PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 22 | Issue 2 Article 1

1-15-1995

The After-Acquired Evidence Doctrine: A Dubious Defense in Employment Discrimination Cases

Kenneth R. Davis

The After-Acquired Evidence Doctrine: A Dubious Defense in Employment Discrimination Cases

Kenneth R. Davis*

I. INTRODUCTION

When a fired employee charges his former employer with discriminatory termination, the employer may have a partial or complete defense, even if the employer violated civil rights law. Such a defense arises if, during the litigation, the employer discovers evidence of employee misconduct that would have provided legal grounds for firing the employee. Based on this "after-acquired evidence," courts often grant summary judgment in favor of the employer, avoiding a trial on the discrimination claim.[1]

The after-acquired evidence doctrine applies principally in two factual contexts: First, in refusal to hire cases,[2] and second, in wrongful discharge cases, where such evidence either shows serious employee misconduct on the job,[3] or employee misrepresentation of qualifications[4]

---

* Assistant Professor of Legal & Ethical Studies, Fordham University School of Business Administration; B.A., 1969, State University of New York at Binghamton; M.A., 1971, University of California at Long Beach; J.D., 1977, University of Toledo College of Law.

1. *See infra* note 9 and accompanying text.

2. *See, e.g.*, Smallwood v. United Air Lines, Inc., 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984) (commercial pilot); Puhy v. Delta Air Lines, Inc., 833 F. Supp. 1577 (N.D. Ga. 1993) (commercial pilot and flight engineer); Kravit v. Delta Air Lines, Inc., 60 Fair Empl. Prac. Cas. (BNA) 994 (E.D.N.Y. 1992) (airline customer services agent); Punahele v. United Air Lines, Inc., 756 F. Supp. 487 (D. Colo. 1991) (ramp service employee).

3. *E.g.*, McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993) *cert. granted*, 114 S. Ct. 2099 (1994) (removal of confidential company files); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) (falsification of company records); Malone v. Signal Processing Technologies, Inc., 826 F. Supp. 370 (D. Colo. 1993) (sexual misconduct and removal of confidential company files); Smith

on a job application.[5] Nearly all courts and administrative agencies that have confronted this issue[6] have acknowledged the relevance of after-

---

v. Equitable Life Assurance Co., 60 Empl. Prac. Dec. ¶ 42,001 (S.D.N.Y. 1993) (falsification of insurance application); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992) (removal of confidential company files); Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992) (removal of confidential company files); Lohmann v. Towers, Perrin, Forster, & Crosby, Inc., 8 Indiv. Empl. Rts. Cas. (BNA) 696 (S.D. Tex. 1992) (improperly obtaining and disclosing electronic mail messages); Printon v. Sterling Nat'l Bank, No. 87 Civ. 4640 (JMC), 1990 U.S. Dist. LEXIS 912 (S.D.N.Y. Jan. 31, 1990) (violation of banking laws); Proulx v. Citibank, N.A., 681 F. Supp. 199 (S.D.N.Y. 1988) (habitual lateness).

4. This practice is known as "resume fraud."

5. *E.g.*, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3371 (U.S. Oct. 24, 1994) (No. 94-742) (misrepresentation of having college education and employment experience); Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994) (concealment of prior discharge); O'Driscoll v. Hercules, Inc., 12 F.3d 176 (10th Cir. 1994) (misrepresentation of age); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993) (misrepresentation of educational qualifications); Dotson v. U.S. Postal Serv., 977 F.2d 976 (6th Cir. 1992) (concealment of medical condition and prior employment discharges for cause); Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302 (6th Cir. 1992) (concealment of drunken driving conviction), *cert. granted*, 113 S.Ct. 2991 (1993); Johnson v. Honeywell Info. Systems, Inc., 955 F.2d 409 (6th Cir. 1992) (misrepresentation of education); Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992) (concealed convictions for criminal trespass and third degree assault); *Smallwood*, 728 F.2d 614 (concealment of misconduct at former job); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993) (misrepresentation of prior job dismissal for sexual harassment); Moodie v. Federal Reserve Bank of New York, 831 F. Supp. 333 (S.D.N.Y. 1993) (concealment of prior discharge); Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D. Va. 1993) (concealment of lay off from prior job); Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992) (misrepresentation of college education); DeVoe v. Medi-Dyn, Inc., 782 F. Supp. 546 (D. Kan. 1992) (concealment of credit problems and domestic problems); Redd v. Fisher Controls, 814 F. Supp. 547 (W.D. Tex. 1992) (concealment of third degree theft conviction); Punahele v. United Air Lines, Inc., 756 F. Supp. 487 (D. Colo. 1991) (concealment of tardiness record of former employer); Churchman v. Pinkerton's, Inc., 756 F. Supp. 515 (D. Kan. 1991) (concealment of prior drug use and two instances of discharge for cause); Benson v. Quanex Corp., 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. 1992) (concealment of robbery conviction and aspects of employment history); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989) (concealment of felony conviction and aspects of employment history); Livingston v. Sorg Printing Co., 49 Fair Empl. Prac. Cas. (BNA) 1417 (S.D.N.Y. 1989) (misrepresentation of prior employment history and experience); Jordan v. Johnson Controls, Inc., 9 Indiv. Empl. Rts. Cas. (BNA) 302 (Tex. Ct. App. 1994) (concealment of armed robbery conviction).

6. In workers' compensation cases many courts require that, to bar recovery, after-acquired evidence of employee misconduct must bear a causal connection to the injury, such as where an employee, on his job application, misrepresents his medical condition and later seeks Workers' Compensation for an injury precipitated by that condition. *See, e.g.*, Rowland v. Carriers Ins. Co., 738 S.W.2d 183 (Tenn. 1987). For a discussion of the doctrine's application to Worker's Compensation cases, see generally Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an*

acquired evidence of employee misconduct to discrimination claims.[7] However, courts have mainly followed two approaches in determining what effect the after-acquired evidence should have on a discrimination case.[8]

Most courts grant summary judgment and deny the employee any remedy[9] if the employer can prove, sometimes by patently self-serving

---

Employee's Termination as a Defense in Employment Litigation, 24 SUFFOLK U. L. REV. 1, 21-23 (1990).

7. One court has interpreted *Summers* broadly, holding that evidence of employee misconduct arising *after* notice of termination may mitigate the damages available to the employee alleging wrongful discharge. Boynton v. Vallas, No. 92C140, 1994 WL 163849, at *1 (N.D. Ill. Apr. 29, 1994). However, several cases have rejected using after-acquired evidence as a complete or partial defense. *E.g.*, Doe v. Marshalls, Inc., No. Civ. 393267, 1994 WL 66061, at *3 (D. Minn. Jan. 10, 1994) (specifically rejecting the use of after-acquired evidence as proposed in both *Summers* and *Wallace*); Lohmann v. Towers, Perrin, Forster & Crosby, Inc., 8 Indiv. Empl. Rts. Cas. (BNA) 696, 697 (S.D. Tex. 1992) (categorically rejecting after-acquired evidence doctrine in any form); McPartland v. American Broadcasting Co., Inc., 623 F. Supp. 1334, 1344 (S.D.N.Y. 1985) (entertaining possibility of awarding discharged employee reinstatement despite after-acquired evidence of material resume fraud).

8. *See infra* notes 9-14, 18-20 and accompanying text.

9. *E.g.*, O'Driscoll v. Hercules, Inc., 12 F.3d 176, 180-81 (10th Cir. 1994); McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 543 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 415 (6th Cir. 1992); Washington v. Lake County, Ill., 969 F.2d 250, 257 (7th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 709 (10th Cir. 1988); Alexander v. Unified School Dist. No. 259, No. 92-1550-PFK, 1993 WL 544279, at *1 (D. Kan. Dec. 30, 1993); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1238 (3d Cir. 1994) (denying availability of summary judgment for employer based on after-acquired evidence); Russell v. Microdyne Corp., 830 F. Supp. 305, 308 (E.D. Va. 1993); Van Deursen v. United States Tobacco Sales and Mktg. Co., 839 F. Supp. 760, 764 (D. Colo. 1993); Bonger v. American Water Works, 789 F. Supp. 1102, 1107 (D. Colo. 1992); Kravit v. Delta Air Lines, Inc., 60 Fair Empl. Prac. Cas. (BNA) 994, 997 (E.D.N.Y. 1992); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 521 (D. Kan. 1991); Livingston v. Sorg Printing Co., 49 Fair Empl. Prac. Cas. (BNA) 1417, 1419 (S.D.N.Y. 1989); Jordan v. Johnson Controls, Inc., No. 05-93-00132-CV, 1994 WL 65650, at *6 (Tex. Ct. App. Feb. 23, 1994). *But see* Kristufek v. Hussmann Food Service Co., 985 F.2d 364, 370 (7th Cir. 1993) (reinstating jury verdict, after district court granted employer's motion for judgment NOV because no question of fact existed as to whether after-acquired evidence of resume fraud was material); *contra* Turnes v. AmSouth Bank, 36 F.3d 1057 (11th Cir. 1994) (denying motion for summary judgment so that finder of fact could determine whether defendant would have discovered after-acquired evidence and would not have hired plaintiff based on that evidence); Conlin v. Mission Foods Corp., 850 F. Supp. 856, 861 (N.D. Cal. 1994) (denying motion for summary judgment because employee made no misrepresentations); Malone v. Signal Processing Technologies, Inc., 826 F. Supp. 370, 376 (D. Colo. 1993) (denying

attestations,[10] that it would have fired the employee,[11] would not have hired the employee,[12] or both,[13] if it had learned of the misconduct.[14]

---

motion for summary judgment because question of fact existed as to whether employee would have been fired if employer had known of after-acquired evidence); Moodie v. Federal Reserve Bank of New York, 831 F. Supp. 333, 335 (S.D.N.Y. 1993) (denying motion for summary judgment because questions of fact existed as to whether employer would not have hired and would have fired employee if it had known of after-acquired evidence); Smith v. Equitable Life Assurance Soc'y, 60 Fair Empl. Prac. Cas. (BNA) 1225, 1227 (S.D.N.Y. 1993) (holding that summary judgment should never be granted based on after-acquired evidence); DeVoe v. Medi-Dyn, Inc., 782 F. Supp. 546, 553 (D. Kan. 1992) and Punahele v. United Air Lines, Inc., 756 F. Supp. 487, 491 (D. Colo. 1991) (denying motions for summary judgment because questions of fact existed as to whether employer would not have hired plaintiff if it had known of after-acquired evidence).

10. *E.g.*, *Hercules*, 12 F.3d at 180 (relying on affidavits of managers swearing that employee would have been fired for misrepresenting her age and related matters, despite employee's showing that employer had not dismissed others for similar improprieties); *Bonger*, 789 F. Supp. at 1107 (admitting that the declarations in the affidavits of employer's witnesses submitted on motion for summary judgment that employee would have been fired for falsely asserting that she had college education were self-serving and questionable in light of employee's uniformly positive evaluations, but nevertheless granting the motion because the statements stood unrebutted); *Pinkerton's*, 756 F. Supp. at 521 (crediting conclusory affidavits that employee would have been fired for falsely denying past use of drugs and concealing two instances of termination); *contra* Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1406 (8th Cir. 1994) (reversing district court's grant of summary judgment because self-serving affidavit failed to meet "substantial burden" test).

11. *See, e.g.*, *Hercules*, 12 F.3d at 179 (resume fraud); McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 541 (6th Cir. 1993) *cert. granted*, 114 S. Ct. 2099 (1994) (job misconduct); Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992) (resume fraud); *State Farm*, 864 F.2d at 703 (job misconduct); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp 1466, 1468 (D. Ariz. 1992) (job misconduct); Benson v. Quanex Corp., 58 Fair Empl. Prac. Cas. (BNA) 743, 745 (E.D. Mich 1992) (resume fraud).

