ct. 1397 (1995), *aff'd in part and vacated in part*, 1995 U.S. App. LEXIS 18611 (10th Cir July 20, 1995).

337. *Mardell*, 31 F.3d at 1223-24.

338. *Id.* at 1224.

339. *Id.* at 1223.

340. *Id.*

341. *See id.* at 1224. The court also noted that the employer declared a policy against misrepresentation on its application form. *Id.*

342. *Id.* The district court followed the Sixth Circuit's approach. Mardell v. Harleysville Life Ins. Co., 854 F. Supp. 378, 380 (W.D. Pa. 1993), *rev'd*, 31 F.3d 1221 (1994), *and vacated*, 115 S. Ct. 1397 (1995), *aff'd in part and vacated in part*, 1995 U.S. App. LEXIS 18611 (10th Cir July 20, 1995).

Third Circuit vacated the district court's order that granted summary judgment to the defendant and remanded the case because it deemed the after-acquired evidence irrelevant at the liability stage of the case.[343] The court in *Mardell* disposed of the argument that after-acquired evidence could provide a "legitimate" reason for the contested discharge on the same basis as in *Wallace*, that the later-discovered reason was nonexistent when the decision was made.[344]

The *Mardell* court noted the Supreme Court's guidance from the *Price Waterhouse* case "that in a mixed-motives case the employers could rely only on a legitimate motive it held *at the time of the adverse employment decision*."[345] The court determined that the relevant inquiry was the "employer's subjective assessment of the plaintiff's qualifications, not the plaintiff's objective ones if unknown to the employer."[346] The Third Circuit found that the plaintiff had standing to sue based upon the language and intent of the federal statutes.[347] The 1991 Civil Rights Act more than reinforced this concept because the statute reaches beyond the result in *Price Waterhouse* to ensure that a plaintiff "is entitled to some relief even if the employer actually would have taken the same action at the same time absent any invidious motive."[348]

The *Mardell* opinion envisions a right to be free from discriminatory treatment on the job as separate from an employee's entitlement to the job.[349] The discriminatory treatment "results . . . in a significant injury to the victim's dignity and a demoralizing impairment of his or her self-esteem."[350]

The misconduct or application fraud of an employee does not excuse the employer's discriminatory actions, for there is an overriding public interest in enforcing these federal laws.[351] The Third Circuit refers to

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343. *Mardell*, 31 F.3d at 1228, 1240.

344. *Id.* at 1228 (citing Wallace v. Dunn Constr. Co., 968 F.2d at 1174, 1179 (9th Cir. 1992) (discussing problem with *Summers* rule is that it ignores lapse of time)).

345. *Id.* at 1229 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion)).

346. *Id.* at 1230 & n.16 (citations omitted).

347. *Id.* at 1231-32.

348. *Id.* at 1232 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075-76, codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (Supp. 1994)). Of course, in after-acquired evidence cases, the damaging information is not known to the employer at the time of the discriminatory action. The Civil Rights Act of 1991 provides for compensatory damages under Title VII for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." *Id.* at 1233 (citing 42 U.S.C. § 1981(a)(b)(3) (Supp. 1994)).

349. *Id.* at 1233. The court noted that "at-will" employees have no "property right" in their jobs and yet may pursue a federal discrimination claim. *Id.* at 1233.

350. *Id.* at 1232-33.

351. *Id.* at 1233-34.

the employer's interests as "purely private state rights" whereas the employee exerts "quasi-public federal" rights.[352]

The after-acquired evidence, while admissible at the remedies stage, must be handled carefully so as not to "affect the liability verdict."[353] The *Mardell* court sets forth guidance for the district court on the potential remedy, including that the "normal rule" for backpay to the date of judgment should generally be used to maximize its deterrent effect.[354]

