Two Wrongs Can Make a Right: *McKennon v. Nashville Banner Publishing Co.* and the After-Acquired Evidence Doctrine

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In May, 1951, Christine McKennon began working at the Nashville Banner, first as an ad taker, and later as a secretary.[1] McKennon's performance in her various positions was consistently rated excellent.[2] However, in October, 1990, the Banner terminated McKennon after thirty years of service, claiming a reduction in the work force.[3]

McKennon, who was sixty-two years old at the time of her discharge, brought an age discrimination suit against the Banner under the Age Discrimination in Employment Act (ADEA)[4] in May, 1991.[5] Although McKennon seemed to have a strong case, the tables were turned when, during her deposition, the Banner discovered that she had copied confidential company documents that related to the Banner's financial condition.[6] McKennon had access to the documents while she served as secretary to the Banner's comptroller and had taken them home and shown them to her husband.[7] McKennon claimed that she was apprehensive about being let go by the Banner because of her age and that she had taken the documents for purposes of insurance and protection.[8] Upon discovering this evidence, the Banner sent McKennon a second termination letter, refiring her for violating company policy.[9]

Based on the newly discovered evidence, the Banner moved for summary judgment, claiming that the company would have fired McKennon immediately upon discovering her unlawful acts.[10] The Banner, admitting to age discrimination for summary judgment purposes, claimed that McKennon's conduct was legitimate grounds for termination and that she was barred from

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[1] McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 540 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995).

[2] *Id.*

[3] McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 605 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995).

[4] 29 U.S.C. §§ 621–634 (1988 & Supp. V 1993).

[5] *McKennon*, 9 F.3d at 540.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 541.

any recovery under the ADEA because she would have been discharged.[11] The district court, applying the after-acquired evidence doctrine of *Summers v. State Farm Mutual Automobile Insurance Co.*,[12] granted the Banner's motion, finding that McKennon had suffered no injury because of her misconduct.[13] The decision was affirmed by the United States Court of Appeals for the Sixth Circuit.[14]

The United States Supreme Court granted McKennon's petition for certiorari, in order to resolve the conflict among the circuits surrounding the use of after-acquired evidence in discrimination cases.[15] The Supreme Court joined the Seventh and Eleventh Circuits' refusal to follow the *Summers* approach to after-acquired evidence.[16] The Court held that the *Summers* rule was wrong because evidence discovered after-the-fact could never be a legitimate motive for an employment decision.[17] As the primary objective of federal antidiscrimination laws such as Title VII[18] and the ADEA[19] is to stop unlawful discrimination,[20] and the secondary objective of such legislation is to make the victim whole,[21] the Court found that the use of after-acquired evidence to nullify liability for discrimination weakens the deterrent value of these laws.[22] The Supreme Court, while rejecting the use of after-acquired evidence as a complete defense to discrimination, did find such evidence relevant at the remedies stage of a suit.[23] The Court held that back pay, the

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[11] *Id.*

[12] 864 F.2d 700 (10th Cir. 1988) (holding that after-acquired evidence, which is evidence of employee misconduct brought to light after a discrimination suit has begun, precludes any claim of plaintiff's injury), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

[13] McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 608 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995).

[14] *McKennon*, 9 F.3d at 543.

[15] *McKennon*, 115 S. Ct. at 883.

[16] *See, e.g.*, Kristufek v. Hussmann Food Serv. Co., 985 F.2d 364 (7th Cir. 1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated*, 32 F.3d 1489 (1994).

[17] *McKennon*, 115 S. Ct. at 885.

[18] 42 U.S.C. §§ 2000e–2000e-17 (1988 & Supp. V 1993).

[19] Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1988 & Supp. V 1993).

[20] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (holding that one purpose of these laws was to "make persons whole for injuries suffered on account of unlawful employment discrimination").

[21] *Id.* at 419 (holding that the compensation of injured parties is also an important Title VII objective).

[22] *McKennon*, 115 S. Ct. at 884.

[23] *Id.* at 885–86.

most common remedy given in employment discrimination cases,[24] should be granted to a wronged employee generally up until the date that the employer discovered the employee's misconduct;[25] to limit back pay to this date, the employer must show that the misconduct was material enough to lead to termination.[26] However, the prospective remedies of front pay and reinstatement were not to be granted to a wrongdoing employee, as an employer should not be forced to rehire an employee who would have been, and will be, terminated.[27]

The after-acquired evidence doctrine is an area of the law that has been subject to much confusion and disagreement. Because of the many important aspects of the after-acquired evidence doctrine, this Note focuses on the use of such evidence through analysis of the Supreme Court's decision in *McKennon*. Part I of this Note will discuss the background of federal antidiscrimination law, focusing on the standards created by the United States Supreme Court in discrimination cases.[28] Part II details the origins of the after-acquired evidence doctrine, tracing its development through federal case law. Part III of this Note will then focus on the Supreme Court's resolution of the problem, explaining why its method is the best way to deal with after-acquired evidence.

I. FEDERAL ANTIDISCRIMINATION LAW

In the past thirty years, equal treatment of individuals has become a paramount concern in our society. The United States government decided to help the equalization process by passing Title VII of the Civil Rights Act of 1964,[29] which prohibits employers from discriminating based on race, sex, color, religion, or national origin.[30] The ADEA, modeled after Title VII and

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[24] *See Albemarle*, 422 U.S. at 421.

[25] *McKennon*, 115 S. Ct. at 886.

[26] *Id.*

[27] *Id.*

[28] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[29] Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e–2000e-17 (1988 & Supp. V 1993)).

