After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance

Kenneth A. Sprang

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I. PROLOGUE

Christine McKennon loved the National Banner, the local afternoon newspaper in Nashville, Tennessee, where she had worked for nearly forty years. Next to her husband and her aging mother nothing was more important to Christine than the Banner and her "family" there.

Her friends and colleagues at the Banner were equally fond of Christine: she was to them a trusted and valued friend. Over the years her supervisors had made such comments as "she is an asset to the company" and "she cheers up the staff." By every measure, Christine McKennon is the kind of person that most of us would welcome as a friend and fellow employee.

Mrs. McKennon began working as a secretary for the Banner in May 1951,2 at the age of twenty-three. Over the years she received consistently excellent evaluations and steady, though modest pay increases. In 1982, she was assigned to work as secretary to the executive vice president of the company, Jack Gunter. Later, in 1989, she was re-assigned to work for the company comptroller. In 1990, at age sixty-two, Mrs. McKennon was earning a mere $26,000 per year for her forty years of experience and dedication—modest compensation for a senior secretary by Nashville standards. But it was enough for Christine McKennon. The Banner was more than a job and a paycheck. It was a raison d’être of her life.

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On October 31, 1990, Christine McKennon went to work much as she had every day throughout her years of service to the Banner. But this day was different. Shortly after her arrival, she was summoned to a meeting attended by the editor of the paper, the comptroller (Mrs. McKennon’s direct supervisor), and the general counsel for the Banner. There she was told that she was being terminated effective immediately.

The general counsel handed her a release form and directed her to sign it. The release was comprehensive and effectively relinquished any and all claims that Mrs. McKennon might have against the Banner, including claims for age discrimination. In exchange for executing the release, she would

3. Ironically, by presenting Mrs. McKennon with a release which included a waiver of any claims she might have for age discrimination, and insisting that she sign immediately, the Banner apparently violated federal law. 29 U.S.C. § 626(f) (Supp. V 1993), which had become effective on October 16, 1990. The Age Discrimination in Employment Act ("ADEA") requires that employees who are asked to waive age claims be given 21 days to make their decision and they must be advised in writing to seek legal counsel. The ADEA specifically provides:

(f) Waiver  
(I) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. . . . [A] waiver may not be considered knowing and voluntary unless at a minimum - (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; (B) the waiver specifically refers to rights or claims arising under this chapter; (C) the individual does not waive rights or claims that may arise after the date the waiver is executed; (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; (E) the individual is advised in writing to consult with an attorney prior to executing the agreement; (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement; (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired; (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees,
receive a severance benefit of $6,000. She refused to sign.

Mrs. McKennon was then directed to attend a second meeting, where the publisher of the paper painted a picture of dire economic straits which were forcing the termination of several employees, including Christine McKennon. She was directed to turn in her keys, escorted to her desk and watched while she cleaned out her personal belongings. Then she was unceremoniously ushered directly to the door of the Banner building. Christine McKennon was unemployed for the first time in her adult life. What would she say that day when she went home to her husband on this their thirty-sixth wedding anniversary? The door to the Banner closed behind her with a soft but painful sound.

There had been some warning signs of the pending discharge since the spring of 1989, some eighteen months earlier. Mrs. McKennon had begun to hear rumors of alleged financial difficulties at the venerable afternoon paper, and whispers of possible cutbacks in resources and personnel. Several members of the Banner’s management had suggested to her that she retire. The publisher himself had requested a memorandum regarding Mrs. McKennon’s retirement plans. Mrs. McKennon responded that she had no plans to retire. Nevertheless, the Comptroller, Imogene Stoneking, obtained from the company’s pension administrator information regarding Mrs. McKennon’s retirement benefits and presented it to her.

In addition, the Banner revoked Mrs. McKennon’s parking privileges and reduced her lunch hour privileges. She was also told she might have to work weekends, something she had not done in years. Although the quality of Mrs. McKennon’s work continued at the same high level as always, she was denied a routine pay raise in 1990. In addition, her compensatory time off was reduced.

In May 1990, the Banner had hired a new secretary who was thirty-six years old. On October 29, 1990, the Banner hired another secretary, age twenty-six. When Mrs. McKennon was summarily terminated two days later, she was told that the Banner had a surplus of secretaries. Christine McKennon and another older secretary were discharged, while the two younger, recently hired secretaries were retained.

the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to - (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Id.
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In the course of her work at the Banner, Christine McKennon handled a lot of documents. Some simply crossed her desk, while others were routinely maintained in her office. In the fall of 1989, Mrs. McKennon's boss, Comptroller Imogene Stoneking, directed her to shred copies of documents which disclosed the actual financial condition of the Banner, including the amount of money being paid by the privately held firm to its owners. Curious and concerned about the rumors of financial problems at the Banner and fearful about the security of her own job, Mrs. McKennon copied the documents before destroying them. In addition, Mrs. McKennon copied three documents related to the status of her former supervisor Jack Gunter. Some time later Mrs. McKennon took the documents home and showed them to her husband. At no time did she ever disclose them to anyone else.

Unemployed and appalled by the treatment given her by her former employer to whom she had dedicated a lifetime of service, Mrs. McKennon consulted with an attorney. On May 6, 1991, she filed suit against the Nashville Banner, alleging violations of the Age Discrimination in Employment Act.

During the course of discovery, the Banner's attorneys requested any documents in Mrs. McKennon's possession that might be relevant to her claims. In response, she produced the pages that she had copied from her office. After deposing Mrs. McKennon regarding those documents, the Banner sought summary judgement on the sole basis that Mrs. McKennon's removal of the documents constituted grounds for discharge, and that the Banner would have unquestionably discharged her had it known what she had done. The trial court granted the employer's motion for summary judgement. Despite eighteen months of employer action aimed at forcing Mrs. McKennon to retire, despite the Banner's insensitive and unjust treatment of Mrs. McKennon during her last eighteen months of employment, and despite the evidence tending to show that Mrs. McKennon had been fired solely because of her age, the Banner was exonerated and Christine

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4. The documents included a Profit and Loss Statement, dated October 10, 1989, and a ledger indicating the amounts the company had been paying to its owners. Petitioner's Brief at *4, McKennon (No. 93-1543).
5. At the time of Gunter's discharge in the spring of 1989, company officials informed Mrs. McKennon that they almost dismissed her.
7. Petitioner's Brief at *5, McKennon (No. 93-1543).
9. For purposes of summary judgment the court assumed the Banner had discharged Mrs. McKennon because of her age. McKennon, 9 F.3d at 541.
McKennon was, for the first time in her adult life, unemployed. Moreover, she was without a legal remedy.\textsuperscript{10}

\textsuperscript{10} The motion for summary judgment was supported by affidavits from four company officials each of whom asserted that he or she would have discharged Mrs. McKennon had the official known about the copied documents. The affiants did not appear to know how many pages had been copied nor the exact content of those pages. The officials merely asserted that they had "been advised" that the materials were "proprietary and confidential" documents. Petitioner's Brief at *5, McKennon (No. 93-1543).

The affidavits asserted a conclusory statement that Mrs. McKennon would have been fired for having copied and removed the documents. No reference was made to any company rule that was violated, any past disciplinary procedures, or any standard procedures for determining when to terminate an employee. In a later deposition, the company comptroller, Mrs. McKennon's immediate supervisor and the person who originally handed her the financial documents for shredding, testified that she knew nothing about the documents issue until a prepared affidavit was submitted to her for her signature. The "would have terminated" language in the affidavit was written by a third party who did not discuss the matter with Ms. Stoneking before preparing the affidavit. \textit{Id.} at *5-6.

Further discovery revealed that not a single employee had been summarily terminated for misconduct in at least five years. In fact, personnel problems were routinely handled by informal conversations between supervisors and those reporting to them and with stern warnings. \textit{Id.} at *6.

Mrs. McKennon was unaware that she had violated any company rule in making the copies. After all, the documents came to her in the course of her employment. She could have read the information in the documents in her hand and made notes or merely remembered the salient facts. It was her understanding that only public disclosure of confidential information was grounds for discharge.

Despite the self-serving nature of the defendant's allegations, the district court granted summary judgment for the defendant, concluding that the Banner would have fired Mrs. McKennon had it known of the copied documents. The Banner then moved for costs, including the costs of discovery. The court granted the motion and awarded $5,000. The Banner's lawyers then filed a Rule 11 motion against Mrs. McKennon and her counsel. That motion was denied with a warning from the court that the filing of the motion bordered on a violation of the very rule it sought to invoke.

The Sixth Circuit affirmed, and in May 1994, the Supreme Court granted \textit{certiorari}. To date, Mrs. McKennon's lawyers have incurred over $20,000 in out-of-pocket expenses for discovery, printing, and other pre-trial expenses. There are four lawyers working on the case for the Banner. A conservative estimate based upon typical billing rates for large firms in the Nashville area would set the Banner's costs thus far at more than $200,000, an amount more than sufficient to have paid Mrs. McKennon's salary for several more years.
II. INTRODUCTION

During the last thirty years, there have been dramatic changes in the law governing job security of employees in the workplace, particularly with regard to employment discrimination. Federal law now protects employees from workplace discrimination based upon sex,\(^\text{11}\) race,\(^\text{12}\) religion,\(^\text{13}\) color,\(^\text{14}\) national origin,\(^\text{15}\) age,\(^\text{16}\) and handicap or disability.\(^\text{17}\) Most states and many local governments provide similar (and sometimes more expansive) statutory protection against discrimination.\(^\text{18}\) Employers have generally opposed each new statutory expansion of employee rights, predicting doom and gloom for free enterprise and the economy. Once statutes have been enacted and employers have faced claims from employees alleging discriminatory treatment by their employers, the employers have sought to narrow the judicial interpretation of the statute or they have sought to develop new defenses to employee claims.\(^\text{19}\)

\(^{11}\) Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) (1988) (prohibiting employers from failing to hire, firing, or otherwise discriminating against any individual because of "race, color, religion, sex, or national origin").

\(^{12}\) Id.

\(^{13}\) Id.

\(^{14}\) Id.

\(^{15}\) Id.


\(^{18}\) See, e.g., Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951-963 (1991) (establishing the right to freedom from discrimination in employment, housing, and public accommodations); New York Human Rights Law, N.Y. EXEC. LAW §§ 290-301 (McKinney 1993) (creating employees' right to equal opportunity to obtain employment without discrimination because of age, race, creed, sex, national origin, color, or marital status).

\(^{19}\) See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); cf. Hunter v. Underwood, 471 U.S. 222, 225 (1985) (in mixed motive cases involving constitutional equal protection claims a plaintiff must prove that discrimination was a substantial or motivating factor in the state action; the plaintiff will then prevail unless the defendant can prove by a preponderance of the evidence that "the same decision would have resulted had the impermissible purpose not been considered."); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 271 n.21 (1977)
The latest in the arsenal of defense weapons developed by employers is the "after-acquired evidence doctrine." This affirmative defense,20 which was first announced by the Tenth Circuit in 1988,21 allows an employer who has acted adversely toward an employee for an unlawful discriminatory reason22 (same, citing Mt. Healthy). In Price Waterhouse the Supreme Court held that employment decisions based upon race, sex, religion, color, or national origin do not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988), if the employer can prove that it would have made the same decision even in the absence of the discriminatory motive. See David A. Cathcart & Mark Snyderman, The Civil Rights Act of 1991, 8 The Lab. Law. 849, 873-74 (1992). Congress responded relatively swiftly and reversed the Court's decision in Price Waterhouse in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which amends § 703 of Title VII, 42 U.S.C. § 2000e-2 (1988), by adding the following provision:

(m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.


20. See Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178 (11th Cir. 1992) (after-acquired evidence provides employer equivalent of an affirmative defense), reh'g granted, vacated, 32 F.3d 1489 (11th Cir. 1994); Rebecca Hanner White & Robert D. Brussack, The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation, 35 B.C. L. Rev. 49, 95 n.10 (1993) (courts have viewed after-acquired evidence as an affirmative defense); Douglas L. Williams & Julia A. Davis, Skeletons in the Closet: "After-Acquired Evidence" As a Defense to Discrimination Claims, C874 A.L.I.-A.B.A. 369, 374 (1993) ("[t]he trend in reported decisions is an acceptance of after-acquired evidence . . . as an affirmative defense to avoid liability"); Samuel A. Mills, Note, Toward an Equitable After-Acquired Evidence Rule, 94 Colum. L. Rev. 1525, 1525 (1994) (employer who invokes after-acquired evidence doctrine "asserts what amounts to an affirmative defense"); cf. Price Waterhouse v. Hopkins, 490 U.S. 228, 243, 246 (1989) (in a mixed-motive case, once plaintiff proves that discrimination was a factor in the employment decision the employer can avoid liability by proving that "even if it had not taken [a protected characteristic] into account, it would have come to the same decision regarding a particular person;" this proof is an affirmative defense).


22. Most after-acquired evidence cases involve discharge, but the defense would presumably be applicable in failure to promote, failure to hire, and similar cases. See, e.g., Smallwood v. United Air Lines, Inc., 728 F.2d. 614 (4th Cir.) (holding in age discrimination case that employer was entitled to assert defense that even if it had discriminated based upon age, it would not have hired plaintiff anyway based upon after-acquired evidence of his discharge for misconduct by a prior employer), cert. denied, 469 U.S. 832 (1984).
to avoid liability as a matter of law, if, subsequent to the employee’s discharge, the employer uncovers evidence of misconduct or dishonesty which was unknown to the employer at the time of discharge, and the employer demonstrates that had it known earlier of the misconduct or dishonesty, it would have discharged the employee. The "after-acquired evidence" is usually uncovered in the course of discovery or as a result of an internal investigation launched in response to the litigation brought by the aggrieved employee following the discharge. At least three federal appellate courts have followed the Tenth Circuit and allowed the use of after-acquired evidence as a defense against liability in an employee’s claim for

23. See, e.g., Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1222 (3d Cir. 1994) ("After-acquired evidence" denotes evidence of employee misconduct or dishonesty unknown to employer at time of adverse action, but later discovered, typically during legal proceedings, upon which employer seeks to capitalize to diminish or "preclude entirely its liability for otherwise unlawful employment discrimination."); Kuchler v. Bechtel Corp., 855 F. Supp. 177, 180 (E.D. Tex. 1994) ("After-acquired evidence" doctrine mandates judgment as a matter of law if employer charged with discrimination uncovers evidence of employee’s misconduct some time after employee’s termination, and employer proves that it "would have fired employee on basis of the misconduct if it had known of it."). Many cases involve the discovery of application or resume fraud. See, e.g., Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992) (employee who had pled guilty to possession of drugs asserted on her application that she had never been convicted of a crime); Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302 (6th Cir. 1992) (after-acquired evidence that plaintiff, a security officer, had concealed a prior DWI conviction in her employment application).


25. The Eighth Circuit, Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994), the Sixth Circuit, McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), rev’d, 115 S. Ct. 879 (1995) and the Seventh Circuit, Washington v. Lake County, Illinois, 969 F.2d 250 (7th Cir. 1992), have followed Summers. The Seventh Circuit actually has been somewhat inconsistent in its position. Compare Smith v. General Scanning, Inc., 876 F.2d 1315 (7th Cir. 1989) (holding that after-acquired evidence of the plaintiff’s resume fraud was not a defense to defendant’s liability for age discrimination) and Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369-70 (7th Cir. 1993) (distinguishing, but not rejecting, Summers on the grounds that the Summers court had found under the circumstances of that case that the employer had carried its burden that the employee would have been discharged anyway had it known of the claim falsification, whereas in Kristufek, the employer failed to prove by a preponderance of the evidence that the employer would have fired the plaintiff even in the absence of protected conduct). See generally infra notes 84-89 and accompanying text.
discriminatory discharge. Two circuits, in contrast, have expressly declined to allow after-acquired evidence to be used as an absolute defense, but rather have limited the use of such evidence to determination of a remedy in discrimination cases.26

The after-acquired evidence doctrine is flawed in several ways. First, dismissing an employee's claim of discrimination based solely upon after-acquired evidence contravenes public policy which seeks to eliminate discrimination in employment. Public policy seeks to deter employers from discriminating and to make victims of discrimination whole.27 The after-acquired evidence doctrine yields the opposite result, by allowing employers to discriminate yet still avoid liability.

Second, after-acquired evidence is irrelevant to the issue of liability in discrimination cases and may be unduly prejudicial to the jury.28 Consequently, the evidence should be excluded from the liability phase of the judicial proceedings under the Federal Rules of Evidence.29

Finally, in view of the psychological theory of cognitive dissonance, which holds that all human beings must internally reconcile conflicting ideas, after-acquired evidence should generally be excluded in determining employer liability. Since a manager who has discharged an employee for discriminatory reasons will be psychologically compelled to find an explanation for his action which allows him to see himself as a "smart, nice" person,30 the after-acquired evidence doctrine encourages employers to focus their time and energy on combing an employee's employment record to seek justification for their discriminatory acts rather than encouraging employers to remedy past discrimination and to invest resources to prevent further discrimination in the future.31

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27. See infra note 31 and accompanying text.


29. See Fed. R. Evid. 403.


This Article proposes that after-acquired evidence which is obtained solely as a result of employment discrimination litigation, whether through the discovery process or through an internal investigation conducted by the defendant employer in response to an employee’s claim, generally should be inadmissible. Only when an employer can demonstrate that the after-acquired evidence would have been discovered in the ordinary course of business, even in the absence of the employment discrimination litigation, should the evidence be admissible. Even then, the evidence should be admissible solely for the purpose of determining remedies. Employees who have been victims of discrimination should always be entitled to recover compensatory and punitive damages, to the extent permitted by law. In most cases the employee should also be entitled to back pay to the date of judgment, regardless of any after-acquired evidence introduced by the employer, and, likewise, any employer who engages in discriminatory activity should be forced to pay such compensation. The goal of such remedies, of course, is to make injured employees whole, to punish wayward employers, and to discourage future discrimination.\textsuperscript{32}

Part III of this Article will discuss the development of the after-acquired evidence doctrine in federal civil rights litigation. Part IV will critique the doctrine and discuss why it is ill-reasoned, contrary to public policy, and unsound in light of the psychological theory of cognitive dissonance. Part V will set forth a proposal to bifurcate employment discrimination trials in which the after-acquired evidence issue is raised, into liability and remedy phases and to severely limit the use of after-acquired evidence even in the remedies phase of the trial.

\textsuperscript{32} Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) ("It is the reasonably certain prospect of a backpay award that provide(s) the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history. . . . It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.").
III. DEVELOPMENT OF THE AFTER-ACQUIRED EVIDENCE DOCTRINE

A. After-Acquired Evidence in Industrial Relations Tribunals

The after-acquired evidence defense is not new to employment litigation. It has been addressed frequently by labor arbitrators over the years in discharge cases. Arbitrators have rather consistently held that a discharge must be examined as a snapshot frozen in time. Evidence discovered after the discharge is generally not admitted. Those arbitrators who do allow it, usually limit the use of such post-discharge or after-acquired evidence to corroboration of the original reason given for the discharge.

The National Labor Relations Board also has generated a long line of cases addressing the admissibility of after-acquired evidence in cases involving discriminatory discharge for union activity. The Board first addressed the issue in 1959, in a case involving application fraud, holding that because of the application fraud an employee who had been discriminatorily discharged in violation of section 8(a)(3) of the National Labor Relations Act was not


34. See, e.g., West Virginia Pulp & Paper Co., 10 Lab. Arb. 117 (1947) (Guthrie, Arb.). Labor arbitrators have generally held that "the correctness of a discharge must stand or fall upon the reason given at the time of discharge." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.8 (1987). Most arbitrators "confine their consideration to the facts known to the employer at the time of discharge." Id. See also Mitchell H. Rubinstein, The Use of Predischarge Misconduct Discovered After an Employee's Termination as a Defense in Employment Litigation, 24 Suffolk U. L. Rev. 1, 4 n.10 (1990).

35. See, e.g., AT&T, 102 Lab. Arb. (BNA) 931, 940 (1994) (Kanner, Arb.) (observing that after-acquired evidence relating to the original reason for discharge, such as the discovery of empty liquor bottles in the locker of an employee discharged for being under the influence of alcohol, or evidence of confession to a theft by someone other than the employee charged with theft, is admissible, but "subsequently discovered grounds for discharge," are precluded, because employers are "limited to the grounds set forth at the time of discharge").


