

**“THE LAST TEMPTATION IS THE GREATEST
TREASON: TO DO THE RIGHT DEED FOR THE
WRONG REASON”:¹ AFTER-ACQUIRED
EVIDENCE IN EMPLOYMENT DISCRIMINATION
CLAIMS: *McKENNON v. NASHVILLE BANNER
PUBLISHING CO.***

INTRODUCTION

Many state and federal statutes protect employees from being discharged by employers based on improper motives.² The Age Discrimination in Employment Act of 1967 (“ADEA”) and the Civil Rights Act of 1964 (“1964 Act”) are two of the federal statutes that serve to protect individual employees from an employer’s discriminatory conduct.³ Under the ADEA, an employer is prohibited from discriminating against an employee based on the employee’s age.⁴ Under Title VII of the 1964 Act, an employer is also prohibited from discriminating based on race, color, sex, national origin, and religion in its employment decisions.⁵ In most respects, if an employee is terminated based on a discriminatory motive, then the employee can sue for wrongful termination.⁶

As a defense to a charge of discrimination, an employer can argue that its firing decision was based on proper considerations.⁷ And, even if the firing decision was based on a discriminatory motive, the employer can discover new evidence and defend that it would not have hired or would have fired the employee anyway based on the new evidence.⁸ That “new” evidence is termed “after-acquired” evidence.⁹

1. T.S. ELIOT, *MURDER IN THE CATHEDRAL* pt.1. In warning of the moral hazards which confront humanity, T.S. Eliot stated, “The last temptation is the greatest treason: To do the right deed for the wrong reason.” *Id.* Judge Morris Sheppard Arnold appropriately cited T.S. Eliot in his eloquent dissenting opinion in *Welch v. Liberty Machine Works Inc.* See *Welch v. Liberty Mach. Works, Inc.*, 23 F.3d 1403, 1406 (8th Cir. 1994) (Arnold, J., dissenting).

2. See 42 U.S.C. § 2000e-2 (1988); 29 U.S.C. § 1001-1461 (1988 & Supp. 1989); MO. ANN. STAT. § 213.055 (Vernon 1994).

3. 29 U.S.C. § 621 et seq. (1988 & Supp. V); 42 U.S.C. § 2000e-2 (1988).

4. 29 U.S.C. s 623(a)(1); see *infra* note 72-78 and accompanying text.

5. 42 U.S.C. § 2000e-2 (1988); see *infra* note 61-62.

6. 42 U.S.C. § 2000e-2 (1988).

7. See James F. Elliot, *After-Acquired Evidence Doctrine; Something Old or Something New?*, ASSOC. OF BUS. TRIAL REP., Vol. XVI, No. 2 at 10 (Feb. 1994).

8. *Id.*

9. See Jennifer Miyoko Follette, *Complete Justice: Upholding The Principles Of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH L. REV. 651, 651 (1993) (arguing that the majority view of using after-acquired evidence to deny all remedies violated the purposes of Title and was incongruous with equitable princi-

The evidence that an employer uses is after-acquired when the employer is unaware of the employee's misconduct when the alleged discrimination occurred or when the employer becomes aware of the information after the employee was discharged.¹⁰ The employer's lawyer usually discovers the employee's misconduct during the discovery phase of the employee's discrimination suit.¹¹ Generally, the after-acquired evidence defense arises in two situations: (1) the employer discovers post-hiring misconduct by the discharged employee; or (2) the employer discovers a discharged employee's pre-hiring misconduct.¹²

Prior to the United States Supreme Court decision in *McKennon v. Nashville Banner Publishing Co.*,¹³ the federal circuits were divided as to whether after-acquired evidence would completely bar an employee's discrimination claim against an employer.¹⁴ The majority rule, articulated by the United States Court of Appeals for the Tenth Circuit in *Summers v. State Farm Mutual Automobile Insurance Co.*,¹⁵ stated that after-acquired evidence completely barred an employee's discrimination claim.¹⁶ The minority view, established by the United States Court of Appeals for the Eleventh Circuit in *Wallace v.*

ples). More specifically, Title VII of the Civil Rights Act of 1964 prohibits employers from discharging, refusing to hire, or otherwise discriminating against any individual because of his or her color, race, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1)(1988).

10. See William S. Waldo & Rosemary A. Mahar, *Lost Cause and Found Defense: Using Evidence Discovered After An Employee's Discharge To Bar Discrimination Claims*, 9 LAB. LAW. 31,34-35 (1993) (offering employers involved in Title VII suits strategies for implementing the after-acquired evidence defense); see also Claudia D. Orr, *The Defense of Resume Fraud and Other "After-Acquired Evidence" Of Misconduct Under Sixth Circuit and Michigan Case Law*, 70 U. DET. MERCY L. REV. 657, 690 (1993)(analyzing the after-acquired evidence defense in Sixth Circuit and Michigan decisions and encouraging employers to ensure that the defense will be available to them by taking precautionary measures before hiring employees).

11. Orr, 70 U. DET. MERCY L. REV. at 657.

12. See Gian Brown, *Employee Misconduct and The Affirmative Defense of "After Acquired Evidence"*, 62 FORDHAM L. REV. 381, 382 (1993)(arguing that the *Summers* approach to the after-acquired evidence defense was flawed because it allowed employers to benefit from information obtained as a result of their discrimination and concluding that the minority approach of limiting a discharged employee's remedies comported with the purposes of the 1991 Act); David D. Kadue & William J. Dristas, *When What You Didn't Know Can Help You—Employers' Use of After-Acquired Evidence of Employee Misconduct To Defend Wrongful Discharge Claims*, 27 BEVERLY HILLS B.A. J., 117, 117 (1993)(tracing the development of the after-acquired evidence defense from contract cases to the context of employment discrimination and the pitfalls of using the defense).

13. 115 S. Ct. 879 (1995).

14. See, Jay W. Waks, *"The U.S. Supreme Court Will Review The 'After-Acquired Evidence' Doctrine and Whether It Bars An Employees Right To Any Recovery"*, NAT'L L. J., June 27, 1994 at 4.

15. 864 F.2d 700 (10th Cir. 1988).

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

Dunn Construction Co.,¹⁷ stated that after-acquired evidence could only operate to limit an employee's remedies, but would not bar an employee's claim.¹⁸ In *McKennon*, the Supreme Court rejected the *Summers* rule and held that after-acquired evidence does not bar an employee's claim, but limits an employee's remedies.¹⁹

This Note will first discuss the Court's decision in *McKennon*.²⁰ This Note will next explore the significance of after-acquired evidence — limited to employee misconduct such as copying company documents and resume/employment application fraud — in ADEA and Title VII employment discrimination cases.²¹ This Note will then review the decisions of other circuits prior to the Court's decision in *McKennon*, including the once prevalent majority rule of *Summers*.²² This Note concludes that the Court's decision in *McKennon* was correct because the *Summers* rule offended the very purpose of Title VII and left an open window through which an employer could escape liability for discriminatory conduct by barring equitable relief to the employee.²³

FACTS AND HOLDING

Christine McKennon sued her employer, Nashville Banner Publishing Company ("Banner"), in the United States District Court for the Middle District of Tennessee.²⁴ McKennon, a secretary, worked for Banner for over thirty years and was sixty-two-years-old when Banner fired her, purportedly due to overall reductions in its workforce.²⁵ McKennon argued that she was dismissed because of her age in violation of the Age Discrimination in Employment Act

17. 968 F.2d 1174 (11th Cir. 1992), *vacated*, 32 F.3d 1489 (11th Cir. 1994).

18. *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1181 (11th Cir. 1992) *vacated*, 32 F.3d 1489 (11th Cir. 1994).

19. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 886 (1995).

20. *Id.*

21. See *supra* notes to 80-225 and accompanying text; see *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466, 1466 (1992) (involving an ADEA plaintiff who copied company documents three days before his dismissal).

22. See *infra* notes 80-125 and accompanying text; Note, *No Harm, No Foul?: The Use of After-Acquired Evidence in Title VII Employment Discrimination Cases*, 62 GEO. WASH. L. REV. 280, 293 (1993) (arguing that after-acquired evidence should only be permissible to limit a plaintiff's relief at the remedies phase of an employment discrimination trial).

23. See *infra* notes 226-268 and accompanying text; see *McKennon*, 115 S.Ct. at 882.

24. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 883 (1995); *McKennon v. Nashville Banner Publishing Co.*, 797 F. Supp. 604, 608 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *cert granted*, 114 S. Ct. 2099, *rev'd*, 115 S. Ct. 879 (1995).