12. *See, e.g.*, Turnes v. AmSouth Bank, 36 F.3d 1057 (11th Cir. 1994) (reversing summary judgment for defendant to allow finder of fact to determine whether it would not have hired plaintiff based on after-acquired evidence); Smallwood v. United Air Lines, Inc., 728 F. 2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984) (reversing judgment for plaintiff after trial because after-acquired evidence established that defendant would not have hired him).

13. *E.g.*, *Honeywell*, 955 F.2d at 415; *Johnson Controls*, 1994 WL 65650, at *6; *Harleysville*, 1993 WL 661152, at *6.; Van Deursen v. United States Tobacco Sales and Marketing Co., 839 F. Supp. 760, 764 (D. Colo. 1993); *Moodie*, 831 F. Supp. at 335; Redd v. Fisher Controls, 814 F. Supp. 547, 551 n. 2 (W.D. Tex. 1992); *Microdyne*, 830 F. Supp. at 307; *Pinkertons'*, 756 F. Supp. at 521; Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 994 (D. Kan. 1989).

14. In discussing the distinctions between the "would not have hired test" and the "would have fired" test, the court in Washington v. Lake Co., Ill., 969 F.2d 250, 256 (7th Cir. 1992) observed that, although the "would not have hired" test may be appropriate in refusal to hire cases, the "would have fired" test is appropriate in wrongful discharge cases. The court in Massey v. Trump's Hotel & Casino, 828 F. Supp.

This approach tempts employers to manufacture evidence showing that they would have fired the employee if they had known of his misconduct.[15] Even more distressing, this approach excuses employer discrimination based on an employee's breach of contract. It confuses the employer's right to rescind the contract with license to commit independent civil wrongs against the employee and violate duties to the employee which arise, not out of the employment contract, but rather from federal law and public policy.[16]

A minority of courts apply the doctrine to preclude awards of front pay and reinstatement but allow an employee to recover backpay until the date the employer would have discovered the employee misconduct independent of the discrimination suit.[17] Like the majority position, this approach[18] requires the employer to show that it either would not have

---

314, 323 (D.N.J. 1993), concurring with the reasoning in *Washington*, concluded that "[t]he inquiry in employment discrimination cases must focus on whether the employer would have made the same employment decision," whether that decision was the refusal to hire or the termination of employment. Although the *Massey* court's view is reasonable, other courts have applied both tests in resume fraud discharge cases. *See, e.g., Honeywell*, 955 F.2d at 415; *Van Deursen*, 839 F. Supp. at 763; *Redd*, 814 F. Supp. at 553. Similarly, although the "would not have hired" test seems particularly suited to refusal to hire cases, see for example, *Smallwood*, 728 F.2d at 626, some courts have applied this test in wrongful discharge cases. *See, e.g.*, DeVoe v. Medi-Dyn, Inc., 782 F. Supp. 546, 553 (D. Kan. 1992); Punahele v. United Air Lines, Inc., 756 F. Supp. 487, 491 (D. Colo. 1991).

15. *See infra* notes 196-200, 251 and accompanying text.

16. *See infra* notes 168-78 and accompanying text.

17. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *reh'g granted*, No. 91-7406, 1994 WL 481439 (Sept. 6, 1994). This case will be used throughout this Article as representative of the minority approach, although the 11th Circuit has vacated the opinion and granted a rehearing en banc. Since other jurisdictions have adopted the *Wallace* position, it will likely continue to have adherents even if the 11th Circuit repudiates it. *See* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 324 (D.N.J. 1993) (expressly following *Wallace*). For other cases following the minority approach, see Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3371 (U.S. Oct. 24, 1994)(No. 94-742); Puhy v. Delta Air Lines, Inc., 833 F. Supp. 1577 (N.D. Ga. 1993); Proulx v. Citibank, N.A., 681 F. Supp. 199, 203, (S.D.N.Y. 1988).

18. In wrongful discharge cases, this approach provides a partial defense, since the employee is entitled to backpay until the date the employer would have discovered the after-acquired evidence independent of the discrimination lawsuit. *Wallace*, 968 F.2d at 1182; *Massey*, 828 F. Supp. at 324; Proulx v. Citibank, N.A., 681 F. Supp. 199, 203 (S.D.N.Y. 1988). In refusal to hire cases, this approach might provide a complete defense. If the employer would have discovered the after-acquired evidence through its customary procedures to investigate prospective employees at the application

hired[19] or would have fired the employee if it had known of the misconduct.[20] Although avoiding the shortcomings of the majority approach, this formulation suffers from the fault of requiring the employer to prove the essentially unprovable—that it would have learned of the misconduct, even if the discharged employee had not brought the discrimination suit. To prevail, the employer must even prove when it would have learned of the misconduct.[21]

Some jurisdictions have cases siding with either the majority or minority position.[22]

A third approach, which has enlisted disappointingly little support, discontinues the aggrieved employee's right to backpay from the date the employer *actually* discovers the after-acquired evidence.[23] This position, although inexplicably unpopular with the courts, affords the aggrieved employee a remedy; yet, the employer is not burdened with having to prove vexing hypotheticals.

---

stage, the employer would never have offered the job to the employee. Hence the employee, even if a victim of discrimination, is not entitled to any backpay. *See, e.g., Smallwood*, 728 F.2d at 626; *Puhy*, 833 F. Supp. at 1582.

19. Turnes v. AmSouth Bank, 36 F.3d 1057 (11th Cir. 1994); *Smallwood*, 728 F.2d at 626; *Puhy*, 833 F. Supp. at 1582.

20. *Mardell*, 31 F.3d at 1240; *Wallace*, 968 F.2d at 1181 n.11; *Massey*, 828 F. Supp. at 327; *Proulx*, 681 F. Supp. at 203.

21. *Proulx*, 681 F. Supp. at 203.

22. *Compare* Kravit v. Delta Air Lines, Inc., No. CV-92-0038, 1992 WL 390236, at *3 (E.D.N.Y. Dec. 4, 1992) (expressly following *Summers* and distinguishing *Wallace* in a refusal to hire case) *with Proulx*, 681 F. Supp. at 203 (adopting the *Wallace* approach); *compare* Redd v. Fisher Controls, 814 F. Supp. 547, 551 (W.D. Tex. 1992) (expressly following *Summers*) *with* Lohmann v. Towers, Perrin, Forster & Crosby, Inc., No. Civ. A-H-91-3586, 1992 WL 548195, at *1 (S.D. Tex. Oct. 28, 1992) (categorically rejecting use of after-acquired evidence as a defense to wrongful a discharge claim).

23. *Compare* Kristufek v. Hussmann Foodservice Co., 985 F.2d 364,371 (7th Cir. 1993) (applying date of discovery test) [*and*] Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2 (7th Cir. 1989) (suggesting in dicta that the court might follow this approach) *with* Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992) (following *Summers* approach); *see also* Printon v. Sterling Nat'l Bank & Trust Co., No. 87-C4690, 1990 U.S. Dist. LEXIS 912, at *18 (S.D.N.Y. Jan. 31, 1990) (stating that the plaintiff should not be barred from recovering damages for the period prior to defendant's discovery of the alleged misconduct, but not clarifying whether such discovery must be from a source independent of the discrimination lawsuit). The NLRB has adopted this approach in unfair labor practice cases. *See, e.g.*, John Cuneo, Inc., 298 N.L.R.B. 856 (1990) (observing that "we must balance our responsibility to remedy the respondent's unfair labor practice against the public interest in not condoning Brite's falsification of his employment application"); Axelson, Inc., 285 N.L.R.B. 862 (1987) (limiting backpay award to wrongfully discharged strikers to the date after-acquired evidence of strike misconduct discovered); AA Superior Ambulance Serv., 292 N.L.R.B. 835 (1989) (following *Axelson*). For a discussion of the application of the doctrine in labor cases, see generally Rubinstein, *supra* note 6, at 1-21.

This article will trace the development of the after-acquired evidence doctrine. Analyzing the doctrine's first application in *Smallwood v. United Air Lines, Inc.*,[24] it will examine how the doctrine was expanded in *Summers v. State Farm Mutual Automobile Insurance Co.*,[25] and applied in *Johnson v. Honeywell Information Systems, Inc.*,[26] *Washington v. Lake County, Illinois*,[27] and *Welch v. Liberty Machine Works, Inc.*[28] It will discuss the use of after-*created* evidence,[29] and the applicability of after-acquired evidence to sexual harassment cases.[30] It will then criticize the *Summers* formulation[31] and discuss why that formulation was rejected in *Wallace v. Dunn Construction Co.*[32] and *Mardell v. Harleyville Insurance Co.*[33] After pointing out the weaknesses of the *Wallace* position,[34] the article will suggest, as an alternative to the *Summers* and *Wallace* approaches, that after-acquired evidence should bar a plaintiff's right to backpay only after the date the employer actually discovers the evidence.[35]

II. DEVELOPMENT OF THE DOCTRINE

The origin of the doctrine may be traced to *Smallwood v. United Airlines, Inc.*,[36] which held, under limited circumstances, that after-acquired evidence barred a civil rights action. Subsequent decisions, most notably *Summers v. State Farm Mutual Insurance Co.*,[37] have transformed the doctrine into a pervasive and formidable defense.

---

24. 728 F.2d 614 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984); *see infra* notes 36-61 and accompanying text.
25. 864 F.2d 700 (10th Cir. 1988); *see infra* notes 62-83 and accompanying text.
26. 955 F.2d 409 (6th Cir. 1992); *see infra* notes 84-99 and accompanying text.
27. 969 F.2d 250 (7th Cir. 1992); *see infra* notes 100-30 and accompanying text.
28. 23 F.3d 1403 (8th Cir. 1994); *see infra* notes 131-48.
29. *See infra* notes 150-56 and accompanying text.
30. *See infra* notes 157-67 and accompanying text.
31. *See infra* notes 168-81 and accompanying text.
32. 968 F.2d 1174 (11th Cir. 1992); *see infra* notes 182-221 and accompanying text.
33. 31 F.3d 1221 (3d Cir. 1994); *see infra* notes 222-49 and accompanying text.
34. *See infra* notes 206-08, 254-55 and accompanying text.
35. *See infra* notes 250-65 and accompanying text.
36. 728 F.2d 614 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984).
37. 864 F.2d 700 (10th Cir. 1988).

A. *The Advent of the Doctrine:* Smallwood v. United Air Lines

In *Smallwood*,[38] United refused to process Smallwood's application for employment as a flight officer because Smallwood was older than thirty-five, the maximum age United would consider for such employment.[39] Smallwood filed an age discrimination claim against United.[40]

While conducting discovery, United learned that Overseas National Airlines (ONA), Smallwood's previous employer, had terminated him for cause.[41] At trial,[42] United argued that it would not have hired Smallwood had it known of his misconduct at ONA, and therefore Smallwood was not entitled to any remedy under federal civil rights law.[43] Although the district court expressed ambivalence as to whether after-acquired evidence could provide a defense, it nevertheless considered the evidence and held that United had failed to carry its burden of proving that it would not have hired Smallwood had it known of the circumstances of the ONA discharge.[44] On appeal, the Fourth Circuit addressed the issue of whether the after-acquired evidence of Smallwood's misconduct at ONA barred his right to relief in the discrimination suit against United.[45] In deciding to allow the use of the after acquired evidence, the *Smallwood* court relied heavily on *Mount Healthy City School District Board of Education v. Doyle.*[46]

In *Mt. Healthy*, a school board refused to rehire a teacher, because

---

38. 728 F.2d 614 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984).

39. 728 F.2d at 615.

40. *Id.*; *see* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-633 (1988) (hereinafter "ADEA").

41. *Smallwood*, 728 F.2d at 619. The two reasons for the ONA termination were that Smallwood had misled ONA into paying for moving expenses that were not reimbursable, and that he had fraudulently charged ONA for transportation for his children. *Id.* at 620.

42. This was the second trial of the case. The district court judge limited the first trial to the issue of whether the employer could establish a BFOQ (bona fide occupational qualification) defense. *Id.* at 615.