37. Southern Airways Co., 124 N.L.R.B. 749, 752 (1959), enforced in part, enforcement denied in part on other grounds, 290 F.2d 519 (5th Cir. 1961). The employee misrepresented on his employment application that he had never been convicted of violating any law, when in fact he had been convicted 16 times for various criminal offenses. Id. at 752-53.

entitled to reinstatement or back pay. Moreover, the Board concluded that after-acquired evidence of application fraud provided an "almost complete defense."

A few years later, the Board reached a contrary conclusion, refusing to consider after-acquired evidence that two employees who were unlawfully discharged had engaged in "petty pilferage" of company property before their discharge. Reasoning that the after-acquired evidence defense was "at best . . . an afterthought," the Board held that the employees should be reinstated with back pay. Board decisions which followed were somewhat inconsistent until 1990, when the Board issued its decision in John Cuneo, Inc. In that case, the Board held that in cases involving evidence of predischARGE misconduct discovered after the unlawful discharge, an unlawfully discharged employee is entitled to back pay from the date of the unlawful discharge until the date the employer discovered the predischARGE misconduct. In order to stop the running of back pay liability, the employer must establish that it would indeed have fired the employee for the infraction. The current Board position, as articulated in John Cuneo, is

39. Southern Airways, Co., 124 N.L.R.B. at 752. The Board reasoned that the employee had "insinuated himself into the Employer's employ by materially false representations of such character that the Employer would not have hired him if he had given truthful information." Id.

40. Id. The defense in Southern Airways was not complete, because the Board did issue a cease and desist order to the employer and required it to post a notice acknowledging that it had committed an unfair labor practice. Accord Service Garage, Inc., 256 N.L.R.B. 931 (1981), enforcement denied on other grounds, 668 F.2d 247 (6th Cir. 1982), overruled by John Cuneo, Inc., 298 N.L.R.B. 125 (1990); W. Kelly Gregory, Inc., 207 N.L.R.B. 654 (1973), overruled by John Cuneo, Inc., 298 N.L.R.B. 125 (1990); National Packing Co., Inc., 147 N.L.R.B. 446 (1964), enforcement denied on other grounds, 352 F.2d 482 (10th Cir. 1965).


42. Id. at 1704.

43. Interestingly, the Board did not reference Southern Airways at all. See Rubinstein, supra note 34, at 8.

44. See generally Rubinstein, supra note 34, at 9-11.


46. Id. at 856-57.

47. Id. at 856. The Board reasoned:

We must balance our responsibility to remedy the [employer's] unfair labor practice against the public interest in not condoning [the employee's] falsification of his employment application . . . . [w]e would be granting an undue windfall to [the employee] if we failed to take into account his misconduct and granted him reinstatement and full back pay. On the other
similar to that of the Equal Employment Opportunity Commission in civil rights cases. 48

B. The After-Acquired Evidence Doctrine in the Federal Courts

The after-acquired evidence doctrine was first announced by the Tenth Circuit in *Summers v. State Farm Mutual Automobile Insurance Co.* 49 The case was brought by Ray Summers, an employee with nineteen years of experience with State Farm, following his discharge in 1982 for "falsification of company records, untimely and poor quality of reporting, problems with settlement negotiations and customer relations, and his generally poor hand, relieving the [employer] of all back pay liability, including that for the period when [the employer] had no knowledge of [the employee’s] misstatement and had no lawful reason to fire him, would provide an undue windfall for the [employer].

Id. The Board did not address whether such an employee is entitled to reinstatement. One commentator, however, has conjectured that the Board will deny reinstatement in such after-acquired evidence cases. See Rubinstein, supra note 34, at 11.

The Supreme Court has recently upheld a Board decision reinstating an employee who was a victim of anti-union discrimination, with back pay, despite the fact that the employee lied to both his employer and the Administrative Law Judge who heard his discrimination claim, regarding the reason for his tardiness at work. The Court concluded that a contrary decision might force the Board to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes about credibility. Its decision to rely on "other civil and criminal remedies" for false testimony [citing St. Mary’s Honor Center v. Hicks, 113 S.Ct. 2742, 2746 (1993)], rather than a categorical exception to the familiar remedy of reinstatement is well within its broad discretion.


48. EEOC Policy Guidance, No. 915.002 (July 14, 1992), EEOC COMPLIANCE MANUAL § 2095.

The Board procedure varies significantly from that of employment discrimination litigation in federal courts in that there is no discovery procedure. Thus, an employer cannot use discovery following a discharge for anti-union animus to find after-acquired evidence. Such evidence would normally be found in the course of an investigation following the employee’s discharge.

49. 864 F.2d 700 (10th Cir. 1988).
attitude." Summers, who was fifty-six years old and a member of the Mormon Church, sued alleging age and religious discrimination.

Nearly four years after Summers' discharge, State Farm, while preparing for trial, thoroughly examined the records prepared by Summers during his employment and discovered over 150 instances of falsified records.53 Thereafter, State Farm sought summary judgement based upon the recent discovery of these falsifications.54

State Farm acknowledged that the additional falsifications discovered in 1986 were not a "cause" or "reason" for Summers' discharge in 1982, since they were not known to State Farm at the time of Summers' discharge.55 However, the employer argued, the "after-acquired evidence" of the 150 falsifications should be "considered in determining what relief, or remedy, [was] available to Summers."56 The Tenth Circuit agreed.57

The Summers court found no case precisely on point, but gleaned support for its position in three federal appellate cases.58 The court relied primarily,

50. Id. at 701. This explanation was contained in the written statement given to Summers at the time of his discharge. Later, State Farm conceded that Summers was not actually fired for falsification of records, but rather "because of his poor attitude, inability to get along with fellow employees and customers, and similar problems in dealing with the public." Id. at 702-03.

53. Summers, 864 F.2d at 703. This was not the first falsification of records by Summers. He had begun working for State Farm in 1963 as a claims adjuster. In 1980, State Farm discovered that Summers had forged the signature of an insured to document a claim. Id. at 702. Summers was warned that another such falsification "could result in dismissal." Id. In 1981, State Farm discovered yet another incident in which Summers had falsified records in 1977. Again he was reprimanded and warned that additional falsifications could result in discharge. Id. Following discovery of the second falsification in September 1981, State Farm randomly examined files involving claims Summers had handled and concluded that several were "suspicious." Id. Again Summers was confronted and warned to cease falsifying records. At that time, Summers was placed on probationary status of two weeks without pay. Of the 150 falsifications discovered after Summers' discharge, 18 had occurred after Summers' return from probation in 1981.
54. Id. at 703.
55. Id. at 704.
56. Id.
57. Id.
58. Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985); Smallwood v. United Air Lines, Inc., 728 F.2d. 614 (4th Cir. 1984), cert denied, 469 U.S. 832 (1984); and Mumane v. American Airlines, 667 F.2d 98 (D.C. Cir. 1981). Summers tried to distinguish the three appellate court cases by arguing that they were
however, on the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, and treated Summers' claim like a mixed-motive case, in which an employer has at the time of discharge both a discriminatory and a non-discriminatory motivation for its action.

For purposes of the motion for summary judgement, the court assumed that State Farm was motivated "at least in part, if not substantially" to fire Summers because of his age and religion. However, the court also accepted State Farm's argument that the facts discovered in 1986 established "application rejection" cases, in which the employer argued it would not have hired the discharged employee had it known the later discovered facts at the time of hire. The Tenth Circuit rejected the argument, however, asserting that it was not concerned with the cause of Summers's dismissal, but only with the appropriate remedy. Consequently, the court concluded, "the probability that Summers' transgressions would have been discovered in the absence of the trial" was immaterial. *Summers*, 864 F.2d at 707. The court concluded that even if it accepted the argument that the relied upon authorities were all "application rejection" cases, State Farm would still prevail because there was a "high probability" that "at least the 18 falsifications" which occurred after Summers' probationary period would have been discovered. *Id.*

The court apparently overlooked several scattered cases decided before *Summers*, all of which allowed the discrimination victim some recovery. *See, e.g.*, McPartland v. American Broadcasting Co., 623 F. Supp. 1334 (S.D.N.Y. 1985) (court refused to bar reinstatement and back pay for a discrimination victim despite after-acquired evidence of falsification of her employment application and resume); Kneisley v. Hercules, Inc., 577 F. Supp. 726 (D. Del. 1983) (holding that an employee who was a victim of age discrimination was entitled to reimbursement for lost wages, despite evidence of falsification of travel and expense reports discovered after his discharge). None of the earlier cases held that a plaintiff in an after-acquired evidence case was without any remedy or that an employer could assert such evidence as an absolute defense. For a general discussion of the pre-*Summers* cases, see Rubinstein, *supra* note 34, at 12-16.

59. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (holding in the case of a public school teacher fired both for an act protected by the First Amendment and for actions which were unprotected by any law, that in such "mixed-motive" cases, a defendant employer could prevail if it could show by a preponderance of the evidence that it would have made the decision to terminate even in the absence of the constitutionally protected activity).


"serious and pervasive misconduct by Summers," which, had those facts been known to State Farm in 1982, would have resulted in Summers' discharge. Consequently, the court concluded that although the after-acquired evidence may not have been a "cause" for Summers' termination in 1982, it was relevant to his claim of "injury," and it precluded the grant of any relief or remedy to Summers. The effect of the court's conclusion that Summers had experienced no injury was to exonerate State Farm of all liability.

The court rejected as "unrealistic" Summers' argument that the after-acquired evidence should be ignored, suggesting in often-quoted language that Summers' case was akin to a hypothetical in which

"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."
The after-acquired evidence doctrine initially remained a relatively obscure defense that seemed to get little use by practitioners or notice by scholars. In the last few years, however, there has been a veritable affidavits. Since she could not do so, summary judgment was upheld. In addition, the court clarified the requirements under Summers for the use of after-acquired evidence: [F]or after-acquired evidence of employee misconduct to bar relief in a termination case, Summers merely requires proof that (1) the employer was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the misconduct.


explosion of after-acquired evidence cases. One of the earlier decisions came from the Sixth Circuit,\textsuperscript{68} which has consistently followed the \textit{Summers} rule. The Sixth Circuit case differed from \textit{Summers} in that it involved only claims under Michigan law.\textsuperscript{69} In addition, the after-acquired evidence consisted of falsification of the plaintiff's employment application, rather than some infraction committed during the course of her employment.\textsuperscript{70}

It is somewhat disturbing that the Sixth Circuit adopted the \textit{Summers} rule with little comment or analysis,\textsuperscript{71} holding that even assuming that the employer had wrongfully discharged the plaintiff, she was entitled to no relief, because the employer had established that it "would not have hired [the plaintiff] and that it would have fired her" had it learned of the fraud during the term of her employment.\textsuperscript{72}

\begin{itemize}
\item \textit{Beverly Hills B.A.J.} 117 (1993). Recent works by academics on the subject include McGinley, \textit{supra} note 24, and White & Brussack, \textit{supra} note 20.
\item 68. Johnson v. Honeywell, 955 F.2d 409 (6th Cir. 1992).
\item The case is also distinguished from \textit{Summers} and most after-acquired evidence cases, in that the jury had rendered a verdict for the plaintiff, albeit on a state common law claim. The district court granted the defendant's motion for a directed verdict on the Elliott-Larsen Civil Rights Act claims, while denying its motions for a directed verdict and for summary judgment (and later judgment n.o.v.) on the common law claim. The Sixth Circuit affirmed the directed verdict and reversed the denial of the motion for summary judgment.
\item 70. \textit{Johnson}, 955 F.2d at 411. The plaintiff, Mildred Johnson, had signed an employment application in 1976 when she was hired, which contained a declaration that the submission of any false information, whether in the application or otherwise, "may be cause" for immediate discharge "at any time thereafter" if Ms. Johnson were employed by Honeywell. \textit{Id}. During discovery, Honeywell learned that Johnson did not have a bachelor's degree as she claimed in her application, but rather she had completed only a few college courses. The advertisement to which Johnson had replied called for applicants with a college degree and four to six years of personnel and industrial relations experience. \textit{Id}. at 412. Johnson represented that she had studied Applied Management for a year at a local university, but there was no record of her enrollment. She also exaggerated some prior job descriptions and falsely claimed to have been managing her own properties prior to being hired by Honeywell. In truth, however, she was unemployed and looking for work. \textit{Id}.
\item 71. \textit{Id}. at 415 ("We agree with the reasoning of the court in Summers").
\item 72. \textit{Id}. In disposing of the common law wrongful discharge claim, the court relied primarily on state law in an unpublished Michigan appellate court decision. \textit{Id}. at 413. Echoing the Tenth Circuit in O'Driscoll v. Hercules, Inc., 12 F.2d 176 (10th Cir. 1994), the Sixth Circuit held:
\end{itemize}
Just nine months later, the Sixth Circuit revisited the *Summers* rule in a case involving blatant sex discrimination. The lower court found that there was clear evidence of discrimination, but it also concluded that the employer would have fired the employee based upon after-acquired evidence of resume fraud. The court therefore exercised its equitable powers and reduced the plaintiff’s recovery by fifty percent. The appellate court reversed and held for the defendant, opining that although the district court judge’s "Solomon-like division of the baby might have much to recommend it in a matter of first

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 judgement 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.

*Johnson*, 955 F.2d at 414. On the other hand, the court declared that it was not holding that "any or all misrepresentations on an employment application [would] constitute just cause for dismissal or serve as a complete defense to a wrongful discharge action." *Id.*

Interestingly, the only evidence that the plaintiff would not have been hired was an affidavit from the employee relations manager who had hired her in 1976, asserting that had he known of the plaintiff’s actual educational background he would not have hired her nor even scheduled her for an interview. *Id.* The attitude of Honeywell is particularly striking in light of the fact that Ms. Johnson’s performance had generally been positive until at least 1983, *id.* at 410, and that Ms. Johnson’s supervisor did not have a college degree. *Id.* at 414.

73. Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), cert. granted, 113 S. Ct. 2991, cert. dismissed, 114 S. Ct. 22 (1993). In *Milligan-Jensen*, the plaintiff, who had a background in law enforcement, was hired as a public security officer by the Michigan Technological University. Ms. Milligan-Jensen was fired at the end of her 90-day probationary period. The trial court applied a mixed-motive analysis, since there were other alleged performance-based reasons for the discharge, and concluded that there was direct evidence of sex discrimination, through the plaintiff’s supervisor who desired to consign her to a "lady’s job," and retaliated for her filing of an EEOC complaint. *Id.* at 303. The court further found that the University had failed to prove that its decision to terminate the plaintiff would have been the same absent the unlawful motives. *Id.*

74. The plaintiff had falsified her employment application by omitting a prior DUI conviction, a fact learned by the University in preparing for trial. The trial court concluded that although the conviction itself would not have resulted in termination, the employer would have terminated Ms. Milligan-Jensen had it known that she had falsified her application. *Id.* at 303-04.

75. *Id.* at 304.
impression,\textsuperscript{76} the court's previous decision on the after-acquired evidence rule\textsuperscript{77} required reversal.\textsuperscript{78} Although two federal appellate courts had addressed the after-acquired evidence rule\textsuperscript{79} since the Sixth Circuit's earlier decision in \textit{Johnson v. Honeywell Information Systems, Inc.},\textsuperscript{80} and one of those had rejected it,\textsuperscript{81} the court declined to reconsider its earlier decision, declaring that it had "committed itself to the Summers rule."\textsuperscript{82} The court concluded that since the trial court had found that the after-acquired fact of the plaintiff's resume fraud would have resulted in termination had it been learned during the course of her employment, it was "irrelevant" whether she was a victim of discrimination.\textsuperscript{83} The Sixth Circuit has decided several other after-acquired evidence cases,\textsuperscript{84} the most important of which is \textit{McKennon v. Nashville Banner Publishing Co.}\textsuperscript{85}

The Seventh Circuit has adopted an intermediate position on the use of after-acquired evidence, suggesting on the one hand that a discriminatory firing must be decided solely upon information known to the employer at the

\begin{itemize}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Milligan-Jensen}, 975 F.2d at 304.
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{See Washington v. Lake County}, 969 F.2d 250 (7th Cir. 1992) (accepting the \textit{Summers} rule but suggesting that more evidence might be necessary to support an allegation that an employer would have fired an employee based upon after-acquired evidence than might be necessary to demonstrate that the employee would never have been hired had the evidence been known); \textit{Wallace v. Dunn Constr. Co.}, 968 F.2d 1174 (11th Cir. 1992) (rejecting \textit{Summers} rule for purposes of determining liability and limiting the use of after-acquired evidence to determining a plaintiff's remedy).
\item \textsuperscript{80} 955 F.2d 409 (6th Cir. 1992).
\item \textsuperscript{81} \textit{Wallace v. Dunn Constr. Co.}, 968 F.2d 1174 (11th Cir. 1992).
\item \textsuperscript{82} \textit{Milligan-Jensen}, 975 F.2d at 304. The court noted that the "crucial difference" between the trial court's approach and the Sixth Circuit's approach was that the "trial court balanced the equities," whereas the Sixth Circuit regarded the issue as one of "causation." \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 305.
\item \textsuperscript{84} \textit{See}, e.g., \textit{McKennon v. Nashville Banner}, 9 F.3d 939 (6th Cir. 1993), \textit{rev'd}, 115 S. Ct. 879 (1995); \textit{Logan v. Express, Inc.}, 12 F.3d 213 (6th Cir. 1993); \textit{Paglio v. Chagrin Valley Hunt Club Corp.}, 966 F.2d 1453 (6th Cir. 1993); \textit{Dotson v. United States Postal Serv.}, 961 F.2d 1576 (6th Cir. 1992).
\item \textsuperscript{85} 9 F.3d 539 (6th Cir. 1993), \textit{rev'd}, 115 S. Ct. 879 (1995). \textit{See} notes 1 to 10 \textit{supra}, and accompanying text for the facts of \textit{McKennon}. Briefs were filed with the Supreme Court in July 1994. Oral argument was held on November 2, 1994. On January 23, 1995, just as this article was to go to press, the Supreme Court issued a unanimous decision in \textit{McKennon} reversing and remanding. \textit{McKennon v. Nashville Banner Publishing Co.}, 115 S. Ct. 879 (1995). \textit{See infra} notes 295 to 308.
\end{itemize}
time of discharge, but yet not expressly rejecting Summers. Even when

87. Id. at 369. The Seventh Circuit actually has been somewhat inconsistent in its position on the after-acquired evidence doctrine. In Smith v. General Scanming, Inc., 876 F.2d 1315 (7th Cir. 1989), the district court held, inter alia, that the plaintiff had failed to establish a prima facie case of age discrimination because he was not qualified for the position, since he had misrepresented on his resume that he had both bachelor's and master's degrees, when in fact he had no degree at all. The employer learned of the misrepresentation during discovery. The appellate court rejected the lower court's conclusion, opining that whether the employer discriminated against the plaintiff "must be decided solely with respect to the reason given for his discharge." Id. at 1319. Plaintiff's resume fraud was for that purpose irrelevant. Id. The Seventh Circuit observed, however, that "there might be cases where [the after-acquired evidence of resume fraud] would be highly relevant." Id. at 1320 n.2. In Smith the court affirmed the lower court's finding for the defendant on grounds other than the after-acquired evidence. However, the court noted, had it found age discrimination, the question of reinstatement and back pay would have arisen. The court, citing Summers, observed that "it would hardly make sense to order Smith reinstated to a job which he lied to get and from which he properly could be discharged for that lie [citation omitted]. The same would be true regarding any back pay accumulation after the fraud was discovered." Id. See infra notes 133-42, and accompanying text for a discussion of the issue of qualification in after-acquired evidence cases.

Subsequently, the court tentatively embraced the Summers doctrine in Washington v. Lake County, Illinois, 969 F.2d 250 (7th Cir. 1992). In Washington, the plaintiff Washington claimed that he had been discharged from his position as a jailer because of his race. Subsequent to the plaintiff's discharge, the defendant Lake County obtained after-acquired evidence that Washington had lied on his employment application when he asserted that he had no criminal convictions. The lower court granted summary judgment based upon affidavits of the defendant asserting that if Washington's prior convictions had been known earlier, he would have been discharged immediately. Id. at 256. On appeal, the plaintiff argued that summary judgment below was improper because there was a question of fact whether he would have been fired or whether he would not have been hired had the defendant known of his convictions. The court rejected the "would have fired" and "would not have hired" distinction, holding that in an application fraud case, the appropriate issue is whether the employer "would have fired the employee upon discovery of the misrepresentation, not whether the employer would have hired the employee had it known the truth." Id.