The employer could use the after-acquired evidence to curtail the accumulating backpay liability at a date prior to the date of judgment if it could prove that it *would have* discovered the evidence anyway (without the lawsuit) or if it *did* discover the evidence independently of the lawsuit engendered by the discrimination.[355] The employer would also need to establish that the innocently discovered after-acquired evidence would have led to the same decision.[356] The court in *Mardell* emphasized the need to preserve management's traditional prerogatives and free choice as long as that choice does not violate the anti-discrimination statutes.[357]

D. *The First Circuit's Earlier Accord in a Related Context*

1. *Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33*[358]

The First Circuit's foray into the arena of after-acquired evidence occurred in a union hiring hall setting.[359] The case, heard before a panel that included then Chief Judge Breyer, who is now a United States Supreme Court Justice, dealt with a series of allegedly discriminatory inter-

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352. *Id.* at 1234.

353. *Id.* at 1238.

354. *Id.* at 1239. The Third Circuit cited, *inter alia*, Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (9th Cir. 1992), for this proposition. *Mardell*, 31 F.3d at 1239. Because this strong language on remedies differed from the Supreme Court's more moderate guidance in *McKennon*, the Court vacated and remanded the case back to the Third Circuit. *After-Acquired Evidence*, Daily Lab. Rep. (BNA) No. 59, at A-2 (March 28, 1995). Thereafter, the Third Circuit restricted its direction on backpay in light of McKennon. *Mardell*, 1995 U.S. App. LEXIS 18611 (10th Cir. July 20, 1995).

355. *Mardell*, 31 F.3d at 1240.

356. *Id.* Generally, this would be a termination decision and the court made clear that reinstatement may be barred based upon after-acquired evidence. *Id.*

357. *Id.*

358. 921 F.2d 396 (1st Cir. 1990).

359. *Id.*

actions between the petitioner Sabree, a black male, and Local 33 of the United Brotherhood of Carpenters and Joiners of America.[360] Only the most recent allegation was not barred by the statute of limitations, but the other allegations, which stretched back fourteen years, while not the subject of relief,[361] were referred to by the court as "circumstantial evidence of discrimination."[362]

In *Sabree*, the issue of after-acquired evidence arose because of a union district council by-law that restricted transfers within the council.[363] At the time of Sabree's third and final attempt to join Local 33 without success, Sabree was a member of another local within the district.[364] In fact, after its second rejection of Sabree, Local 33 advised him to transfer into another local within the district, thus setting him up for his future problem with the district council by-law.[365]

Two years after joining the other local union, Sabree sought once again to transfer into Local 33 and was rejected without any inquiry or discussion about his history as a union member.[366] Thereafter, the defendant sought to defend against Sabree's discrimination complaint with its after-acquired knowledge that Sabree would not have qualified for transfer because of his pre-existing membership in another union local within the district.[367]

The First Circuit found that at the time of Sabree's final attempt to transfer, the by-law was not mentioned and Local 33 did not know that the petitioner was a member of another local within the district council.[368] Thus, it was not possible for these considerations to preclude the petitioner's establishment of a prima facie case of race discrimination, as the district court had held.[369]

The First Circuit's opinion supported the principle of causation, reflecting that the employer's motivating "reasons" for an employment decision

360. *Id.* at 397-98.

361. *Id.* at 405.

362. *Id.* at 404. The court refused to consider these earlier separate allegations as a continuing violation because there was "no substantial relationship between [them]." *Id.* at 402. The plaintiff admitted that he thought he was being discriminated against throughout the long period of time in question, and thus the court characterized him as a "knowing plaintiff" who had "an obligation to file promptly or lose his claim." *Id.*

363. *Id.* at 398.

364. *Id.*

365. *Id.*

366. *Id.* Such a discussion would have related to petitioner's disqualification from intra-council transfer. *Id.*

367. *Id.* at 402-04.

368. *Id.* at 402.