43. *Id.* at 616. In addition to arguing that the after-acquired evidence doctrine ought not to be applied at all, Smallwood raised two subsidiary arguments. First, he argued unsuccessfully that character is irrelevant to one's qualifications to work as an airline pilot. *Id.* at 625. Second, he contended that even if the after-acquired evidence doctrine applied, he was entitled to backpay from the date of United's discriminatory denial of his employment application until the date of the court's determination that United would not have hired Smallwood had it know of his fraud at ONA. The court rejected this argument. *Id.* at 626.

44. *Id.* at 616-17. Although the court admitted the after-acquired evidence, it stated that it "is entitled to be and should be, skeptical of after-the-fact decisions as to what the defendant would have done had it known what it knows now." *Id.* at 616.

45. *Id.* at 617, 620.

46. *Id.* (citing Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

he had (1) disclosed to a disc jockey the contents of an internal memorandum concerning a dress code which the disc jockey announced on the radio, and (2) made obscene gestures to two female students in the school cafeteria.[47] The teacher sued the board, alleging that his dismissal violated his First and Fourteenth Amendment rights.[48] The United States Supreme Court agreed that disclosing the contents of the memorandum was protected speech, but made no similar finding regarding the obscene gestures.[49] The court went on to hold that even if protected speech was a substantial factor in the board's decision, if the board would in any event have fired the teacher for a legitimate reason—making obscene gestures—the teacher was not entitled to relief.[50] The Supreme Court said:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing . . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.[51]

The Fourth Circuit in *Smallwood* interpreted *Mt. Healthy* as an endorsement of the after-acquired evidence doctrine.[52] "[T]he Supreme Court in-

---

47. *Mt. Healthy*, 429 U.S. at 282-83.
48. *Id.* at 276.
49. *Id.* at 284, 287.
50. *Id.* at 287.
51. *Id.* at 285-86.
52. Smallwood v. United Air Lines, Inc., 728 F.2d 614, 623 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984). *Mt. Healthy* and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which reaffirmed it, see *infra* notes 117-20 and accompanying text, were implicitly overruled by a 1991 amendment to Title VII which provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (Supp. IV 1992). If, in addition to discrimination, a legitimate reason contributed to the discharge, the court may take that factor into consideration in fashioning the remedy. *See* 42 U.S.C. § 2000e-2 (1981). Since Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) holds that victims of discrimination are not "injured" if after-acquired evidence establishes that they would have been fired, one commentator has argued that the 1991 amendment calls *Summers* into question. Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?* 9 LAB. LAW. 43, 61-62 (1993) (construing 42 U.S.C. § 2000e-5(g)(2)(B)). Gregory believes that, under the 1991 amendment, a victim of discrimination may be entitled to injunctive relief, declaratory relief and attorneys' fees, even if after-acquired evidence bars a make-whole remedy. *Id.* However, it has also been argued that since *Summers* does not deny that the em-

structed district courts in cases where the issue is such as here that they '*should*' proceed to make the 'after-the-fact rationale' which the district court in this case deprecates."[53]

Having held that *Mt. Healthy* instructs courts to consider after-acquired evidence as a defense to discrimination suits, the court articulated a formulation of the doctrine.

> The question is whether the plaintiff would not have been hired had the defendant followed its normal procedure and processed the plaintiff's application as it did all others. Such processing would have included inquiries of the plaintiff's former airline employer as listed on his application form. That inquiry would have elicited the full evidence of the circumstances of plaintiff's discharge by ONA. The information received from ONA would have meant the plaintiff would never have been hired by the defendant as a flight officer.[54]

Finding these elements satisfied, the court reversed the district court's determination.[55]

The *Smallwood* decision thus rested on United's ability to prove two distinct elements, each requiring an inference of what would have occurred. First, United had to prove that it would have discovered Smallwood's misconduct at ONA in the normal course of processing his application, even if it had not refused to hire him for discriminatory reasons. Second, United had to show that it would not have hired Smallwood if it had known of the misconduct.[56]

It is baffling how the court extracted this formulation from *Mt. Healthy*, which involved a teacher *actually* fired for mixed motives, one legitimate and the other illegal.[57] In holding that a discharge is not actionable if the legitimate motive would have resulted in the discharge, the Supreme Court was not inviting courts to engage in a guessing game of what the employer would have discovered and what it would have done based on the hypothetical discovery. The Supreme Court in *Mt. Healthy* was simply not addressing the issue of whether after-acquired evidence could be used to justify an otherwise illegal firing.

---

ployer has violated Title VII but merely denies the existence of an injury, the 1991 amendment does not contradict it. *See* William M. Muth, Jr., *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by* Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992), 72 NEB. L. REV. 330, 343 (1993).

53. *Smallwood*, 728 F.2d at 623.

54. *Id.* at 626.

55. *Id.* at 627.

56. *See* Turnes v. AmSouth Bank, NA, 36 F.3d 1057 (11th Cir. 1994) (holding that defendant, in refusal to hire case must prove that it would have discovered after-acquired evidence in the course of the application review process and that it would not have hired the plaintiff based on that evidence).

57. *See supra* notes 47-51 and accompanying text. Nor did *Mt. Healthy* involve issues of discrimination, which pose public policy considerations not presented to the Court. *Mt. Healthy*, 429 U.S. at 274.

Despite the suspect conceptual underpinnings of *Smallwood*, the after-acquired evidence doctrine has developed beyond the confines set forth in that case.[58] Later decisions applying the doctrine have either altered or ignored the first[59] or second[60] elements of the test *Smallwood* articulated, and the majority of courts apply the doctrine as a complete defense to a discrimination lawsuit.[61]

B. *The Use of After-Acquired Evidence To Disprove "Injury":* Summers v. State Farm

The seminal case, which reshaped the doctrine into an easily provable defense, is *Summers v. State Farm Mutual Automobile Insurance Co.*[62] This version of the doctrine is overwhelmingly the majority view.[63]

---

58. *See infra* notes 157-67 and accompanying text (discussing the application of the after-acquired evidence doctrine as a complete defense in sexual harassment cases).

59. Many courts have disregarded the first element of the *Smallwood* rationale, which requires that the employer would have discovered the after-acquired evidence independent of the discrimination suit. *See, e.g.*, O'Driscoll v. Hercules Inc., 12 F.3d 176, 179 (10th Cir. 1994) (holding that after-acquired evidence completely bars recovery if the employer proves that it would have fired the employee based on the evidence); McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 542 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994) (same); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1468 (D. Ariz. 1992) (same).

60. *See, e.g.*, Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992) (applying "would have fired" test in wrongful discharge case involving after-acquired evidence of resume fraud); Malone v. Signal Processing Technologies, Inc., 826 F. Supp. 370, 375 (D. Colo. 1993) (applying "would have fired" test in wrongful discharge case involving after-acquired evidence of job misconduct); Van Deursen v. United States Tobacco Sales & Mktg. Co., 839 F. Supp. 760, 764 (D. Colo. 1993) (applying both "would not have hired" and "would have fired" tests in wrongful discharge case involving after-acquired evidence of resume fraud).

61. *See, e.g.*, *Honeywell*, 955 F.2d at 415 (violation of state civil rights act); Washington v. Lake County, Ill., 969 F.2d 250, 253 (7th Cir. 1992) (race discrimination); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) (age and race discrimination); Russell v. Microdyne Corp., 830 F. Supp. 305, 308 (E.D. Va. 1993) (sex discrimination); Redd v. Fisher Controls, 814 F. Supp. 547, 551 (W.D. Tex. 1992) (sex, race and age discrimination). *But see* Wallace v. Dunn Construction Co., 968 F.2d 1174, 1181 (11th Cir. 1992) (holding that employer must show when evidence would have been discovered to establish date terminating employee's entitlement to backpay); *contra* Lohmann v. Towers, Perrin, Forster, & Crosby, Inc., H-91-3586, 1992 WL 548195, at *1 (S.D. Tex. Oct. 28, 1992) (rejecting after-acquired evidence doctrine based on state law).

62. 864 F.2d 700 (10th Cir. 1988).

63. *See supra* notes 9-14 and accompanying text.

Summers was an insurance claims adjuster for State Farm who forged documents on behalf of claimants.[64] State Farm discovered the forgeries, and, after warning him that future falsifications would result in discharge, examined randomly selected files to determine if Summers had engaged in other improprieties.[65] Although the investigation revealed additional misconduct, Summers was merely placed on probation for two weeks without pay, because he had not profited from his wrongdoing.[66] More than a year later, State Farm fired Summers, not for falsifying documents, but rather for his "poor attitude" and inability to get along with co-workers.[67] At the time of the discharge, Summers, a Mormon, was fifty-six years old.[68] He sued State Farm for discrimination based on age and religion.[69] Pre-trial disclosure revealed that Summers had falsified 150 additional documents, eighteen of them after State Farm had placed him on probation.[70] State Farm argued that if it had known of this misconduct, it would have fired Summers.[71]

The issue was whether Summers' pervasive fraud, discovered long after his discharge, barred his recovery under federal civil rights law.[72] The court decided that the after-acquired evidence deprived Summers of the right to relief.[73] The *Summers* court agreed with the *Smallwood* court's view that *Mt. Healthy* implicitly approved of the use of such evidence to bar a discrimination claim.[74] The *Summers* court likened Summers to a masquerading doctor:

> [T]he present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.[75]

While recognizing that Summers' fraud was not a "cause" of his discharge, the court found that because State Farm would have fired him had it known of the misconduct, Summers could not prove legal "injury."[76] Absent injury, the claimant was not entitled to relief, even assum-

64. *Summers*, 864 F.2d at 702.
65. *Id.*
66. *Id.*
67. *Id.* at 702-03.
68. *Id.* at 702.
69. *Id.*
70. *Id.* at 703.
71. *Id.* at 708.
72. *See id.* at 704.
73. *Id.* at 704, 708.
74. *Id.* at 707.
75. *Id.* at 708.
76. *Id.*

ing a civil rights violation had occurred.[77] The court therefore granted State Farm's motion for summary judgment.[78]

Though both *Smallwood* and *Summers* adopted the after-acquired evidence doctrine, their holdings differ in two substantial respects. First and most significantly, *Summers* discarded the first element of the *Smallwood* formulation and barred an employee from recovery regardless of whether the employer would have discovered the misconduct independent of the discrimination suit.[79] By eliminating this element, the *Summers* court removed a major hurdle to establishing an after-acquired evidence defense. Second, *Summers* changed the second element of the *Smallwood* formulation, substituting the "would not have hired" test,[80] for the "would have fired" test.[81] This distinction, however, may be more theoretical than practical, because, as later cases show, employers have been adept at meeting either test.

More disturbing than *Summers'* misreading of *Mt. Healthy* and *Smallwood* is the tacit premise on which the *Summers* court grounded its decision. Although it is undeniable that after-acquired evidence of employee misconduct may relieve the employer of its contractual obligations to the employee,[82] *Summers* shields the employer with far broader impunity. It holds that such evidence relieves the employer of a non-contractual duty—the duty to abide by civil rights law. It applies, by logical extension, even to sexual harassment[83] and common law torts.

C. *Application of The* Summers *Doctrine to Resume Fraud:* Johnson v. Honeywell

In *Summers*, the Tenth Circuit applied the after-acquired evidence

---

77. *Id.*

78. *Id.* at 709.

79. *See id.* at 706-07, 708 n.3.

80. *Id.; see* Murnane v. American Airlines, 667 F.2d 98 (D.C. Cir. 1981) (citing East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977)). Since Smallwood never worked for United, the court did not consider whether United would have fired Smallwood, though theoretically the court could have applied the "would have fired" test. *See id.* at 707; *Smallwood*, 728 F.2d at 623.

81. *Summers*, 864 F.2d at 708. One writer has eschewed the significance of the distinction between the "would not have hired" and "would have fired" tests, because in either event, according to that writer, the discharged employee has no standing to sue under Title VII. Muth, *supra* note 52, at 349; *see infra* notes 116-22 and accompanying text.

82. *See infra* notes 168-71 and accompanying text.