Concluding that there was no genuine issue of material fact as to whether the defendant would have fired the plaintiff based on the after-acquired evidence, the Seventh Circuit affirmed summary judgment for the defendant. The appellate court noted that it had never "squarely adopted the Summers rationale," but the court followed Summers since the plaintiff had not challenged its validity. Id. at 253. The court also acknowledged that Summers might be inconsistent with the then recent Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 107, Washington, 969 F.2d at 255 n.4, but assumed that the Summers doctrine had survived the new statute,
id. at 256 n.6, since neither party had cited the statute. Id. at 255 n.4.

More recently, in Kristufek v. Hussman Foodservice Co., 985 F.2d 364 (7th Cir. 1993), a former personnel manager sued alleging that he was terminated both because of his age and in retaliation for his efforts opposing the discharge of an older secretary, who asserted a successful age claim in the same case. Concluding that a discriminatory firing "must be decided solely with respect to the known circumstances leading to the discharge," the court held that after-acquired evidence of the personnel manager's falsification of his educational qualifications at the time of his application for the job did not preclude his prevailing on his claim of retaliation. Id. at 369-70. The court explained:

The deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not. The after discovered alternate reason comes too late. That remains our view of the law. (citation omitted)

Id. at 369.

Although finding for the plaintiff in Kristufek, the Seventh Circuit did not actually reject the Summers doctrine. Rather it took pains to distinguish Summers, observing that in Summers the Tenth Circuit had permitted the after-acquired evidence of claims falsification to be considered along with falsifications known prior to the discharge in denying the plaintiff any recovery (though in fact, the employer in Summers acknowledged that Summers was not fired for falsification of claims, Summers, 864 F.2d at 702-03). The Seventh Circuit concluded that the Summers court had found under the circumstances of that case that "the employer had carried its burden that the employees [sic] would have been discharged anyway had the employer known of the continuing extensive falsifications." Kristufek, 985 F.2d at 369. In contrast, the court found that in Kristufek the employer had failed to prove to the jury by a preponderance of the evidence that it would have fired the plaintiff even in the absence of the protected conduct. Id. at 370.

The court's conclusion appeared to be grounded in the fact that the employment application on which Kristufek had misrepresented his educational background provided that a misstatement on the application "may be cause for immediate dismissal." Id. at 369. The court observed that "'[m]ay be' is not 'will be' and is not enough to avoid the proven charge of a retaliatory firing." Id. The court then concluded that "[f]or a noncritical, non-fundamental job requirement without adequate showing that Kristufek would have been fired, not just that he might have been, it was error to decide it as a matter of law and set aside the jury verdict." Id. at 370. It appears, therefore, that in a case where there is no doubt whether the employer would have fired the employee had it known of after-acquired evidence at the time of discharge, the Seventh Circuit may follow Summers and allow the use of after-acquired evidence as a defense against liability. See, e.g., Redden v. Wal-Mart Stores, Inc., 35 F.3d 568 (7th Cir. 1994) (affirming in an employment discrimination claim summary judgment for the employer based upon after-acquired evidence of resume fraud, where employer's affidavits asserted that the employer had a policy of immediate termination of employees who falsify employment applications or resumes).
liability is found, the Seventh Circuit cuts off back pay as of the date the after-acquired evidence is actually discovered. The Eighth Circuit has also embraced the Summers rule, but has imposed a higher burden upon employers to show that they would have discharged an employee based solely upon the after-acquired evidence.

88. Kristufek, 985 F.2d at 369-70.
89. Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994). In Welch, the plaintiff Welch was discharged after informing his employer that he needed surgery. Welch then sued alleging violations of the Employee Retirement Income and Security Act and handicap discrimination under state law. Subsequently, the employer learned that Welch had falsified his resume and employment application, by not disclosing that he had worked for and been discharged by his prior employer. The court rejected the analysis of Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992) (rejecting the Summers after-acquired evidence doctrine, but allowing the use of such evidence to determine remedies), and adopted the Summers doctrine. However, the court, with little explanation, interpreted Summers to mean in the case of application fraud, "that after-acquired evidence of employee misrepresentation bars recovery for an unlawful discharge, if the employer establishes that it would not have hired the employee had it known of the misrepresentation." Welch, 23 F.3d at 1405. The court declined to reach the "would have hired" prong of the Summers rule. Id. at 1406 n.2.

The summary judgment for the employer, however, was reversed. The employer's motion for summary judgment was supported only by an affidavit from the president of Liberty Machine Works, Kurt Maier, asserting that Liberty would "never have hired" Welch if Welch had disclosed the fact that he had been fired from his previous position after only a month, and would have terminated the employee upon discovery of the omission. Id. at 1404. Concerned not to create "pervasive incentives" for employers, id. at 1406, the Welch court concluded that the affidavit was insufficient to establish the purported policy, id. at 1405, because it was a "self-serving document" which did not establish "the material fact that Liberty would not have hired Welch but for the misrepresentation." Id. at 1406. The court concluded that an employer bears a "substantial burden" of establishing that a policy "pre-dated the hiring and firing" of an employee and constitutes more than "mere contract or missing employment application boilerplate." Id.

The after-acquired evidence issue is currently pending in the Fourth Circuit, Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D. Va. 1993) (Summers rule adopted), appeal pending Nos. 93-1895 & 93-2078 and in the Ninth Circuit, O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992), appeal pending No. 92-15625. The Ninth Circuit seems likely to reject the Summers rule. In EEOC v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994), the employer sought to raise the after-acquired evidence defense for the first time on appeal. Since the defense had not been reserved for appeal, the court declined to address the issue. It noted in dictum, however, that even if we were to decide this issue, it would be inequitable to hold that after-acquired evidence of misrepresentations in a job application should
The Eleventh Circuit was the first federal appellate court to reject the Summers rule. In Wallace v. Dunn Construction Co., the Eleventh Circuit observed that the Tenth Circuit's approach to after-acquired evidence left a plaintiff in "a worse position than if he had not been a member of the protected class." In fact, the court observed, the Summers rule is preclude an otherwise successful plaintiff from recovering damages. . . . It would make no sense for example to permit an employer to refuse to reinstate an illegally discharged employee who had properly performed her job . . . for twenty years simply because a generation earlier she had exaggerated the facts regarding her educational experience in hopes of obtaining employment . . . . [N]o absolute rule can provide the answer to what relief other than damages may be barred when an employee who has been illegally discharged turns out to have misstated the truth on an employment application. However, common sense and a reasonably developed sense of equity can. Id. at 901-02 (citations omitted).

The Fifth Circuit has not yet addressed the issue. District courts in the Fifth Circuit, however, are split in their approach. Compare Redd v. Fisher Controls, 814 F. Supp. 547 (W.D. Tex. 1992) (adopting Summers no recovery rule) with McDaniel v. Mississippi Baptist Medical Ctr., 869 F. Supp. 445 (S.D. Miss. 1994) (adopting the rule of Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993), which allows after-acquired evidence to be used to bar remedies of front pay and reinstatement; back pay is cut off only if the evidence is discovered independently of the litigation).

90. 968 F.2d 1174 (11th Cir. 1992). In Wallace, the plaintiff, Joyce Annette Neil, asserted claims of inadequate compensation and retaliation under the Equal Pay Act ("EPA"), see 29 U.S.C. §§ 206(d)(1), 215 (a)(2) (1988), and sexual harassment and retaliation claims under Title VII, see 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a) (1988). Wallace, 968 F.2d at 1176. During Neil's deposition, the defendant, Dunn Construction, learned that Neil had pled guilty to the possession of cocaine and marijuana prior to filing her application with Dunn. On her employment application she had asserted that she had never been convicted of a crime. Id. at 1176-77. The defendant sought partial summary judgment, which the district court denied. Id. at 1177.

91. Wallace, 968 F.2d at 1179. The court explained that under the facts assumed by the Tenth Circuit in Summers, absent his age and his religion, Mr. Summers "would have remained employed for at least some period of time after he was actually discharged." Yet the Tenth Circuit denied Summers any relief at all. Consequently, had Summers not been a member of any protected class, he would never have been a victim of discrimination, his records might not have been thoroughly examined, at least for some period of time, and he would have worked for a longer period of time. See also Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1229 (3d Cir. 1994) (courts that allow after-acquired evidence to bar liability make plaintiffs worse off for having a protected characteristic because presumably, 'absent the wrong done the employee, the employer would not have discovered the 'legitimate motive' evidence.
"antithetical to 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, employment discrimination."

Rather than encouraging employers to eliminate discrimination, the court observed, the Summers rule invites employers to "establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination" because the rule allows employers to escape 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."

More importantly, the Wallace court concluded the Tenth Circuit had misinterpreted the Supreme Court's pronouncements regarding mixed-motive cases which had formed the fundamental basis for the Summers decision. The appellate court opined that the "law governing after-acquired evidence should not ignore the time lapse between the unlawful act and the discovery of a legitimate motive and therefore should not replicate the law applicable to mixed motives."

The Wallace court concluded that a sufficient showing of after-acquired evidence "mandates the drawing of a boundary between the preservation of the employer's lawful prerogatives and the restoration of the discrimination victim." The court placed the burden on the employer to prove "whether and in what manner after-acquired evidence would have legitimately altered the employment relationship" and how the evidence should affect relief.

The court acknowledged that if the after-acquired evidence would have caused the discharge of the plaintiff-employee, then neither reinstatement nor front pay would be appropriate. Back pay, however, should not be cut off

(92) Wallace, 968 F.2d at 1180 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).

93. Id.

94. Id. See supra note 30 and accompanying text.


96. Wallace, 968 F.2d at 1180.

97. Id. at 1181, see generally infra notes 105-28 and accompanying text.

98. Id.

99. Id. at 1181 n.11.

100. Id. at 1181.
unless the employer proves that it would have discovered the after-acquired evidence in the absence of the unlawful acts and the subsequent litigation.\textsuperscript{101}

The court concluded that the total effect of after-acquired evidence on remedies must be decided on a case by case basis.\textsuperscript{102}

Observing that "[r]easoning that the plaintiff suffered no legal injury from invidious discrimination when after-acquired evidence reveals resume fraud or work misconduct . . . defies common sense," the Third Circuit, in a particularly erudite analysis of the after-acquired evidence doctrine, has recently joined the Eleventh in rejecting the \textit{Summers} doctrine and limiting the use of after-acquired evidence to determination of the appropriate remedy in a discrimination case.\textsuperscript{103}

\textsuperscript{101} \textit{Id.} at 1182.

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} Mardell \textit{v.} Harleysville Life Ins. Co., 31 F.3d 1221, 1231 (3d Cir. 1994). \textit{Mardell} involved a claim for sex and age discrimination under both state and federal law. Before joining the Harleysville Life Insurance Co., Nancy Mardell was an accomplished life insurance agent at Prudential Life Insurance Company. In 1988, she was approached by Harleysville regarding the possibility of filling a vacancy created by promotion. \textit{Id.} at 1222-23. She accepted the offer. In December 1989, however, Mardell became the first Harleysville employee ever to be placed on probation. \textit{Id.} at 1223. The probation was allegedly imposed for poor performance, even though at the time of the probation, Mardell had surpassed the yearly goal set for her. \textit{Id.} Under the terms of her probation, Mardell was required to meet or exceed her quota every month, or face the risk of dismissal. This requirement was not imposed on any of her male peers or supervisors, and, in fact, was a standard that most of Harleysville's managers regularly failed to meet. \textit{Id.} During her short term of employment, Mardell's supervisor allegedly told her, \textit{inter alia}, that as a woman he had higher expectations of her, that she "wasn't one of the boys," and "couldn't be a good old boy." He also, according to Mardell's testimony, said he did not think her position "was a job for a woman" and that many agents "would think of her 'as a wife.'" \textit{Id.} The supervisor also allegedly mentioned Mardell's age frequently and told her once that "she 'should be home playing with [her] grandchildren.'" \textit{Id.}

During discovery, Harleysville learned that although Mardell represented on her resume and employment application that she had a college degree, she in fact was two courses short of the degree. Mardell explained that the course work had been belatedly completed and submitted and that she had been advised that the grade change would be filed, but she was never credited with the change. A college degree was not a requirement for Mardell's job, however. \textit{Id.} In addition, Mardell had exaggerated some of her duties in prior positions unrelated to the sale of life insurance, and had misrepresented that some of her prior work experience had been remunerated when in fact it was unpaid field course work for college. \textit{Id.} at 1223-24.

Thereafter, Harleysville filed a motion for summary judgment, supported by affidavits from the vice-president of sales who had hired Mardell and Mardell's immediate supervisor. The vice-president of sales asserted that he had relied upon
Mardell’s application and resume in hiring her and would not have hired her had had he known of the misrepresentations. Mardell’s supervisor averred that the college degree was a "plus," when he interviewed Mardell, and that had he known of the misrepresentations at the time of the interview, he would have recommended against the hiring. Moreover, he would have terminated Mardell immediately when he found out about the misrepresentations. Id. For purposes of summary judgment, of course, Harleysville assumed arguendo that it had discriminated, but contested Mardell’s standing to sue and, alternatively, questioned whether she had sustained any injury. The district court granted the motion for summary judgment, concluding that because of her fraud in gaining employment, Mardell had suffered no legally cognizable injury, even if Harleysville had discriminated against her. Id.

The Third Circuit reversed. The appellate court first observed that, contrary to the reasoning in Summers, an after-acquired evidence case is different than a mixed-motive case, see infra notes 104-13 and accompanying text, or a pretext case, see infra notes 129-32 and accompanying text, because the legitimate reason proffered by the employer for discharging an employee in an after-acquired evidence case was "non-existent" at the time of the adverse employment decision and could not possibly have motivated the employer. Mardell, 31 F.3d at 1228. The court further expressed concern that the effect of applying the after-acquired evidence doctrine was to "make plaintiffs worse off for having a protected characteristic," since "absent the wrong done the employee, the employer would not have discovered the 'legitimate motive' evidence . . . and the employee would still be employed." Id. at 1229.

The court made short work of the standing issue, noting that the civil rights statutes contain no exception for "individuals who would not have been employed by the employer but for their fraud or misconduct." Id. at 1231. In addition, the court rejected the fundamental premise of Summers that a plaintiff guilty of misconduct has suffered no injury, opining that "[r]easoning that the plaintiff suffered no legal injury from invidious discrimination when after-acquired evidence reveals fraud or work misconduct . . . defies common sense." Id. (citations omitted). The Mardell court provided a lengthy exposition of the public policy which underlies the nation’s civil rights laws. See id. at 1234-38.

The Third Circuit held that after-acquired evidence is irrelevant at the liability phase of an employment discrimination case. Id. at 1238. The court concluded, however, that the evidence was relevant to the remedies stage of the proceeding. Id. The court rejected the approach of the Seventh Circuit, which allows back pay to be cut off as of the date that the employer discovers the after-acquired evidence, because such an approach is "inconsistent with the effectuation of the [civil rights] statute's deterrent and compensatory purposes." Rather, the court concluded that back pay should generally be awarded until the date of judgment. Id. at 1239. The court would, however, allow an employer to stop the running of back pay liability if it could show that it would have "inevitably discovered the evidence in the normal progression of things," or that the employer had discovered the evidence independently of any investigation prompted by the plaintiff’s discriminatory employment action. Id. at 1239-40.
IV. RATIONALES FOR RESTRICTING THE USE OF AFTER-ACQUIRED EVIDENCE

A. The After-Acquired Evidence Doctrine Is Ill-Reasoned

1. The Misinterpretation of Mt. Healthy

In holding that a plaintiff can be denied all relief, despite the existence of employment discrimination, the Tenth Circuit and those courts which have followed it have treated after-acquired evidence cases as if they were mixed-motive cases. In a mixed-motive case, although there is evidence of discrimination by the employer, there is also evidence of a lawful, non-discriminatory reason for the employer’s action. Traditionally, an employer who can show that it would have discharged the employee based upon the non-discriminatory reason, regardless of the existence of discrimination, will prevail.104

The origin of guidelines for mixed-motive cases is the Supreme Court’s decision in Mt. Healthy City School District Board of Education v. Doyle.105

The Second Circuit has not directly addressed the issue yet. However, the court has in dicta "[noted its] doubt as to the validity of an after-acquired rationale as a defense to a claim of prohibited discrimination," because "[t]he recognition of such a defense would not be consistent with the goals of Title VII." Chambers v. TRM Copy Centers Corp., 43 F.3d 29 (2d Cir. 1994). A trial court in the District of Columbia has recently embraced the approach of the Third and Eleventh Circuits. Castle v. Bentsen, 867 F. Supp. 4, 8 (D.D.C. 1994) (allowing after-acquired evidence to stop accumulation of back pay if the evidence was discovered independent of the litigation).

104. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); cf. Hunter v. Underwood, 471 U.S. 222, 225 (1985) (in mixed-motive cases involving constitutional equal protection claims a plaintiff must prove that discrimination was a substantial or motivating factor in the state action; the plaintiff will then prevail unless the defendant can prove by a preponderance of the evidence that "the same decision would have resulted had the impermissible purpose not been considered"); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252. 271 n.21 (1977) (same, citing Mt. Healthy). In Price Waterhouse the Supreme Court held that employment decisions based upon race, sex, religion, color, or national origin do not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988), if the employer can prove that it would have made the same decision even in the absence of the discriminatory motive. Congress subsequently reversed the Court’s decision in Price Waterhouse in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which amends § 703 of Title VII, 42 U.S.C. § 2000e-2 (1988), providing that any discrimination gives rise to employer liability, regardless of the existence of non-discriminatory reasons for the adverse employment action. See supra note 19.

105. 429 U.S. 274 (1977)
In *Mt. Healthy*, a non-tenured school teacher was discharged because he had "shown a notable lack of tact in handling professional matters." Specifically, the teacher had sent a copy of a Board of Education memorandum related to teacher dress and appearance to a local radio station. In addition, the teacher had made an obscene gesture to two female students when they refused to obey his commands in the cafeteria.

The Supreme Court accepted the lower court's conclusion that the communication with the radio station was protected by the First and Fourteenth Amendments. The Court concluded, however, that "the fact that the protected conduct played a 'substantial part' in the actual decision not to renew [Doyle's teaching contract]" did not "necessarily amount to a constitutional violation justifying remedial action." The Court expressed concern that a "rule of causation" which focused only on "whether protected conduct played a part, 'substantial' or otherwise" in an employment decision "could place an employee in a better position as a result of the exercise of . . . protected conduct than he would have occupied had he done nothing." The Court concluded that the "constitutional principle at stake is sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct." Recognizing the practical problems indigenous to the employment relationship, the Court observed:

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

106. *Id.* at 282 n.1.
107. *Id.* at 282.
108. *Id.* Actually, the teacher, Fred Doyle, had been involved in several incidents. First, he was involved in an argument with another teacher which led to the other teacher slapping Doyle. Doyle then refused the other teacher's apology. Second, he got into an argument with cafeteria workers over the amount of spaghetti he was served. Finally, Doyle referred to students in connection with a disciplinary complaint as "sons of bitches." *Id.*
109. *Id.* at 284.
110. *Id.* at 285.
111. *Id.*
112. *Id.* at 285-86.
113. *Id.* at 286.
The Court concluded that the initial burden in a mixed-motive case is on the employee to show that his conduct was constitutionally protected and that the protected conduct was a "substantial factor" or a "motivating factor" in the employer's decision. Once the employee carries that burden, however, the burden shifts to the employer to demonstrate by a preponderance of the evidence that it would have reached the same employment decision even in the absence of the discriminatory motive.\textsuperscript{114} Relying in part on a Fourth Circuit decision applying \textit{Mt. Healthy} to an after-acquired evidence case, the Summers court applied this mixed-motive analysis of \textit{Mt. Healthy} to the after-acquired evidence case before it.\textsuperscript{115}

At first glance, an after-acquired evidence case does look somewhat like a mixed-motive case.\textsuperscript{116} There is an identifiable discriminatory reason for the discharge, as well as a non-discriminatory reason being proffered by the employer. However, in fact, an after-acquired evidence case \textit{is} not a mixed-motive case.\textsuperscript{117} What sets an after-acquired evidence case "far apart" from a mixed-motive case to which the \textit{Mt. Healthy} standards are applied is that the articulated "legitimate" reason was non-existent at the time of the adverse decision and "could not possibly have motivated the employer to the slightest degree."\textsuperscript{118} After-acquired evidence is simply not relevant to the issue of liability in an employment discrimination case because the sole inquiry at that stage is whether the employer unlawfully discriminated against the employee "\textit{at the instant of the adverse employment action}."\textsuperscript{119}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 287.
\item \textsuperscript{115} Smallwood v. United Air Lines, Inc., 728 F.2d 614 (4th Cir.), \textit{cert. denied}, 469 U.S. 832 (1984). In \textit{Smallwood}, the employer was found to have discriminated against Smallwood by refusing to hire him because of his age. United Air Lines introduced evidence discovered after it refused to process Smallwood's application that Smallwood had previously been fired by another airline for fraud. The district court rejected the after-acquired evidence defense because it occurred after the discriminatory hiring decision. The Fourth Circuit, however, reversed and accepted the defense, observing that the district court's refusal to rely upon the "after-the-fact rationale" was directly contrary to \textit{Mt. Healthy}. The Fourth Circuit observed that "the Supreme Court instructed 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." \textit{Id.} at 623.
\item \textsuperscript{118} Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1228 (3d Cir. 1994).
\item \textsuperscript{119} \textit{Id.} (emphasis added).
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Subsequent to the *Summers* decision, the Supreme Court extended the *Mt. Healthy* analysis to mixed-motive employment discrimination cases,\(^\text{120}\) holding that once a plaintiff in an employment discrimination case shows that discrimination "played a motivating part in an employment decision,"\(^\text{121}\) the employer may avoid a finding of liability "only by proving that it would have made the same decision" even if it had not discriminated on the basis of a protected characteristic.\(^\text{122}\) In discussing the kind of proof necessary to establish that the employer would have made the same decision even in the absence of discrimination, the Court observed that "proving that the same decision would have been justified is not the same as proving that the same decision would have been made."\(^\text{123}\) An employer "may not . . . prevail in a mixed-motive case by offering a legitimate and sufficient reason for its [employment] decision if that reason did not motivate [the employer] at the time of the decision."\(^\text{124}\)

After-acquired evidence is "evidence of [an] employee's or applicant's misconduct or dishonesty which the employer did not know about at the time it acted adversely to the employee or applicant," but which was discovered after the adverse action.\(^\text{125}\) Since the employer does not know of after-acquired evidence at the time it makes its discriminatory employment decision, such evidence cannot provide the "legitimate and sufficient" reason for its action necessary to avoid liability in a mixed-motive case.\(^\text{126}\) If the


\(^{121}\) Price Waterhouse, 490 U.S. at 244.