369. *Id.* at 404.

must be known or evident at the "'actual moment of the event.'"[370] The court recommended taking "a snapshot" of the moment of the challenged employment decision, and refused to acquiesce to invention of "*post hoc* rationalization."[371] As in the *Price Waterhouse* case, the key to the motivation is in the defendant's mental state at the time the employment decision was made.[372] Thus, since the by-law was only "unearthed" during discovery, it could not have been a motivating factor in the defendant's decision.[373]

While the by-law could not prevent liability, the court determined that it could reduce the damages if the defendant established that Sabree's prior membership within the district council would have been discovered and that this fact would then have legitimately barred his transfer.[374] This outcome is essentially in agreement with the later decisions of the Eleventh Circuit in *Wallace*[375] and its progeny, including the Supreme Court's decision in *McKennon*.[376] Just as in *Wallace* and *McKennon*, *Sabree* bifurcated the issues of liability and remedy and did not permit the after-acquired evidence to bar plaintiff's right to prove the alleged discrimination. *Sabree* explicitly depended upon the temporal rule of causation from *Price Waterhouse*[377] for its holding that the defendant's after-the-fact evidence may reduce the damages but not prevent liability.[378]

The *Sabree* decision squarely placed the First Circuit within the group of courts that refuse to allow after-acquired evidence to protect a defendant from liability for employment discrimination. The case is also of historical importance because it predates *Wallace*, which is generally credited as the primary precedent countering the *Summers* doctrine. It is

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370. *Id.* at 403 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41 (1989)).

371. *Id.* at 404.

372. *Id.* at 403 (citing *Price Waterhouse*, 490 U.S. at 240-41).

373. *Id.* at 404.

374. *Id.* at 405.

375. *See supra* notes 280-300 and accompanying text discussing *Wallace*; *see also* Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 LAB. LAW. 43, 46 & n.21, 53 & n.59 (1993) (discussing *Sabree*).

376. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995). It is of interest that the only decision within this "camp" that apparently cited *Sabree* in support of its own opinion was Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1230 n.16 (3d Cir. 1994).

377. *Sabree*, 921 F.2d at 403 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41).

378. *Id.*

probable that *Sabree* is often overlooked as precedent because the facts of the case relate more to union by-laws than to traditional issues of application fraud or employee wrongdoing.

VIII. Determining the Remedy in Future After-Acquired Evidence Cases

A. *Related Cases: Balancing the Interests of the Parties*

Returning to a consideration of the competing interests involved in after-acquired evidence cases, such that a trial court may balance those interests and equities at the remedies stage, the *McKennon* case provides the primary paradigm. The plaintiff's misconduct in *McKennon* involved a breach of confidentiality that occurred just prior to her termination.[379] The court noted that management has an important interest in the confidentiality of its business records, and the plaintiff violated her duty of confidentiality to the employer by copying documents in her own self-interest and then showing them to her husband.[380] Plaintiff McKennon asserted as her justification for this misstep that she feared for her job.[381] Apparently, McKennon was justified in her insecurity as she was terminated shortly thereafter, although not because of her disloyal conduct.[382]

In a related mixed-motive case, *Jefferies v. Harris County Community Action Ass'n*,[383] the Fifth Circuit held that an employer's interest in protecting the confidentiality of its records outweighed an employee's right to protect her interests by opposing perceived employment discrimination.[384] In *Jefferies*, the plaintiff transmitted confidential personnel materials to the chair of the personnel committee who was also a member of the board of directors.[385] This unauthorized dissemination of the confidential personnel action form took place when the plaintiff learned

379. McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 605-06 (M.D. Tenn. 1992).

380. *See id.* at 606; see also *supra* note 38 and accompanying text.

381. *McKennon*, 797 F. Supp. at 606.

382. *Id.* at 605-06, 608. The defendant learned of McKennon's breach of confidentiality only after termination. *Id.* at 605-06.

383. 615 F.2d 1025 (5th Cir. 1980). *Jefferies* involved allegations on the basis of race and sex combined. *Id.* at 1032-35. The *Jefferies* case was subjected to a partial remand on several other issues where the district court and court of appeals affirmed the dismissal of plaintiff's suit. Jefferies v. Harris County Community Ass'n, 693 F.2d 589 (5th Cir. 1982).