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

("ADEA").²⁶ The fact that McKennon copied several of Banner's confidential financial documents was revealed during the discovery phase of her wrongful discharge action.²⁷ McKennon explained that she copied those documents because she feared that Banner was about to fire her because of her age and wanted some "insurance" and "protection" in the event that her fears were realized.²⁸ Following the deposition, Banner sent McKennon a letter advising her that she violated her job responsibilities by removing and copying the confidential documents and stated that had it known of McKennon's misconduct, it would have fired her immediately.²⁹ Banner moved for summary judgment, conceding that it had discriminated against McKennon.³⁰

The district court granted summary judgment for Banner.³¹ The district court held that McKennon's conduct was sufficient grounds for termination, and therefore she was not entitled to backpay or any other remedy outlined under the ADEA.³² The United States Court of Appeals for the Sixth Circuit affirmed the lower court's decision, adhering to the same rationale.³³ The Sixth Circuit relied on its earlier decisions in *Johnson v. Honeywell Information Systems, Inc.*³⁴ and *Milligan-Jensen v. Michigan Technological University*,³⁵ and on the United States Court of Appeals for the Tenth Circuit's decision in *Summers v. State Farm Mutual Automobile Insurance Company*.³⁶

The United States Supreme Court granted certiorari to resolve the conflicting views among the courts of appeals regarding the role of "after-acquired" evidence in barring all relief where post-hiring or pre-hiring misconduct was discovered and the employee was subsequently fired for an unrelated, but discriminatory reason.³⁷ In focusing on this issue, the Supreme Court denounced the Sixth Circuit's reliance on *Summers*, because, in part, *Summers* was premised on *Mt. Healthy City School District Board of Education v. Doyle*³⁸ ("*Mt. Healthy*"), an employment discrimination case involving mixed motives.³⁹ The

26. *Id.*

27. *Id.*

28. *Id.* (citing Deposition, Dec. 18, 1991, Record, Doc. Entry No. 39, Vol. 2, at 241).

29. *McKennon*, 115 S. Ct. 879 at 882.

30. *Id.* at 883.

31. *Id.*

32. *Id.*

33. *Id.*; *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539, 543 (6th Cir. 1993), *cert. granted* 114 S. Ct. 2099, *rev'd*, 115 S. Ct. 879 (1995).

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

35. 975 F.2d 302 (6th Cir. 1992).

36. 864 F.2d 700 (10th Cir. 1988); *McKennon*, 9 F.3d at 541-42.

37. *McKennon*, 115 S. Ct. at 883; *McKennon v. Nashville Banner Publishing Co.*, 114 S. Ct. 2099 (1994) (granting certiorari).

38. 429 U.S. 274 (1977).

39. *McKennon*, 115 S. Ct. at 884-85; *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Court noted that *Mt. Healthy* was a mixed-motives case because it involved two motives which were said to have influenced the employer's decision to fire the employee.⁴⁰ One motive was lawful but the other, which alleged a constitutional violation, was unlawful.⁴¹ The Court ruled in *Mt. Healthy* that if the lawful reason alone would have justified the firing, then the employee's discrimination suit would fail.⁴² In resolving McKennon's suit, the Court referred to *Mt. Healthy* as "inapposite" because an unlawful motive was the only basis for McKennon's discharge.⁴³

Although the Court rejected the Sixth Circuit's reliance on *Summers*, the Court adopted two of the district court's findings: (1) that Banner discharged McKennon solely due to her age in violation of the ADEA; and (2) that McKennon's misconduct, as revealed in the deposition, was substantial enough that McKennon would have been fired had Banner found out about it.⁴⁴ The Court reversed the Sixth Circuit's decision and held that McKennon was not precluded from all relief when, following her discharge, Banner discovered evidence of her misconduct which would have resulted in her termination on lawful grounds.⁴⁵

In reaching its holding, the Court began by criticizing the Sixth Circuit's reasoning that McKennon's misconduct constituted supervening grounds for her termination.⁴⁶ The Court reasoned that the Sixth Circuit should not have relied on its earlier decision in *Milligan-Jensen* to conclude that, in McKennon's case, it was "irrelevant whether or not [McKennon] was discriminated against."⁴⁷ Emphasizing its decision in *Price Waterhouse v. Hopkins*,⁴⁸ the Court stated that Banner's "proving [that] the same decision would have been justified . . . is not the same as proving that the same decision would have been made."⁴⁹ The Court stated that the Sixth Circuit erred when it denied McKennon any remedy for employment discrimination solely on the basis of her post-hiring misconduct.⁵⁰

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

41. *Id.* at 885; *Mt. Healthy*, 429 U.S. at 287.

42. *Mt. Healthy*, 429 U.S. at 285.

43. *McKennon* 115 S. Ct. at 884-85. The Court noted that because McKennon's misconduct was discovered only after she had been fired, Banner's decision to fire McKennon could not have been motivated by a lawful nondiscriminatory reason. *Id.*

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

45. *Id.* at 886-87.

46. *Id.*

47. *Id.* at 883.

48. 490 U.S. 228 (1989) (plurality opinion).

49. *McKennon*, 115 S. Ct. 879 at 886; see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion) (White, J., concurring).

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

The Court next noted that Banner's violation of the ADEA was significant.⁵¹ In so doing, the Court examined the purpose behind the ADEA.⁵² The Court emphasized the importance of eradicating discrimination in the workplace, and drew a parallel between the antidiscriminatory intent of Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act ("FLSA"), and the ADEA, noting that the ADEA was "something of a hybrid."⁵³ The Court emphasized that the ADEA's remedial provisions mirrored those of Title VII and the FLSA.⁵⁴

Furthermore, the Court explained that under the ADEA the district court had the power to award an injured employee relief in the form of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees.⁵⁵ The Court stated that federal courts have the discretion to "grant such equitable relief as may be appropriate to effectuate the purposes of [the ADEA]."⁵⁶ The Court then stated that the role after-acquired evidence should play in equity to reduce an employee's damages needed to be resolved on a case-by-case basis.⁵⁷ As a general rule in after-acquired evidence cases, the Court stated that neither reinstatement nor front pay are appropriate remedies.⁵⁸ However, the Court noted that backpay would be appropriate from the date of the unlawful discharge to the date the employer obtained the new information.⁵⁹ The Court concluded that any fears that employers might be motivated to over-investigate an employee's background or past job performance to parry claims brought under the ADEA could be allayed by a court's authority to award attorney's fees and other sanctions.⁶⁰

51. *Id.*

52. *Id.*

53. *Id.* at 884 (quoting *Lorillard v. Pons*, 434 U.S. 575, 578 (1978); 42 U.S.C. § 2000e et seq. (1988 & Supp. V); 29 U.S.C. § 216(b) (1938); see *Whitten v. Farmland Indus., Inc.*, 759 F. Supp. 1522, 1543 (D. Kan. 1991) (demonstrating how courts look to Title VII cases when interpreting the ADEA).

54. *McKennon*, 115 S. Ct. at 886; see 29 U.S.C. § 626(b) (1967) (prohibiting age discrimination and outlining awardable damages to include unpaid minimum wages or overtime, and liquidated damages available only in cases of willful violation of the ADEA).

55. *McKennon*, 115 S. Ct. at 886 (citing 29 U.S.C. § 626(b) (1967)).

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

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*; see 29 U.S.C. §§ 216(b) (1938), 626(b) (1967); FED. R. CIV. P. 11.

BACKGROUND

STATUTES BARRING EMPLOYMENT DISCRIMINATION: TITLE VII AND THE ADEA

Title VII

Title VII of the Civil Rights Act of 1964 ("1964 Act") specifically prohibits employers from discriminating against employees based on impermissible factors.⁶¹ Under Title VII, it is unlawful for an employer to "fail or refuse to hire or to discharge," or to "limit, segregate, or classify" employees or applicants in any way because of the individual's "race, color, religion, sex or national origin."⁶²

Congress' goal in enacting Title VII was to eliminate "discriminatory barriers" in the workplace and to compensate employees and job applicants for injuries resulting from discriminatory employment practices.⁶³ The 1964 Act extended remedies to employees and prospective employees who suffered wrongful discharge or wrongful refusal to hire.⁶⁴ By extending plenary powers to the courts, Congress authorized the courts to enjoin discriminatory conduct and to compel an employer to reinstate an employee.⁶⁵

The Civil Rights Act of 1991 ("1991 Act"), which amended the 1964 Act, expanded the scope of compensatory and punitive remedies available to persons alleging intentional employment discrimination.⁶⁶ Under the 1991 Act, courts are now authorized to award attorney's fees, declaratory relief, and injunctive relief to plaintiffs.⁶⁷ More importantly, an employer is now always liable for discrimination levelled against an employee based on impermissible factors even if the employer was also motivated by lawful factors in making the employment decision.⁶⁸ When the employer articulates that the same decision would have been reached absent the impermissible factor, the Title VII plaintiff's burden is to show that the employer was motivated by these impermissible factors.⁶⁹

However, the 1991 Act specifically enumerates the types of remedies available to those plaintiffs who demonstrate that the employer

61. 42 U.S.C. §§ 2000e-2(a)-2000e-17 (1988).

62. *Id.* § 2000e-2.

63. Gian Brown, *Employee Misconduct and the Affirmative Defense of "After-Acquired Evidence"*, 62 *FORDHAM L. REV.* 381, 384 (1993).

64. *Id.* at 385.

65. 42 U.S.C. § 2000e-5(g) (1964).

66. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 1102, 105 Stat. 1071 (1991).

67. *Id.* § 103.

68. *Id.* § 107.

69. 42 U.S.C. § 2000e-5(g)(2)(B) (Supp.III 1991).

had mixed motives for the allegedly discriminatory decision.⁷⁰ Under the 1991 Act, once a court finds that the employer had an impermissible motive along with a lawful motive, the employer will still be held liable for the impermissible motive, but the plaintiff will only be able to recover declaratory and injunctive relief and attorney's fees.⁷¹

The Age Discrimination in Employment Act

Congress enacted the Age Discrimination in Employment Act of 1967 ("ADEA") as part of a legislative scheme to eradicate discriminatory employment practices.⁷² In this regard, Congress modeled the ADEA after Title VII.⁷³ The ADEA applies to employers with more than twenty employees and prohibits discriminating against employees over the age of forty.⁷⁴ The ADEA makes it unlawful for any employer to "discharge any individual or otherwise discriminate against

70. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071 (1991). Mixed motives cases include those situations where more than one reason led to the particular employment decision. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989); *Massey v. Trump's Castle Hotel & Casino*, 828 F. Supp. 314, 314 (D. N.J. 1993).