\(^{122}\) *Id.* at 244-45. *Price Waterhouse* was a sex discrimination case, so gender was the personal characteristic at issue. The Court took pains to point out that it had addressed the mixed-motive issue before in the constitutional context in *Mt. Healthy*, 429 U.S. 274 (1977), and its progeny, and in the context of the National Labor Relations Act in *NLRB v. Transportation Management, Inc.*, 462 U.S. 393 (1983), observing:

We have, in short, been here before. Each time, we have concluded that the plaintiff who shows than an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive. Our decision today treads this well-worn path.

*Price Waterhouse*, 490 U.S. at 249-50.

\(^{123}\) *Id.* at 252.

\(^{124}\) *Id.*

\(^{125}\) *Mardell*, 31 F.3d at 1222.

\(^{126}\) *Id.* at 1228 ("What sets an after-acquired evidence case far apart from a mixed-motives case like *Price Waterhouse* . . . is that the articulated 'legitimate' reason, which was non-existent at the time of the adverse decision, could not possibly
employer did not know about the evidence, it could not have motivated the employer's action. Therefore, the after-acquired evidence provides no defense.

2. The Misallocation of the Burden of Proof

When he has little or no direct evidence of discrimination, a victim of employment discrimination must rely upon circumstantial evidence to prove his case. The Supreme Court has fashioned a well known framework for allocating the burden of production and ordering the presentation of proof in employment discrimination cases based upon circumstantial evidence. A plaintiff must first make out a prima facie case of discrimination by showing that (1) he belongs to a protected class; (2) he applied for and was qualified for a job which the employer was seeking to fill; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open. The "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee."

have motivated the employer to the slightest degree.

127. Id. at 1229 ("under the mixed-motives analysis, the employer in an after-acquired evidence case cannot contend that it would have reached the same decision at the time it was made absent the illicit motive").

128. See Price Waterhouse, 490 U.S. at 252 (employer may not prevail in mixed-motive case by asserting non-discriminatory reason for discharge which did not motivate the employer at the time of discharge). Congress responded rather quickly to Price Waterhouse and several other decisions viewed as adverse to the rights of employees to be free from discrimination. The Civil Rights Act of 1991, Pub. L. No. 102-166 § 107, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-(2)(m) (Supp. V 1993)), amended Title VII to provide that any finding of discrimination at all by an employer will cause a finding of liability.


130. See McDonnell Douglas Corp., 411 U.S. at 802; Zemelman, supra note 67, at 177. In a discharge case, the elements change slightly in that the third element requires a showing that the employee was disciplined or discharged rather than that the employee applied for a position and was rejected. See, e.g., Hicks, 113 S. Ct. at 2747 (discharged employee asserting claim for race discrimination met McDonnell-Douglas test by proving that (1) he was black; (2) he was qualified for his position; (3) he was demoted from that position and ultimately discharged; and (4) the position remained open and was ultimately filled by a white man).

131. Hicks, 113 S. Ct. at 2747. The plaintiff's prima facie case establishes a presumption which requires the conclusion that the employer discriminated, unless the employer can produce some other legitimate explanation for its actions. Id. ("To establish a 'presumption' is to say that a finding of the predicate fact (here, the prima
order to rebut the presumption, the employer must produce evidence that the employee was discharged "for a legitimate, non-discriminatory reason."132

Courts which have allowed the use of after-acquired evidence to exonerate employers from all liability for discrimination have done violence to this ordered scheme of proof and to the plaintiffs who seek to use it. First, some courts have allowed the use of after-acquired evidence of application or resume fraud to defeat a plaintiff’s showing that he was qualified for his job.133 Such courts have reasoned that a plaintiff who has lied about his
ci case) produces ‘a required conclusion in the absence of explanation’ (here, the finding of unlawful discrimination”).

132. Id. The defendant is required to "clearly set forth, through the introduction of admissible evidence," an explanation of its action, "which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause" of the discharge. Id. The Court has made clear, however, despite the shift to the employer of a burden of production, that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id.

Prior to the Supreme Court’s recent decision in St. Mary’s Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993), it appeared that a plaintiff could prevail in a discrimination case by simply showing that "the employer’s proffered explanation [of its adverse employment action] is unworthy of credence." Id. at 2752. However, in Hicks the Court held that if the fact-finder does not believe the employer’s explanation, it is not required to hold for the plaintiff unless the fact-finder believes the plaintiff’s claim of intentional discrimination." Id. at 2753 ("[T]he district court must decide which party’s explanation of the employer’s motivation it believes . . . . It is not enough . . . to disbelieve the employer; the fact-finder must believe the plaintiff’s explanation of intentional discrimination."). The fact-finder may find discrimination based upon the plaintiff’s prima facie case and the disbelief of the defendant’s explanation, but it is not compelled to do so. Id. at 2749.

133. See, e.g., Dotson v. United States Postal Serv., 977 F.2d 976 (6th Cir.), cert. denied, 113 S. Ct. 263 (1992) (after-acquired evidence of misrepresentation on original employment application admissible in handicap discrimination case to show plaintiff was not qualified); Gilty v. Village of Oak Park, 919 F.2d 1247 (7th Cir. 1990) (discharged employee’s claim of discrimination based on his national origin failed because of after-acquired evidence of falsification of his employment application which precluded him from meeting the second prong of the McDonnell Douglas test, i.e., showing that he was qualified); Livingston v. Sorg Printing Co., 49 Fair Empl. Prac. Cas. (BNA) 1417 (S.D.N.Y. 1989) (after-acquired evidence of misrepresentations on employment application and resume barred plaintiff "from meeting his prima facie burden and from establishing that he is entitled to damages on his claim" in claim for racial discrimination); see also Village of Oaklawn v. Human Rights Comm’n, 478 N.E.2d 1115 (Ill. App. Ct. 1985) (after-acquired evidence of discharged employee’s misrepresentations on employment application admissible to show she was not qualified and therefore could not establish prima facie case under McDonnell Douglas in claim for handicap discrimination under state law); Zemelman, supra note 67, at
qualifications on his application or resume is not qualified for the job under the McDonnell Douglas standard. Therefore, the defendant employer has no liability for discrimination.\(^{134}\) Such an analysis misconstrues the intent of the McDonnell Douglas formula.

The McDonnell Douglas standard simply provides one means for a plaintiff to make out a case of discrimination when the plaintiff has only circumstantial evidence of discrimination. The reasoning is that if all the elements of the McDonnell Douglas test are met, it is more likely than not that discrimination has occurred, absent a showing of some non-discriminatory explanation by the defendant.\(^{135}\) Even if the plaintiff cannot meet all the elements of McDonnell Douglas, he may still be able to make out his case through other means. The Supreme Court has made it clear that a plaintiff may establish the existence of discrimination without necessarily meeting every element of the McDonnell Douglas formula.\(^{136}\) Courts are not

\(^{179}\) But see Stephen v. PGA Sheraton Resort, Ltd., 669 F. Supp. 1573 (S.D. Fla. 1987) (after-acquired evidence of misrepresentations on plaintiff's employment application which, according to defendant, established that plaintiff was not qualified for the job, did not destroy plaintiff's prima facie case of discrimination), rev'd, 873 F.2d 276 (11th Cir. 1989).

134. See, e.g., Dotson v. United States Postal Serv., 977 F.2d 976 (6th Cir. 1992); Guzman v. United Airlines, Inc., 53 Fair Empl. Prac. Cas. (BNA) 1419, 1422 (D. Mass. 1990). In Dotson, for example, the plaintiff alleged, inter alia, that he was terminated for reasons of handicap discrimination in violation of the Rehabilitation Act, 29 U.S.C. §§ 701-796i (1988). The trial court admitted after-acquired evidence showing that the plaintiff had excluded from his application prior health and employment information, and granted summary judgment in favor of the employer. The Sixth Circuit affirmed, concluding that under the standards of Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), "plaintiff lacked the honesty and trustworthiness required for the USPS position." Dotson, 977 F.2d at 978. The court held that even though the evidence of application fraud was not discovered until after the termination of plaintiff's employment, the plaintiff "is not entitled to . . . relief when he was not initially qualified for the position." Id.

135. The prima facie case: raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 254.

136. Id. at 254 n.6 (McDonnell Douglas standard is not inflexible, as "the facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie
required to "blindly adhere to the elements of the prima facie case," but rather must satisfy themselves that the plaintiff has met the burden of proving by a preponderance of the evidence that the circumstances under which the plaintiff was fired raise an "inference of unlawful discrimination." Thus, a defendant who is allegedly not qualified can still be a victim of discrimination and assert a statutorily cognizable claim against his employer.

The ultimate question before the court in an employment discrimination case is always whether the employer relied upon discriminatory motives in making its decision. Consequently, the element of a plaintiff's qualification for a job should be measured by the defendant's subjective perception of the plaintiff's qualifications at the time of the alleged discriminatory employment action. The proper inquiry is whether an employee is satisfying the

proof required [in McDonnell Douglas] is not necessarily applicable in every respect in differing factual situations."

137. Stephen, 669 F.Supp. at 1583 (citing Burdine, 450 U.S. at 254 n.6).

138. See, e.g., Stephen v. PGA Sheraton Resort, Ltd., 669 F. Supp. 1573 (S.D. Fla. 1987), rev'd, 873 F.2d 276 (11th Cir. 1989). Some courts have argued that a plaintiff who cannot meet the "qualified" prong of the McDonnell Douglas formula lacks standing to assert a claim for discrimination. See, e.g., Gilty, 919 F.2d at 1251; Wallace, 968 F.2d at 1187-89 (Godbold, J., dissenting). This "no-standung" argument, however, "runs counter to the plain meaning" of the employment discrimination statutes. Mardell, 31 F.3d at 1231. Title VII, 42 U.S.C. §§ 2000e-2000e-17 (1988), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988), grant standing to "any individual" who is a victim of discrimination. See Mardell, 31 F.3d at 1231. Neither statute contains any exception for individuals "who would not have been employed by the employer but for their fraud or misconduct" or for those "who measured against some objectively defined criteria are 'unqualified.'" Id. See Kenneth G. Parker, After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray, 72 Tex. L. Rev. 403, 428 (1993) (noting that "the ability of the plaintiff to sue is delineated by the statute itself").

The Supreme Court has addressed a similar no-standing argument in the context of the Federal Employers' Liability Act ("FELA"), which provides railroad employees with the right to recover compensatory damages for personal injuries. Still v. Norfolk & W. Ry., 368 U.S. 35 (1961). In Still, the employer argued that a plaintiff employee who had made false statements regarding his physical condition in order to obtain employment was not "employed" for purposes of FELA. Id. at 36. The Court rejected the argument and concluded that "the status of employees who become such through . . . fraud, although possibly subject to termination . . . must be recognized" for purposes of suits under the statute. Id. at 45. See generally Petitioner's Brief at *13-21, McKennon (No. 93-1543).

139. Mardell, 31 F.3d at 1230. As the Third Circuit explained:

[W]hat is relevant to the inquiry is the employer's subjective assessment of the plaintiff's qualifications, not the plaintiff's objective ones if unknown to the employer. In other words, the strength of the inference of
normal requirements of the job or performing according to the employer's "legitimate expectations." Nothing in McDonnell Douglas suggests that the qualification element is to be objectively determined based upon facts totally unknown to the employer at the time of discharge. Such facts are completely irrelevant to the ultimate issue of whether the employment decision was discriminatory. The analysis used by the courts applying the after-acquired evidence doctrine turns McDonnell Douglas on its head and focuses upon the behavior of the plaintiff rather than on the unlawful behavior of the defendant. Such a result contravenes the clear intent of the employment discrimination statutes.

The second problem with the current application of the after-acquired evidence doctrine is that most of the after-acquired evidence cases are being disposed of on summary judgment. Despite the fact that the after-

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142. See Zemelman, supra note 67, at 181.

acquired evidence doctrine is an affirmative defense on which the defendant employer bears the burden of proof, \(^{144}\) many courts deciding these cases have effectively placed the burden on the plaintiff to prove he would not have been fired, rather than placing the burden on the defendant to prove by a preponderance of the evidence that it would have fired the plaintiff had it known of the after-acquired evidence earlier. \(^{145}\)

A party seeking summary judgment has the initial burden of clearly establishing that there is "no factual dispute regarding the matter upon which summary judgment is sought." \(^{146}\) The moving party, the employer in an after-acquired evidence case, should be held to "a strict standard." \(^{147}\) Evidence is to be construed in the light most favorable to the party opposing the motion, and "[a]ny doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party." \(^{148}\)

To meet its burden the moving party typically submits affidavits of witnesses stating facts to which the witnesses would testify at trial. \(^{149}\) If the

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\(^{144}\) White & Brussack, supra note 20, at 53 n.12 ("The after-acquired evidence defense should be treated as an affirmative defense, with the employer carrying the burdens of production and persuasion.").

\(^{145}\) See McGinley, supra note 24, at 177-78.

\(^{146}\) Id.

\(^{147}\) Id.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); Agosto v. Immigration and Naturalization Serv., 436 U.S. 748, 773 (1978) ("[T]he party opposing a summary judgment motion is to be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists that justifies proceeding to trial.").

\(^{148}\) Id.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); Agosto v. Immigration and Naturalization Serv., 436 U.S. 748, 773 (1978) ("[T]he party opposing a summary judgment motion is to be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists that justifies proceeding to trial.").
moving party produces information that "appears to establish that no factual dispute exists," then the non-moving party must produce information to show that a genuine factual dispute does exist.\textsuperscript{150} Otherwise summary judgment will be granted.\textsuperscript{151} If the non-moving party produces information that contradicts the moving party and shows that a factual dispute exists, "summary judgment must be denied" and the issues should go to trial.\textsuperscript{152} The Supreme Court has observed that the ultimate inquiry in a summary judgment proceeding is the same as that governing a directed verdict—"if reasonable minds could differ as to the import of the evidence," summary judgment should be denied.\textsuperscript{153} In cases where the moving party has the burden of proof, as in cases in which defendants assert the after-acquired evidence doctrine as an affirmative defense, the non-moving party cannot simply argue that the opponent's witnesses should have to testify at trial where they might be disbelieved.\textsuperscript{154} Rather the party opposing the motion must present affidavits supporting his case on the merits or "casting doubt on the veracity" of those who executed affidavits on behalf of the moving party.\textsuperscript{155} However, summary judgment is inappropriate "[i]f the opponent can show some reason why the witness might be disbelieved at trial," such as the case where the witness might personally profit from a judgment in favor of the moving party.\textsuperscript{156}

Summary judgment should also be denied "when the nature of the issue gives control of the facts to the moving party—for example, when the issue is the latter's state of mind at a particular time."\textsuperscript{157} In such cases the only way to counter the witness' affidavit as to his intent will be to have the witness appear at trial and be subject to formal examination.\textsuperscript{158}

Unfortunately, courts dismissing employment discrimination cases on summary judgment based upon the after-acquired evidence doctrine have not uniformly held defendant employers to the "strict standard" required. Although such courts have viewed the after-acquired evidence doctrine as an affirmative defense, they have typically allowed defendant employers to satisfy their burden of production and proof by the submission of an affidavit from a company manager asserting that the manager would have fired the employee for the misconduct which was discovered after the employee's discharge, had

\textsuperscript{150} FRIEDENTHAL ET AL., supra note 146, at 444.
\textsuperscript{151} FRIEDENTHAL ET AL., supra note 146, at 444-45.
\textsuperscript{152} FRIEDENTHAL ET AL., supra note 146, at 445.
\textsuperscript{153} Anderson, 477 U.S. at 250-51.
\textsuperscript{154} FRIEDENTHAL ET AL., supra note 146, at 446.
\textsuperscript{155} FRIEDENTHAL ET AL., supra note 146, at 447.
\textsuperscript{156} FRIEDENTHAL ET AL., supra note 146, at 447.
\textsuperscript{157} FRIEDENTHAL ET AL., supra note 146, at 447.
\textsuperscript{158} FRIEDENTHAL ET AL., supra note 146, at 447-48.
the manager known about the misconduct at the time.\textsuperscript{159} Although such affidavits describe a hypothetical decision and are clearly self-serving, courts have nevertheless found them a sufficient basis on which to render summary judgment for the defendant employer.\textsuperscript{160}

\textsuperscript{159} See White & Brussack, \textit{supra} note 20, at 52 n.10.

\textsuperscript{160} White & Brussack, \textit{supra} note 20, at 52 n.10; McGinley, \textit{supra} note 24, at 178. Accepting such affidavits as true without "requiring objective documentary proof" or allowing plaintiff to cross-examine the witness regarding the company's past policies is arguably improper in light of the moving party's burden. \textit{See id.} at 178 n.224.; White & Brussack, \textit{supra} note 20, at 53 n.12 ("It is at least open to question whether the determinative significance routinely accorded to employers' affidavits in these cases is consistent with summary judgment doctrine.").

The laxity of the courts in embracing the after-acquired evidence is aptly illustrated by Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988). In \textit{Summers} it was assumed for purposes of summary judgement that State Farm had discriminated against Mr. Summers based upon his age and religion. \textit{Id.} at 708. Prior to discharging Summers, State Farm had learned that Summers had on multiple occasions falsified company records regarding insurance claims. \textit{Id.} at 702. He had even been placed on probation for a time because of the falsifications. \textit{Id.} When State Farm ultimately fired Summers, it did so because of his "poor attitude and inability to get along with fellow employees," not because of the falsifications. \textit{Id.} Subsequent to Summers' discharge, State Farm discovered over 150 instances of falsification, 18 of which had occurred after Summers had returned from his probation. State Farm sought summary judgment on the basis of the after-acquired evidence of the additional falsifications.