384. *Jefferies*, 615 F.2d at 1036-37.

385. *Id.* at 1029.

that another (black male) employee had already been hired for a purportedly vacant position for which the plaintiff had just applied.[386]

Jefferies asserted that her misconduct was a protected activity under the "opposition clause" of the Civil Rights Act of 1964.[387] The Fifth Circuit explained that "courts have required that the employee conduct be reasonable in light of the circumstances."[388] The court concluded that Jefferies did not establish that she had a reasonable belief which would have justified her actions.[389] Just as in *McKennon*, the statutorily protected right to oppose unlawful practices did not create a right to delve into management's confidential business records and share them with others.[390]

Whether a plaintiff's wrongdoing involves such a breach of confidentiality or other misconduct, when after-acquired evidence is discovered during employment litigation, the courts, after *McKennon*, will permit the plaintiff to establish its prima facie case of discrimination before deciding whether the offense was grave enough to warrant discharge independently. Thereafter, the impact of "an error in judgment committed under fear of discriminatory discharge" on the record of an "otherwise exemplary" employee such as McKennon will be evaluated for its impact upon the remedy.[391]

A recent Connecticut decision dealing with the issue of after-acquired evidence in a wrongful termination case set forth the principle that public policy disfavors providing future wages or front pay if the employer establishes by a preponderance of the evidence that after-acquired evidence of employee misconduct would have warranted discharge.[392] This

386. *Id.*

387. *Id.* at 1036. *See* Civil Rights Act of 1964, 29 U.S.C. § 2000e - 3(a) (1988). McKennon asserted an analogous opposition defense under the ADEA. *See* McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 543 (6th Cir. 1993), *cert. granted*, 114 S.Ct. 2099 (1994), *rev'd and remanded*, 115 S.Ct. 879 (1995).

388. *Jefferies*, 615 F.2d at 1036-37.

389. *Id.*

390. *See McKennon*, 9 F.3d at 543. The Supreme Court's opinion reversing the Sixth Circuit in *McKennon* did not mention this specific issue. *See McKennon*, 115 S. Ct. at 879. As discussed above, the dissemination of confidential business records amongst other employees may cause more harm internally than when an employee seeks advice only from her spouse, as occurred in *McKennon*. *See supra* note 9.

391. *See* Mills, *supra* note 24, at 1534 (discussing problem with Sixth Circuit's application of *Summers* rule in *McKennon*).

392. Preston v. Phelps Dodge Copper Products Co., 647 A.2d 364, 369 (Conn. App. 1994). The complaint alleged claims at common law under both contract and tort theories. *Id.* at 366. There were no statutory discrimination claims. *Id.*

case is of interest because it illustrates the carryover of federal remedial doctrines from statutory employment discrimination cases to employment litigation decided under state common law. In *Preston v. Phelps Dodge Copper Products Co.*, the appellate court ruled that the jury should have been instructed to determine whether and when the termination would have occurred, so that damages could be appropriately adjusted.[393] The Connecticut court noted that the issue was one of first impression in Connecticut, but it interpreted federal precedent from the Sixth, Tenth, and Eleventh Circuits as allowing after-acquired evidence to affect relief.[394]

The after-acquired evidence in the *Preston* case involved an unusual incident where plaintiff, due to his dissatisfaction with his employer, put poison ivy on a toilet seat and stall in the lavatory used by the plant and personnel managers.[395] Preston warned three friends not to use that facility, but failed to warn the plant manager who incurred a severe allergic reaction as a result.[396] Other evidence in the case established that plaintiff functioned as a whistleblower with respect to safety issues and that the "plaintiff was discharged because of his persistent complaints about safety."[397] There was no indication of impropriety on the plaintiff's part with regard to this latter activity, and he sustained significant emotional and economic injuries from the discharge.[398]

The Connecticut Court of Appeals weighed the circumstances and concluded that the poison ivy episode was unrelated to Preston's discharge.[399] Consequently, that misconduct did not change the illegality of the termination, but the remedy may be reduced "depending on when the after acquired evidence was discovered and how it would have affected the employment relationship."[400] With respect to the award of future earnings, the court placed upon the plaintiff the burden of proving that "but for the wrongful discharge, he would still be employed and that he would have remained with his employer for a period of years."[401] The

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393. *Id.* at 368, 370.