71. Civil Rights Act of 1991, Pub. L. No. 102-166 at § 107(b), 105 Stat. 1071 (1991).

72. See 81 Stat. 602 (1965) (codified as amended 29 U.S.C. § 621 et seq. (1988 & Supp. V)). Under section 621 of the ADEA, Congress declared:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Id.; see Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988 & Supp. V) (prohibiting discrimination based on race, color, sex, national origin, and religion); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (1988 & Supp. V) (prohibiting disability discrimination); National Labor Relations Act, 29 U.S.C. § 158(a) (1988 & Supp. V) (prohibiting discrimination based on participation in union activities); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988 & Supp. V) (prohibiting sex discrimination).

73. See Frank J. Cavaliere, *The Recent "Respectability" of Summary Judgment and Directed Verdicts In Intentional Age Discrimination Cases: ADEA Case Analysis Through The Supreme Court's Summary Judgment "Prism"*, 41 CLEV. ST. L. REV. 103, 106-12 (1993) (detailing the impact of summary judgment motions on suits under the ADEA). Plaintiffs suing under the ADEA are entitled to jury trial whereas under Title VII, prior to the Civil Rights Act of 1991, a judge heard the case. 29 U.S.C. § 626(c)(2) (1967).

74. 29 U.S.C. § 623 (a)(1) (1967).

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."⁷⁵ The purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁷⁶

Under the ADEA, an injured employee may sue an employer and seek legal and equitable remedies including backpay.⁷⁷ In interpreting the ADEA, courts have stated that it is "remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment."⁷⁸

75. *Id.*

76. 29 U.S.C. § 621(b) (1967); A 1965 Labor department report entitled, *The Older American Worker-Age Discrimination In Employment*, alerted Congress to the prevalence of arbitrary age discrimination against older workers despite their ability. See 1967 U.S.C.C.A.N. 2213, 2214. The report outlined the "persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability." *Id.*; see *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 409 (1985). Legislative history indicates that employers discriminated despite data which showed many older individuals outperform younger ones.

77. 29 U.S.C. § 626(c) (1967). See *supra* notes 63-67 and accompanying text (discussing how Title VII grants an injured employee a similar right of action).

78. *Dart v. Shell Oil Co.* 539 F.2d 1256, 1260 (10th Cir. 1976), *cert. granted*, 429 U.S. 1089 (1977), *aff'd*, 434 U.S. 99 (1977). See *Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 660-61 (7th Cir. 1991) (stating that the ADEA is "a major source of federal litigation and a growing factor in American labor markets").

ALLOCATING THE BURDENS IN EMPLOYMENT DISCRIMINATION CASES⁷⁹*The Landmark Burdens Analysis: McDonnell Douglas*

In *McDonnell Douglas Corp. v. Green* ("McDonnell Douglas"),⁸⁰ the plaintiff, Percival Green, argued that he was denied re-employment because of his race, in violation of Title VII.⁸¹ Green, an African-American, participated in an unlawful stall-in at McDonnell Douglas' plant.⁸² McDonnell Douglas refused to rehire Green after the stall-in, but rehired the white employees who participated in the unlawful stall-in.⁸³ Green sued McDonnell Douglas, alleging that it discriminated against him because of his race, and McDonnell Douglas defended the suit by stating that the unlawful stall-in was the crucial factor in its decision not to rehire Green.⁸⁴

The United States Court of Appeals for the Eighth Circuit noted that Green had established a prima facie case of racial discrimination.⁸⁵ The Eighth Circuit noted that McDonnell Douglas' decision not to rehire Green was based on "subjective" criteria which did little to rebut a discrimination claim.⁸⁶ The court held that the absence of a

79. The employee's burden of proving an action under the ADEA parallels the *McDonnell Douglas* test and its progeny under *Title VII*. See Cavaliere, 41 CLEV. ST. L. REV. at 103 (1993) (advancing that the three-step analysis of *McDonnell Douglas Corp. v. Green* allows a plaintiff in a Title VII or ADEA discrimination case to sue even in the absence of direct or "smoking gun" evidence of discrimination); *Visser* 924 F.2d at 657 (stating the three-tiered McDonnell Douglas test is useful in ADEA cases because "if the employer offers a pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age"). Judge Posner explained in *Shager v. Upjohn Co.*:

If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas*. It is important to understand however that the inference is not compelled. The trier of fact must decide after a trial whether to draw the inference. The lie might be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability. The point is only that if the inference of improper motive can be drawn, there must be a trial.

Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990).

80. 411 U.S. 792 (1973).

81. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 794-96 (1973).

82. *Id.* at 794. The Court described the stall-in as follows:

Five teams, each consisting of four cars would "tie up" five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were also instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

Id.

83. *McDonnell Douglas*, 411 U.S. at 796.

84. *Id.* at 797.

85. *McDonnell Douglas Corp. v. Green*, 463 F.2d 337, 343-44 (8th Cir. 1972), *vacated and remanded*, 411 U.S. 792 (1973).

86. *Id.* at 344.

finding by the Equal Employment Opportunity Commission ("EEOC") that McDonnell Douglas had reasonable cause did not bar a Title VII action.⁸⁷

On appeal, the United States Supreme Court set out a three-tiered burden shifting approach in analyzing Title VII cases.⁸⁸ First, the plaintiff has the initial burden of making out a prima facie case of discrimination.⁸⁹ Second, the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for rejecting the employee.⁹⁰ Third, the burden shifts back to the plaintiff to show that the employer's reason is a pretext, and that the real reason was an unlawful one.⁹¹

The Supreme Court concurred with the Eighth Circuit in finding that Green had established a prima facie case of employment discrimination.⁹² However, the Court stated that the Eighth Circuit erred in holding that Green failed to carry the burden of showing that McDonnell Douglas' reason for refusing to rehire Green was not merely pretext to cover up illegal activity.⁹³ The Court clarified that, regardless of Green's conduct, if McDonnell Douglas did not act based upon lawful motives, then it had violated Title VII.⁹⁴ In remanding the case, the Court directed that Green be given a fair opportunity to show that his employer's reason for refusing to rehire him was racially motivated and simply a pretext.⁹⁵

The Burdine Boost: Clarifying The Allocation of Burdens

In *Texas Department of Community Affairs v. Burdine*,⁹⁶ the Court applied the *McDonnell Douglas* test and solidified the burdens

87. *Id.*

88. *McDonnell Douglas*, 411 U.S. at 796.

89. *Id.* at 807. The first part of the *McDonnell Douglas* three-tiered test requires the complainant to carry the burden of making out a case of racial discrimination by showing:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.

Id. at 802.

90. *McDonnell Douglas*, 411 U.S. at 807.

91. *Id.* See *St. Mary's Honor Ctr. v. Hicks*, 756 F. Supp. 1244, 2746 (E.D. Mo.1993) (addressing the plaintiff's burden in employment discrimination cases), *rev'd*, 970 F.2d 487 (8th Cir. 1992) *cert. granted*, 113 S. Ct. 954 (1993), *rev'd*, 113 S. Ct. 2742 (1993).

92. *McDonnell Douglas*, 411 U.S. at 804.

93. *Id.*

94. *Id.* at 807.

95. *Id.* at 804.

96. 450 U.S. 248 (1981).

analysis to be used in employment discrimination claims.⁹⁷ Joyce Burdine sued her employer, the Texas Department of Community Affairs, for employment discrimination in violation of Title VII.⁹⁸ Burdine claimed that she was denied a promotion and later terminated because of her sex.⁹⁹ The United States Court of Appeals for the Fifth Circuit held that a defendant in a Title VII case had the burden of proving by a preponderance of the evidence that a legitimate, nondiscriminatory reason existed for the termination and also that, using objective evidence, those who were subsequently hired were "better qualified" than the discharged employee.¹⁰⁰

On appeal, the Supreme Court addressed the narrow task of determining the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII.¹⁰¹ In delivering the Court's opinion, Justice Lewis F. Powell, Jr., noted that the Fifth Circuit erred by imposing a heavier burden on an employer than was required under the *McDonnell Douglas* analysis.¹⁰² The Court held that when an employee proves a prima facie case of employment discrimination, the employer only bears the burden of explaining clearly that nondiscriminatory reasons exist for its action.¹⁰³ The Court noted that there is no requirement that the employer hire a minority or female applicant when faced with an equally qualified applicant who might be a white male.¹⁰⁴ The Court stated that the tripartite burden-shifting approach articulated in *McDonnell Douglas* was intended "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."¹⁰⁵

The "Mixed-Motives" Analysis

In *Mt. Healthy City School District Board of Education v. Doyle*,¹⁰⁶ the Court stated that an employer is not liable for discrimination if it shows that it would have fired the employee for a lawful

97. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 248 (1981).

98. *Id.* at 249-50.

99. *Id.* at 250-51.

100. *Texas Dep't. of Community Affairs v. Burdine*, 608 F.2d 563, 570 (5th Cir. 1979), *vacated and remanded*, 450 U.S. 248 (1981). The Fifth Circuit found that the Department's testimony rebutted Burdine's allegations of gender discrimination; that is, that gender was not the factor which motivated the department's decision to terminate her. *Burdine*, 608 F.2d at 570.