Summers argued that there were issues of material fact in dispute. However, the court concluded with little discussion that no such factual issues existed, apparently because Summers had not denied the falsifications in his depositions or affidavits. The court did not discuss the specific content of the employer's affidavits, if any, or the identity of the persons executing them. In fact, the motion appears to have been supported solely by the "depositions, exhibits, records, and files" of the case and the employer's brief. \textit{Id.}

What is particularly interesting about \textit{Summers} is that in the Tenth Circuit "[t]he moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment." Bethley v. City of Spencer, Oklahoma, 37 F.3d 1509, No. 94-6110, 1994 WL 573765, at **2 (10th Cir. Oct. 19, 1994); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). In \textit{Summers}, one might certainly agree that State Farm had the right to discharge Mr. Summers because of his falsification of records. However, the fact is that the employer chose not to do so. Even though it knew of numerous falsifications prior to his discharge, when Summers was actually terminated it was for reasons other than the falsifications. The falsifications represented by the after-acquired evidence occurred in the same employment period as previous falsifications. Therefore, it is certainly open to "reasonable doubt" whether State Farm would in fact have discharged Mr. Summers if it had known of all the falsifications prior to his discharge. Yet the court, with little discussion of whether
Accepting such affidavits seems to be contrary to the established requirements for summary judgment. These employer affidavits are typically subjective, and they often involve conjecture about what the employer would have done had it known of the after-acquired evidence prior to the employee’s discharge, when in fact the employee’s action is "conduct of first impression."\(^{161}\) For example, in \textit{McKennon v. Nashville Banner Publishing Co.}\(^{162}\) there was no evidence that any express company rule had been violated nor that anyone had ever before been disciplined for copying confidential records.\(^{163}\) In practice, such affidavits may be executed by persons who are simply doing what their superiors are directing them to do.\(^{164}\) To refuse to execute such an affidavit might well cost the witness his job. Similarly, a supervisor who has discriminated could lose his job if the plaintiff’s suit is successful and the company is required to pay significant sums of money. Such a supervisor has a vested interest in the outcome of the lawsuit and his affidavit regarding a personnel decision that has never occurred should be viewed with sufficient suspicion to preclude the use of the witness’ affidavit to support summary judgment.\(^{165}\)

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material facts were indeed in dispute, granted summary judgment for the defendant employer.

161. Affidavits that point to specific employer rules, specific instances in the past in which employees have been discharged for infractions similar to plaintiff’s, and similar objective data that could lead a reasonable person to conclude that the employer more likely than not would have discharged the plaintiff had it known earlier of the after-acquired evidence, are distinguishable and should be sufficient to support summary judgment. This Article goes further and suggests that an employer should get no relief from after-acquired evidence unless the employer can show that a \textit{reasonable employer} would have discharged the plaintiff under the circumstances. \textit{See infra} notes 174-78 and accompanying text.


163. \textit{See}, \textit{e.g.}, Petitioner’s Brief at *5-6, \textit{McKennon} (No. 93-1543); \textit{see supra} note 9.

164. For example, in \textit{McKennon}, the plaintiff Christine McKennon would allegedly have been discharged for taking confidential documents which had come into her possession, even though her only reason for taking them was because she feared being wrongfully terminated. Her supervisor, the company comptroller, knew nothing about the documents incident until she was handed the prepared affidavit to sign. The "would have terminated" language in the affidavit was written by a third party who did not discuss the matter with the comptroller before preparing the affidavit. Petitioner’s Brief at *5-6, \textit{McKennon}, (No. 93-1543).

165. This suspicion should be heightened in view of the psychological phenomenon of cognitive dissonance under which witnesses, in order to resolve their psychological discomfort, will convince themselves that the statements in the affidavit are true, that the employee would have been fired had the employer known of the after-acquired evidence earlier. For a more extensive discussion of the phenomenon
Another problem with the current approach to summary judgment by courts following *Summers* is that the plaintiff is too often handicapped with a lack of evidence. Summary judgment is generally to be denied when all of the facts relevant to the employer’s allegations are in the control of the employer. In cases where an employer simply asserts through affidavits that it would have discharged the plaintiff had it known of the after-acquired evidence earlier, all of the facts are within the employer’s exclusive, subjective knowledge. There is no evidence that the plaintiff could obtain through discovery that would allow the plaintiff to rebut the employer’s assertion, even if the employer were blatantly lying. Unless a plaintiff can find evidence of incongruous treatment of other employees for the same offense, there may be no way to rebut the employer’s assertion that it would have fired the employee for the misconduct at issue. Many if not most after-acquired

of cognitive dissonance and its impact upon employer witnesses see infra notes 215-57 and accompanying text.

The American Federation of Labor and Congress of Industrial Organization in its *amicus* brief in *McKennon* argued that under the general principles of FED. R. EVID. 602 & 701, "since admissible testimony must be based on personal knowledge" non-expert testimony by an employer premised on "speculation or conjecture" as to what the employer would have done had it known of the after-acquired evidence is generally "inadmissible entirely." Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner at 26, *McKennon*, (No. 93-1543) (citing *inter alia*, 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 6026 at 231 (1990)). Generally a witness "may not testify to what he would have done had the situation been different from what it actually was." Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 298 F.2d 356, 360 (6th Cir. 1961). Consequently, the AFL-CIO has argued, the employer’s "bare testimony . . . that . . . [a] plaintiff would have been discharged other than when she actually was, and would have been discharged for a legitimate, non-discriminatory reason, is simply inadmissible as conjectural."

166. FRIEDENTHAL ET AL., supra note 146, at 447-48 (summary judgment should not be granted "when the nature of the issue gives control of the facts to the moving party—for example, when the issue is the latter’s state of mind at a particular time."). The effect of such a circumstance is to make it unfair "to expect the responding party to obtain countering information." FRIEDENTHAL ET AL., supra note 146, at 448. Courts draw a distinction, however, between cases in which it is unfair to require the responding party to obtain countering information and those in which a diligent search reveals that no such information exists. *Id.*

167. See Bonger v. American Water Works, 789 F. Supp. 1102, 1107 (D. Colo. 1992) (noting that courts frequently grant motions for summary judgment based upon self-serving affidavits because "there is no evidence to rebut the declaration that [the employer] would have terminated the plaintiff’s employment had [plaintiff’s] actions been discovered").
evidence cases appear to fall into this category. In such cases, summary judgment is inappropriate, for the only way to counter the witness' affidavit as to his intent will be to have the witness appear at trial and be subject to formal examination.

The result, in short, of the current approach to summary judgment in after-acquired evidence cases by courts embracing the after-acquired evidence doctrine, is that employers who discover evidence of employee misconduct after they have discriminatorily fired an employee, are in a much better position to defend themselves than are the employers who have a mixed motive at the time of discharge. An employer who wants to retaliate against an employee who has asserted a claim has simply to go on a fishing expedition for after-acquired evidence to avoid liability completely.

This nation has committed itself to a public policy which seeks to eradicate unlawful employment discrimination. The upside-down scheme of proof created when after-acquired evidence cases are resolved by summary judgment contravenes the statutory scheme developed by Congress to rid the country of the ignominious stain of discrimination.

B. The After-Acquired Evidence Doctrine is Contrary to Public Policy

In applying the after-acquired evidence doctrine, the Tenth Circuit observed that after-acquired evidence was irrelevant to the issue of liability, i.e., whether State Farm had in fact discriminated against Summers based upon

168. See generally McGinley, supra note 24, at 177-81.
169. McGinley, supra note 24, at 177-81.
170. See Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180 (11th Cir. 1992) (employers can escape all liability for discrimination 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").
171. See, e.g., The Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 74 (1975) (Douglas, J., dissenting) (the enactment of Title VII "unequivocally makes the eradication of employment discrimination part of the federal labor policy"); EEOC v. O & G Spring and Wire Forms Specialty Co., 38 F.3d 872, 881 (7th Cir. 1994) (noting that the fee-shifting provisions of the Civil Rights Act are "integral linked to advancing the substantive goal of eradication of discrimination—a goal shared by the [Age Discrimination in Employment Act]"); see generally infra notes 172-202 and accompanying text.
172. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (discussing fact that certainty of back pay award in discrimination cases causes employers "to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history").
his age and religion, 173 a proper conclusion since the "existence of liability depends on the actual motivation for the discharge, rather than a post hoc hypothetical motivation based on knowledge acquired subsequent to the discharge decision." 174 However, the court went on to find that in light of the after-acquired evidence, Summers had suffered no injury, 175 and therefore was entitled to no remedy. 176 The practical effect, therefore, of the after-acquired evidence doctrine, as applied by the Summers court and those courts which have followed it, is that the doctrine operates as a "complete defense to liability." 177 This reasoning that a plaintiff has suffered no legal injury from invidious discrimination, simply because the employer had a lawful, albeit unknown, reason to discharge the employee at the time of the discriminatory discharge, "defies common sense." 178 Moreover, such a stance deprecates the federal right violated and heaps insult upon injury. 179

Contrary to the view of the Tenth Circuit, every victim of discrimination suffers injury, and that injury is "not lessened by the plaintiff's status as a wrongdoer." 180 The trauma experienced by a victim of discrimination arises from the very fact that the victim has been singled out solely because of some personal characteristic. 181 A victim of discrimination "suffers a

173. See Summers, 864 F.2d at 704 ("[T]he additional falsifications discovered in 1986 could not have been a 'cause' or 'reason' for Summers' discharge in 1982 since they were unknown to State Farm at the time of the dismissal.").
174. Wallace, 968 F.2d at 1178.
175. Summers, 864 F.2d at 708 (after-acquired evidence is relevant to plaintiff's claim of injury and precludes the grant of any remedy).
176. Id.
177. Mardell, 31 F.3d at 1226; Id. at 1229 ("Although Summers reasoned not that the after-acquired evidence would avoid liability but instead that it would bar all remedies, the effect is the same.").
178. Id. at 1231.
179. Id. at 1232 ("[T]o maintain that a victim of employment discrimination has suffered no injury is to deprecate the federal right transgressed and to heap insult ("You had it coming") upon injury.").
181. See Mardell, 31 F.3d at 1232 ("in an employment discrimination suit the traumatic injury is having been subjected to the adverse employment action because of one's race, sex, age, or other protected characteristic"). Discriminatory employment decisions "inflict psychological injury by stigmatizing their victims as inferior." Paul Brest, The Supreme Court's 1975 Term. Foreword: In Defense of the Anti-Discrimination Principle, 90 HARV. L. REV. 1, 8 (1976). Acts of discrimination "tend to occur in pervasive patterns." Id. Consequently, discrimination victims "suffer especially frustrating, cumulative and debilitating injuries." Id. Discrimination "based
dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw."\[182\] Such victims of discrimination "often endure terrible humiliation, pain and suffering,"\[183\] and suffer emotional disorders and medical problems.\[184\] It is because of the seriousness of the injury

upon immutable characteristics, such as race and sex, is especially harmful, not only because the victim is unable to avoid the discrimination but because too often the injuries are cumulative as well, given the pervasiveness of discrimination in our society." White & Brussack, supra note 20, at 87. See also Mark S. Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 COLUM. L. REV. 292, 318-19 (1982) ("stigmatization that discrimination based on an immutable characteristic inflicts on a person occurs when that characteristic operates as a motivating factor").

182. Mardell, 31 F.3d at 1232 (citing United States v. Burke, 112 S. Ct. 1867, 1872 (1992) ("It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is, as ... this Court consistently has held, an invidious practice that causes grave harm to its victims.").


184. H.R. REP. No. 40(I), supra note 183, at 14, 1991 U.S.C.C.A.N. at 552. See Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). Jacksonville Shipyards was a case in which the female plaintiff alleged sexual harassment. The court related in great detail the testimony of Dr. Susan Fiske, a professor of psychology from the University of Massachusetts, regarding the nature of sexual harassment and its effect on female employees. Id. at 1502-07. According to Dr. Fiske:

Victims of sexual harassment suffer stress effects from the harassment. Stress as a result of sexual harassment is recognized as a specific diagnosable problem by the American Psychiatric Association. Among the stress effects suffered is "work performance stress," which includes distraction from tasks, dread of work, and an inability to work. Another form is "emotional stress," which covers a range of responses, including anger, fear of physical safety, anxiety, depression, guilt, humiliation, and embarrassment. Physical stress also results from sexual harassment; it may manifest itself as sleeping problems, headaches, weight changes, and other physical ailments. A study by the Working Women's Institute found that ninety-six percent of sexual harassment victims experienced emotional stress, forty-five percent suffered work performance stress, and thirty-five percent were inflicted with physical stress problem.

Sexual harassment has a cumulative, eroding effect on the victim's well-being. When women feel a need to maintain vigilance against the next incident of harassment, the stress is increased tremendously.

Id. at 1506-07 (citations omitted).
experienced by discrimination victims that Congress in the Civil Rights Act of 1991\textsuperscript{185} expanded remedies available to discrimination victims to include compensatory and punitive damages.\textsuperscript{186} Persons who are terminated and suddenly find themselves unemployed often suffer severe emotional trauma.\textsuperscript{187} Those who are terminated for invidiously discriminatory reasons endure even greater injury.

In enacting anti-discrimination laws, Congress sought to do more than simply create a statutory remedy in tort for victims of discrimination.\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{186} Id. See 42 U.S.C. § 1981a (Supp. V 1993) (allowing Title VII and Americans with Disabilities Act plaintiffs to recover compensatory and punitive damages up to statutory ceiling). Congress concluded that monetary damages were necessary "to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity." H.R. REP. No. 40(I), supra note 183, at 69, 1991 U.S.C.C.A.N. at 603. The House Education and Labor Committee also observed "Victims of intentional discrimination often endure terrible humiliation, pain and suffering, psychological (sic) harm and related medical problems, which in turn cause victims of discrimination to suffer substantial out-of-pocket medical expenses and other economic losses as a result." Id. at 66, 1991 U.S.C.C.A.N. at 604. The Committee intended to confirm that "the principle of anti-discrimination is as important as the principle that prohibits assaults, batteries and other intentional injuries to people." Id. at 15, 1991 U.S.C.C.A.N. at 553.
\item \textsuperscript{188} But see Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (referring to Title VII as an "employment tort"); Zemelman, supra note 67 at 196. Ms. Zemelman argues critically that there has been "a two-decade evolution
Rather, Congress responded to the "pernicious misconceptions and ignoble hatreds"\textsuperscript{189} that have plagued the nation throughout its history,\textsuperscript{190} by enacting humanitarian laws designed to "wipe out the iniquity of discrimination in employment."\textsuperscript{191} The anti-employment discrimination laws "resonate with a forceful public policy vilifying discrimination."\textsuperscript{192} This compelling public policy has been frequently recognized and embraced by the Supreme Court in its employment discrimination decisions.\textsuperscript{193} When an employee who has been a victim of discrimination asserts a claim against his former employer, he seeks not only to redress his own wrong, but also to enforce the public policy against discrimination for the benefit of the entire society.\textsuperscript{194} The plaintiff employee becomes a "private attorney general" whose role and responsibility in enforcing the nation's civil rights laws is as

189. \textit{Mardell}, 31 F.3d at 1234.

190. \textit{Id.} ("Throughout this Nation's history, persons have far too often been judged not by their individual merit, but by the fortuity of their race, the color of their skin, the sex or year of their birth, the nation of their origin, or the religion of their conscientious choosing.").

191. \textit{Id.; see also} Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ("the ADEA is designed not only to address individual grievances, but also to further important social policies").

192. \textit{Mardell}, 31 F.3d at 1234.


194. Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) (a Title VII plaintiff "not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices"). The importance of the public interest in discrimination claims brought by private plaintiffs is further illustrated by Congress' action in the Civil Rights Act of 1991, in which it overruled the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and declared that an employer is liable for discrimination in mixed-motive cases, even when a completely non-discriminatory action alone would have propelled the employer to take the action it chose. \textit{See} Civil Rights Act of 1991, Pub. L. No. 102-66, § 107(a), 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(m) (Supp. V 1993)). The Act "reinforces the common sense notion that, even if the plaintiff is entitled to no personal relief, at least the remedies inuring to the public's benefit . . . should be considered in an after-acquired evidence case." \textit{Mardell} 31 F.3d at 1234.
important as that of the Equal Employment Opportunity Commission itself.\textsuperscript{195}

An act of discrimination does violence not just to a single African American or woman or disabled person. The act does violence to all persons in the class. A common law or statutory wrongful discharge in which a single employee is discharged for a specious or even morally reprehensible reason, does injury to the single victim of the employer’s wrong. But discrimination against those protected by the nation’s anti-discrimination laws does harm to a class of persons possessed of a common personal characteristic. Unless the employer is stopped by enforcement of the discrimination laws, the risk is great that the employer will repeat the discriminatory employment activity with other members of the same class.

The goal of the nation’s employment discrimination laws is to deter employers from engaging in discriminatory activity and to encourage employers to engage in self-examination and self-evaluation of their employment practices,\textsuperscript{196} so that they may "take affirmative steps to educate and discipline members of their workforce insensitive to or disdainful of their co-workers’ civil rights."\textsuperscript{197} The only way to achieve the desired goals is to place an "economic price" on discriminatory acts\textsuperscript{198} and to publicly expose the wrongdoer’s acts.\textsuperscript{199} Economic penalties function as "reliable

\textsuperscript{195} Mardell, 31 F.3d at 1234 n.22 ("Congress considered the charging party a ‘private attorney general,’ whose role in enforcing the ban on discrimination is parallel to that of the Equal Employment Opportunity Commission itself."); Alexander, 415 U.S. at 45 ("[A]lthough the 1972 amendment to Title VII empowers the [EEOC] to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII."). See also Zemelman, supra note 67 at 189 (citing Neuman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam) (noting that a Title VII plaintiff acts as a private attorney general "vindicating a policy that Congress considered of the highest priority"). In a real sense, the role of the private plaintiff is more important than that of the Commission, since private persons bring far more claims to federal court than does the EEOC. Although the Commission may administratively process every Title VII, ADA, and ADEA charge that is filed, it has no enforcement power of its own. It can only compel an employer to act by suing in federal court, a path it chooses only occasionally because of limited time and resources.

\textsuperscript{196} See Albemarle, 422 U.S. at 417-18 ("It is the reasonably certain prospect of a back pay award that provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.").

\textsuperscript{197} Mardell, 31 F.3d at 1235.

\textsuperscript{198} Id.

\textsuperscript{199} Id. ("Deterrence is accomplished by placing an economic price on
engines to force employers to recognize the paramount importance of our national policy, and to effectively inspire affirmative responses.

The conclusion by the Summers court that the plaintiff who had been a victim of age and religious discrimination had suffered no injury is anathema to the compelling national policy of eliminating discrimination. Subsequent judicial pronouncements that "it becomes irrelevant" whether or not the plaintiff was a victim of discrimination when after-acquired evidence is discovered, demonstrate a complete misunderstanding of the public purpose of our national civil rights legislation. Any suggestion that after-acquired evidence in any way mitigates an employer's liability for unlawful discrimination shows paltry understanding of the scope of the discrimination problem in our society, disrespect for those Americans who suffer the consequences of such discrimination, and blatant disregard for our national policy to eradicate unlawful discrimination.

C. The Federal Rules of Evidence Prohibit the Admission of After-Acquired Evidence to Prove Liability

Under the Federal Rules of Evidence, only relevant evidence is admissible. The assumption implicit in the after-acquired evidence doctrine, therefore, is that after-acquired evidence is relevant to the issue of liability in an employment discrimination case. Contrary, however, to the reasoning of the courts that have accepted the doctrine and allowed the admission of after-acquired evidence as an affirmative defense to liability, "[a]fter-acquired evidence, simply put, is not relevant in establishing liability" in employment discrimination cases, "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 discriminatory acts, and by exposing and stigmatizing the wrongdoer's acts before the entire community.")

200. Id.
201. See id.
202. For purposes of the summary judgment motion upon which the case pivoted, it was assumed the discrimination had in fact occurred. Summers, 864 F.2d at 708.
204. Fed. R. Evid. 402 ("All relevant evidence is admissible, except as otherwise provided . . . by these rules, or by other rules. . . . Evidence which is not relevant is not admissible.").
205. See Mardell, 31 F.3d at 1226 ("Summers held that after-acquired evidence, at least if material, bars all relief and hence effectively operates as a complete defense to liability.").
Since the employer by definition knew nothing of the after-acquired evidence at the time of its discriminatory action, the evidence is irrelevant to the issue of whether the employer in fact discriminated. Therefore, after-acquired evidence should not be admitted in the liability phase of the proceeding.207

Assuming arguendo, that after-acquired evidence has some relevance to the issue of liability, the evidence should still be excluded at the liability phase because of its prejudicial effect. Under the Federal Rules of Evidence, a court may exclude evidence when its probative value is clearly outweighed by its prejudicial effect.208 The rule is a catch-all that allows a judge to exclude any evidence that would distort the jury's perceptions, ranging from evidence which might lead to a decision "on a purely emotional basis" to "nothing more harmful than wasting time."209

In those cases which do go to trial,210 the introduction of after-acquired evidence into the liability phase of the trial creates great risk that the jury's focus will shift away from the discriminatory wrong-doing of the defendant employer and point instead toward the plaintiff's alleged wrong-doing. A

206. Id. at 1228 (emphasis added); cf. Fed. R. Evid. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

207. See Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."); see Mardell, 31 F.3d at 1238 (holding that after-acquired evidence is inadmissible at the liability stage of a Title VII or ADEA case); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992) (same). After-acquired evidence may be admissible, however, for the purpose of determining an appropriate remedy. See Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992); see generally infra notes 260-94 and accompanying text.