394. *Id.* at 369 (concluding that after-acquired evidence in statutory employment cases was relevant to relief).

395. *Id.* at 366.

396. *Id.*

397. *Id.* Plaintiff's positions included responsibility for quality assurance and later, laboratory safety and maintenance. *Id.* Thus, the complaints in question were within his job description as well as legal rights in accordance with public policy. *See id.*

398. *Id.*

399. *Id.* at 369. The misconduct was not known to defendant until after plaintiff's discharge. *Id.* at 366.

400. *Id.* at 367.

401. *Id.* Thus future earnings may be curtailed if the trier of fact finds that Preston's employment would have been terminated (anyway) upon discovery of the after-acquired evidence. *Id.*

rule of damages derived from breach of contract theory that would place the nonbreaching party "in the same position as he would have been in had the contract been performed."[402] The court remanded the case to the trial court to determine the damage issue.[403]

After *McKennon*, in after-acquired evidence cases involving statutory employment discrimination, once liability is proven, the burden of proof regarding the cut off of backpay would rest upon the defendant employer. If the employer establishes that the employee would have been terminated anyway because of the after-acquired evidence, then backpay should be awarded up until the date when the evidence would have been discovered absent the lawsuit, to the date of discovery of the evidence, or to the date of judgment, depending upon the equities of the case.

B. EEOC Guidance

On July 14, 1992, the EEOC issued guidelines reversing its earlier position that after-acquired evidence of employee wrongdoing could bar reinstatement and backpay.[404] The agency vested with the administration and enforcement of Title VII and the ADEA moved to reject the strict *Summers* rule that after-acquired evidence could bar all liability.[405] Rather, such evidence may be used to preclude reinstatement and to alter the measure of damages.[406] The Seventh Circuit's measure of damages from *Kristufek*, permitting the date of discovery of the incriminating

402. *Id.* (citations omitted). This rule is somewhat analogous to that stated as a guiding principle on remedies in statutory employment discrimination cases, that of placing the victim of discrimination in the place that he or she would have been in absent the discrimination. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975) (involving race discrimination suit based on violations of Civil Rights Act of 1964).

403. *Preston*, 647 A.2d at 370.

404. *See* EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory, reprinted in 8 Fair Empl. Prac. Man. (BNA) 405: 6925-28 (July 7, 1992) [hereinafter, Revised Enforcement Guide]. This 1992 guidance revised the agency's earlier approach that limited an employee's recovery to attorney's fees. *See* Equal Employment Opportunity Comm'n, Policy Guidance No. N-915.063, 1991 WL 70108 at *8 (Mar. 7, 1991) [hereinafter, 1991 EEOC Guidance]. The 1991 EEOC Guidance cited and generally agreed with *Summers*. *Id.* at *8-9.

405. *See* Mills, *supra* note 24, at 1551 & n.179.

406. *See* Richard G. Steele, *Rethinking the After-Acquired Evidence Defense in Title VII Disparate Treatment Cases*, 46 HASTINGS L.J. 243, 274 (1994) (discussing Revised Enforcement Guide, *supra* note 404).

evidence to terminate the accumulation of backpay, was endorsed in the 1992 Revised Enforcement Guide.[407]

In a later memorandum to agency attorneys, the EEOC's General Counsel stated that "[a]fter-acquired evidence is not relevant to liability because it could not have been a factor in employer decision making."[408] Accordingly, a plaintiff in an after-acquired evidence case could be entitled to backpay and compensatory damages up to the date of discovery, and perhaps to punitive damages if the employer's conduct is egregious and covered by the 1991 amendments to the Civil Rights Act.[409]