101. *Burdine*, 450 U.S. at 249-50.

102. *Id.* at 252. The Texas Department of Community Affairs had to show that it had objective reasons for preferring the replacement applicant over Burdine. *Burdine*, 608 F.2d at 570.

103. *Burdine*, 450 U.S. at 252-53.

104. *Id.* at 259.

105. *Id.* at 255 n.8.

106. 429 U.S. 274 (1977).

reason, even in the presence of an impermissible reason.¹⁰⁷ Fred Doyle, an untenured teacher, sued the Mount Healthy School Board when it refused to rehire him after discharging him.¹⁰⁸ Prior to Doyle's discharge, he had argued with a fellow teacher and with school cafeteria employees, swore at students, and made obscene gestures to female students.¹⁰⁹ In another incident, he phoned a radio station and openly criticized a school memorandum concerning the school's dress code.¹¹⁰ Subsequently, the radio station announced the school's dress code policy as part of a regular news item.¹¹¹ Thereafter, the school board adopted the school superintendent's suggestion that Doyle be dismissed, succinctly highlighting the teacher's lack of tact and professionalism and obscene gesture incidents.¹¹²

Doyle sued, claiming that the school board's decision not to rehire him violated his First and Fourteenth Amendment rights.¹¹³ The United States District Court for the Southern District of Ohio found that Doyle's action in calling the radio station constituted an exercise of free speech and that it was this activity which influenced the school board's decision not to rehire him.¹¹⁴ In addition, the district court found that the First Amendment protected Doyle's right to free speech and ordered the school board to reinstate Doyle because Doyle's protected conduct had played a "substantial part" in the school board's decision not to rehire him.¹¹⁵ On appeal, the United States Court of Appeals for the Sixth Circuit affirmed.¹¹⁶

The Supreme Court affirmed the result of the lower courts; however, the Court disagreed with the district court's failure to clarify the issue of protected conduct.¹¹⁷ The Court criticized the district court's "substantial part" test.¹¹⁸ The Court explained that such a test,

107. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

108. *Id.* at 276.

109. *Id.* at 281-82.

110. *Id.* at 282.

111. *Id.*

112. *Id.* at 282-83 n.1.

113. *Id.* at 276.

114. *Id.* at 274. The district court concluded that the telephone call to the radio station was "clearly protected by the First Amendment." *Id.*

115. *Mt. Healthy*, 429 U.S. at 284. The District Court awarded Doyle reinstatement with backpay but failed to articulate the test it used to determine that Doyle's conduct was protected by the First Amendment. *Id.* at 276.

116. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 529 F.2d 524 at 527, *vacated and remanded*, 429 U.S. 274 (1977).

117. *Mt. Healthy*, 429 U.S. at 285. The Court noted that state law lacked a requirement of "cause" or "reason" for the decision not to rehire an untenured teacher. *Id.* The Court applied a test of causation to distinguish between an employment result reached by a constitutional violation and one reached in the absence of such a violation. *Id.* at 286.

118. *Mt. Healthy*, 429 U.S. at 284.

which focused on whether the protected conduct played a "substantial part" in the decision not to rehire, could place the discharged employee in a better position than if the discharged employee had not engaged in the protected conduct which lead to dismissal in the first place.¹¹⁹ The Court feared that an employee might intentionally engage in "abrasive" conduct knowing that it was protected, and therefore the employer would be forced to rehire the offending employee.¹²⁰ The Court stated that 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. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct."¹²¹

In formulating a test of causation which distinguished between a result obtained following a constitutional violation and one not occurring incident to a constitutional violation, the Court recognized the shortcomings of a "substantial part" test.¹²² The Court noted that the district court correctly placed on Doyle the initial burden of showing that the conduct was both constitutionally protected and played a substantial part in the employment decision but stated that the district court should have continued its analysis by determining whether the school board had shown by a preponderance of the evidence that the same decision not to rehire Doyle would have been reached even without the protected conduct.¹²³ The Court concluded by vacating the Sixth Circuit's decision and remanding it for further proceedings.¹²⁴

"AFTER-ACQUIRED" EVIDENCE AS AN AFFIRMATIVE DEFENSE

The pertinent "after-acquired" evidence situation involving pre-hiring misconduct arises when the employer finds, during the discovery phase of the employee's suit, some evidence of resume fraud, or other concealed instances of prior misconduct that the employee failed to reveal on the employment application.¹²⁵ Such evidence is used by the employer to convince a court to dismiss the employee's suit because the discovered misconduct was such that the employer would

119. *Id.*

120. *Id.* at 285-86.

121. *Id.*

122. *Id.* By recognizing the significant consequences of awarding tenure, the Court explained that the school board should not be precluded from considering "constitutionally protected conduct" in its decision not to rehire Doyle nor from using such evidence to show that Doyle still would not have been rehired even if he had not phoned the radio station. *Id.* at 286.

123. *Mt. Healthy*, 429 U.S. at 287 n.2 (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270-71 n.21(1977)).

124. *Id.* at 287.

125. *Brown*, 62 *FORDAM L. REV.* at 391 n.96.

not have hired or would have fired the employee as soon as it discovered the evidence.¹²⁶

The Majority Rule: Summers v. State Farm Mutual Automobile Insurance Co.

In *Summers v. State Farm Mutual Automobile Insurance Co.*,¹²⁷ the United States Court of Appeals for the Tenth Circuit articulated what was once the majority view in analyzing the affirmative defense of after-acquired evidence in employment discrimination cases.¹²⁸ In *Summers*, State Farm Mutual Automobile Insurance Company ("State Farm") discovered that Ray Summers, one of its employees, had falsified company records.¹²⁹ Despite State Farm's knowledge of Summers' falsifications, he was not fired.¹³⁰ State Farm decided not to fire Summers because he had not profited from the falsifications.¹³¹ However, during the course of discovery for a religion and age discrimination suit filed by Summers, State Farm learned that he had actually

126. *Id.* at 391-93 n.96; but see Mark A. Hoffmann, *Court Bars Popular Defense For Employment Bias Suits*, *Bus. Ins.*, Jan. 30, 1995., at 2.

127. 864 F.2d 700, 702 (10th Cir. 1988).

128. *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 702 (10th Cir. 1988). The majority rule is an extension of the principles articulated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Student Jason Weinstein stated that:

The majority rule, originated by the Tenth Circuit and adopted by the Sixth, is that an employer is able to avoid all liability under Title VII for a discriminatory employment decision if [the employer] can show that it would have made the same decision based only on evidence of employee misconduct acquired after the decision [to discharge] had been made.

Jason M. Weinstein, Note, *No Harm, No Foul?: The Use of After-Acquired Evidence in Title VII Employment Discrimination Cases*, 62 *GEO. WASH. L. REV.* 280, 281-82 (1993). The following cases adhered to the *Summers* rule: *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539, 539 n.24 (6th Cir. 1993) (denying recovery where employee took confidential company records), *cert. granted*, 114 S. Ct. 2099 (1991), *rev'd* 115 S. Ct. 879 (1995); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 307, 304-05 (reducing plaintiff's recovery by 50%); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 414-15 n.1 (6th Cir. 1992) (barring recovery under Michigan's Elliot-Larsen Act where employee's misrepresentations regarding educational background were "material, directly related to measuring a candidate for employment and relied upon by the employer"); *Washington v. Lake County, Illinois*, 969 F.2d 250, 253-56 (7th Cir. 1992) (granting summary judgment where employer proved that it would have fired the employee had it discovered the falsehood while still employed); *Bonger v. American Water Works*, 789 F. Supp. 1102, 1105-07 (D. Colo. 1992) (upholding the use of "after-acquired" evidence where employer sustained burden of showing the same decision would have been made absent racial motivations); *Churchman v. Pinkerton's Inc.*, 756 F. Supp. 515, 521 (D. Kan. 1991) (granting summary judgment based on the "would have fired" and "would not have hired" standards); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991, 995 (D. Kan. 1989) (upholding summary judgment for the defendant based on the "would not have hired" standard).

129. *Summers*, 864 F.2d at 702. Summers forged a signature on a "loss-of-wages" claim. *Id.*

130. *Summers*, 864 F.2d at 702.

131. *Id.*

committed over 150 instances of falsifying insurance claims records.¹³² The United States District Court for the District of Utah granted State Farm's motion for summary judgment based on this after-acquired evidence.¹³³ On appeal, the Tenth Circuit upheld the district court's grant of summary judgment, dismissing the case in favor of State Farm.¹³⁴ The court concluded that the after-acquired evidence of the numerous misdeeds totally precluded a remedy for Summers.¹³⁵ The court conditioned its decision, stipulating that after-acquired evidence cannot be considered "cause" for the decision to fire the employee.¹³⁶ However, the court asserted that the after-acquired evidence *was* relevant to the issue of injury and the appropriate remedy.¹³⁷ The court supported its argument on the appropriate treatment of misconduct discovered incident to litigation by offering an often quoted hypothetical to explain its rationale:

To argue, as Summers does, that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company 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. . . . [T]he masquerading doctor would be entitled to no relief, and Summers is in no better position.¹³⁸

In *Welch v. Liberty Machine Works, Inc.*,¹³⁹ the United States Court of Appeals for the Eighth Circuit followed the *Summers* rule.¹⁴⁰ In *Welch*, Richard L. Welch, a discharged machinist, sued his employer, Liberty Machine Works ("Liberty"), for wrongful discharge and handicap discrimination, activities which allegedly violated the Employee Retirement Income Security Act ("ERISA") and the Missouri

132. *Id.* at 703 n.2. The employer discovered the falsifications almost four years after Summers had been discharged. *Id.* at 803.