208. Fed. R. Evid. 403. The Rule provides:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

209. Fed. R. Evid. 403 advisory committee's notes. In deciding whether to exclude on the grounds of unfair prejudice, the court must consider the "probable effectiveness or lack of effectiveness of a limiting instruction," as well as the availability of other means of proof. Id.

number of after-acquired evidence cases have involved plaintiffs who, prior to being employed by the defendant employer, had been convicted of a crime, used drugs, or engaged in other unseemly activity. The unfavorable information was then omitted by the plaintiff in his application or resume. When this after-acquired evidence was discovered, the employer introduced it to justify the discharge of the plaintiff.

After-acquired evidence which is sufficient to justify the discharge of the employee, may also suggest to the jury that the plaintiff is "undeserving" of recovery for the discrimination claim. The jurors may be offended by the plaintiff’s misconduct, or by the fact of plaintiff’s lying on his resume, and they may therefore overlook the fact that discrimination has taken place. Such evidence, which causes the jury to focus on the typically lawful conduct of the plaintiff rather than the unlawful discriminatory conduct of the employer, confuses the issues and misleads the jury. Since public policy demands that all unlawful discrimination be punished in order to deter employers from engaging in such discrimination in the future, trial judges should use Rule 403 to exclude evidence that is reasonably likely to take the jury’s attention away from the compelling public interest at hand.

211. See, e.g., Wallace, 968 F.2d at 1176-77 (after-acquired evidence that the plaintiff had pled guilty to crime of possession of cocaine and marijuana); Milligan-Jensen, 975 F.2d at 303 (after-acquired evidence that the plaintiff omitted a DUI conviction on her application for a position as a security officer); Redd v. Fisher Controls, 814 F. Supp. 547, 550 (W.D. Tex. 1992) (after-acquired evidence that the plaintiff had stated on her job application that she had never been convicted of a felony when in fact she had been convicted of felony theft).

212. See note 211, supra. Interestingly, in many cases, the plaintiff has performed quite satisfactorily in the job with the defendant employer, despite his prior transgressions.

213. See, e.g., Richard Granofsky & Jay S. Becker, After-Acquired Evidence in Employment Discrimination Cases, 36 Dep. 19, 24 (1994) (noting that by challenging the standing of discrimination victims by using after-acquired evidence, courts may dismiss "claims by unworthy employees"); McGinley, supra note 24, at 181-82 ("The notion underlying the courts' use of after-acquired evidence as a complete defense is that an undeserving plaintiff has no right to use the court system to redress unlawful discrimination, no matter how egregious the employer's discriminatory actions were."); Parker, supra note 138, at 429 (critiquing argument that "plaintiff is an undeserving beneficiary" who did not deserve the job and therefore suffered no injury and lacks standing to sue). See also Wallace, 968 F.2d at 1181 n.10 (rejecting argument that plaintiff who asserted, inter alia, claim for sexual harassment, but who lied about prior drug conviction on her employment application should be barred from relief by her "unclean hands").

214. See, e.g., Plair v. E.J. Brach & Sons, Inc., 864 F. Supp. 67 (N.D. Ill. 1994). In E.J. Brach & Sons, for example, the plaintiff was discharged in 1992 after 19 years of employment with E.J. Brach. The employer gave as its reason for the discharge
D. Cognitive Dissonance Will Cause Employers To Misuse After-Acquired Evidence

1. The Theory of Cognitive Dissonance

Another reason for severely limiting the use of after-acquired evidence lies in the psychological theory of cognitive dissonance. Application of the theory to employment termination decisions suggests that employers, acting through their managers, will be psychologically compelled to search for or even construct evidence that will justify their decision.

Plair's "walking off the job and/or leaving the work area . . . during scheduled working time without authorization from management." Id. at 69. The evening that Plair and a fellow employee walked off the job, they were arrested in a field behind the Brach plant and apparently charged with theft of candy from the plant.

Upon plaintiff's motion, the court excluded evidence of Plair's arrest, observing: Even if the events surrounding the arrest had any marginal relevance, the evidence . . . must be excluded as unduly prejudicial. Under Fed. R. Evid. 403, evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The introduction of evidence of Plair's arrest would create a significant danger of unfair prejudice. If the jury were informed that Plair was arrested on the night before he was fired, it may unfairly conclude that Plair deserved to be fired because of his arrest or because he stole the cases of candy.

Id. at 70. The court reasoned that Brach had "considered and rejected" the arrest as a basis for dismissal. Id. at 71. Therefore it should be excluded. Id. "[E]vidence that was not ultimately relied upon in making the discharge decision," said the court, was "irrelevant and therefore would be inadmissible." Id. at 70.

Cf. Karen A. DiLisio, The Admissibility of Subsequent Remedial Measures In a Products Liability Case, 3 PROD. LIAB. L.J. 222, 226 (1992) (noting that evidence of subsequent remedial measures taken by defendant in tort cases is not admissible because of the "high prejudicial value such evidence might have on the jury"). Courts and legal scholars have argued that in the case of subsequent remedial measures, even when a trial judge instructs the jury not to consider evidence of such measures as an admission of wrongdoing, "the jury will probably not understand or follow the instructions." Id.

The theory of cognitive dissonance is based upon three fundamental premises: (1) when faced with a particular set of circumstances or presented with particular information, a person is able to manipulate or modify his beliefs regarding the circumstances or information so that those beliefs are compatible with the person's personal preferences; (2) people will seek out information that will confirm or augment desired beliefs; and (3) once beliefs are formed in the context of cognitive dissonance reactions, they persist over time.216

Cognitive dissonance theory is really an application of cognitive consistency theory, which recognizes that persons are uncomfortable "maintaining two seemingly contradictory ideas."217 Two cognitions are dissonant if, "considering these cognitions alone, the opposite of one follows from the other."218 Because the experience of cognitive dissonance is unpleasant, human beings seek to reduce it.219 Professor Elliot Aronson has refined the concept as a result of his own research, and suggests that dissonance effects are limited to situations in which a person's behavior "violates his self-concept."220 This violation occurs when (1) one consciously and knowingly does something "stupid," and (2) when one does something that hurts another person—even if it is done unknowingly.221

216. Orm B. Bodvarsson, The Welfare Effects of Disclosure Under Cognitive Dissonance, 19 ATLANTIC ECON. J. 33, 33 (1991). An alternative statement of the propositions underlying the theory is that: (1) persons have preferences "not only over states of the world, but also over their beliefs about the state of the world;" (2) persons have "some control over their beliefs;" and (3) it is important that beliefs "once chosen persist over time." George A. Akerlof & William T. Dickens, The Economic Consequences of Cognitive Dissonance, 72 AM. ECON. REV. 307, 307 (1982).

217. Akerlof & Dickens, supra note 216, at 308. See THE ENCYCLOPEDIC DICTIONARY OF PSYCHOLOGY 93 (Rom Marre & Roger Lam eds., 1983) (explaining that the theory of cognitive dissonance assumes that one behaves in a way "which will maximize the internal consistency of his or her cognitive system;" since "dissonance is psychologically uncomfortable, its existence will motivate a person to reduce it and achieve consonance").

218. ELLIOT ARONSON, THE SOCIAL ANIMAL 102 (3d ed. 1979); Festinger, supra note 215, at 13 (Two elements "are in a dissonant relation if considering these two alone, the obverse of one element would follow from the other.").

219. ARONSON, supra note 218, at 102. Dr. Aronson observes that "[t]o hold two ideas that contradict each other is to flirt with absurdity, and—as Albert Camus, the existentialist philosopher, has observed—man is a creature who spends his entire life in an attempt to convince himself that his existence is not absurd." Id. See also Festinger, supra note 215, at 18 ("The presence of dissonance gives rise to pressures to reduce or eliminate the dissonance.").

220. ARONSON, supra note 218, at 148.

221. ARONSON, supra note 218, at 148.
The theory of cognitive dissonance views people not as rational beings, but as "rationalizing beings." People are not motivated to be right, but rather we are motivated to believe that we are right. Generally we all view ourselves as "smart, nice people." Information which conflicts with our perception of ourselves as smart and nice "tends to be ignored, rejected, or accommodated by changes in other beliefs." Thus, for example, once a person has made a decision, such as a decision to discharge an employee, he will tend to disregard information that might suggest that the decision was in error because the cognition that the decision might be wrong is at odds with the cognition that the decision-maker is a smart, nice person.

The more one is committed to an action or belief, the more resistant one will be to information that threatens the belief. Professor Aronson, in his book, The Social Animal, provides an illustration of the dilemma of a vice-president of a major tobacco company whose task it is to maximize cigarette sales. Given the reams of scientific data demonstrating that cigarette smoking causes cancer, the executive is, in a sense, at least partially responsible for the illness and death of many persons. The cognition of the vice-president that "I am a decent, kind human being" is dissonant with the cognition "I am contributing to the early death of a great many people." In order to reduce the dissonance, the vice-president must refute the evidence that links smoking and cancer. In order to demonstrate that he is a good, moral person the executive may smoke a great deal himself. If the need to reduce dissonance is great enough, he might even convince himself that cigarettes are good for people.

222. ARONSON, supra note 218, at 148 (emphasis in original).
223. ARONSON, supra note 218, at 148. We also see ourselves as "wise, decent, and good."
224. ARONSON, supra note 218, at 148.
225. ARONSON, supra note 218, at 148.
226. ARONSON, supra note 218, at 308-09; LEON FESTINGER, CONFLICT, DECISION, AND DISSONANCE 155 (1964) (explaining that once one makes a decision, he becomes less objective about alternatives; simply acting upon his alternatives affects his belief about those alternatives).
227. ARONSON, supra note 218, at 105.
228. ARONSON, supra note 218.
229. ARONSON, supra note 218, at 105.
230. ARONSON, supra note 218, at 105.
231. ARONSON, supra note 218, at 105. Noting that the analysis is so fantastic as to almost defy belief, Dr. Aronson relays the following 1971 news story from the Washington Post News Service:

Jack Landry pulls what must be his 30th Marlboro of the day out of one of the two packs on his desk, lights . . . it and tells how he doesn't believe all those reports about smoking and cancer and emphysema.
He has just begun to market yet another cigarette for Philip Morris U.S.A. and is brimming with satisfaction over its prospects. But how does he square with his conscience the spending of $10 million . . . over the next year to lure people into smoking his new brand? "It's not a matter of that," says Landry . . . . "Nearly half the adults in this country smoke. It's a basic commodity of them. I'm serving a need.

"There are studies by pretty eminent medical and scientific authorities, one on a theory of stress, on how a heck of a lot of people, if they didn't have cigarette smoking to relieve stress, would be one hell of a lot worse off. And there are plenty of valid studies that indicate that cigarette smoking and all those diseases are not related."

His satisfaction, says Landry, comes from being very good at his job in a very competitive business . . . . Why a new cigarette now? Because it is there to be sold, says Landry.

. . . . Landry predicts confidently that [the new cigarette] will have a 1 percent share of the American market within 12 months [which] will equal about five billion cigarettes and a healthy profit for Philip Morris U.S.A.

Id. at 106 (citing AUSTIN AMERICAN, Nov. 18, 1971, at 69). A similar illustration of the effect of cognitive dissonance is found in the statement of Sir Charles Ellis, the science advisor to the British American Tobacco Company, in 1962, following release of a report of Britain's Royal College of Surgeons warning that cigarettes are a major health hazard:

It is my conviction that nicotine is a very remarkable, beneficent drug that both helps the body to resist external stress and also can, as a result, show a pronounced tranquilizing effect. You're all aware of the very great increase in the use of artificial controls, stimulants, tranquilizers, sleeping pills, and it is a fact that under modern conditions of life people find that they cannot depend just on their subconscious reactions to meet the various environmental strains with which they are confronted. They must have drugs available which they can take when they feel the need. Nicotine is not only a very fine drug, but technique of administration by smoking has considerable psychological advantages.

All Things Considered (NPR radio broadcast, June 14, 1994) (Transcript # 1513-12). Cf. J.M. Balkin, Commentary On Constitutional Positivism: Ideological Drift and the Struggle Over Meaning, 25 CONN. L. REV. 869, 887 n.24 (1993) (noting that "[a]dvocacy has power over the advocate as well as the audience," and attorneys defending tobacco companies may come to believe that the hazards of smoking have not been sufficiently demonstrated); ROBERT A. WICKLUND & JACK W. BREHM, PERSPECTIVES ON COGNITIVE DISSONANCE 4-5 (1976) (suggesting, for example, that one who votes for a candidate for political office despite knowledge that the candidate is not very intelligent may reduce his dissonance by convincing himself that intelligence is not a requirement of the office or that the candidate is exceptionally honest).
Dissonance-reducing behavior can prevent people from "learning
important facts" or "from finding real solutions to their problems."\textsuperscript{232} We engage in it, however, because "dissonance-reducing behavior is ego-defensive
behavior."\textsuperscript{233} The behavior allows us to maintain a positive images of
ourselves as smart, nice, and competent persons.\textsuperscript{234}

Cognitive dissonance plays a major role in the aftermath of the decision-
making process. After making a decision, particularly a difficult one, "people
almost always experience dissonance."\textsuperscript{235} The reason is that the alternative
chosen in the decision is seldom entirely positive and the alternatives which
were rejected are seldom entirely negative.\textsuperscript{236} Consequently, after decisions
are made, people seek to affirm their decisions by "seeking information that
is certain to be reassuring."\textsuperscript{237} They tend to disregard information which is
incompatible with the decision already made.\textsuperscript{238}

The need to reduce cognitive dissonance can also lead to justification of
cruelty. If one acts so as to cause a great deal of harm to an innocent person,
the cognition "I am a decent, fair, and reasonable person" is dissonant with the
cognition "I have hurt another person."\textsuperscript{239} One way to reduce the dissonance
is to "maximize the culpability of the victim" of the action so as to convince
oneself that the victim deserved the harm that was caused either because the
victim brought the harm upon himself or because he was a "bad, evil, dirty,
reprehensible person."\textsuperscript{240}

\begin{itemize}
\item \textsuperscript{232} ARONSON, supra note 218, at 109.
\item \textsuperscript{233} ARONSON, supra note 218, at 109.
\item \textsuperscript{234} ARONSON, supra note 218, at 109.
\item \textsuperscript{235} ARONSON, supra note 218, at 111; see generally FESTINGER, supra note 214,
    at 32-36 (discussing dissonance that results from decisions).
\item \textsuperscript{236} See COVER, supra note 215, at 305 n.1 ("When a decision has been made,
    then the cognition of the action taken is always dissonant with the cognition of the
    positive attributes of 'the road not taken.'").
\item \textsuperscript{237} ARONSON, supra note 218, at 112.
\item \textsuperscript{238} ARONSON, supra note 218, at 114. Professor Aronson illustrates the point
    by reference to Ralph White's analysis of the Pentagon Papers, in which he compares
    McNamara's "highly factual evidence-oriented summary of the case against bombing
    [in Vietnam] in 1966" with the Joint Chiefs' memorandum which ignored the facts
    raised by McNamara. The Joint Chiefs prevailed and the bombing moved forward.
    \textit{Id.} (citing Ralph White, \textit{Selective Inattention}, \textit{Psychology Today, Nov. 1971, at 47-}
    50, 78-84).
\item \textsuperscript{239} ARONSON, supra note 218, at 136.
\item \textsuperscript{240} ARONSON, supra note 218, at 136. The principle has been demonstrated in the
    laboratory. In one experiment, for example, students were ask to watch another
    student being interviewed and then to tell the interviewee that he was "shallow,
    untrustworthy, and dull." \textit{Id.} at 138. The students who made the disparaging
    comments "systematically changed their attitudes" regarding the disparaged student.
\end{itemize}
2. The Effect of Cognitive Dissonance in Discriminatory Discharges

Virtually every significant employment decision brings some dissonance to the person making the decision.\textsuperscript{241} Even a decision to discharge based upon a lawful and just reason may cause some dissonance, since decisions are rarely black and white. The chosen alternative of discharging the employee is rarely completely positive. The discharged employee may have valuable experience that must now be found in a new employee. There may be concern by the discharging supervisor as to whether the supervisor's superiors will approve of the decision. The supervisor may also fear legal action from the discharged employee. Likewise, the rejected alternative of retaining the employee is not completely negative. The employer would not have to seek a replacement, the threat of litigation would be eliminated, or the discharged employee might have been reassigned to a job he could better perform. When the discharge was made for discriminatory reasons, the dissonance may be even greater.

Every discharge will presumably cause harm to the terminated employee, thereby creating cognitive dissonance for the manager doing the termination. Even if the discharge is completely legitimate, the discharged employee will suffer economic loss and possibly psychological and emotional upheaval.\textsuperscript{242} When the discharge is for a discriminatory reason, the manager will not only know that he has harmed another person, both through the discharge and through the discriminatory attitude and behavior which precipitated the discharge, but he may also see himself as having done something imprudent. When the discharged employee brings legal action for violation of employment discrimination laws, the shortcomings of the decision may be particularly apparent. Even managers who engage in such blatant discrimination as open sexual harassment see themselves as "smart, nice" persons, and they must therefore seek out information that will support their self-image and reduce the cognitive dissonance created by the discriminatory

\textit{Id.} The students thought of themselves, of course, as smart and nice. They were only able to preserve that self-image while inflicting pain upon the subject by creating a low opinion of the object of their disparagement. \textit{Id.} In a similar experiment, students who gave electrical shocks to their victims lowered their opinion of the victims. \textit{Id.} at 139. \textit{See generally} ARONSON, \textit{supra} note 218, at 135-41.

\textsuperscript{241} \textit{See} notes 235-38 \textit{supra} and accompanying text.

\textsuperscript{242} \textit{See supra} note 187 and accompanying text.
treatment.\textsuperscript{243} The managers will actively seek evidence that supports their decision and disregard evidence that challenges it.

In the case of the hierarchical business enterprise, such as a corporation, there will also be an element of "corporate cognitive dissonance."\textsuperscript{244} Although business enterprises are made up of real persons, collectively they share a corporate culture and a corporate self-image. Corporations see themselves as decent, law-abiding entities. The thought that the corporate enterprise has done something imprudent or unlawful or has done harm to someone will therefore cause dissonance for the organization as well. Whether we view the dissonance as the sum total of the dissonance experienced by each of the real persons involved, or whether we view it as a dissonance actually experienced by the organization, the result is the same. The cognition that the business enterprise has discharged someone for a discriminatory reason, whether lawful or not, creates dissonance with the cognition that the enterprise is a decent organization that employs smart, nice persons. The dissonance must be reduced.

Another factor that may affect the effort to reduce dissonance is that more than one person may be directly involved in the decision. In a small entrepreneurial enterprise, the owner may make all decisions to terminate. In that case, only his own cognitive dissonance is at issue. In a large, hierarchical enterprise, however, the decision to discharge will usually involve several persons, such as the discharging manager's supervisor and the director of personnel. Since each of these persons will seek to resolve the dissonance

\textsuperscript{243} Cf. Peck, supra note 215, at 378 n.175 (suggesting that to avoid cognitive dissonance, "an employer charged with handicapped discrimination by an employee will find it proper to refuse to employ the employee because the employer does not want to believe that he is an evil person who would harm the handicapped"). Cognitive dissonance will be most apparent in persons with high self-esteem. ARONSON, supra note 218, at 143. The research shows that persons with low self-esteem may not experience the dissonance. \textit{Id.} It would appear a fair assumption that most managers, given their success in reaching the managerial level, have some modicum of self-esteem.

\textsuperscript{244} See, e.g., Joseph A. Grundfest, \textit{Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates}, 45 STAN. L. REV. 857, 936 n.377 (1993) (suggesting that because of cognitive dissonance which leads individuals to selectively interpret information so as to confirm their desired beliefs, a corporate board faced with evidence of corporate underperformance "has an incentive to ignore its sources or discredit them"); JoEllen Lind, \textit{Liberty, Community, and the Ninth Amendment}, 54 OHIO ST. L.J. 1259, 1323 n.206 (1993) ("A collective case of cognitive dissonance produces a collective effort to accommodate the non-conforming evidence. Within each person rages the battles generated by the ideological contradictions of the whole.") (quoting Joyce Appleby, \textit{Republicanism in Old and New Contexts}, 43 WM. & MARY Q. (3d ser.) 28-29 (1986)).
that is created by the discharge, they will be united in seeking evidence which will "prove" that their collective or hierarchical decision was sound and not imprudent.\textsuperscript{245} A thorough review of the employment history of almost any employee will reveal something that could, at least in theory, justify discharge. A judicial doctrine which allows after-acquired evidence to be used as an affirmative defense on the issue of liability in employment discrimination cases, invites employers to resolve the psychological discomfort of cognitive dissonance through the use of such after-acquired evidence.