It is noteworthy that the EEOC's position and guidance are not cited in *Wallace*, *Kristufek*, *Mardell* or in the Supreme Court's *McKennon* opinion. The *amici curiae* brief filed by the Justice Department and the EEOC in *McKennon* cites the 1992 Revised Enforcement Guidance and recommends "terminating backpay on the date that after-acquired evidence would have resulted in such a [lawful] discharge."[410] Yet the brief also refers to the *Wallace* remedy,[411] and, in discussing the employer's burden on its affirmative defense relating to the curtailment of the remedy, the brief states that the employer would:

> ordinarily be required to show that other employees, who had not been the objects of discrimination, had been terminated for similar reasons. Nor should an employer be able to escape liability for backpay by relying upon evidence of misconduct that the employer did not discover in the ordinary course of business, but that was unearthed during a search of the employee's record or background that was inspired by, and designed as a response to, the employee's discrimination allegations.[412]

This language appears to interject that the employer should establish that it would have discovered the evidence without the lawsuit. Thereafter, the U.S. and EEOC Brief asserts that, if the trial court, upon remand,

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407. *See* Revised Enforcement Guide, *supra* note 404, at 405: 6926; *supra* notes 301-18 and accompanying text discussing *Kristufek; see also* Zemelman, *supra* note 24, at 204. Where the discovery date is not known, the EEOC recommends reducing damages "based upon an assessment of the approximate date of discovery." Revised Enforcement Guide, *supra* note 404, at 6926 n.27; *see also* Babb, *supra* note 30, at 1963 & n.148.

408. *See* EEOC Office of General Counsel, *Revised EEOC General Counsel's Memo on Civil Rights Act of 1991*, reprinted in Daily Lab. Rep. (BNA) F-1 (Mar. 4, 1993).

409. *See* Babb, *supra* note 30, at 1970; Follette, *supra* note 33, at 663.

410. *See* U.S. & EEOC Brief, *supra* note 43, at D-8 (citing Kristufek v. Hussman Foodservice Co., 985 F.2d 364 (7th Cir. 1993)).

411. U.S. & EEOC Brief, *supra* note 43, at D-8 n.17 (requiring employer to prove that it would have discovered the after-acquired evidence in the absence of the allegedly unlawful acts and the litigation, in order to cut-off backpay) (citing Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992), *vacated*, 32 F.3d 1489 (11th Cir. 1994), *rev'd in part*, 62 F.3d 374 (11th Cir. 1995)).

412. U.S. & EEOC Brief, *supra* note 43, at D-8.

finds that McKennon's discharge was discriminatory, "but that she thereafter would have been lawfully discharged based on after-acquired evidence, the court would then have discretion to deny reinstatement and terminate backpay as of the date the discharge would have occurred absent discrimination."[413] This latter recommendation carefully avoids the issue of how the after-acquired evidence came to light. Overall, the recommendation of the Justice Department and the EEOC in its *McKennon* brief regarding the cut-off of backpay is confusing. It straddles the 1992 Revised Enforcement Guidance, but peers wistfully at the make-whole relief envisaged in *Albemarle* and *Wallace*.[414]

The EEOC's recommendations on the use of after-acquired evidence generally have not had a great impact on the judicial outcomes, and the agency's guidance in this area has been criticized by some commentators.[415] In particular, the entitlement to compensatory damages under the 1991 amendments to Title VII arguably should not be terminated as of the date of discovery of the after-acquired evidence, as the EEOC Revised Enforcement Guidelines apparently advocate.[416] While the EEOC's position should be taken into account by the federal district courts, which are vested with the authority to order remedies in these cases, the Supreme Court's guidance from *McKennon* should provide the principal direction.[417]

413. *Id.* at D-9.

414. *Id.* at D-8 & n.17 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); *Wallace*, 968 F.2d at 1182)).