133. *Summers*, 864 F.2d at 703 n.1. Summers' wrongful discharge and intentional infliction of emotional distress claims were dismissed, but the discrimination claim was upheld. *Id.*

134. *Summers*, 864 F.2d at 709.

135. *Id.* at 708.

136. *Id.*

137. *Id.*

138. *Id.* See Rebecca Hanner White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 56-57 n.26 (1993) (criticizing the after-acquired evidence defense and arguing that evidence of an employee's misconduct should have no impact on an employer's liability for discriminatory conduct); see also Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 LAB. LAW. 43, 69 (1993) (arguing that after-acquired evidence is useful in limiting back pay to the prevailing plaintiff in an employment discrimination suit and urging courts to reject the *Summers* rationale).

139. 23 F.3d 1403 (8th Cir. 1994).

140. *Welch v. Liberty Mach. Works, Inc.*, 23 F.3d 1403, 1405 (8th Cir. 1994).

Human Rights Act.¹⁴¹ In November of 1990, Liberty hired Welch after he completed an employment application pursuant to Liberty's hiring policy.¹⁴² Welch intentionally failed to disclose that just before he was hired by Liberty, he was employed as a machinist by K & M Machine Works, Inc. ("K & M") and was subsequently fired by K & M due to poor work performance after only one month of employment.¹⁴³ After Welch began employment and a week after Welch revealed that he had developed a fistula which required surgery, Liberty discharged Welch, alleging a shortage of work for machinists.¹⁴⁴

141. *Welch*, 23 F.3d at 1406. Title VII of the Civil Rights Act of 1964 ("Title VII") provides in relevant part:

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

42 U.S.C. § 2000e-2 (1988). See Employee Retirement Income Security Act, 29 U.S.C. § 1001-1461 (1988 & Supp. 1989). ERISA is a federal statute which protects employees under "employee pension benefit plans" and "employee welfare benefit plans," which extend to include medical coverage. 29 U.S.C. § 1002(1)-(2)(1988). The Missouri Human Rights Act provides in relevant part:

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or handicap of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap. . .

MO. ANN. STAT. § 213.055 (Vernon 1994). "Handicap" is defined by the statute as:

[A] physical or mental impairment which substantially limits one or more of a person's major life activities, a condition perceived as such, or a record of having such an impairment, with or without reasonable accommodation does not interfere with performing the job, utilizing the place of public accommodation, or occupying the dwelling in question.

Id. at § 213.010(10). ERISA is a federal statute implemented to protect employee benefit plan members and their beneficiaries. Employee Retirement Income Security Act of 1974 §§ 1-4402, 29 U.S.C. §§ 1001-1461 (1988). ERISA governs "employee pension benefit plans," "employee welfare benefit plans," and medical insurance plans. *Id.* Section 510 of ERISA specifically addresses the protection of employees from an employer's discriminatory acts or discharge designed to harass or prevent an employee from receiving ERISA-related benefits. 29 U.S.C. § 1140 (1988). To establish a prima facie case under section 510, the plaintiff must do three things: (1) provide evidence of the employer's prohibited conduct; (2) show that the action was undertaken to interfere; and (3) show that the interference was aimed at the attainment of rights to which the employee might become entitled. 29 U.S.C. § 1132(a)(3) (1988).

142. *Welch*, 23 F.3d at 1404. The main purpose of the application process was to provide Liberty with a comprehensive full-time and part-time employment record. *Id.* The form warned that "any misstatement or omission of fact" would be adequate grounds for dismissal. *Id.*

143. *Welch*, 23 F.3d at 1404. K & M fired Welch because of "unsatisfactory performance." *Id.* Welch worked for Liberty from November 1, 1990, until he was fired in early January, 1991. *Id.*

144. *Welch*, 23 F.3d at 1404. The term "fistula" is defined as:

Welch filed a wrongful discharge action in the United States District Court for the Eastern District of Missouri.¹⁴⁵ The fact that Welch falsified his job application was uncovered by Liberty during the discovery phase of Welch's wrongful discharge action.¹⁴⁶ Liberty moved for summary judgment, filing an affidavit signed by Liberty's President, Kurt Maier.¹⁴⁷ In his affidavit, Maier stated that even in the absence of Welch's suit, Liberty would have dismissed Welch for his omissions of fact on the job application as soon as Liberty discovered the material inconsistencies.¹⁴⁸

Anticipating that the Eighth Circuit would adopt the rule in *Summers*, the United States District Court for the Eastern District of Missouri granted Liberty's request for summary judgment.¹⁴⁹ In relying on the *Summers* rule, the district court accepted Maier's affidavit as proof that Liberty would never have hired Welch had it known of his misrepresentation.¹⁵⁰ Therefore, the district court barred Welch from any recovery.¹⁵¹ On appeal, Welch argued that the after-acquired evidence rule in *Summers* should only apply to bar recovery where the alleged misrepresentation was "material" to the employee's qualifications necessary to be eligible for the job.¹⁵² Rejecting Welch's argument, the Eighth Circuit adopted the *Summers* rule and held that the after-acquired evidence that Welch had been fired from K & M pre-

An abnormally formed canal or passage running between the surface of the body and an internal organ or a space inside the body, or between two organs or spaces within the body. A fistula is formed by ulceration, by the erosion of an ulcer, or by the failure in the healing process of a penetrating wound. For example, if ulceration in the wall between the rectum and the vagina produces an opening, the result (the opening) would be a fistula. . . . The naming of fistulas is based on the organ involved. Small fistulas communicating with the outside are sometimes made to heal up by "freshening" their surfaces with a caustic, or by scraping. The more serious ones must be treated by surgical closure.

SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE F-90 (1994).

As a discharged employee, Welch's surgery would no longer be covered under Liberty's employee benefit plan. *Welch*, 23 F.3d at 1404. Welch argued that Liberty fired him to avoid paying his medical expenses. *Id.*

145. *Welch*, 23 F.3d at 1404.

146. *Id.* More specifically, Welch's deposition revealed that he had knowingly and intentionally omitted evidence from his resume and job application to Liberty that he had previously worked for and was subsequently fired from K & M. *Id.*

147. *Welch*, 23 F.3d at 1404.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1405. The district court in *Summers* agreed with the *Mt. Healthy* holding that "[t]he 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 for which he was allegedly discharged]." *Id.*

152. *Welch*, 23 F.3d at 1404. The Supreme Court in *Mt. Healthy* developed a "same decision" test to be applied in cases where the employer had both legitimate and illegitimate motives when making an employment decision. *Mt. Healthy*, 429 U.S. 274 at 285-86.

cluded any relief on his handicap discrimination suit.¹⁵³ In analyzing the viability of Liberty's affirmative defense of "after-acquired" evidence, the court concluded that in the context of employment application fraud, after-acquired evidence of employee misrepresentation barred recovery under an employment discrimination claim if the employer established that it would not have hired the employee had it known of the misrepresentation.¹⁵⁴

In *Johnson v. Honeywell Information Systems, Inc.*,¹⁵⁵ the United States Court of Appeals for the Sixth Circuit adopted the *Summers* rule, noting that not just any misrepresentation or omission on an employment application could be used in an after-acquired evidence defense.¹⁵⁶ The resulting "materiality" test developed by the Sixth Circuit determined whether the alleged inconsistency on the resume

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

154. *Id.* at 1405. However, the Eighth Circuit rejected the district court's acceptance of Maier's affidavit, finding it to be insufficient to establish "that Liberty would not have hired Welch but for the misrepresentation." *Id.* Furthermore, the court explained that in employment discrimination cases, the employer retains the "substantial burden of establishing" the material fact that a policy of not hiring employees who misrepresent themselves on applications actually existed before the employee alleging discrimination was hired, and subsequently fired, and "that the policy constitutes more than mere contract or employment application boilerplate." *Id.* at 1406. The Eighth Circuit relied on *Mt. Healthy* to establish that the employer and not the employee has the burden of showing that an employment policy was in force which would have resulted in the employee's discharge regardless of the disability. *Id.* Therefore, the court remanded the case for further proceedings, stating that Maier's affidavit did not meet the required showing. *Id.*

In a dissenting opinion, Judge Morris Sheppard Arnold stated that rather than applying the *Summers* rule, the case should have been decided by implementing the approach to after-acquired evidence advanced by the Eleventh Circuit in *Wallace v. Dunn Construction Co.* *Id.* (Arnold, J., dissenting). Judge Arnold explained that the court should have first focused on the fact that Liberty did hire Welch and secondly, that, up until the discovery phase of Welch's suit, Liberty was oblivious to the misrepresentation which could have resulted in Welch's dismissal. *Id.* at 1406 (Arnold, J. dissenting). The effect, Judge Arnold argued, was that the latent misrepresentation was inappropriately used as a convenient excuse for the termination even though the misrepresentation was not the catalyst for Liberty's decision to terminate Welch. *Id.* Liberty originally explained that Welch was dismissed due to a general lack of available work. *Id.* at 1404. Judge Arnold stated that the purpose of ERISA and the Missouri Human Rights Act is to "deter discriminatory acts and compensate those who have suffered from them." *Id.* at 1406 (Arnold, J. dissenting). Judge Arnold concluded that the dual objectives of deterrence and compensation demanded an appropriate analysis of "a defendant's [employer's] mind for what it contained, not what it might have contained" in order to determine whether the employer acted unlawfully and was therefore liable. *Id.*

155. 955 F.2d 409 (6th Cir.1992).