83. *See infra* notes 157-67 and accompanying text.

doctrine in a job misconduct case. The Sixth Circuit followed *Summers* in *Johnson v. Honeywell Information Systems, Inc.*, where it applied the after-acquired evidence doctrine to resume fraud.[84] Johnson, a field relations manager for Honeywell, was responsible for assisting branch managers in implementing affirmative action programs and for responding to discrimination complaints.[85] Fired ostensibly for poor job performance, Johnson filed suit alleging that Honeywell discharged her because she insisted on meeting affirmative action goals.[86] She asserted two claims of retaliatory discharge, the first for violation of her employment contract and the second for violation of Michigan's Elliot-Larsen Civil Rights Act.[87] During discovery, Honeywell learned that Johnson had materially misrepresented her education and work experience on her employment application.[88] The application cautioned that any misrepresentation "may be cause for immediate discharge."[89]

Honeywell moved for summary judgment on the contract claim based on the after-acquired evidence of Johnson's "resume" fraud,[90] and for a directed verdict on the state civil rights claim.[91] The district court denied the motion for summary judgment but granted the motion for a

---

84. 955 F.2d 409 (6th Cir. 1992).

85. *Id.* at 411.

86. *Id.*

87. *Id.*

88. *Id.* In an apparent attempt to meet the published job requirements, which included a college education and significant work experience, Johnson stated that she had received a Bachelor of Arts degree at the University of Detroit, though she had completed only four courses at that institution. She also represented that she had studied applied management at Wayne State University for one year. Wayne State had no record of her ever having been enrolled. In addition, she exaggerated her duties at prior jobs and falsely claimed that during the one-year hiatus between her last job and her application to work at Honeywell she had managed her properties. *Id.* at 411-12.

89. *Id.* at 411. As in *Johnson*, the job application used in many resume fraud cases admonishes that the employer *might* fire applicants for making misrepresentations. However, most courts treat these warnings as establishing that the employer *will* dismiss employees for resume fraud. *See, e.g.*, O'Driscoll v. Hercules Inc., 12 F.3d 176, 178 (10th Cir. 1994) (The application said: "I understand that any misrepresentation made by me herein may result in the . . . termination of employment."); Washington v. Lake County, Ill., 969 F.2d 250, 252 (7th Cir. 1992) (The application said: "I agree that if any misrepresentation has been made by me . . . any offer of employment may be withdrawn or my employment terminated immediately . . . ."); Redd v. Fisher Controls, 814 F. Supp. 547, 551 (W.D. Tex. 1992) (The application said: "I UNDERSTAND AND AGREE THAT ANY FALSE INFORMATION OR CONSEQUENTIAL OMISSION CONTAINED IN MY APPLICATION IS CAUSE FOR DISCHARGE.").

90. *Johnson*, 955 F.2d at 412.

91. *Id.*

directed verdict.[92]

Adopting the *Summers* formulation of the after-acquired evidence doctrine, the court summarized its elements as follows:

> In order to provide a defense to an employer in a wrongful discharge claim, the after-acquired evidence must establish valid and legitimate reasons for the termination of employment. As a general rule, in cases of resume fraud, summary judgment will be appropriate where the misrepresentation or omission was material, directly related to measuring a candidate for employment, and was relied upon by the employer in making the hiring decision.[93]

Explaining the reliance element, the court noted that the question was whether Honeywell would have hired Johnson if it had known that she did not possess a college degree.[94] In support of the motion, the person who hired Johnson submitted an affidavit asserting, as one might predict, that he would not have hired or even interviewed Johnson had he known that she was not college educated.[95] He also stated that he hired four other field relations managers at approximately the same time he hired Johnson, and that in each instance he relied on the applicant's representation of having graduated from college. The court found these perfunctory assertions sufficient to warrant reversing the district court and granting summary judgment.[96]

The court next reviewed and affirmed the district court's directed verdict in favor of Honeywell on the state civil rights claim.[97] Agreeing with the rationale of *Summers*, the court said: "Because Honeywell established that it would not have hired Johnson and that it would have fired her had it become aware of her resume fraud during her employment, Johnson is entitled to no relief, even if she could prove a violation of Elliott-Larsen."[98]

The court's analysis is perplexing; it used the "would not have hired" test to decide the contract claim, while applying a combination "would not have hired" and "would have fired" test to decide the state civil

---

92. *Id.*

93. *Id.* at 414 (citing Churchman v. Pinkerton's, Inc., 756 F. Supp. 515, 520 (D. Kan. 1991)). The court observed that "[t]hese requirements are necessary to prevent an employer from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise impermissible discharge." *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 415.

97. *Id.*

98. *Id.*

rights law claim.[99] Even more distressing than the court's analytic shortcomings was the ease with which it granted Honeywell summary judgment.

D. *Analysis of the "Would Not Have Hired" and "Would Have Fired" Tests:* Washington v. Lake County

The *Johnson* court did not explain why it intermixed the "would not have hired" and "would have fired" tests.[100] The Seventh Circuit aligned itself with *Summers* in *Washington v. Lake County, Illinois*,[101] and offered an analysis of when these tests should apply.[102] Washington, an African-American, was a jailer at the Lake County Sheriff's Department.[103] He had been on the job less than a year when the department discharged him.[104] Only two months before the firing, Washington earned excellent and proficient ratings and received no scores in the adequate or marginal range.[105] He filed suit alleging racial discrimination.[106]

After the case began, the department discovered that Washington had lied on his job application, which asked if he had ever been convicted of a crime.[107] Washington had concealed a guilty plea to a criminal trespass charge and a third-degree assault conviction.[108] The application, which explained that a conviction record is not an automatic bar to employment, warned that any misrepresentation might result in the withdrawal of an offer of employment or job termination.[109]

The department moved for summary judgment, relying on the after-acquired evidence doctrine.[110] Washington argued that summary judgment was inappropriate because a question of fact remained as to whether the department would have hired him or would have fired him had it known of his criminal record.[111]

The court reasoned that there is a crucial distinction between the "would not have hired" and "would have fired" tests.[112] An employer,

---

99. *Id.* at 414-15.
100. *Id.*
101. 969 F.2d 250 (7th Cir. 1992).
102. *See infra* notes 112-16 and accompanying text.
103. *Washington*, 969 F.2d at 251.
104. *Id.* at 251-52.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 252.
111. *Id.* at 253.
112. *Id.* at 254-55.

the court said, might not hire an applicant who misrepresented his background, especially if the misrepresentations bore a relationship to job qualifications.[113] However, if the misrepresentations come to light after the employee is performing capably on the job, the employer may be disinclined to fire him.[114] The court recognized that where the challenged employment decision is a refusal to hire, such as in *Smallwood*, the "would not have hired" test is appropriate.[115] However, in cases alleging wrongful discharge, the relevant inquiry is whether the employer would have fired the employee based on the after-acquired evidence.[116]

To support its adoption of the "would have fired" standard in wrongful discharge cases, the court raised two arguments. First, it invoked the expansive interpretation of *Mt. Healthy* expressed in *Smallwood* and relied on a more recent Supreme Court case, *Price Waterhouse v. Hopkins*,[117] which applied the *Mt. Healthy* "mixed motives" analysis to a Title VII claim.[118] Since the relevant inquiry in *Mt. Healthy* and *Price Waterhouse* was whether the employer would have reached the same employment decision—to fire the employee—based on a legitimate reason,[119] the proper inquiry in a situation involving after-acquired evidence is the same.[120] Second, it argued that "[f]ocusing on whether the applicant would have been hired is an unjustified importation of 'property right' concepts into employment discrimination law."[121] To prove this point, the court observed that civil rights law protects at-will employees, even though by definition they have no property right to their jobs.[122]

---

113. *Id.*

114. *Id.* at 254.

115. *Id.* at 255-56, n.5.

116. *Id.* at 256.

117. 490 U.S. 228 (1989). In *Price Waterhouse*, Hopkins, a woman, was eligible for partnership in an accounting firm. *Id.* at 231. When the firm denied her partnership, she brought a Title VII lawsuit based on gender discrimination. *Id.* at 232. The firm responded that it rejected her because she was abrasive and could not get along with staff. *Id.* at 234-35. As in *Mt. Healthy*, the court held that to show a violation of Title VII the plaintiff must "prove that the employer relied upon sex-based considerations in coming to its decision." *Id.* at 241-42. The burden then shifts to the defendant to prove that "it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 244-45.

118. *Washington*, 969 F.2d at 255 (citing *Price Waterhouse*, 490 U.S. at 242).

119. The Civil Rights Act of 1991 has overruled the mixed-motives analysis *Mt. Healthy* and *Price Waterhouse*. *See supra* note 52 and accompanying text.

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

121. *Id.* at 256.

122. *Id.*

This reasoning is flawed. The "would not have hired" test does not engraft property right concepts into civil rights law. Rather, it is a test of causation, although a hypothetical one, which asks whether the legitimate reason for not hiring the employee would have preceded the action of discrimination and prevented it from ever having occurred. *Summers* does not deny that civil rights law covers at-will employees though they have no property right to their jobs. It holds, however, that after-acquired evidence deprives them of the protection of that law.

The court concluded that the department would have fired Washington if it had known of his criminal record, and accordingly, affirmed the district court's grant of summary judgment for Lake County.[123] The court based its conclusion on affidavits submitted by the Lake County Sheriff and Superintendent of Jails, both asserting that Washington would have been discharged for his criminal record.[124] The court emphasized that Washington failed to contradict these assertions.[125] Yet, Washington did present uncontroverted proof that the department merely suspended for three days a white female officer, involved in a hit-and-run accident and arrested for driving under the influence of alcohol and leaving the scene of an accident.[126] He also apprised the court of the positive job appraisals he had earned.[127] Finally, Washington pointed out that there was neither a departmental policy of, nor a history of firing officers who had lied on their employment applications.[128] The court held that Washington's assertions did not create a material issue of fact.[129] One must shudder at the daunting evidentiary burden placed on employees who, on a motion for summary judgment, seek to rebut the hypothetical, self-serving declarations of their employers.[130]

E. The "Substantial Burden" Test: Welch v. Liberty Machine

The Eighth Circuit recently adopted the *Summers* formulation in *Welch*

---

123. *Id.* at 256-57.
124. *Id.* at 256.
125. *Id.*
126. *Id.* at 252.
127. *Id.* at 257.
128. *Id.*
129. *Id.*
130. *See generally* 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. L. 31, 40 (1993) (commenting that, although courts recognize that employer affidavits submitted on motions for summary judgment in discrimination cases are self-serving, they are disposed to granting such motions absent concrete rebuttal evidence); Pauline Yoo, *After-Acquired Evidence Doctrine*, 25 COLUM. HUM. RTS. L. REV. 219, 242-43 (criticizing *Summers* rule for inappropriately encouraging summary judgment in employment discrimination cases).

v. Liberty Machine Works, Inc.[131] In doing so, the court increased the evidentiary burden required of employers seeking summary judgment, ameliorating the oppressive consequences of granting such motions based on flimsy attestations.[132] One must hope that other courts following *Summers* have the good sense to use the *Welch* approach to summary judgment. In *Welch*, Liberty hired Welch as a machinist for a ninety day probationary period.[133] Two months into the period, Welch reported to Liberty that he needed surgery.[134] One week later, Liberty fired him allegedly for "lack of work."[135] Welch commenced a wrongful discharge action under ERISA and a handicap discrimination action under the Missouri Human Rights Act.[136] During discovery, Liberty learned that Welch had failed to disclose that his former employer terminated him for cause.[137] Liberty moved for summary judgment based on an affidavit from its president asserting that Liberty would not have hired Welch if it had known of the previous discharges[138] and would have fired Welch because he lied on the job application.[139]

The court adopted the *Summers* doctrine because it believed that an employee should not benefit from his own fraud.[140] Contrary to *Washington*,[141] which used the "would have fired" test in a discharge case, the *Welch* court applied the "would not have hired test" because the case involved application fraud.[142] Reversing the lower court's grant of summary judgment, the Eighth Circuit was wary of relying on a single, "self-serving" affidavit.[143] The court explained: "[W]e believe that the employer bears a substantial burden of establishing that the policy predated the hiring and firing of the employee in question and that the policy constitutes more than a mere contract or employment application boilerplate."[144]

---

131. 23 F.3d 1403, 1405 (8th Cir. 1994).
132. *Id.* at 1406.
133. *Id.* at 1404.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* The application warned: "[A]ny misstatement or omission of fact on this application shall be considered cause for dismissal." *Id.* at 1404.
140. *Id.* at 1405.
141. Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992).
142. *Welch*, 23 F.3d at 1403.
143. *Id.* at 1405.
144. *Id.*

In a dissenting opinion, Judge Arnold endorsed *Wallace*.[145] He argued that, based on after-acquired evidence of application fraud, no one would excuse Liberty if it had committed a battery against Welch.[146] Excusing wrongful discharge for such fraud was, in his view, similarly unsupportable.[147]

Although Judge Arnold's argument is plausible, a supporter of *Summers* might respond that firing an employee who has committed resume fraud inflicts no injury because the employer would have fired him based on the after-acquired evidence. By contrast, committing a battery involves a separate injury that after-acquired evidence does not justify. Judge Arnold should have focused on whether a discriminatory discharge of an employee guilty of application fraud entails an injury separate from the injury resulting from breach of contract.[148]

III. IMPLAUSIBLE EXTENSIONS OF THE DOCTRINE

The *Summers* doctrine encourages employers to invent after-the-fact justifications for otherwise illegal discharges and, more critically, it condones discriminatory conduct.[149] The decisions discussed below exacerbate these concerns.