415. *Compare* Steele, *supra* note 406, at 274; Zemelman, *supra* note 24, at 204-06 (criticizing EEOC) *with* Follette, *supra* note 25, at 663, 667, 670 (recommending deferral to EEOC Guidance); R. Shaw Wellons, *Plaintiff's Bane: The After-Acquired Evidence Defense and Title VII Discrimination Suits*, 29 WAKE FOREST L. REV. 1325, 1354-55 (1994) (urging Supreme Court to adopt EEOC position); Mills, *supra* note 24, at 1551-57 (generally recommending EEOC Guidelines but pointing out some defects).

416. Mills, *supra* note 24, at 1553; *see also* Zemelman, *supra* note 24, at 206. "[P]ersonal injuries" including emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life "do not cease on the date an employer discovers after-acquired evidence." Zemelman, *supra* note 17, at 206. In addition to the previously available remedies of reinstatement, backpay, front pay, injunctive relief, prejudgment interest and attorney's fees, the 1991 Civil Rights Act added the availability of compensatory and punitive damages with caps based upon the size of the employer. *See* 42 U.S.C. § 1981a(b)(2)(3) (Supp. III 1991). For a concise summary of the damages available pursuant to the 1991 amendments, see Parker, *supra* note 24, at 425-26 & nn.137-41.

417. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 886-87 (1995).

C. *Supreme Court Guidance*

The *McKennon* Court specifically noted that it could not "require the employer to ignore the [after-acquired] information . . . even if the information might have gone undiscovered absent the suit."[418] However, the Court prefaced its discussion by referencing the interests and equities that must be balanced in determining the proper measure of backpay.[419]

The language that "[t]he *beginning point* in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered,"[420] might be interpreted to encourage the trial courts to award backpay beyond that point in instances where it is warranted. This construction is reinforced by the next sentence of the opinion, which sets forth that "the court can consider taking into further account [in determining the appropriate relief] extraordinary equitable circumstances that affect the legitimate interests of either party."[421] Certainly the Court anticipated that the trial courts would exercise their discretion based upon their evaluation of the facts and equities in each case.[422]

D. *Analysis and Recommendations*

Once liability for employment discrimination is ascertained, the employer may use after-acquired evidence of employee wrongdoing to establish that, if it had known of the wrongdoing, it would have terminated the employee on those grounds alone.[423] If the employer is successful at that stage, the remedies of reinstatement and front pay will be unavailable,[424] but backpay need not be curtailed as of the discovery date of the after-acquired evidence in every case. This is so because such a rule would reward the employer for its wrongdoing where the evidence would not have been discovered absent the discrimination lawsuit. The egregiousness of the wrongdoing and its nexus to the plaintiff's employment and to the discrimination must be considered, as well as the harm suffered by the employer as a result of the wrongdoing.

In the *McKennon* case, arguably, an exemplary employee of nearly four decades would hardly have violated confidentiality if she had not been a victim of the defendant's discrimination. While the courts should be

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418. *Id.* at 886; *see supra* notes 88-105 and accompanying text discussing fully remedial guidance from *McKennon.*
419. *McKennon,* 115 S. Ct. at 886.
420. *Id.* (emphasis added).
421. *Id.*
422. *See id.*
423. *See id.* at 886-87.
424. *See id.* at 886.

loathe to overlook employee breaches of duty, they should also weigh the harm to the employer resulting from the plaintiff's breach of duty. In *McKennon*, the harm to the employer was de minimis. As was noted earlier, Justice Stevens reportedly reflected at the close of oral arguments in the case, "[t]he result is a severe one for McKennon but did not cause even a nickel of damages for the Banner. At worst, she told a corporate secret to her husband."[425] Of course, the courts should be mindful that their resolution of the two wrongs in these cases will ultimately impact upon the future conduct of both employers and employees.