156. *Johnson*, 955 F.2d at 414; see *Milligan-Jensen*, 975 F.2d at 304-5 (applying the *Johnson* "materiality" test to find that a female campus security officer who brought a Title VII sexual discrimination claim following her discharge after a ninety-day employment probation period had omitted evidence of a prior drunk driving conviction which constituted a material falsification).

or application was of such a degree that an employer's decision to dismiss the employee was warranted.¹⁵⁷

Mildred Johnson sued her former employer, Honeywell Information Systems, Inc. ("Honeywell"), alleging violations of Michigan's Elliot-Larsen Civil Rights Act.¹⁵⁸ Honeywell fired Johnson after she refused to resign when Honeywell found her performance to be unsatisfactory.¹⁵⁹ In response, Johnson filed suit.¹⁶⁰ During the discovery phase, Honeywell learned of several flagrant misrepresentations made on Johnson's employment application, the most substantial being her contentions as to her education and experience, which prompted Honeywell to request summary judgement for breach of contract.¹⁶¹ The United States District Court for the Eastern District of Michigan rejected Honeywell's request for summary judgment because Michigan law prohibited using after-acquired evidence as the foundation of a contract defense.¹⁶²

In reversing the district court's findings, the Sixth Circuit stated that Honeywell was entitled to rely on after-acquired evidence of misconduct.¹⁶³ The court noted that as a "general rule," in resume fraud cases, "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."¹⁶⁴ The court held that Johnson was completely barred from any recovery because her misrepresentations were material, were directly related to her being hired, and were relied upon by Honeywell in deciding to hire her.¹⁶⁵

The Sixth Circuit also applied the *Summers* rule in *Dotson v. United States Postal Service*,¹⁶⁶ finding that misrepresentations on a postal worker's employment application rendered him unqualified for the job.¹⁶⁷ The United States Postal Service ("Postal Service") terminated Dotson because previous back injuries rendered him unable to

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

158. *Id.* at 410. The general provisions of the Elliot-Larsen Act forbid an employer from retaliating or discriminating against a person "because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MICH. COMP. LAWS § 37.2701(a)(1988).

159. *Johnson*, 955 F.2d at 410.

160. *Id.* at 411.

161. *Id.* at 411-12.

162. *Id.* at 412. The court did not address Johnson's civil rights claim. *Id.*

163. *Johnson*, 955 F.2d at 415.

164. *Id.* at 414.

165. *Id.*

166. 977 F.2d 976 (6th Cir. 1992); *cert. denied*, 113 S. Ct. 263 (1992).

167. *Dotson v. United States Postal Serv.*, 977 F.2d 976, 978 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992).

carry mail.¹⁶⁸ Following his discharge, Dotson sued the Postal Service and the Postmaster General, alleging handicap discrimination.¹⁶⁹ Discovery by the Postal Service revealed material omissions on Dotson's employment application about his prior employment and current health status.¹⁷⁰ The United States District Court for the Eastern District of Michigan granted the Postal Services' motion for summary judgment.¹⁷¹ In so doing, the court noted that Dotson had misled the district court by filing two conflicting sworn statements regarding prior instances in which he had been fired.¹⁷²

On appeal, the Sixth Circuit required Dotson to present a prima facie case of handicap discrimination under the *Burdine* standards.¹⁷³ The court stated that "proof that [the] plaintiff is entitled to relief is essential to handicap discrimination claims."¹⁷⁴ Based on the after-acquired evidence, the court reasoned that Dotson was never initially qualified for the postal position.¹⁷⁵ The court noted that Dotson was not qualified for the postal position because he lacked trustworthiness and honesty, two qualities the Postal Service deemed requisite for the position.¹⁷⁶ Therefore, the court precluded all relief because Dotson failed to prove the essential element of relief necessary to form a prima facie case of employment discrimination.¹⁷⁷

In *Milligan-Jensen v. Michigan Technological Univ.*,¹⁷⁸ the United States District Court for the Western District of Michigan declined to follow the *Summers* rule, but the Sixth Circuit reversed the district court's decision.¹⁷⁹ Patricia Milligan-Jensen, a former public

168. *Id.* at 977.

169. *Id.* Dotson alleged that the Postal Service violated the Rehabilitation Act, 29 U.S.C. §§ 791 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § e-16. *Id.*

170. *Dotson*, 977 F.2d at 977. Dotson failed to reveal on his application form that he had worked for the Michigan State Department of Corrections and also for a Detroit A & P warehouse. *Id.* In both instances, Dotson had been fired or had been forced to resign. *Id.* He also intentionally concealed evidence that he continued to use prescription drugs for a back condition he had which prevented him from carrying mail. *Id.*

171. *Dotson*, 977 F.2d at 977.

172. *Id.* at 977.

173. *Id.* The Sixth Circuit explained that Dotson had to show, apart from the alleged handicap, that he was qualified for the postal job. *Id.* at 977. Dotson was not qualified because he could no longer carry mail as was required. *Id.* at 977.

174. *Dotson*, 977 F.3d at 977 (citing *Crabtree v. Collins*, 900 F.2d 79, 82-83 (6th Cir. 1990)).

175. *Id.*

176. *Id.*

177. *Id.*

178. 975 F.2d 302 (6th Cir. 1992).

179. *Milligan-Jensen v. Michigan Technological Univ.*, 767 F. Supp. 1403, 1416 (W.D. Mich. 1991), *rev'd*, 975 F.2d 302 (6th Cir. 1992); *Milligan-Jensen*, 975 F.2d at 1410. The district court held that MTU was liable for both sex discrimination and retaliation against Milligan-Jensen for filing an EEOC complaint. *Milligan-Jensen*, 767 F. Supp. at 1411. MTU was ordered to pay damages in the form of backpay; however, the court

safety officer, filed a Title VII action against Michigan Technological University ("MTU") for sex discrimination and retaliation for filing a complaint with the Equal Employment Opportunity Commission.¹⁸⁰ The district court found that MTU was liable for discrimination, but considered Milligan-Jensen's omission of a prior driving under the influence conviction on her application to be a material falsification.¹⁸¹ Refusing to follow the rationale of *Summers*, the court reduced Milligan-Jensen's award by fifty percent.¹⁸²

Applying the *Summers* rule, the Sixth Circuit reversed.¹⁸³ The court held that Milligan-Jensen's failure to reveal her prior conviction precluded recovery under Title VII.¹⁸⁴ The court reasoned that if MTU would not have employed or would have dismissed Milligan-Jensen when MTU became aware of the falsification, then Milligan-Jensen was not legally injured by being fired.¹⁸⁵

The United States Court Appeals for the Seventh Circuit adopted *Summers* in *Washington v. Lake County, Illinois*.¹⁸⁶ The Seventh Circuit held that an employer needed to only show that it would have fired an employee had it known of the misrepresentations on the employment application.¹⁸⁷ Eddie Washington, an African-American corrections official at the Lake County Sheriff's Department ("Department"), sued Lake County, the Department, and his superior, alleging a racially motivated discharge.¹⁸⁸ During discovery, the Department learned that Washington had falsified his application by lying about his previous convictions.¹⁸⁹ The United States District Court for the Northern District of Illinois granted Lake County's motion for summary judgment.¹⁹⁰ In reaching its decision, the district court relied upon *Summers*, explaining that even if Washington was fired because

limited damages awarded because Milligan-Jensen falsified her employment application. *Id.* at 1416-17.

180. *Milligan-Jensen*, 767 F. Supp. at 1409. Milligan-Jensen was cited for uniform violations, and continually received low evaluations despite her experience in law enforcement. *Id.* at 1408. A male employee who committed the same violation was neither cited nor reprimanded on his evaluation form. *Id.* She was later reassigned and her duties restricted to the "bump shift" — a meter maid position characterized by her co-workers as "the lady's job." *Id.* at 1409.

181. *Milligan-Jensen*, 767 F. Supp. at 1410, 1416.

182. *Id.*

183. *Milligan-Jensen*, 975 F.2d at 1417.

184. *Id.* at 305. Milligan-Jensen had a prior conviction for driving under the influence of alcohol. *Id.*

185. *Milligan-Jensen*, 975 F.2d at 304-05.

186. 969 F.2d 250, 256 (7th Cir. 1992).

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

188. *Id.* at 256. Eddie Washington sued under Title VII of the Civil Rights Act of 1964, as well as 42 U.S.C. §§ 1981, 1983. *Id.*

189. *Washington*, 969 F.2d at 251-52.

190. *Id.* at 252.

of his race, he was not entitled to relief because he lied on his application and failed to challenge the validity of *Summers* at trial.¹⁹¹

On appeal, the Seventh Circuit affirmed the district court's decision.¹⁹² The court held that Washington was precluded from obtaining relief under his employment discrimination claim due to: (1) after-acquired evidence that Washington had lied about his prior convictions on his employment application form; and (2) Washington's failure to produce evidence of the nonexistence of a Lake County policy to fire employees on such grounds.¹⁹³ The court stated that "[i]n the Supreme Court mixed-motives cases, the temporal focus is on the time of the adverse employment decision, and the inquiry is whether the same employment decision would have been made if the protected characteristic or conduct were removed from consideration."¹⁹⁴ The court saw no reason not to apply this approach in *Summers*-type cases.¹⁹⁵ The court stated that, in an employment discrimination case involving employment application fraud where the employee is later discharged for unrelated reasons, the appropriate issue is whether the employer, "acting in a race-neutral fashion," would have fired the employee after discovering the misrepresentation.¹⁹⁶ The court concluded that once the Department produced evidence that it would have fired Washington upon discovery of the misrepresentation, the burden shifted to Washington to show that he would not have been fired had the Department acted in a race-neutral manner in a "resume fraud" situation.¹⁹⁷

The Minority Rule: Wallace v. Dunn Construction Company, Inc.