A. *After-Created Evidence*

The problem of employer manufactured evidence reached unanticipated heights in *Puhy v. Delta Air Lines, Inc.*,[150] where the court considered evidence that was not only after-acquired but was also after-created. Puhy applied to Delta for the positions of pilot and flight engineer.[151] When Delta denied the application, Puhy commenced an action alleging age discrimination.[152] In an effort aimed at settlement, Delta consented

145. *Id.* at 1406 (Arnold, J., dissenting).

146. *Id.* (Arnold, J., dissenting).

147. *Id.* (Arnold, J., dissenting).

148. *See infra* notes 168-76 and accompanying text.

149. In McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 543 (6th Cir. 1993), *cert. granted*, 114 S. Ct. 2099 (1994), the employee asserted that she removed confidential documents belonging to her employer to protect herself against an anticipated discriminatory discharge. *Id.* at 543. She argued that, under these circumstances, the court should not allow her employer to rely on the after-acquired evidence of her removal of the files. *Id.* The court rejected this argument because "[t]he sole issue in after-acquired evidence cases is whether the employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct." *Id.*

150. 833 F. Supp. 1577 (N.D. Ga. 1993).

151. *Id.* at 1578.

152. *Id.*

to process Puhy's application, despite the pending lawsuit. Delta's outside industrial psychologists administered a battery of tests to Puhy, and ostensibly based on his poor performance, Delta again refused to employ him.[153] Delta moved for summary judgment submitting the test results as after-acquired evidence demonstrating that Delta would not have hired Puhy.[154]

The court accepted the test results as after-acquired evidence which theoretically could bar recovery,[155] but nevertheless denied the motion because material issues of fact existed as to whether Delta would not have hired Puhy based on the test results.[156]

All other cases involve after-acquired evidence in existence before an alleged discrimination. *Puhy* is troubling because the after-acquired evidence was created at Delta's behest after Delta denied Puhy employment. This case offers employers the option of fashioning their own after-acquired evidence if none is to be found elsewhere.

B. After-Acquired Evidence Excusing Sexual Harassment

At least three district courts have applied the after-acquired evidence doctrine to bar claims of sexual harassment.[157] The most recent such

---

153. *Id.* at 1578-79.

154. *Id.* at 1580.

155. *Id.* at 1582. The court believed it was in accord with Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *reh'g granted*, No. 91-7406, 1994 WL 481439 (Sept. 6, 1994). It observed that the "dominant concern in the *Wallace* opinion was preventing the use of the after-acquired evidence to 'place[] plaintiff in a worse position than if he had not been a member of the protected class.'" *Puhy*, 833 F. Supp. at 1582 (quoting *Wallace*, 968 F.2d at 1179). The *Puhy* court reasoned that, since Puhy was jobless when he applied to Delta for employment, the alleged discrimination did not place him in a worse position than he would have occupied absent the discrimination. *Id.* This reading misconstrues *Wallace*. The questions *Wallace* asks are whether Puhy would have been hired absent the discrimination (since *Puhy* is a refusal to hire case), and when Delta would have discovered the after-acquired evidence independent of the lawsuit. *Wallace*, 968 F.2d at 1181-82. Puhy's joblessness does not, under *Wallace*, disqualify him for relief. *Id.*

156. *Id.* at 1586.

157. *See* Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D. Va. 1993) (alleging sexual discrimination and sexual harassment); Churchman v. Pinkerton's, Inc., 756 F. Supp. 515 (D. Kan. 1991) (alleging constructive discharge in retaliation for reporting sexual harassment); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989) (alleging discriminatory discharge based on race and sex in addition to sexual harassment); *contra* Doe v. Marshalls, Inc., Nos. 3-92-463, 3-93-267, 1994 WL 66061, *3 (D. Minn. Jan. 10, 1994) (rejecting the after-acquired evidence doctrine where employ-

case is *Russell v. Microdyne Corp.*[158] While still employed at Microdyne, Russell filed claims for sexual harassment and sex discrimination claims for the denial of promotions and raises.[159] During the litigation, Microdyne discovered that Russell had falsely stated on her job application that she was currently employed. In truth, the stated employer laid her off ten months before she applied for the job at Microdyne.[160] Moreover, she grossly exaggerated her prior salary.[161]

Typical self-serving submissions convinced the court that Microdyne would have fired Russell upon learning of her fraud and that her retention resulted from Microdyne's desire to avoid the appearance of retaliatory discharge.[162] Although the fact pattern was novel in that Microdyne had not fired Russell, the court nevertheless applied the after-acquired evidence doctrine.[163] It reasoned that discriminatory refusal to promote is less harmful to an employee than discriminatory discharge.[164] Thus, if after-acquired evidence of employee misconduct bars recovery in a discharge case, such evidence should likewise bar recovery in a case where the employer has unfairly refused to promote the employee.[165] In granting Microdyne's motion for summary judgment,[166] thereby disposing of Russell's sexual harassment claim, the court stated in alarmingly broad language that "[i]f an employee never would have been discharged due to fraudulent statements, no recovery is warranted, regardless of any alleged adverse employment actions against the plaintiff."[167] The court failed to explain or even comment on how after-acquired evidence of employee misconduct can justify sexual harassment.

IV. THE FALLACY OF THE *SUMMERS* RATIONALE

The *Summers* formulation of the after-acquired evidence doctrine misapplies a sound principle of contract law to a wholly inappropriate area—discrimination law. A body of contract cases holds that if an employer fires an employee and learns later of employee misconduct justifying termination, the court will dismiss the employee's wrongful discharge

---

ee alleged discriminatory discharge and sexual harassment).

158. 830 F. Supp. 305 (E.D. Va. 1993).

159. *Id.* at 306.

160. *Id.* at 307.

161. *Id.*

162. *Id.* at 308.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 309. The *Russell* court's extension of the after-acquired evidence doctrine to a refusal to promote case follows logically from *Summers*. If discharge causes no injury, neither does obstructing an employee's advancement.

167. *Id.* at 307.

claim based on the after-acquired evidence of misconduct.[168] Although the courts have generally applied this rule of contract law to on-the-job misconduct cases, since an employee's material fraud on a job application justifies discharge,[169] the same principle of contract law should apply to resume fraud cases. This rule makes sense in the context of contract law because an employee who breaches an employment agreement loses the right to benefit from the agreement.[170] Therefore, the employee suffers no injury from the employer's rescission of the contract.[171]

---

168. *See, e.g.*, Leahey v. Federal Express Corp., 685 F. Supp. 127, 128 (E.D. Va. 1988) (refusing, under Virginia law, to preclude after-acquired evidence of racial slurs and sexual harassment of discharged employee); Von Heyne v. Tompkins, 93 N.W. 901 (Minn. 1903) (ruling that acts of employee misconduct in operating farm justified dismissal of employee although employer did not know of the derelictions when he discharged the employee); Masonite Corp. v. Handshoe, 44 So. 2d 41, 43-45 (Miss. 1950) (upholding admissibility of after-acquired evidence of discharged engineer's incompetence and unruliness to justify termination); Marnon v. Vaughan Motor Co., 219 P.2d 163, 167 (Or. 1950) (holding that agent's acceptance of secret profits justified his termination although principal did not know of misconduct at time of firing); Loos v. Geo. Walter Brewing Co., 129 N.W. 645, 646 (Wis. 1911) (stating that "[i]f misconduct amounting to a breach of contract exists at the time of a discharge, the master can justify under it irrespective of whether or not he knew it at the time of the discharge"); Kilian v. Ferrous Magnetic Corp., 280 N.Y.S. 909, 910 (N.Y. App. Div. 1935) (observing that "[b]ad motive[s] for strict insistence on legal rights, or even ignorance of a sufficient cause at the time of discharge, does not preclude defendant from justifying its act"). *But see* Barrett v. ASARCO Inc., 763 P.2d 27, 31-33 (Mont. 1988) (holding after-acquired evidence of employee dishonesty admissible on the issue of character declining to address its use as after-acquired evidence to justify an otherwise wrongful discharge) (citing Flanigan v. Prudential Fed. Savings & Loan, 720 P.2d 257 (Mont. 1986)), *overruled in part on other grounds*, Bache v. Gilden, 827 P.2d 817, (Mont. 1992); *contra* Lohmann v. Towers, Perrin, Forster, & Crosby, Inc., Civ. A. No. H-91-3586, 1992 WL 548195, at *1 (S.D. Tex. Oct. 28, 1992). *See generally* 3A CORBIN ON CONTRACTS § 762, at 526 (1960); WILLISTON ON CONTRACTS § 839, at 723 (Rev. Ed. 1938).

169. Morgan v. City of Jasper, 959 F.2d 1542, 1548-50 (11th Cir. 1992) (stating that misrepresenting reasons for termination of previous employment is valid grounds for discharge); Douglas v. Levingston Shipbuilding Co., 617 S.W.2d 718, 719-20 (Tex. Ct. App. 1979) (holding that employee's concealment on employment application of identity of former employer, medical condition, and receipt of Worker's Compensation benefits afforded employer defense to wrongful discharge claim); Robitzek v. Reliance Intercontinental Corp., 183 N.Y.S.2d 870 (N.Y. App. Div. 1959) (granting summary judgment to employer based on employee's misrepresentation of educational background), *aff'd*, 167 N.E.2d 74, 75 (N.Y. 1960).

170. *See* John P. Furfaro & Maury B. Josephson, *After-Acquired Evidence*, N.Y.L.J., at 3, col. 1 (June 6, 1993).

171. *Summers* holds that, even assuming the employer has violated civil rights law, after-acquired evidence may disprove "injury," and hence defeat a discrimination

However, an employee's prior breach of an employment agreement or fraud should not excuse unlawful discrimination or the injury it causes. Discrimination is a statutory wrong analogous to a tort.[172] It is illegal as a matter of federal law and public policy.[173] The urgency of the public policy to eradicate discrimination[174] arguably elevates the inviolability of civil rights law even above tort law.[175]

The civil rights law creates duties of the employer that are independent of the obligation to perform a contract. One such duty is not to fire employees for discriminatory reasons. A violation of civil rights law is an act of wrongdoing separate from a breach of an employment contract.[176]

---

claim. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988).

172. One commentator has argued that the "public enforcement function" of every civil right case is as important as the assessment of damages. Thus, even if injury cannot be established, a trial on the issue of liability is imperative to expose the wrongdoer and deter future acts of discrimination. Gregory, *supra* note 52, at 47-48.