The problem with such a result is that it gives the sanction of law to the resolution of cognitive dissonance at the expense of truth. "The reduction of cognitive dissonance is a powerful motivational force [which] operates as a significant obstacle to the recognition of social injustice or irrationality."\textsuperscript{246} Certainly all employers will seek to vigorously defend themselves against claims of discrimination. They will internally investigate the allegations and hope to find evidence that the alleged discrimination did not occur. But when employers invoke the after-acquired evidence defense, they are not denying their discriminatory acts, no matter how invidious. Rather they are seeking to justify their acts as lawful.\textsuperscript{247} Because of cognitive dissonance, however,

\begin{itemize}
\item \textsuperscript{245} See supra note 226 and accompanying text.
\item \textsuperscript{247} After-acquired evidence is used as an affirmative defense. See supra note 19 and accompanying text. Federal employment discrimination laws do allow a few very narrow affirmative defenses. See, e.g., 42 U.S.C. § 2000e-2(e) (1988) (providing that it is not a violation of Title VII to make employment decisions based upon religion, sex, or national origin, "in those certain instances where religion, sex, or national origin is a bona fide occupation qualification reasonably necessary to the normal operation of that particular business or enterprise"); 29 U.S.C § 623(f) (1988) (providing an affirmative defense in age discrimination claims in the event of a bona fide occupational qualification, in cases where the decision is made based upon "reasonable factors other than age," where the employer is observing a bona fide seniority system, and where the employer is observing a bona fide employee benefit plan); see generally Schleif & Grossman's Employment Discrimination Law 340-60, 504-20 (David A. Cathcart & R. Lawrence Ashe, Jr., eds., 2d ed. 1989) (5 year cum. supp.). The statutes do not, however, excuse discrimination based upon race. See, e.g., Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989). Those instances in which an affirmative defense is allowed by statute, however, involve narrow and unusual circumstances such as the existence of a bona fide occupational qualification ("BFOQ"), in which it would be nearly impossible for an employer to avoid discrimination and still operate its business. See, e.g., Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (permitting finding of BFOQ only where "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved"); Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting
employers will not simply use the after-acquired evidence to win the lawsuit. Rather, they will use it to reduce their internal dissonance and soon come to believe that the discrimination victim deserved the treatment he or she received.248

The cognition of the manager engaging in the discrimination that he is an intelligent, nice person who makes rational decisions is inconsistent with the cognition that the manager has unlawfully discriminated against an employee. A fruitful search for after-acquired evidence that shows the victim to be a "bad apple,"249 allows the employer to lay culpability on the discrimination victim and to complete exonerate himself. Blaming the victim is a common means of resolving dissonance.250 If the manager concludes

*Weeks* with approval and holding that being male was a bona fide occupational qualification for one seeking employment in a "contact" position in an Alabama male maximum security penitentiary). Such affirmative defenses are construed very narrowly. *See*, e.g., *id.* at 334 (stating that the BFOQ exception is "meant to be an extremely narrow exception" to the general prohibition of discrimination).

Nothing in the language of any of our federal employment discrimination statutes allows an employer to engage in invidious discrimination such as sexual harassment or racism and then to justify the act with an affirmative defense. It is true that in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that an employer who had taken adverse employment action based both upon discriminatory and non-discriminatory business reasons could prevail if it proved by a preponderance of the evidence that the employee would have been fired for the non-discriminatory business reason, even if there had been no discrimination. However, Congress has subsequently overruled *Price Waterhouse* as to Title VII cases. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e(m) (Supp. V 1993).

248. Cf. Sunstein, *supra* note 246, at 194-95. As Professor Sunstein has observed:

Most generally, the beliefs of both beneficiaries and victims of existing [discrimination] are affected by dissonance-reducing strategies. The phenomenon of blaming the victim has distinct cognitive and motivational foundations. A central point here is that the strategy of blaming the victim, or assuming that an injury or an inequality was deserved or inevitable, tends to permit nonvictims or members of advantaged groups to reduce dissonance by assuming that the world is just—a pervasive, insistent, and sometimes irrationally held belief. The reduction of cognitive dissonance is a powerful motivational force, and it operates as a significant obstacle to the recognition of social injustice or irrationality.

*Id.*

249. *See All Things Considered* (NPR radio broadcast, Nov. 2, 1994) (Transcript # 1654-8) (quoting R. Eddie Whalen, attorney for the *Nashville Banner* Corp., "Congress did not intend to reward and protect bad apples, bad employees.").

250. *See supra* notes 239-40 and accompanying text.
that the employee-victim deserved discharge because of his misconduct, which the employee concealed from the employer, then the manager resolves the dissonance.\textsuperscript{251} The result is that the manager's dissonance-reducing rationalization absolves him from all culpability in his mind. Consequently, there is no incentive to examine his attitude and his behavior to avoid future discrimination.

The impact of the manager's need to reduce cognitive dissonance is particularly pointed since most after-acquired evidence cases have been disposed of by summary judgment.\textsuperscript{252} Typically, the employer has done nothing more than submit self-serving affidavits that assert that had the employer known of the after-acquired evidence of employee misconduct at the time of the discharge, the employee would have been fired for that misconduct.\textsuperscript{253} If a manager is experiencing dissonance from the conflict between the cognition that he is a good, honest, non-bigoted person and the cognition that he has discriminated, the presentation of an affidavit prepared by the manager's attorney provides the perfect vehicle for dissonance reduction. The manager does not have to face cross-examination or any challenge to the internal, dissonance-reducing conclusion that the employee would have been fired immediately had the employer known earlier of the after-acquired evidence. The manager merely has to process the matter in his own mind. Given the compelling need to reduce the internal dissonance that the manager is experiencing, it is nearly inevitable that the manager will blame the victim and happily execute an affidavit which avers that the employee would have been fired.

The impetus to blame the former employee is heightened as well by the manager's interest in keeping his job. If a manager has engaged in employment discrimination and the resulting claim costs the employer substantial amounts of time or money, or both, the manager may well lose his job. The manager will want to preserve his employment at all costs. The motivation to keep his job combined with the motivation to reduce the discomfort of his cognitive dissonance leaves the manager little choice but to conclude that the employee would have been fired for the misconduct.

\textsuperscript{251} One of the problems with the after-acquired evidence doctrine is that it moves the focus of inquiry from the unlawful discrimination of the defendant employer to the misconduct (which is usually not unlawful) of the plaintiff. Plaintiffs may even be labelled "undeserving." \textit{See supra} note 212 and accompanying text.

\textsuperscript{252} \textit{See supra} note 143 and accompanying text.

\textsuperscript{253} \textit{See supra} note 159 and accompanying text. In some cases, the employer asserts that it would have fired the employee based upon the after-acquired evidence, even if the employee's conduct violated no specific work rule or the specific misconduct has never occurred before. \textit{See, e.g.}, Petitioner's Brief at *5-6, \textit{McKennon} (No. 93-1543).
Seeking to resolve his cognitive dissonance and preserve his employment, the manager will search the employee’s file for some basis to justify the discharge.\textsuperscript{254} If the employer discovers that the employee lied on his resume about the employee’s education or age, or that the employee has violated some company rule, however arcane, the employer has "won the lottery."\textsuperscript{255}

The critical problem then is that because of the phenomenon of cognitive dissonance, an employer who defends a discrimination claim relying upon after-acquired evidence is likely to convince itself that it did not discriminate. The result is the development of an ethos of blaming the victim and denying the realities of discrimination. This result is particularly troublesome because of the subtlety of much discrimination today. To be sure, there are still instances of blatant sexual harassment, racism, and other morally offensive acts of discrimination. But much of the discrimination is almost unconscious.\textsuperscript{256} Consequently, the use of after-acquired evidence will secure the employer’s denial of such discrimination, and perpetuate it. This effect is clearly contrary to the national goal of encouraging employers to "self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history."\textsuperscript{257}

V. \textbf{PROPOSAL FOR PROPER USE OF AFTER-ACQUIRED EVIDENCE}

Any rule governing the admission and use of after-acquired evidence in employment discrimination cases should meet the following criteria:

1. The rule should make discrimination victims whole and place them in the same position they would have been in had there never been any discrimination.\textsuperscript{258}

2. The rule should uphold the policy of Title VII and other anti-discrimination statutes by encouraging employees to assert their

\textsuperscript{254} Cf. Peter H. Huang & Ho-Mou Wu, \textit{Emotional Responses in Litigation}, 12 Int’l Rev. L. & Econ. 31 (1992) (suggesting that jurors would rather "bias their selection of information" than update their beliefs).

\textsuperscript{255} Waldo & Mahar, supra note 143, at 32 n.1 ("For an employer, discovering [after-acquired] evidence [of employee misconduct] is akin to winning the lottery.").


\textsuperscript{257} Albemarle, 422 U.S. at 417; see also Paul Gudel, \textit{Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law}, 70 Tex. L. Rev. 17, 98 (1991) ("Title VII exists to strike down an entire socio-economic structure of conduct" and to alter "attitudes and expectations.").

\textsuperscript{258} See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975) ("The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.").
discrimination claims as private attorneys general. Nothing in the rules governing the use of after-acquired evidence should discourage or dissuade employees from asserting their discrimination claims.

3. The rule should uphold the integrity of the judicial process and not allow an employer to obtain any procedural or evidentiary advantage or benefit, whether through the discovery process or otherwise, from any discriminatory employment action it has taken.

4. The rule should be consistent with public policy which seeks to deter employers from discriminating.

5. The rule should protect employers from having to retain or rehire employees, such as the hypothetical doctor in *Summers*, whose continued employment would threaten harm to the employer's business or the public. 259

The following proposal seeks to reflect these criteria.

A. *All After-Acquired Evidence Should be Inadmissible in the Liability Phase of a Title VII Proceeding*

The ultimate issue in an employment discrimination case is whether the employer unlawfully treated the employee in a discriminatory manner. Evidence which was unknown to the employer at the time of the discharge, and which was only discovered after the decision to discharge the employee was made, is completely irrelevant to the question of whether the discharge was unlawfully discriminatory. The admission of such evidence may also tend to prejudice the jury against the victimized employee. Therefore, when an employer has asserted an after-acquired evidence defense, the trial should be bifurcated into two phases. In the first phase, which will be tried to the jury, if there is one, liability alone is to be determined. In that phase, after-acquired evidence should be completely inadmissible for any purpose. In the second phase of the trial, appropriate remedies will be determined. After-acquired evidence should be admissible in the remedies phase in accordance with the guidelines set forth infra.

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259. *See* supra note 66 and accompanying text.
B. After-Acquired Evidence Should Generally Not Be Admissible to Determine Remedies When It Is Discovered Solely as a Result of an Employee's Discrimination Litigation

1. Exclusion of Evidence Discovered Solely as a Result of the Lawsuit

Although after-acquired evidence should generally be admissible in the remedial phase of the trial, evidence which is discovered by an employer solely as a result of its discriminatory action toward the plaintiff employee should normally be excluded from evidence. Any other approach allows the employer to benefit from its wrongdoing. 260 Had the employer not

260. Employers have made the contrasting argument that allowing an employee guilty of misconduct to recover for discrimination allows the employee to benefit from his wrongdoing, therefore such recovery should be barred by the equitable defense of "unclean hands." See, e.g., Respondent's Brief at *40-42, McKennon (No. 93-1543) (asserting that plaintiff was properly denied all relief in the courts below because she had betrayed her employer's trust); McGinley, supra note 24, at 181-82. Some courts have viewed the after-acquired evidence doctrine as essentially such an "unclean hands" defense. Id.; Zemelman, supra note 67, at 197. The defense requires that one "who seeks equity must do equity." Manufacturer's Fin. Co. v. McKay, 294 U.S. 442, 449 (1935). Therefore, a "tainted" plaintiff is foreclosed from recovery, Respondent's Brief at *40, McKennon (No. 93-1543), "however improper may have been the behavior of the defendant." ABF Freight System, Inc. v. NLRB, 114 S. Ct. 835, 842 (1994) (Scalia, J., concurring) (quoting Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945)). The purpose of the doctrine is "to protect judicial integrity, ensure a fair result, and to promote the public interest." McGinley, supra note 24, at 182.

In order to successfully invoke the doctrine, a defendant must prove some nexus between the misconduct of the plaintiff and the equity he seeks. Courts of equity do not "make the quality of suitors the test." Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933). Rather

[they apply] the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct . . . that has no relation to . . . the suit, but only for violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication . . . . They apply the maxim, not by way of punishment for extraneous transgressions, but upon considerations that make for the achievement of right and justice.

Id.

The problem with applying the unclean hands defense to after-acquired evidenced cases is that in most cases there simply is no "immediate and necessary relation"
between the employee’s misconduct and the employer’s illegal, discriminatory behavior. See Brief of Amici Curiae of the Nat’l Employment Lawyers Assoc. and the Assoc. of Trial Lawyers of America in Support of Petitioner at 13, McKennon (No. 93-1543) [hereinafter “Brief of NELA”]; McGinley, supra note 24, at 184 (“Even if the plaintiff has lied on her resume, the employer can show no nexus between the plaintiff’s resume fraud and eliminating discrimination in the workplace”); see e.g., Calloway v. Partners Nat’l Health Plans, 986 F.2d 446, 450-51 (11th Cir. 1993) (concluding that plaintiff’s resume fraud had no nexus to defendant’s discrimination and that defendant had not been injured by plaintiff’s resume fraud). Neither misconduct by the plaintiff during his term of employment nor misrepresentations made on his application or resume at the time he was hired, bear any relationship at all to the employer’s discrimination against the plaintiff since the plaintiff’s actions were unknown to the employer at the time of the adverse decision.

Moreover, the typical misconduct or misrepresentation found in an after-acquired evidence case, see, e.g., Massey v. Trump’s Castle Hotel & Casino, 828 F. Supp. 314 (D.N.J. 1993) (plaintiff in race discrimination claim for failure to promote failed to notify employer that he had been terminated from a police department sixteen years earlier for misplacing his gun); Miller-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992) (plaintiff, who was a victim of open sex discrimination omitted DUI conviction five years earlier on employment application), cert. granted, 113 S. Ct. 2991 (1993), cert. dismissed, 114 S. Ct. 22 (1993), is not the kind of "unconscionable act" which would bar a plaintiff’s recovery, particularly when balanced against the employer’s invidious, unlawful discrimination, which "offends social justice." Weber, infra note 269, at 533.

The issue becomes somewhat more complex if a plaintiff has engaged in misconduct such as theft or dissemination of confidential information, which has caused harm to the employer. The employer’s argument for application of the unclean hands defense is somewhat stronger under such circumstances. However, even in the face of such harm to the employer, the compelling public policy against discrimination will preclude application of the unclean hands defense.

To allow an employer to escape all liability for its unlawful discrimination solely because of the employee’s misconduct ignores the public nature of the employer’s wrongdoing. See Brief of NELA, supra, at 5. Discrimination is a moral wrong against society. An employer who has discriminated has “reinforced the powerlessness and coercion” the victims of discrimination experience. Weber, infra note 269, at 534. Our public conscience should not permit us to excuse the employer’s immoral and unlawful conduct on the sole ground that the victim is not meritorious. See id.; EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 753 (9th Cir. 1991) (“[T]he clean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest.”); cf. Perma Life Mufflers, Inc. v. Int’l Parts Corp., 392 U.S. 134, 138 (1968) (“We have often indicated the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes.”).

Consequently, courts have been reluctant to allow the unclean hands defense in employment discrimination cases. See, e.g., Calloway v. Partner Nat’l Health Plans, 986 F.2d 446, 450-51 (11th Cir. 1993); EEOC v. Recruit U.S.A., 939 F.2d 746 (9th
discriminated and the lawsuit not been filed, the employer may never have discovered the after-acquired evidence and the employee would have kept his job.\footnote{261} In addition, allowing the use of such evidence has the undesirable

Cir. 1991); but see Woods v. Ficker, 768 F. Supp. 793, 802 (N.D. Ala. 1991) (refusing to strike defendant’s unclean hands defense in Title VII case), aff’d without opinion, 972 F.2d 1350 (11th Cir. 1992); Women Employed v. Rinella & Rinella, 468 F. Supp. 1123, 1129 (N.D. Ill. 1979) (allowing in Title VII case unclean hands defense to reject relief claimed by plaintiffs, where plaintiffs had harassed defendants).

Although the Supreme Court has not addressed the application of the unclean hands defense in employment discrimination cases, it has done so within the statutory scheme of federal securities laws, and concluded that application of the common law unclean hands defense would frustrate the purposes of the securities statutes. A.C. Frost & Co. v. Couer D’Alene Mines Corp., 312 U.S. 38, 43 (1941). The Court has further observed that such common law doctrines are of "questionable pertinence" in cases brought under federal securities laws, since such laws were enacted "to rectify perceived deficiencies in the available common law protections by establishing higher standards of conduct in the securities industry." Herman & MacLean v. Huddleston, 459 U.S. 375, 388-89 (1983).

Similarly, in determining whether the common law defense of in pari delicto, which is similar to the unclean hands defense, is available in antitrust cases, the Court has rejected the defense, observing:

The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. Perma-Life, 392 U.S. at 139; see also, Pinter v. Dahl, 486 U.S. 622, 634 (1988) (in pari delicto defense available only when "statutory goal of deterring illegal conduct is served more effectively by preclusion of suit than by recovery").

The purpose of the nation’s employment discrimination laws is "to deter conduct which has been identified as contrary to public policy and harmful to society as a whole." Price Waterhouse v. Hopkins, 490 U.S. 228, 264-65 (1989) (O’Connor, J., concurring). Permitting the defense of unclean hands in such cases, even in the rare circumstances where there is some nexus between the employee’s misconduct and the employer’s discrimination, would seriously undermine that important public policy.

Employers who are harmed by employee misconduct are not left without a remedy, however. Employers retain their common law right to sue an employee to recover for harm done. Such a counterclaim allows recognition of the claims of both parties without excusing discrimination by employers and thereby undermining the public policy against discrimination.

\footnote{261} See, e.g., Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1237 (3d Cir. 1994). In Mardell the Third Circuit observed:

On the one hand, holding the employer liable and providing the victim appropriately fashioned remedies would restore the victim to his or her
result of putting the plaintiff in a worse position than he would have been in absent the discrimination, because as a direct consequence of the employer's discrimination the plaintiff employee's personnel records are scrupulously analyzed and as a result the employee loses his job.

There is yet another reason for excluding after-acquired evidence discovered as a result of the employer's wrongdoing. The uncovering and use of the evidence has the effect of retaliation aimed at the plaintiff who has brought the discrimination claim. Title VII and other civil rights statutes

prior position, not a better one than had he or she not suffered from unlawful discrimination. On the other hand, barring all remedies would leave the victim in a worse position than had the employer not unlawfully discriminated against him or her (in which case the employee assumedly would still be employed), and elevates the employer to a superior position insofar as it lets the employer get off scot-free despite its blameworthy conduct. These two observations hold true especially in instances where the employer's discovery of the after-acquired evidence was brought about due to the legal proceedings instituted in response to the employer's wrongful acts, since in those cases, absent the discrimination, the employer may never have discovered the evidence (or at least not until some indeterminate future time).

Id. See also Wallace v. Dunn Constr. Co., 968 F.2d. 1174, 1182 (11th Cir. 1992) (holding that an employer may use after-acquired evidence to terminate backpay period prematurely only if employer proves that "it would have discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and [the] litigation" because the alternative approach has "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.").

262. See Mardell, 31 F.3d at 1237 ("a major weakness of the Summers approach is that it does not restore a victim to the position he or she would have occupied but for the discrimination").