In 1992, the United States Court of Appeals for the Eleventh Circuit in *Wallace v. Dunn Construction Co., Inc.*¹⁹⁸ rejected the use of

191. *Id.* at 252-53.

192. *Id.* at 257.

193. *Id.* at 257. Washington filled in the application form, checking the box "no" in response to the following question:

Have you ever been convicted of an offense other than a minor traffic violation? (Do not include convictions while a minor and/or convictions sealed by court order.) If so, please state nature of offense(s), date(s), city and state and disposition. A conviction record is not an automatic bar to employment and the nature, recency and disposition of an offense will be considered only as it relates to the job for which you are applying.

Id. at 251-52.

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

195. *Id.*

196. *Id.* The court cautioned that the issue was not whether the misled employer would have initially hired the employee had it known the truth. *Id.*

197. *Washington*, 969 F.2d at 257.

198. 968 F.2d 1174 (11th Cir. 1992), *vacated* 32 F.3d 1489 (4th Cir. 1994).

the *Summers* rule to resolve after-acquired evidence cases.¹⁹⁹ Plaintiffs Becky Wallace and Annette Neil sued Dunn Construction Company ("Dunn") for employment discrimination.²⁰⁰ During discovery, Dunn learned that Neil had falsified her employment application by lying about a previous narcotics conviction.²⁰¹ Dunn moved for partial summary judgment with regard to Neil.²⁰² The United States District Court for the Northern District of Alabama denied Dunn's motion.²⁰³

On appeal, the Eleventh Circuit confronted the issue of whether Dunn could use evidence of an existing policy to show that Neil would have been fired anyway due to her prior drug conviction.²⁰⁴ Dunn argued that Neil was not an "aggrieved" person within the meaning intended under Title VII and the Equal Pay Act.²⁰⁵ The court stated that the *Summers* reasoning ignored the issue of the time lapse between the allegedly discriminatory termination and the time that the falsification was discovered.²⁰⁶ Therefore, the court stated that the *Summers* analysis was inappropriate.²⁰⁷

The court reasoned that in awarding less than the full amount of damages of backpay, Neil would be left in a worse position than she

199. *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1178 (11th Cir. 1992), *vacated* 32 F.3d 1489 (11th Cir. 1994).

200. *Wallace*, 968 F.2d at 1176. On September 6, 1994, the court vacated its decision in *Wallace* and granted a motion for rehearing en banc. *Id.* Neil alleged four causes of action:

(1) Inadequate pay under the Equal Pay Act (EPA). See 29 U.S.C.A. § 206(d)(1), 215(a)(2)(West 1978); (2) retaliatory discharge under the EPA. See 29 U.S.C.A. § 215(a)(3)(West 1965) (3) a hostile work environment sexual harassment claim under Title VII. See 42 U.S.C.A. § 2000e-31(a)(1)(West 1981) and (4) a retaliatory discharge claim under Title VII. She alleged that her complaints about sexual harassment resulted in her termination. See 452 U.S.C.A. § 2000e-31(a)(West 1981). Neil also brought two Alabama state tort claims alleging invasion of privacy and assault and battery.

Id.

201. *Id.* at 1176-77.

202. *Id.* at 1177.

203. *Id.*

204. *Id.* Dunn contended that Wallace had no standing because she obtained employment that she would not otherwise have obtained. *Id.* (Godbold, J., dissenting). The court decided not to address the issue of standing, finding it to be irrelevant except as indirect proof that Dunn would have fired Wallace for the misrepresentations. *Id.* at 1186 (Godbold, J., dissenting).

205. *Wallace*, 968 F.2d at 1181 n.10. The court explained that Congress did not intend to include Wallace in the protected class given the circumstances of employment application fraud. *Id.*

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

207. *Id.* at 1179. Once it is determined that the plaintiff's misrepresentations were relevant to the position sought and the employer can show that it would not have hired the plaintiff had it known of the lie, the plaintiff's lack of standing comes to light and the case ends. *Id.*

would have been absent the discrimination, resulting in a windfall for Dunn.²⁰⁸ Therefore, in reaching a compromise, the court established the proposition that after-acquired evidence may come in at the remedies phase.²⁰⁹ The court decided that Neil was precluded from the remedies of reinstatement or front pay.²¹⁰

In *Mardell v. Harleysville Life Insurance Co.*,²¹¹ the United States Court of Appeals for the Third Circuit also rejected the *Summers* rule.²¹² Nancy Mardell, a fifty-two-year-old female employee at Harleysville Life Insurance Company ("Harleysville"), was placed on probation following a poor insurance sales performance rating.²¹³ The terms of Mardell's probation required that Mardell meet or exceed certain sales quotas that many of her male counterparts were not required to meet.²¹⁴ When Mardell failed to meet these quotas, Harleysville terminated her and hired a younger male to replace her.²¹⁵

Mardell sued Harleysville for employment discrimination, alleging age and gender discrimination under Title VII and the ADEA.²¹⁶ During discovery, Harleysville found that Mardell had misrepresented several credentials which Harleysville contended it relied upon in making the decision to hire her.²¹⁷ The United States District Court for the Western District of Pennsylvania relied upon the *Summers* rule to grant Harleysville summary judgment and to completely bar Mardell's cause of action.²¹⁸ The district court held that Harleysville had a complete defense to Mardell's suit based on the after-acquired evidence of Mardell's resume fraud.²¹⁹

In overturning the district court's reliance on *Summers*, the Third Circuit summarized the classes of federal disparate treatment cases and applied the reasoning advanced by the Eleventh Circuit in *Wal-*

208. *Id.* at 1181.

209. *Id.*

210. *Id.*

211. 31 F.3d 1221 (3d Cir. 1994), *vacated and remanded*, NO. 93-742, 1995 U.S. LEXIS 2268 (Mar. 27, 1995). Although the Supreme Court ultimately vacated this opinion, it serves as an example of how after-acquired evidence was used in age discrimination cases.

212. *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1222 (3d Cir. 1994), *vacated and remanded*, NO. 93-742, 1995 U.S. LEXIS 2268 (Mar. 27, 1995).

213. *Id.* at 1223.

214. *Id.*

215. *Id.* The new employee hired to replace Mardell was a forty year-old male. *Id.*

216. *Id.* at 1222. Mardell sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e - e-17 (1981 & Supp. 1994), The Age Discrimination In Employment Act, 29 U.S.C.A. §§ 621-34 (1985 & Supp. 1994) and the Pennsylvania Human Relations Act, 43 PA. STAT. ANN. §§ 951-63 (1991 & Supp. 1994). *Id.*

217. *Mardell*, 31 F.3d at 1223.

218. *Id.* at 1224.

219. *Id.*

lace to reject the after-acquired evidence defense.²²⁰ The Third Circuit distinguished the *Summers* line of after-acquired evidence cases and held that “[a]fter-acquired evidence, simply put, is not relevant in establishing liability under Title VII or [the] ADEA because the sole question to be answered at that stage is whether the employer discriminated against the employee on the basis of an impermissible factor at the instant of the adverse employment decision.”²²¹ The court reasoned that an after-acquired evidence case was distinguishable from a mixed-motives case because the “legitimate reason” articulated by the employer in an after-acquired evidence case was nonexistent when the decision to fire was made and therefore could not have motivated the employer’s decision.²²² The court explained that an employer who unlawfully discriminates, as in *Summers*, cannot suddenly assume a “legitimate” reason for the decision to terminate in an attempt to justify its actions.²²³

Furthermore, the court rejected the argument in *Summers* that a plaintiff found to have misrepresented a material fact in some manner was not “injured” even though an employer invidiously discriminated against the employee.²²⁴ The court explained that the rationale in *Summers* would prevent the employee’s remedy in an action because the employee did not have a “right” to be employed at the moment of the injury.²²⁵ The court stated that “[s]urely that result flies in the face of reason and the whole body of tort law.”²²⁶ The court concluded that after-acquired evidence is inadmissible because it is irrelevant at the liability stage of a Title VII or ADEA suit, and it may not be used by an employer as substantive evidence to defend against liability.

ANALYSIS

*McKennon v. Nashville Banner Publishing Co.*²²⁷ was an opportunity for the United States Supreme Court to resolve the dilemma of “after-acquired” evidence in employment discrimination cases.²²⁸ As

220. *Id.* at 1224, 1228.

221. *Id.* at 1228. The *Wallace* decision highlighted the lapse of time between the employment decision and the discovery of a lawful reason for dismissing the employee. *Wallace*, 968 F.2d at 1181.

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

223. *Id.* at 1229.

224. *Id.* at 1233.

225. *Id.* at 1231.

226. *Id.* at 1233 (citing *Welch*, 23 F.3d at 1406). The court remanded the case to the district court to resolve the issue of appropriate remedies to determine the appropriate amount of backpay that should be awarded so as not to “dilute” the deterrent purposes of Title VII and ADEA by confining recovery to the date of discovery of the misrepresentations. *Id.* at 1239.