173. Some have observed that *Summers* undermines the public policy embodied in federal civil rights law, which is to eradicate unlawful discrimination. Wallace v. Dunn Const. Co., 968 F.2d 1174, 1180 (11th Cir. 1992). The *Wallace* court commented that *Summers* is incompatible with the principal purpose of Title VII—"to achieve equality of employment opportunity" by giving employers incentives "to self-examine and self-evaluate their employment practices and to endeavor to eliminate so far as possible" discrimination in employment. *Id.* (citations omitted) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429, 30 (1971) and United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973))); *see* Gregory, *supra* note 52, at 62 (criticizing the rationale of *Summers*).

174. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (emphasizing that the central purpose of Title VII is to "eradicat[e] discrimination throughout the economy and mak[e] persons whole from injuries through past discriminations"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (stating that "[t]the language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"), *aff'd*, 528 F.2d 1102 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (instructing that the purpose of Title VII is "to achieve equality of employment opportunities . . .").

175. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 98 (1991) ("Title VII has a purpose different from that of tort law; Title VII exists to strike down an entire socio-economic structure of conduct (which it forbids) and attitudes and expectations (which it is meant to change by the moral force and suasion of the law).").

176. *Cf.* Smith v. Secretary of Navy, 659 F.2d 1113, 1120 (D.C. Cir. 1981) (declaring that unlawful discrimination is "a wrong in itself"). *See generally* Cheryl K. Zemelman, *The After-Acquired Evidence Defense in Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 200-01 (1993) (criticizing the use of the breach of contract defense in employment discrimination cases).

Confusion lurks in the *Summers* rationale, which rests on the premise that a victim of discrimination, who might have been fired for a legitimate reason, has suffered no injury.[177] Firing an employee for unlawful discriminatory reasons breaches the statutory duty imposed by federal civil rights law and inflicts the injury of job loss. This injury is separate from the injury caused by a breach of contract because it arises from an independent duty. The victim must be compensated for the resulting loss, even though the same loss may not compensable under contract theory.[178]

A proponent of the *Summers* position might argue that the so-called "employee" was not really an employee at all.[179] Since the employer would have fired the employee for misconduct, the employment relationship was a sham that deprived the "employee," who might have been characterized as an impostor, of the protection of civil rights law. The answer to this argument is that until discharged, the employee's status is unimpaired and the employer is obliged by federal law not to deny the employee a job through discrimination.[180] The consequence of failing to satisfy that obligation is paying the employee damages arising from loss of the job.

Sexual harassment is perhaps the most striking illustration of discriminatory conduct to which the *Summers* rationale is inapplicable[181] because it is apparent that sexual harassment causes injury independent of the loss occasioned by a breach of contract. It would be absurd to excuse an employer's deliberate assault or slander of the employee based on evidence discovered after-the-fact that the employee engaged in resume fraud. It is equally untenable to excuse sexual harassment under the same circumstances. The employee is injured in both cases.

---

177. Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988).

178. An at-will employee, who by definition is employed for an indefinite period, may ordinarily be fired for nearly any reason or no reason at all. *See* Abney v. Baptist Medical Ctrs., 597 So. 2d 682, 683 (Ala. 1992); Murphy v. American Home Prod. Corp., 448 N.E.2d 86, 91 (N.Y. 1983); Lynas v. Maxwell Farms, 273 N.W. 315, 317 (Mich. 1937); Geary v. United States Steel Corp., 319 A.2d 174, 176 (Pa. 1974). Even an employee at-will comes within the protection of federal civil rights law. *See* Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992). Therefore, firing an employee at-will in violation of civil rights law, like firing a contractual employee, inflicts injury.

179. *See infra* notes 213-18 and accompanying text.

180. *See infra* notes 219-21 and accompanying text.

181. *But see supra* notes 157-67 and accompanying text.

V. REJECTION OF *SUMMERS*

The Third and Eleventh Circuit courts have rejected the *Summers* formulation, and have adopted approaches more restrictive to the use of after-acquired evidence. Although these courts correctly recognize inadequacies in the *Summers* position, the alternatives they propose are equally unacceptable.

A. *The First Assault on* Summers: Wallace v. Dunn Construction

The Eleventh Circuit was the first circuit to resist the *Summers* formulation of the after-acquired evidence doctrine.[182] In *Wallace v. Dunn Construction Co.*,[183] the court reverted to the *Smallwood* rationale, requiring the employer to prove that it would have discovered the after-acquired evidence absent the discrimination suit.[184] Neil, who had worked for Dunn as a flagperson on road crews, commenced an action against Dunn for federal civil rights violations.[185] At her deposition, Neil admitted that she had entered a plea of guilty to possession of cocaine and marijuana before submitting her job application to Dunn.[186] She denied on the job application that she had ever been convicted of a crime.[187] Soon after discovering Neil's misrepresentation, Dunn moved for summary judgment, arguing that the after-acquired evidence established a defense to the discrimination claims.[188]

The Eleventh Circuit rejected the *Summers* formulation of the after-acquired evidence doctrine and criticized the *Summers* court for basing its holding on a flawed reading of *Mt. Healthy*.[189] Seizing upon the very language in *Mt. Healthy* that *Summers* relied on, the *Wallace* court rejected the *Summers* doctrine.[190] Thus, the court revisited the fecund *Mt. Healthy* passage that instructs: "'The constitutional principle at stake is sufficiently vindicated if such an employee is *placed in no worse position than if he had not engaged in the conduct.*'"[191] The court argued

---

182. The Eleventh Circuit's grant of rehearing en banc in *Wallace* calls into question its continuing rejection of *Summers*. No. 91-7406, 1994 WL 481439 (11th Cir. Sept. 6, 1994).

183. 968 F.2d 1174 (11th Cir. 1992), *reh'g granted*, No. 91-7406, 1994 WL 481439 (Sept. 6, 1994).

184. *Id.* at 1182. *See supra* notes 38-61 and accompanying text.

185. *Wallace*, 968 F.2d at 1176.

186. *Id.* at 1176-77.

187. *Id.*

188. *Id.* at 1177.

189. *Id.* at 1178-80.

190. *Id.* at 1179.

191. *Id.* (quoting Mt. Healthy v. Doyle, 429 U.S. 274, 286 (1977)) (emphasis added by the *Wallace* court).

that, in using after-acquired evidence as the basis to dismiss Summers' claim, the Tenth Circuit placed Summers in a *worse* position than if he had not been a member of a protected class.[192] The court explained that absent age and religious discrimination, Summers would have remained employed for some period beyond his discharge.[193] Nevertheless, the Tenth Circuit denied him relief even for injury occurring during that period.[194] The *Wallace* court attributed the Tenth Circuit's interpretive error to a confusion of the hypothetical with the actual. "Whereas the *Mt. Healthy* rule excuses all liability based on what *actually* would have happened absent the unlawful motive, the *Summers* rule goes one step further: it excuses all liability based on what *hypothetically* would have occurred assuming the employer had knowledge [of employee wrongdoing]."[195]

The *Wallace* interpretation of *Mt. Healthy* is as dubious as the *Summers* interpretation. *Mt. Healthy* did not address the issue of after-acquired evidence. Both *Wallace* and *Summers* have ascribed unintended nuances to an out-of-context sentence.

The *Wallace* court also defended its departure from *Summers* by charging that *Summers* discourages employers from eliminating illegal discrimination.[196] Rather, it fosters disobedience; employers may become lax in their observance of civil rights laws,[197] knowing that they can escape responsibility by rummaging through the background of illegally discharged employees until they contrive a justification for the discharge.[198]

---

192. *Id.* Discharge for being a member of a protected class under the civil rights laws, the situation in both *Summers* and *Wallace*, is arguably analogous to discharge for engaging in protected speech, the situation in *Mt. Healthy*. However, different policy considerations apply in the two situations.

193. *Id.* at 1179-80.

194. *Id.* at 1180.

195. *Id.* at 1179.

196. *Id.* at 1180.

197. The argument that use of the after-acquired evidence doctrine will deter employee misconduct is unpersuasive. An employee who lies to get a job or who engages in job misconduct is not likely contemplating how the misconduct might affect the theoretical possibility of a discrimination suit. *See* Gregory, *supra* note 52, at 56.

198. *Wallace*, 968 F.2d at 1180. It has been suggested that in the case of resume fraud this fear is unjustified because the after-acquired evidence doctrine will be applied only if the fraud was (1) material, (2) relevant to job qualifications, and (3) relied on by the employer in making the hiring decision. *Johnson v. Honeywell Info. Systems, Inc.*, 955 F.2d 409, 414. One commentator, decrying this concern, has noted that courts, in discrimination cases, look at the practices of employers to discern

After expressing this serious criticism of *Summers*, the *Wallace* court leaped into the absurd. It stated:

> Even more troubling is the incentive to 'sandbag.' *Summers* encourages an employer with a proclivity for unlawful motives to hire a woman—despite knowledge of a legitimate reason that would normally cause the employer not to employ her—to destroy any evidence of such knowledge, to pay her less on the basis of her gender, to sexually harass her until she protests, to discharge her, and to 'discover' the legitimate motive during the ensuing litigation, thus escaping any liability for the unlawful treatment of the erstwhile employee.[199]

The spectre of scheming employers weaving diabolical plots to oppress the innocent is a matter of grave concern only in the imaginations of the judges who decided *Wallace*.[200]

In fashioning its own approach, the *Wallace* court stressed that the law should make victims whole for injuries caused by unlawful discrimination, while respecting employers' lawful prerogatives.[201] If an employer would have fired an employee, based on after-acquired evidence, the employee should not receive front pay or reinstatement.[202] Such an award would go beyond making the employee whole and would deny the employer's right to terminate the employment for a legitimate reason.[203] Backpay, according to the court, is a different matter. If the employer can prove that it would have discovered the after-acquired evidence prior to what otherwise would have been the end of the backpay period (presumably the date of judgment),[204] the hypothetical date of discovery terminates the employee's entitlement to backpay.[205]

This complex formulation is as unworkable as it is senseless. Asking

---

whether they have treated other employees in like circumstances similarly to how they treated the employee claiming discrimination. Muth, *supra* note 52, at 347. These assurances offer little solace to the discharged employee. Once an employee sues alleging discrimination, it is in the employer's interest to search the employee's past for job-related misconduct. *See, e.g.*, Rubinstein, *supra* note 6, at 28 (questioning the wisdom of a rule that "allows an employer to cover up illegal activities by searching an employee's past for unknown falsifications"). If such evidence is found, the discharged employee's ex-supervisors will swear that the employer would not have hired and would have fired the employee based on the newly-discovered misconduct. It is difficult for employees to refute assertions of what others would have done.

199. *Wallace*, 968 F.2d at 1180-81.

200. The expense of implementing such a conspiracy and defending the victim's inevitable lawsuit would thankfully render such evil conduct cost ineffective. *See* Muth, *supra* note 52, at 348.

201. *Wallace*, 968 F.2d at 1181.

202. *Id.*

203. *Id.* at 1182.

204. *See* Massey v. Trump Castle Hotel & Casino, 828 F. Supp. 314, 323 (D.N.J. 1993) (agreeing with *Wallace* that backpay should be available to the aggrieved employee until the date of judgment).

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

employers to prove that they would have discovered after-acquired evidence from an independent source at a definite time is a question of such perplexity that they will have to polish their crystal balls and consult their astrologers.

Although the court recognized a reasonable alternative to its confounding rule—to end the period of backpay when the employer actually learned of the after-acquired evidence—it rejected this more sensible approach.