263. See infra notes 264-66 and accompanying text. See also Mardell, 31 F.3d at 1229 ("Problematically, courts that allow after-acquired evidence to bar liability allow employers to make plaintiffs worse off for having a protected characteristic . . . because presumably, absent the wrong done the employee, the employer would not have discovered the 'legitimate motive' evidence (at least during the relevant time frame) and the employee would still be employed."); see also Wallace, 968 F.2d at 1179 (observing that the Summers rule "excuses all liability based on what hypothetically would have occurred absent the alleged discriminatory motive assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge" and that the "rule clashes with the Mt. Healthy principle . . . that the plaintiff should be left in no worse a position than if she had not been a member of a protected class.").
prohibit retaliatory acts by employers.\textsuperscript{264} An employer seeking after-acquired evidence will comb the file of and depose the plaintiff seeking such evidence. The employer will not, however, review the personnel record of every employee. The effect is that only those employees who file claims of discrimination will have their employment histories carefully scrutinized. If an employee were to engage in some protected activity, such as testifying at a hearing in support of the discrimination complaint of a fellow employee, and his employer then searched the employee witness’ personnel file hoping to find some reason to discipline or discharge the employee, the employer’s act would be retaliatory and a clear violation of the federal law prohibiting retaliation.\textsuperscript{265} The effect is the same if an employer is able to use the tools of discovery to meticulously review an employee’s personnel records in search of after-acquired evidence that would bar the discrimination victim’s recovery.\textsuperscript{266}

2. Exceptions Where Employee Misconduct Threatens Harm to the Employer or the Public

There will be rare instances, like that of the well-known hypothetical doctor in \textit{Summers},\textsuperscript{267} in which prohibiting all use of the after-acquired evidence uncovered in the course of litigation would cause results that threaten serious harm to the employer or the public or violate public policy. One way to resolve the dilemma, of course, is simply to allow the employer to assert against the plaintiff a counterclaim for fraud, breach of contract, or other legally cognizable wrong. However, there may be instances where no such common law claim exists. Yet, it is still important to compensate the discrimination victim in such cases, but it is equally important to protect the employer and the public.

In such cases, the employer should be able to introduce the after-acquired evidence at the remedy phase of the trial. If the employer can demonstrate by clear and convincing evidence that (1) a reasonable employer would have discharged the employee based upon the after-acquired evidence,\textsuperscript{268} and (2) requiring the employer to reinstate the employee would expose the employer

\textsuperscript{264} See, e.g., 42 U.S.C. § 2000e-3(a) (1988) (prohibits, \textit{inter alia}, an employer from discriminating against an employee because the employee has opposed the employer’s discriminatory practices or because the employee has filed a discrimination charge, testified, assisted, or participated in an investigation or other proceeding under Title VII).

\textsuperscript{265} See supra note 264 and accompanying text.

\textsuperscript{266} See generally Mardell, 31 F.3d at 1238 n.31.


\textsuperscript{268} See notes 277–81 infra.
or the public to the possibility of substantial harm or violate public policy, then the employee should be denied reinstatement and should instead receive front pay to the time the employer would have discovered the evidence in the ordinary course of business. In a case where the harm of the discrimination is substantially outweighed by the prospective harm to the employer or the public, the court should, as a matter of equity, deny the plaintiff front pay as well.269

Employers may argue that the result of excluding after-acquired evidence uncovered as a result of litigation is too harsh. However, few policies are more important than the policy of eliminating discrimination in our society. It is important that civil rights jurisprudence encourage employers to engage in self-evaluation and self-analysis toward the goal of eliminating discrimination in the workplace and the society at large, rather than rewarding employers for expending time and money searching for after-acquired evidence that will permit them to avoid liability for discrimination.270

C. Admissibility of After-Acquired Evidence Discovered Independently of the Lawsuit

Although after-acquired evidence should be completely excluded from the liability stage of a discrimination proceeding, it should be admissible in the remedial stage of the proceeding, provided that the employer can prove by clear and convincing evidence that (1) it discovered or would have discovered the evidence in the ordinary course of business, even in the absence of the plaintiff’s claim of discrimination and the consequent litigation; and (2) a reasonable employer would discharge an employee based upon such evidence.

The clear and convincing standard is necessary in order to avoid undermining the nation’s civil rights laws and the compelling public policy which underlies them.271 In determining relief in civil rights cases, courts are to seek "the most complete achievement of the objectives [of the civil rights statutes]" as possible.272 Federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."273 Employers who introduce after-acquired evidence in employment discrimination cases are seeking to limit liability following a finding or


270. See supra note 92 and accompanying text.

271. See supra note 189 to 201 and accompanying text.


273. Id.
presumption of discrimination. Discrimination is a wrong against society as a whole, not just a single plaintiff. Consequently, no modification of liability should be permitted absent proof by clear and convincing evidence.274

In most after-acquired evidence cases the sole evidence that the employee would have been dismissed had the employer known of the evidence has been the testimony or affidavit of a company official asserting that the employee would have been fired for the alleged misconduct.275 Where there is no express rule regarding the conduct or when no employee has ever before been disciplined for similar conduct, it is almost impossible for an employee to rebut such a subjective assertion by an employer. In order to eliminate this inequity, courts should hold employers to an objective standard. To limit liability, an employer should have to demonstrate that a reasonable employer would have discharged the employee for the act or omission revealed by the after-acquired evidence.276

The proposed reasonable employer standard is analogous to the "business necessity" standard necessary for an employer to defend in a disparate impact discrimination case.277 In a disparate impact case, a plaintiff must show that some neutral employment practice by an employer, such as the use of a test or other screening device, has a disproportionate impact on a group of persons protected by the civil rights laws. If the employee is successful in showing the impact, the employer must show that there is some business necessity for

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274. The Supreme Court observed in Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989), that although parties in civil litigation are generally required only to prove their case by a preponderance of the evidence, there is a "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." See also 29 C.F.R. § 1613.271(e)(2) (1994) (EEOC regulation requires federal agencies that have violated Title VII to show by clear and convincing evidence that an individual employee is not entitled to relief); Price Waterhouse, 490 U.S. at 253; Zemelman, supra note 67, at 209-10.

275. Most of the cases have been decided on summary judgment and have relied on self-serving affidavits submitted by employers. See supra notes 143, 159-67 and accompanying text. Some courts have granted summary judgment simply because the employer "could have" fired the employee. See Zemelman, supra note 67, at 209 n.249.

276. The proposed standard is similar to the "just cause" standard commonly used in collective bargaining agreements between unions and employers. In determining whether an employer had just cause for a discharge, the arbitrator considers the totality of the circumstances. For an excellent analysis of the concept of "just cause," see Roger I. Abrams & Dennis R. Nolan, Toward a Theory of "Just Cause" in Employee Discipline Cases, 1985 Duke L.J. 594. See also ADOLPH M. KOVEN & SUSAN L. SMITH, JUST CAUSE: THE SEVEN TESTS (2d ed. rev. by Donald F. Farwell 1992).

the challenged employment practice.\textsuperscript{278} Even if an employer demonstrates business necessity, an employee can rebut the showing by proving that other less discriminatory alternatives were available.\textsuperscript{279} Consequently, an employer cannot simply utilize any employment practice it chooses.

Similarly, defendant employers in after-acquired evidence cases should not be able to draw on a wholly subjective standard to determine whether the employee’s later-discovered conduct justified discharge. Rather, employers should be held to a standard of reasonableness in justifying the discharge of an employee and the consequent limitation of liability.

D. Application of After-Acquired Evidence in Determining Remedies

An award of back pay is generally presumed appropriate in employment discrimination cases because it fosters the statutory purposes of deterring discrimination and making aggrieved employees whole.\textsuperscript{280} When discrimination is found, the Supreme Court has held, back pay should be denied "only for reasons which if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered" through discrimination.\textsuperscript{281}

\begin{thebibliography}{10}
\bibitem{278} Id. at 431.
\bibitem{280}Brief for the United States and the Equal Employment Opportunity Commission as \textit{Amici Curiae} at 11-12, McKennon, (No. 93-1543), (citing Albemarle, 422 U.S. at 417, 418, 421).
\bibitem{281}Albemarle, 422 U.S. at 421. The National Labor Relations Board has also recognized the appropriateness of imposing a higher standard upon an employer seeking to limit its liability, declaring:

While seeking to be excused from his obligation to reinstate or pay backpay because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to the efficiency of the plant. Owens Illinois, 290 N.L.R.B. 1193 (1988), \textit{enforced without opinion}, 872 F.2d 413 (3d Cir. 1989).
\end{thebibliography}
Back pay is an important remedy in discrimination cases, for it is "the reasonably certain prospect of a backpay award that provides the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history."\(^\text{282}\) In the case of ADEA cases, the back pay award also serves as the measure of liquidated damages if it is determined that the employer’s discrimination was willful.\(^\text{283}\) Consequently, any reduction in the back pay award will cause a corresponding reduction in the legal remedy of liquidated damages.

There is a legitimate concern that awarding a plaintiff back pay to the date of judgment despite the existence of independently obtained after-acquired evidence of misconduct that would justify discharge, puts a plaintiff in a better position than the plaintiff would have been in absent the employer’s discriminatory conduct.\(^\text{284}\) Such an argument would perhaps carry the day if the only purpose of the civil rights statutes was to make plaintiffs whole. But the more compelling goal is a public one—"eradicating discrimination throughout the economy."\(^\text{285}\) The application of Title VII and other employment discrimination statutes must deter future discrimination.\(^\text{286}\) If courts are to balance the equities, then the public interest of deterring discrimination must be deemed more important than the risk of a plaintiff

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282. *Albemarle*, 422 U.S. at 417-18. Prior to the Civil Rights Act of 1991, backpay was the only monetary remedy available in Title VII cases. CATHCART, ET AL., supra note 279, at 9. The Civil Rights Act of 1991 has amended the statute to allow recovery of limited compensatory and punitive damages in Title VII and Americans With Disabilities Act cases. Id.; see Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a (Supp. V 1993)). The maximum damages available against an employer with 15 to 100 employees are $50,000; with 101 to 200 employees, $100,000; with 201 to 500 employees, $200,000; with over 500 employees, $300,000. 42 U.S.C. § 1981a (Supp. V 1993). The damages are recoverable in addition to the traditional remedies of back pay, front pay, and injunctive relief. Id.


286. *See Weber*, supra note 269, at 532 ("It is the expectation of liability that deters wrongdoing. Potential wrongdoers will not choose . . . adequate levels of internal antidiscrimination activity unless there is at least the possibility that the full cost of the wrongdoing may fall on them."); *Price Waterhouse*, 490 U.S. at 264 (O’Connor, J., concurring) (purpose of Title VII is "to deter conduct which has been identified as contrary to public policy and harmful to society as a whole").
enjoying excess recovery. The harm to society from allowing discrimination to continue unabated far outweighs the harm that may arise from excessive recovery by a discrimination victim.

The goal of civil rights legislation is to put the plaintiff in the position he would have been in had there been no discrimination. Consequently, the equitable remedy of reinstatement is favored. When reinstatement is impractical, many courts award front pay. If an employer has independently discovered legitimate grounds for discharge, however, discrimination plaintiffs should not be awarded reinstatement or front pay, for it is clear that absent the discrimination the employee would have been discharged anyway. Plaintiffs should, however, always be entitled to

287. There are other factors which further support tilting the scales of equity toward the plaintiff. If the defendant has discriminated, its acts were unlawful, in violation of both public policy and an express statute. The plaintiff's misconduct generally is not unlawful. Furthermore, if the defendant is really concerned about the type of behavior that is typically discovered through after-acquired evidence, e.g., resume fraud, it could utilize more stringent practices in its hiring and evaluation processes. The employer could also conduct a thorough investigation prior to discharging the employee. In many cases such a review prior to discharge would give the employer a legitimate reason for discharge. If there were also discrimination, the case would then, of course, be a mixed motive one.

288. See Weber, supra note 269, at 530 ("Considerations of deterrence, expression of the community's sense of justice, or prevention of self-help may outweigh the narrow goal of avoiding overcompensation."). Since one can now recover compensatory and punitive damages under Title VII and the Americans With Disabilities Act, see 42 U.S.C. § 1981a (Supp. V 1993), there may be instances when the back pay award combined with the award of damages does indeed result in a windfall to the plaintiff. In such cases, courts may need to stop back pay accumulation as of the date the employer would have fired the employee in the normal course of business. See infra note 294 and accompanying text.

289. See Franks, 424 U.S. at 779; Zemelman, supra note 67, at 209 n.50 (Courts generally grant reinstatement absent proof of some "unusual adverse impact" following a finding of intentional discrimination by the employer.).

290. Schleip & Grossman's, supra note 247, at 533-35. Front pay may be awarded to individual plaintiffs where, inter alia, there is no position to which the plaintiff can be assigned immediately, or where reinstatement is "neither appropriate nor feasible due to the likelihood of continuing antagonism or hostility between the plaintiff and the employer." Id. at 533.

291. Even the courts which have rejected the Summers rule and found after-acquired evidence inadmissible to prove liability, have denied plaintiffs both reinstatement and front pay, on the grounds that plaintiffs who are guilty of misconduct are not entitled to either of these equitable remedies. See, e.g., Wallace, 968 F.2d at 1181-82 (front pay and reinstatement inappropriate if the after-acquired evidence would have in and of itself led to the adverse employment action); Smith v.
attorney's fees and appropriate injunctive and declaratory relief, so that they can continue to play the role of private attorneys general in the enforcement scheme of our civil rights laws.\textsuperscript{292}

It is ultimately impossible to craft a remedial rule that will adequately address every circumstance. Ultimately, decisions must be made on a case by case basis.\textsuperscript{293} There will occasionally be cases where the discrimination or the harm therefrom is significantly outweighed by the economic harm that a back pay or front pay award would cause the employer. In such cases, courts should recognize the undue hardship that would be imposed by such an award, and should adjust the award accordingly.\textsuperscript{294} Conversely, there may be times when a particular generous award of such compensation is in order, particularly in age cases and others that do not provide for compensatory and punitive damages, because a plaintiff needs to be compensated for particularly egregious discrimination by an employer.

There are multiple benefits to the proposed treatment of after-acquired evidence. First, it is consistent with public policy. Employers who have discriminated cannot use after-acquired evidence to avoid liability. Neither can employers use the judicial process to obtain such evidence and then use it to retaliate against civil rights plaintiffs. By limiting the use of independently obtained after-acquired evidence to the remedial phase of the proceeding, plaintiffs are assured that they will be put in a position at least as good as they would have enjoyed absent the discrimination.

Employers may express concern about the possibility that they will have to reinstate and pay damages to a culpable employee, perhaps one guilty of particularly offensive conduct. However, the employer is not without a remedy. If the after-acquired evidence was discovered independently of the lawsuit, the employer may use it to justify immediate discharge following the trial, \textit{i.e.}, a denial of reinstatement. Even if the evidence is inadmissible and

\begin{itemize}
\item General Scanning, Inc., 876 F.2d 1315, 1319, n.2 (7th Cir. 1989) (plaintiff who committed resume fraud not entitled to reinstatement); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 322 (D.N.J. 1993) (after-acquired evidence may preclude the award of front pay and reinstatement).
\item 292. Cf. The Civil Rights Act of 1991, Pub. L. No. 102-166, \S\ 107, 105 Stat. 1075 (1991) (codified at 42 U.S.C. \S\S 2000e-2, 2000e-5(g) (Supp. V 1993)), which provides that in mixed motive cases there must still be a finding of liability, and successful plaintiffs in such cases are entitled to declaratory and injunctive relief and attorney's fees and costs, but such plaintiffs may not be awarded damages or other payment nor granted reinstatement. \textit{But see} Weber, \textit{supra} note 269, at 524-39 (proposing that plaintiffs' recovery in mixed motive cases not be limited).
\item 293. \textit{See} Wallace, 968 F.2d at 1181 ("[T]he effect of after-acquired evidence on Title VII remedies is best decided on a case-by-case basis.").
\item 294. \textit{See} Weber, \textit{supra} note 269, at 537 (discussing application of undue hardship to limit equitable relief).
\end{itemize}
cannot be used to mitigate remedies, the employer still has available common law remedies against employees. If an employee has misrepresented material facts to get his job or has committed theft or misappropriated confidential information or engaged in some other culpable conduct which has caused the employer harm, then the employer can assert a common law claim against the employee as a counterclaim in the discrimination proceeding, seeking damages for theft, breach of fiduciary duty, or another appropriate claim. Moreover, if the proposed rule would cause undue hardship for the employer, the court can exercise its equitable powers to achieve a just result.

VI. CONCLUSION

Discrimination against fellow citizens based upon personal characteristics such as race, gender, religion, age, and handicap, is a dark stain in the history of this nation. The civil rights laws enacted over the last three decades constitute a giant step forward in trying to erase the ignominious stain. Over the years, Congress and the courts have articulated clear public policy which supports this lofty goal.

The after-acquired evidence doctrine threatens to undo over thirty years of progress. The doctrine demonstrates a misunderstanding in some parts of the judiciary of the societal importance of eradicating discrimination and of the comprehensive legislative schemed designed to achieve that end. The doctrine must be repudiated. It is inherently ill-reasoned and illogical. Its adoption as the law of the land would do irreparable harm to thirty years of progress in civil rights and create a loss of immeasurable magnitude. This nation cannot afford such a loss.

VII. EPILOGUE

On January 23, 1995, just as this article was about to go to press, the Supreme Court issued its decision in McKennon v. Nashville Banner Publishing Co.295 In a unanimous decision written by Justice Kennedy, the Court reversed the Sixth Circuit and rejected the after-acquired evidence doctrine as a defense against liability in employment discrimination cases.296

The Court observed that the ADEA "reflects a societal condemnation of

295. 115 S. Ct. 879 (1995). For a detailed discussion of the facts of McKennon, see supra notes 1 to 10 and accompanying text.

296. Id. at 883. The Court expressly held that the lower court's ruling that after-acquired evidence barred an age claim was "incorrect." Id. However, the Court took note of the "common substantive features" and "common purpose" of both the ADEA and Title VII to eliminate "discrimination in the workplace," leaving little doubt that the decision applies to all discrimination cases. Id. at 884.
invidious discrimination in employment decisions, and the statute is "but part of a wider statutory scheme to protect employees in the workplace nationwide."\textsuperscript{297} The remedial measures in the nation's anti-discrimination statutes are intended to serve as "a spur or catalyst" to employers to "eliminate, so far as possible, the last vestiges of discrimination."\textsuperscript{298} Consequently, a private litigant who seeks redress "vindicates both the deterrent and the compensation objectives of the ADEA."\textsuperscript{299} To allow an employer to use after-acquired evidence of an employee's wrongdoing to bar all relief for earlier violations of an anti-discrimination statute, would be contrary to the federal scheme to eradicate discrimination.\textsuperscript{300}

The Respondent \textit{Nashville Banner} had argued that the Petitioner should be denied relief because of the traditional "unclean hands" doctrine in equity.\textsuperscript{301} The Court rejected the argument, however, noting that the traditional rule does not apply where Congress has authorized broad relief "to serve important national policies" or "where a private suit serves important public purposes."\textsuperscript{302}

Nevertheless, the Court opined that it must still give attention to the "duality" between the legitimate interests of employers in operating their businesses and the public policy embraced by the anti-discrimination statutes.\textsuperscript{303} The Court concluded, therefore, that although claims involving after-acquired evidence would have to be decided on a case by case basis, as a general rule plaintiffs in such cases will be denied reinstatement or front pay.\textsuperscript{304}

As to back pay, the Court held that a plaintiff in an after-acquired evidence cases is still entitled to back pay.\textsuperscript{305} However, the Court concluded that, subject to power of the trial court to consider "extraordinary equitable circumstances that affect the legitimate interests of either party," the accrual of back pay will generally end on the date of discovery of the after-acquired evidence.\textsuperscript{306} The fact that the employer discovers the after-acquired evidence only as a result of the plaintiff's litigation, or that the employer

\begin{itemize}
  \item \textsuperscript{297} \textit{Id.} at 884.
  \item \textsuperscript{298} \textit{Id.} (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975)).
  \item \textsuperscript{299} \textit{Id.} (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974)).
  \item \textsuperscript{300} \textit{Id.}
  \item \textsuperscript{301} \textit{See supra} note 260.
  \item \textsuperscript{302} McKennon, 115 S. Ct. at 885-86.
  \item \textsuperscript{303} \textit{Id.} at 886.
  \item \textsuperscript{304} \textit{Id.} ("It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.")
  \item \textsuperscript{305} \textit{Id.}
  \item \textsuperscript{306} \textit{Id.}
\end{itemize}
might never have discovered the evidence in the absence of the litigation, will generally have no effect on the determination of back pay liability.\textsuperscript{307}

Finally, the Court held that in order to use the after-acquired evidence defense, an employer must establish that the employee’s wrongdoing "was of such severity" that the employee "in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."\textsuperscript{308}

The Court’s decision is laudable for its rejection of the after-acquired defense doctrine as a complete defense to liability in employment discrimination cases. Unfortunately, in allowing back pay liability to be cut off as of the date of discovery of the after-acquired evidence, the Court has still left open the door for employers to focus their attention on finding after-acquired evidence to limit their liability, rather than directing their energy toward eradicating discrimination.

\textsuperscript{307} Id.
\textsuperscript{308} Id. at 886-87.