It is unlikely that the Banner would have discovered McKennon's wrongdoing absent the lawsuit. Thus, but for the discrimination, she would not have been discharged. This is the premise upon which *Wallace* and *Mardell* required the employer to establish that the after-acquired evidence would have been discovered anyway, absent the lawsuit, in order to curtail backpay prior to the date of judgment.[426] This rule more nearly places the victim of discrimination in the place that he or she would have been in absent the discrimination,[427] rather than using the actual date of discovery of the information.[428]

Certainly, the use of the actual date of discovery is a more convenient rule than the "would have been discovered anyway" rule. However, con-

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425. *Justices Debate*, *supra* note 12, at AA-3; *see also supra* note 20 and accompanying text.

426. See *supra* notes 280-300 and 319-57 and accompanying text for discussion of these cases. The *McKennon* case is distinguishable from the facts in *Wallace* and *Mardell* which both involved application fraud. As Judge Godbold noted in his dissent in the *Wallace* case, such false application claims should be categorized and treated differently from those involving mere employee wrongdoing in a rightfully obtained position. Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1186-87 (11th Cir. 1992). The Eleventh Circuit's subsequent *en banc* decision made clear that the same logic applies to both classes of cases. *Wallace*, 63 F.3d 374 (11th Cir. 1995). Nonetheless, both groups of employees who are "guilty of undiscovered misconduct work on borrowed time," as one commentator aptly phrased the situation. Wellons, *supra* note 415, at 1355.

427. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).

428. The use of the actual date of discovery may be appropriate in some cases, e.g., where the employee's wrongdoing is egregious in nature or extent. Although the NLRB used this standard in *John Cuneo, Inc.*, 298 NLRB Dec. (CCH) ¶ 16, 123 (1990), the facts in that case involved serious employee wrongdoing, a willful, deliberate, and intentional misstatement of employment history that resulted in a hiring that would not otherwise have occurred. The Board there sought to avoid an "undue windfall" to either side. *Id.* For another discussion of the after-acquired evidence doctrine, see Kenneth R. Davis, *The After-Acquired Evidence Doctrine: A Dubious Defense in Employment Discrimination Cases*, 22 PEPP. L. REV. 365 (1995).

venience is not the sole concern where important statutory rights have been violated. Placing a burden of proof on the employer on this issue sends a message that discrimination is not lightly tolerated, and that a defendant's wrongdoing will not inadvertently bear fruit by allowing the after-acquired evidence from pre-trial discovery to automatically cut off the accrual of backpay. An outcast employee is often the proverbial David seeking retribution against a Goliath with far greater financial and legal resources to combat litigation. The remedy should fit the injuries in these cases and neither party should be entitled to escape the consequences of misconduct.

IX. CONCLUSION

The purposes and policies behind the federal labor and employment laws include balancing the inequalities between employers and the employed, as well as the inequalities between the employees themselves. These purposes are well served when plaintiffs come forward to process legitimate complaints of statutory violations and are rewarded for telling the whole truth. The after-acquired evidence doctrine, promulgated in the *Summers* case, and adopted by a majority of the federal circuit courts of appeals, permitted after-acquired evidence of employee wrongdoing to bar liability for defendant employers in employment discrimination cases where the after-acquired nondiscriminatory reason for termination would have independently resulted in discharge.

The United States Supreme Court in *McKennon* clarified that after-acquired evidence may not establish a legitimate "reason" for a termination that will bar liability for employment discrimination. After-acquired evidence, lacking temporal propinquity to the decision, could not have even partially motivated the decision, and thus these cases may not be analyzed as mixed-motive cases. If the employer who is found liable for employment discrimination proves that the after-acquired grounds for termination alone would have resulted in discharge, then reinstatement and front pay will not be available as remedies. Backpay may terminate as of the discovery date of the after-acquired evidence that provided the employer with an independent, nondiscriminatory reason for discharge. Where the facts and equities dictate, backpay may extend to the date when the after-acquired information would have been discovered anyway (absent the lawsuit) or to the date of judgment. Other compensatory and punitive damages,[429] attorney's fees, and prejudgment interest may also be awarded. The trial courts are vested with discretion to balance the interests and equities of the parties once the facts are determined.

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429. Under Title VII compensatory and punitive damages are available for causes of action occurring after 1991. *See supra* note 416.