> [The alternative approach] overlooks the teaching of *Price Waterhouse* and *Mt. Healthy* that the victim should be placed in no worse a position than if she were not a member of a protected class and had not engaged in protected conduct—if the allegedly unlawful acts did not occur, and this litigation never existed, then Dunn would not have discovered Neil's prior conviction at her deposition.[206]

The *Wallace* court's reasoning contradicts the part of its decision that denied the right to front pay. To use the court's own words, "if the allegedly unlawful acts did not occur, and this litigation never existed, Dunn would not have discovered Neil's prior convictions."[207] Absent the after-acquired evidence of Neil's convictions and misrepresentations concerning the convictions, Dunn would have had no basis to fire Neil. As a result, Neil would have received pay on a "going forward" basis. It follows, under the *Wallace* rationale, that Neil should be entitled to front pay and reinstatement, although the court denied the availability of these remedies.[208]

The court reached predictable results. Dunn submitted the usual litany of self-serving evidence to show that it would not have hired Neil had it known of her criminal convictions, and would have fired her if it had known that she had lied on her job application.[209] Neil was unable to

---

206. *Id.* The court bristled at the "perverse effect of providing a windfall to employers who, in the absence of their unlawful act and the ensuing litigation, would never have discovered any after-acquired evidence." *Id.*

207. *Id.*

208. *Id. See generally* Kenneth G. Parker, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 436-37 (1993) (recognizing this inconsistency in the *Wallace* court's reasoning and arguing that victims of discrimination should be entitled to front pay and reinstatement until the date the employer would have discovered the employee misconduct independent of the suit).

209. *Id.* at 1184. This evidence included Dunn's employee handbook, which details Dunn's policy against drug use and falsification of records and authorized dismissal for both. *Id.* Two of Neil's witnesses testified at depositions that they knew they could be fired for lying on their job applications, and two of Neil's supervisors stated in affidavits that Dunn would not have hired Neil and would have fired her had it known of her drug record and job application fraud. *Id.* The court characterized this

controvert this evidence.[210] Thus, the court granted partial summary judgment on the issues of front pay, reinstatement and injunctive relief.[211] The court's determination of Neil's claim for backpay was similarly easy to foretell. Because Dunn had not introduced evidence that it would have discovered the after-acquired evidence by means independent of and prior to Neil's lawsuit, the court denied Dunn's motion for summary judgment with respect to Neil's claim for backpay.[212]

Judge Godbold dissented.[213] He took a novel position, arguing that since Neil secured the job with Dunn under false pretenses, she was not within the class protected by the civil rights law, and therefore she lacked standing to sue.[214] To support his view, Judge Godbold cited the enforcement section of Title VII, which says, in part: "No order of the court shall require . . . the hiring, reinstatement, or promotion of any individual *as an employee* . . . if such individual was refused admission, suspended, or expelled . . . for any reason other than [illegal] discrimination . . . ."[215] Thus, according to Judge Godbold, only "employees" are protected by civil rights law, and Neil was not an "employee" within the meaning of the statute.[216] As an illustration, Judge Godbold suggested that Congress did not intend to offer civil rights protection to an "employee" whose name a collaborator had fraudulently placed on the payroll and who received paychecks without ever having worked.[217] Judge Godbold believed that Neil was not materially different from this "absentee" employee.[218]

Judge Godbold's standing argument, although seductive, falters under scrutiny. The civil rights law protects "employees" from discrimination. The question is whether a person who secured a job under false pretenses is an "employee." Judge Godbold says "no" simply because he believes the civil rights law should not protect such a person.[219] He can point to nothing in the civil rights law that will substantiate this view.[220] Further-

---

evidence as "unrelenting," and therefore granted summary judgment. *Id.*

210. *Id.*

211. *Id.* at 1184-85.

212. *Id.* at 1184.

213. *Id.* at 1185 (Godbold, J., dissenting).

214. *Id.* (Godbold, J., dissenting).

215. *Id.* at 1188 (Godbold, J., dissenting) (citing 42 U.S.C. § 2000e-5(g)(2)(A) (1981)) (emphasis added by Judge Godbold).

216. *Id.* (Godbold, J., dissenting).

217. *Id.* (Godbold, J., dissenting).

218. *Id.* (Godbold, J., dissenting).

219. *Id.*

220. *See id. See generally* Parker, *supra* note 208, at 429 (refuting standing argument on the ground that it is inconsistent with Title VII's definition of "employee"). However, one commentator approves of the argument and would expand it. He believes that employee misconduct in the course of employment, if grounds for termina-

more, characterization of Neil as a "non-employee" would find little support in other quarters.[221] If Dunn had failed to deduct payroll taxes from Neil's paycheck, it is doubtful that the IRS would have excused Dunn's neglect on the grounds that Neil was not an "employee." If Neil had been injured on the job, no one would have argued that she would not have been eligible for Workers' Compensation. If Dunn had laid her off, she surely would have been eligible for unemployment insurance. Neil worked as a flagperson on Dunn's payroll. She, doubtless, regarded herself as Dunn's employee, and Dunn regarded itself as her employer. It is sophistry to characterize their relationship as anything else.

B. The Second Assault on Summers*:* Mardell v. Harleyville

In *Mardell v. Harleyville Life Insurance Co.*, the Third Circuit rejected *Summers*. Harleyville hired Nancy Mardell, a fifty year-old woman, to manage insurance agents.[222] Two years later, Harleyville fired her purportedly for poor job performance.[223] She filed suit alleging age and sex discrimination.[224] Pre-trial disclosure revealed that Mardell, in applying for the job, had materially misrepresented her education and employment history.

Based on this after-acquired evidence of resume fraud, Harleyville moved for summary judgment.[225] Harleyville attached to the motion the affidavits of Mardell's supervisor and the executive who had hired her.[226] These submissions sought to prove that Mardell would not have

---

tion, deprives the employee of standing under civil rights law. *See* Muth, *supra* note 52, at 346.

221. For example, in the context of Workers' Compensation Law, Professor Larsen has said: "[I]t has been held that employment which has been obtained by the making of false statements—even criminally false statements—whether by a minor or an adult, is still employment; that is the technical illegality will not of itself destroy compensation coverage." ARTHUR LARSEN, THE LAW OF WORKMEN'S COMPENSATION § 47.53 (1990 & Supp. 1993) (citations omitted). For a discussion of the status of the after-acquired evidence doctrine in Workers' Compensation Law, see *supra* note 6.

222. 31 F.3d 1221, 1222 (3d Cir. 1994).

223. *Id.* at 1222-23. Mardell commenced her employment in February 1988 and was fired in December 1989. *Id.*

224. *Id.* at 1223. Four months after Mardell was fired, Harleyville hired a 40 year old male to replace her. *Id.*

225. *Id.* at 1224.

226. *Id.* Mardell was hired by Glyn Mangum, the vice-president of sales, and supervised by William Forloine, Harleyville's senior vice-president of marketing and sales. *Id.*

been hired if the company had been aware of her actual background and that she would have been fired as soon as her dishonesty had been discovered.[227]

The court disallowed the after-acquired evidence at the liability stage of a civil rights suit;[228] however, it held such evidence relevant for determining what remedy was appropriate.[229] To reach this conclusion, the court agreed with *Wallace* that, because *Price Waterhouse* dealt with what *actually* motivated the discharge, the *Price Waterhouse* mixed-motives analysis[230] is inapplicable to after-acquired evidence cases.[231] Wary of permitting after-acquired evidence to put an employee in a position worse than he would have occupied absent illegal discrimination,[232] the court in *Mardell* concluded that "the sole question to be answered at [the liability] stage is whether the employer discriminated against the employee on the basis of an impermissible factor . . . ."[233]

The court proceeded to criticize arguments supporting the *Summers* position[234] by rejecting the contention that resume fraud deprives a worker of employee status under Title VII or the ADEA.[235] The court asserted that since establishing a *prima facie* case of disparate treatment requires proof of discriminatory intent,[236] the employment status of the worker is irrelevant.[237] This argument is specious. The plaintiff's status as an employee is not rendered irrelevant merely because intent is an element of a discrimination claim. The court next argued, again unconvincingly, that Title VII and the ADEA protect any "individual," rather than only "employees."[238] This argument ignores the essence of laws intended to combat *employment* discrimination and protect "any individu-

---

227. *Id.*

228. *Id.* at 1228-30.

229. *Id.* at 1238-40.

230. The filing of *Mardell* preceded the effective date of the 1991 amendments to Title VII.

231. *Mardell*, 31 F.3d at 1229-30.

232. *Id.* at 1237-38. For a discussion of this argument see *supra* notes 192-95 and accompanying text.

233. *Mardell*, 31 F.3d at 1228.

234. The court reiterated the property rights argument first articulated in Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992) and expanded the argument to encompass any application of *Summers*, whether based on the "would not have hired" test or "would have fired" test. *Mardell*, 31 F.3d at 1233. For a discussion of this argument see *supra* note 122 and accompanying text.

235. *Mardell*, 31 F.3d at 1230-31.

236. *Id.* at 1224-25 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 256 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

237. *Mardell*, 31 F.3d at 1230-31.

238. *Id.* at 1231. *See* 42 U.S.C.A. § 2000e-2(a) (1981) (providing the text of the statute referred to); 29 U.S.C.A. § 623(9) (1985) (stating the statute discussed in full).

al" as an *employee*.[239] Finally articulating a persuasive argument, the court recognized that even if the civil rights laws are interpreted to restrict coverage to "employees,"[240] as they undoubtedly should be, nothing in the statutes suggests that resume fraud deprives a worker of employee status.[241]

Criticizing the *Summers* "no-injury" argument, the court observed that "[a] victim of discrimination suffers a dehumanizing injury,"[242] which causes "a demoralizing impairment of his or her self-esteem."[243] The court's observation, though perhaps justifying relief for non-economic injury, does not support a claim for backpay as the court suggests. The court might have recognized that a victim of discriminatory discharge, even when guilty of resume fraud or other misconduct, endures not only humiliation, but also a distinct, compensable injury—the loss of employment.[244]

The court then turned to the federal policy that seeks to deter civil rights violations. It stated that a plaintiff alleging employment discrimination acts "as a 'private attorney general' to enforce the paramount public interest in eradicating invidious discrimination."[245] "Deterrence is accomplished by placing an economic price on discriminatory acts, and by exposing and stigmatizing the wrongdoer's acts before the entire community."[246] To promote these policies, the court held after-acquired evidence inadmissible at the liability stage.[247] However, the court acknowledged the relevance of such evidence in fashioning the remedy and echoed the *Wallace* "hypothetical date of discovery test"[248] which, as noted,

---

239. *Mardell*, 31 F.3d at 1231.

240. *See* 42 U.S.C.A. § 2000e(f) (1981) (providing a definition); 29 U.S.C.A. § 630(f) (1985).

241. *Mardell*, 31 F.3d at 1231. *See supra* notes 213-21 and accompanying text for discussion of the standing argument.

242. *Mardell*, 31 F.3d at 1232.

243. *Id.* at 1233. *See generally* Yoo, *supra* note 130, at 253-54 (arguing that victims of discrimination should be compensated for non-economic injury, particularly under the 1991 Civil Rights Act, which provides for "compensatory and punitive damages" for "emotional pain, suffering . . . and other non-pecuniary losses." 42 U.S.C. § 1981a, a(b)(3) (Supp. III 1991)).

244. *See infra* notes 250-65 and accompanying text.

245. *Mardell*, 31 F.3d at 1234.

246. *Id.* at 1235.

247. *Id.* at 1234-37. *See supra* note 172 and accompanying text. *See generally* Yoo, *supra* note 130, at 148-49.

248. *Mardell*, 31 F.3d at 1239-40.

provides an unsatisfactory alternative to *Summers*.[249]

VI. A REASONABLE ALTERNATIVE: TERMINATING BACK-PAY WHEN THE AFTER-ACQUIRED EVIDENCE IS DISCOVERED

Both the majority position, espoused in *Summers*, and the minority view, articulated in *Wallace*, are misguided. The *Summers* position forces a defense, appropriate in contract law, into the wholly inappropriate arena of civil rights law. Based on after-acquired evidence, *Summers* erroneously denies that a victim of discrimination has been injured.[250]

The *Summers* position invites employers to fabricate after-the-fact justifications to extricate themselves from discrimination lawsuits.[251] The temptation may be irresistible. Presented with tailored, self-serving submissions, most courts deny the plaintiff a day in court, granting summary judgment with mechanical regularity to employers.[252] This problem will become more acute if the trend to follow *Summers* continues.[253]

Although recognizing that victims of discrimination are injured regardless of after-acquired evidence of misconduct, *Wallace* is equally unacceptable. Only in rare circumstances will an employer be able to prove that on a certain date it would have learned of employee misconduct, if it had not learned of the misconduct as the result of the discrimination lawsuit. Although such a burden might be met in a refusal to hire case where the employer follows procedures to investigate the information the employee has entered on his job application,[254] the burden will be nearly insurmountable in the far more prevalent wrongful discharge suit, where such procedures are not followed. If the employer fails to meet

---

249. *See supra* notes 206-08, 254-55 and accompanying text.