227. 115 S. Ct. 879 (1995).

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

the Supreme Court noted in its unanimous decision in *McKennon*, courts which adhered to the *Summers*²²⁹ rule — the rule that after-acquired evidence of misconduct which would have resulted in an employee being discharged completely barred the employee any relief — were incorrect.²³⁰ In rejecting *Summers*, the Court stated that the Age Discrimination in Employment Act (“ADEA”) and Title VII share the common goal of accomplishing “the elimination of discrimination in the workplace.”²³¹ In light of the congressional scheme of legislation targeting employment discrimination, the Court noted that it would be in direct contravention of congressional intent to allow after-acquired evidence of wrongdoing to completely deny all relief when the employer had previously violated the ADEA.²³² As a result, the Court adopted a rule which favors awarding partial remedies in after-acquired evidence cases, emphasizing that an employee injured as a result of a violation of the ADEA is entitled to liquidated damages in the form of backpay.²³³

The Court’s ultimate conclusion that Christine McKennon was entitled to partial relief, although in contravention of the majority rule first articulated in *Summers*, was correct.²³⁴ The Court correctly adopted the once minority view that, in cases of invidious employment discrimination, courts have the authority to award at least a partial remedy rather than to bar all relief, even when the employer uses the affirmative defense of after-acquired evidence.²³⁵ The Court’s rationale upheld the antidiscriminatory principles of the ADEA and Title VII of the Civil Rights Act of 1964 (“1964 Act”), including the amendments contained in the Civil Rights Act of 1991 (“1991 Act”).²³⁶

THE COURT’S REJECTION OF THE *SUMMERS* RULE WAS CORRECT

The Court Upheld the Congressional Intent of the ADEA and Title VII

In questioning the Sixth Circuit’s legal conclusion that McKennon was barred from any relief, the Court effectively upheld the protective

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

230. *Id.* at 883.

231. *Id.* at 884 (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (holding that the ADEA allows an injured employee to seek concurrent state and federal claims to expedite age-discrimination claims)).

232. *Id.*

233. *Id.* at 883; 29 U.S.C. § 626(b) (1967).

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

235. *Id.* See *supra* notes 198-225 and accompanying text (outlining cases which follow the minority rule).

236. *McKennon*, 115 S. Ct. at 883, 886; see *supra* notes 61-78 and accompanying text (discussing the deterrent purposes of Title VII and the ADEA).

purposes of the ADEA and Title VII.²³⁷ Not only is the ADEA aimed at eradicating age discrimination in the workplace, the ADEA allows a private individual to "vindicat[e] both the deterrence and the compensation objectives of the ADEA."²³⁸

Title VII accomplishes a similar purpose of preventing discriminatory practices in the workplace because "Title VII also strives to make the injured person whole by encouraging employers to examine and evaluate their practices and to endeavor to eliminate employment discrimination."²³⁹ Furthermore, in defining the goals of the 1991 Act, the House Committee on Education and Labor stated that the "committee intend[ed] to confirm that the principle of anti-discrimination is as important as the principle that prohibits assaults, batteries and other intentional injuries to people."²⁴⁰

The Court Upheld the Public Policy Behind the ADEA and Title VII

The most overriding argument against a rule which would completely bar any recovery based on the defense of after-acquired evidence is that an employer, federally charged with the task of self-evaluating employment practices, escapes the public system of accountability.²⁴¹ Recognizing that each Title VII or ADEA action has a public enforcement component, the cumulative effect of a successful Title VII or ADEA action is two-fold.²⁴² First, a Title VII or ADEA action identifies the victim's injuries.²⁴³ Second, the action deters future injuries.²⁴⁴ To ignore each incidence of discrimination simply because a "skeleton" is found in the victim's closet discredits the power of the legislative process and dehumanizes the victim.²⁴⁵

As a complete defense, the *Summers* rule did exactly that because it was more concerned with broadly protecting the employer from being sued.²⁴⁶ The *Summers* rule both offered license and rewards to

237. *McKennon*, 115 S. Ct. at 886-87.

238. *Id.* at 440.

239. See Pub. L. No. 102-166 § 3, 105 Stat. 1071 (1991); Jason M. Weinstein, *Note, No Harm, No Foul: The Use of After-Acquired Evidence in Title VII Employment Discrimination Cases*, 62 GEO. WASH. L. REV. 280 at 312 (1993) (arguing that the *Summers* doctrine was plagued by overbreadth and condoned employer discrimination by failing to attach legal repercussions).

240. H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 15 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 553.

241. *Id.*

242. *Id.*

243. *Id.*, 1991 U.S.C.C.A.N. at 549, 552.

244. *Id.*

245. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J. concurring) (recognizing that discrimination injures the victim's self-esteem and dignity).

246. *Wallace v. Dunn Constr. Co.* 968 F.2d 1174, 1180, *vacated*, 32 F.3d 1489 (11th Cir. 1994).

the employer who investigated an applicant's background after the discharge in order to manufacture a nondiscriminatory reason for the discharge.²⁴⁷ The *Summers* rule manifested employers' desires to avoid costly litigation by guaranteeing summary judgment and defeating handicap discrimination remedies — in essence, subverting the antidiscrimination statutes, including Title VII's primary goal of "eradicate[ing] discrimination throughout the economy."²⁴⁸

THE NEW QUESTION: HOW SHOULD AFTER-ACQUIRED EVIDENCE LIMIT AN EMPLOYEE'S DAMAGES?

After *McKennon*, the employee who engages in misconduct and is subsequently fired for an unrelated, yet discriminatory, reason is no longer deemed "uninjured" by the courts and therefore unentitled to a remedy.²⁴⁹ In *McKennon*, the Supreme Court correctly followed the previously minority rule to award at least partial damages.²⁵⁰ The Court stated a formula to limit awardable remedies rather than adhering to the majority rule of barring all damages.²⁵¹ As a general rule in cases involving violations of federal antidiscrimination law and after-acquired evidence, neither reinstatement nor front pay are appropriate forms of compensation, but limited backpay is appropriate.²⁵²

The Court correctly pointed out that reinstatement or front pay are unfeasible because the new evidence creates "lawful" grounds upon which an employer can subsequently fire the very employee whom they discriminated against.²⁵³ This is not a remedy but rather a second opportunity to injure a victim of unlawful discrimination.²⁵⁴ However, by awarding backpay "from the date of the unlawful discharge to the date the new information was discovered," while instructing courts to take into account other "extraordinary equitable circumstance" to determining relief, the harsh effects of the *Summers* rule are avoided.²⁵⁵ Indeed, this new formula for calculating remedies in the form of backpay accomplishes the goals of the ADEA and other

247. *Id.*

248. Weinstein, 62 GEO. WASH. L. REV. at 309-11.

249. See *supra* notes 183-85 and accompanying text (describing how the court in *Milligan-Jensen* held that an employee who engaged in misconduct and was subsequently fired for a discriminatory reason was not legally injured by the dismissal).

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

251. *Id.*; See *supra* notes 55-60 and accompanying text.

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

253. *Id.*

254. *Id.*

255. *Id.* at 886; Mark A. Hoffmann, *Court Bars Popular Defense For Employment Bias Suits*, BUS. INS., Jan. 30, 1995, at 2.

federal antidiscrimination legislation.²⁵⁶ Employers must adhere to Title VII's objective of forcing employers to "examine their motivations" or face the penalties of violating federal laws.²⁵⁷ In light of the new standard, employers will have a harder time dismissing employment suits using after-acquired evidence.²⁵⁸ The new interpretation *McKennon* has set by rejecting the inequitable, albeit majority, *Summers* rule and its progeny means that employers will be less likely to engage in "fishing expeditions" designed to thwart legitimate employment discrimination suits or to screen out any employees who might have the potential to sue companies after being hired.²⁵⁹

CONCLUSION

The rule from *Summers v. State Farm Mutual Automobile Insurance Co.*,²⁶⁰ which denied a discharged employee relief where the employer implemented the "after-acquired" evidence defense, no longer exists as a total defense to employment discrimination claims.²⁶¹ The United States Supreme Court made a compelling decision in *McKennon v. Nashville Banner Publishing Co.*²⁶² when it held that an employer cannot escape liability for its discriminatory actions by finding after-acquired evidence of misconduct.²⁶³ The Supreme Court rejected the rigid absolute bar rule advanced in *Summers*.²⁶⁴ The once prevalent *Summers* rule barred discrimination claims for the wrong reasons and, as a result, let discriminating employers evade liability.²⁶⁵ The Court in *McKennon* correctly adopted an after-acquired evidence rule which upholds the purposes of antidiscrimination laws by granting victims of employment discrimination at least partial damages.

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256. See Weinstein, 62 GEO. WASH. L. REV. at 309-11.

257. See Pub. L. No. 102-166 § 3, 105 Stat. 1071 (1991).

258. Hoffmann, BUS. INS., Jan. 30, 1995, at 2.

259. *Id.*

260. 864 F.2d 700 (10th Cir. 1988).

261. *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.3d 700, 709 (10th Cir. 1988).

262. 115 S. Ct. 879 (1995).

263. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 886 (1995); see *supra* notes 44-60 and accompanying text.

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

265. *Welch v. Liberty Mach. Works*, 23 F.3d 1403, 1406 (8th cir. 1994) (Arnold, J. dissenting).