250. *See supra* notes 76-78 and accompanying text.

251. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *reh'g granted*, No. 91-7406, 1994 WL 481439 (Sept. 6, 1994). The *Wallace* court noted:

> The *Summers* rule does not encourage employers to eliminate discrimination. Rather, it invites them to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to escape all liability by rummaging through an unlawfully-discharged employee's background for flaws and then manufacturing a 'legitimate' reason for the discharge that fits the flaws in the employee's background.

Id.; *see supra* notes 196-200 and accompanying text.

252. *See supra* notes 9-14 and accompanying text.

253. *Id.*

254. Smallwood v. United Air Lines, Inc., may be such a case since there, United, which denied Smallwood a job as a pilot, might have learned of his disqualifying behavior at ONA by pursuing the process it customarily used when evaluating prospective employees. Smallwood v. United Airlines, Inc., 728 F.2d 614 (4th Cir. 1984); *see also* Turnes v. AmSouth Bank, NA, 36 F.3d 1057 (11th Cir. 1994).

the burden, the employee will receive backpay until the date the court finally disposes of the case.[255] This artificial cutoff, which may take years to reach, provides the employee with a windfall.

The issue is how to measure a discrimination victim's damages when the employee would have been discharged legitimately if the employer had known of after-acquired evidence of misconduct. One should not ignore such after-acquired evidence. As nearly all courts agree, it would be absurd to order the reinstatement of an employee guilty of misconduct justifying his dismissal.[256] Yet depriving such an employee of backpay fails to provide adequate compensation. The aggrieved employee should be entitled to backpay from the date of discharge until the date the employer actually discovers the legitimate reason for dismissal.[257] The date of discovery marks when the employer legitimately could and presumably would have fired the employee. Such damages compensate the employee for his actual injury.

This measure of damages is also practical. Using the date of discovery circumvents the need to engage in the fanciful conjecture *Wallace* requires, without tacitly encouraging illegal discrimination and the exaggeration, if not contrivance, of after-the-fact justifications for dismissal.[258]

Public policy, as expressed in state and federal civil rights law, seeks to rid the workplace of discrimination. Achieving this goal is a matter of national concern. At the same time the law condemns activities such as resume fraud, falsifying work documents and removing company records without permission. Dismissal is the price of employee misconduct. These interests conflict when an employer uses after-acquired evidence to defend against the charge of discrimination. The date of discovery test sensibly balances these interests. On the one hand, victims of discrimination receive redress. Offenders are exposed publicly and must compensate victims for substantial periods of backpay. Future violations of civil rights law are thus deterred and the public policy to eradicate invidious discrimination is promoted. Yet the victim, who is also a wrongdoer, does not escape without penalty. His right to recover damages ends when the employer discovers the misconduct. Neither the employer nor the employee benefits from a windfall. Both reap the consequences of their wrongdoing.[259]

---

255. *See Wallace*, 968 F.2d at 1182.

256. *But see* McPartland v. American Broadcasting Co., 623 F. Supp. 1334, 1344 (S.D.N.Y. 1985).

257. *See supra* note 23 and accompanying text.

258. *See supra* notes 196-200, 254-55 and accompanying text.

259. *See* James G. Babb, *The Use of After-Acquired Evidence As a Defense In Title*

Critics of the "date of discovery" rule complain that the employer should not benefit from his wrongdoing. If he had not unlawfully discriminated against the employee, he would not have discovered the employee's misconduct.[260] They also argue that this rule fails to compensate adequately victims of discrimination.[261] These arguments fail to recognize that, irrespective of how the employer learned of the employee's misconduct, the employer would have had the right to fire him immediately. No provision of the civil rights law deprives an employer of this right. Furthermore, critics focus unduly on punishing the employer, while overlooking the employee's wrongdoing.

Another objection to the "date of discovery" rule is that the rule, like the *Summers* approach, provides incentive for employers to concoct after-the fact justifications for firing employees who have filed civil rights actions.[262] This criticism can be raised against any rule that permits the use of after-acquired evidence—even the *Wallace* approach. However, the force of the criticism is mitigated to the extent that an approach assures the victim a remedy of backpay. Unlike the *Summers* formulation, the "date of discovery" rule assures the victim such a remedy.

In a disparate treatment case, when the employer purports to have fired the employee for a legitimate reason, the employee will ordinarily offer proof that the purported justification is a pretext.[263] An aggrieved employee may similarly expose as a pretext his employer's after-acquired evidence defense. While the *Summers* line of cases has denied employees this opportunity, granting employers summary judgment with ruthless facility,[264] the courts should adopt the skeptical approach of *Welch v. Liberty Machine Works, Inc.*[265] and let the trier of fact decide if an avowed legitimate reason is really a self-serving fantasy.

VII Employment Discrimination Cases, 30 HOUS. L. REV. 1945, 1972 (1994).

260. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992), *reh'g granted*, No. 91-7406, 1994 WL 481439 (Sept. 6, 1994).

> We realize that an alternative approach exists—to end the period of backpay on the day that Dunn actually learned of the after-acquired evidence in the course of litigating this case . . . . [This] alternative approach would have the perverse effect of providing a windfall to employers who, in the absence of their unlawful act and the ensuing litigation, would never have discovered any after-acquired evidence.

Id. at 1182.

261. *See generally* Zemelman, *supra* note 176, at 205-06 (arguing that the "date of discovery" rule fails to provide make-whole relief).

262. *See generally id.* (asserting that the date of discovery rule encourages employer fishing expeditions into employees' backgrounds).

263. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1993).

264. *See supra* notes 9-14 and accompanying text.

265. 23 F.3d 1403, 1405 (8th Cir. 1994).

VII. CONCLUSION

The after-acquired evidence doctrine of *Summers* is alluring. If an employee, through his fraud or misconduct, has forfeited his right to a job, the employer should have no obligations to him. Thus, civil rights law should not protect the employee. Because the principle is simple, the conclusion seems inescapable. Nevertheless, the conclusion is wrong. Violating civil rights law inflicts injury apart from the loss caused by a mere breach of contract. After-acquired evidence of employee defalcations, although a defense to contract actions, should not be a defense to civil rights claims.

Yet, it is not sensible to require an employer to prove when and how it would have discovered such after-acquired evidence independent of the civil rights action. The *Wallace* standard imposes an unrealistic burden on employers.

The most practical approach, which accommodates the interests of employer, employee and society, is the "date of discovery" formulation. By adopting this rule, the courts will abandon confusion and replace it with common sense and equity.

ADDENDUM

Shortly before publication of this Article, The United States Supreme Court decided *McKennon v. Nashville Banner Publishing Co.*[1] The *McKennon* Court unanimously rejected both the *Summers* and *Wallace* positions and adopted the date-of-discovery rule advocated in this Article.[2]

In *McKennon*, the Nashville Banner fired McKennon, an employee of thirty years, ostensibly as part of a plan to reduce its work force. McKennon, who was sixty-two when fired, sued for age discrimination under the ADEA. During her deposition, McKennon admitted that she had surreptitiously copied confidential company documents disclosing its financial condition, took the copies home, and showed them to her husband. She explained that she was seeking "insurance" against the discriminatory discharge which she anticipated. Based on this after-acquired evidence of misconduct, the Banner moved for summary judgment. Relying on *Summers* and *Johnson v. Honeywell Information Systems, Inc.*,[3] the District Court granted the motion and the Sixth Circuit affirmed.[4]

The Supreme Court, in a cryptic opinion, reversed and remanded the case.[5] Writing for the Court, Justice Kennedy emphasized the dual policy of the ADEA and Title VII: to deter illegal discrimination and to compensate victims.[6] When victims of discrimination bring suit, they promote these goals.[7] To deny their claims based on after-acquired evidence would frustrate the objectives of federal civil rights law.[8] Noting that *Summers* relied substantially on *Mt. Healthy City School District Board of Education v. Doyle*,[9] Justice Kennedy found the mixed-motives analysis of *Mt. Healthy* irrelevant[10] because in an after-acquired evidence case, unlike a mixed motives case, the legitimate motive played no part in the decision to fire.[11] After-acquired evidence does not bear on and thus cannot negate discriminatory intent.[12] It is, therefore, not a bar to a

---

1. No. 93-1543, 1995 LEXIS U.S. 699 (Jan. 23, 1995).
2. *Id.* at *19-20.
3. 955 F.2d 409 (6th Cir. 1992).
4. *McKennon*, No. 93-1543, 1995 LEXIS 699, at *6 (Jan. 23, 1995).
5. *Id.* at *21.
6. *Id.* at *12.
7. *Id.*
8. *Id.* at *12-13.
9. *Id.* at *14 (citing Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).
10. *Id.* at *15. The Court qualified this assertion, stating that *Mt. Healthy* is relevant to the extent that it reinforces the necessity of proving the employer's motive in discharging the employee.
11. *Id.* at *15 (Jan. 23, 1995).
12. *Id.*

discrimination claim.[13]

Though holding that after-acquired evidence is not a complete defense to a civil rights claim, the Court acknowledged that such evidence should be considered in determining the remedy.[14] The misconduct of the employee must be taken into account, because the proper role of such evidence depends not only on the policies of federal civil rights law but also on the employer's legitimate interests, which include the prerogatives to hire, promote and fire employees.[15] After holding that, as a general rule, neither front pay nor reinstatement is an appropriate remedy,[16] the Court ruled that an employee is entitled to backpay from the date of discharge until the actual date of discovery of the after-acquired evidence.[17]

> Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point of 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.[18]

The High Court suggested that, if presented "extraordinary equitable circumstances," lower courts might diverge from this formulation.[19] However, the Court failed to provide guidance of what such circumstances might be.

To answer charges that employers might gain undue advantage by using after-acquired evidence, the Court stressed that an employer may use such evidence only if the employer establishes that it would have fired the employee based on the evidence.[20] The Court discounted fears of employer fishing expeditions to unearth employee misconduct, commenting that assessment of attorneys fees and imposition of Rule 11

---

13. *Id.* The Court held the unclean hands defense inappropriate to foreclose plaintiffs relief, relying on Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968), an anti-trust case, which rejected the defense because of the importance of federal anti-trust policy. The *McKennon* Court ruled that federal civil rights law embodies a national policy of analogous significance. *Id.* at *16 (Jan. 23, 1995).
14. *Id.* at *16 (Jan. 23, 1995).
15. *Id.* at *17.
16. *Id.*
17. *Id.* at *19-20.
18. *Id.*
19. *Id.* at *20.
20. *Id.*

sanctions will deter most abuses.[21]

In adopting the date-of-discovery rule, the Court correctly balanced the conflicting interests presented in the case. However, the Court might have elaborated on its rationale. Furthermore, some of its reasoning is suspect. If after-acquired evidence is admissible on the issue of backpay, it is hard to understand why searching for such evidence justifies sanctions. The date-of-discovery rule mitigates concerns over fishing expeditions, because that rule precludes summary judgment for the employer and assures the employee a substantial award of backpay. A more pressing concern arises when an employer uses after-acquired evidence as a pretext; a dishonest employer might lie that it would have fired the employee based on such evidence. Courts may punish such duplicity with sanctions. Ultimately, however, the answer rests with the trier of fact. In disparate treatment cases the trier of fact must evaluate the evidence to determine if the purportedly legitimate reason for firing the employee is a pretext for discrimination.[22] The same responsibility falls to the trier of fact when the employer interposes an after-acquired evidence defense.

---

21. *Id.* at *20-21.

22. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747-48 (1993); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 793, 804 (1973).