[30] 42 U.S.C. § 2000e-2(a):

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

passed just three years later in 1967,[31] made it unlawful for employers to discriminate on the basis of age.[32] Title VII and the ADEA share similar language, goals, and prohibitions; the Supreme Court has noted in several opinions that the statutes should be similarly construed.[33] The purposes of these statutes are deterrence of discriminatory employment practices and compensation of injured employees.[34] Both statutes are administered by the Equal Employment Opportunity Commission (EEOC).[35]

The ADEA differs from Title VII, however, in its remedial aspects;[36] the ADEA remedies were modeled after those of the Fair Labor Standards Act of 1938 (FLSA).[37] Remedies available under the ADEA include reinstatement, back pay, declaratory and injunctive relief, liquidated damages, and attorney's

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(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunity or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

[31] *See* Suzanne M. Boris, *The Age Discrimination in Employment Act: A Case Study*, 58 GEO. WASH. L. REV. 877, 880 (1990). The author notes that the ADEA was passed in order to grant older workers the same protection as women and minorities received under Title VII. *Id.*

[32] Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (1988):

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.

Id.

[33] *See, e.g.*, Oscar Mayer Co. v. Evans, 441 U.S. 750, 756 (1979) (noting that the ADEA and Title VII share the common purpose of eradicating discrimination); Lorillard v. Pons, 434 U.S. 575, 584 (1978) (stating that "the prohibitions of the ADEA were derived *in haec verba* from Title VII").

[34] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975).

[35] *See* 42 U.S.C. § 2000e-12(a) (1988); 29 U.S.C. § 633(b) (1988).

[36] *See* Kimberlye K. Fayssoux, *The Age Discrimination in Employment Act of 1967 and Trial By Jury: Proposals for Change*, 73 VA. L. REV. 601, 607 (1987).

[37] 29 U.S.C. §§ 201–219 (1988 & Supp. V 1993).

fees.[38] However, under Title VII, the ADEA, and the FLSA, a private litigant has the right to sue to enforce his or her rights,[39] and back pay has become presumptively granted in discrimination suits under these statutes as a way to make plaintiffs whole.[40] After the antidiscrimination laws were enacted, the United States Supreme Court developed two different methods of analysis for discrimination claims: the pretext, or single-motive model, and the mixed-motive model.[41] Discrimination can be proven through either direct or indirect evidence.[42] Pretext cases involve the use of indirect, circumstantial evidence to create a prima facie case of liability, while mixed-motive cases rely on direct evidence of discrimination to create both a prima facie case of discrimination and liability.[43] The burdens on the parties vary, depending on the type of case at issue.[44]

A pretext case is one in which a single motive, whether legitimate or discriminatory, caused the employer to make an employment decision regarding an employee or applicant.[45] The Supreme Court has developed a three-part test for burden-shifting between the parties in pretext cases.[46] First, the plaintiff must establish a prima facie case of discrimination, which creates a presumption of unlawful discrimination.[47] The burden of a prima facie case is not onerous,[48] and what is needed to meet it varies with the facts of the case.[49]

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[38] 29 U.S.C. § 626(b) (1988).

[39] *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 626(c); 29 U.S.C. § 216(b).

[40] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

[41] Jason M. Weinstein, *No Harm, No Foul? The Use of After-Acquired Evidence in Title VII Employment Discrimination Cases*, 62 GEO. WASH. L. REV. 280, 283–84 (1993).

[42] Gian Brown, *Employee Misconduct and the Affirmative Defense of After-Acquired Evidence*, 62 FORDHAM L. REV. 381, 387 (1993) (noting that plaintiffs are more likely to rely on indirect evidence because blatant discriminatory policies by an employer are rare today).

[43] *Id.* at 387–89.

[44] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 230 (1989) (noting that the pretext case burden-shifting regime was inapplicable in mixed-motive cases).

[45] Weinstein, *supra* note 41, at 282, n.9.

[46] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[47] *Id.* at 802. The prima facie case can be made by a showing that 1) the plaintiff belongs to a protected class, 2) the plaintiff was qualified and applied for a job for which the employer was taking applications, 3) the plaintiff was rejected, and 4) after the plaintiff's rejection, the position was still open, and other applicants were being considered. *Id.*

[48] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (noting that the purpose of a prima facie case was to eliminate the most common nondiscriminatory reasons for rejection).

[49] *See McDonnell Douglas*, 411 U.S. at 802.

After a prima facie case has been established, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its employment decision.[50] However, the burden of persuasion always remains with the plaintiff,[51] and the employer must give only a simple reason for its decision in order to rebut the discrimination claim.[52] Once the employer provides a reason for its decision, the plaintiff must show that the employer's reason was actually a pretext for discrimination;[53] the plaintiff must persuade the court that the discrimination was intentional.[54]

A mixed-motive case is one in which several factors, both legitimate and discriminatory, motivated the employer to decide as it did.[55] The method for finding discrimination in such cases was first articulated by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*,[56] an employment discrimination suit brought on constitutional grounds.[57] The initial burden in mixed-motive cases is on the plaintiff to show that his or her protected conduct was a motivating factor in the employment decision;[58] the employer then carries the burden of persuasion to prove that the same decision would have been made despite the employee's engagement in the protected conduct.[59] If the employer can prove by a preponderance of the evidence that an employee's performance was such that he or she would have been fired anyway, then the employee would be entitled to no relief.[60]

The *Mt. Healthy* "same decision" test was found applicable to Title VII cases in *Price Waterhouse v. Hopkins*,[61] a gender discrimination case. The Court held in *Price Waterhouse* that the plaintiff must show that her status as a member of a protected class was a "motivating factor" in the employment decision, and only then would the burden shift to the employer to prove that the same decision would have been made.[62] If the employer can successfully

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[50] *Id.*

[51] *Burdine*, 450 U.S. at 256.

[52] *Id.* at 255 (noting that the defendant's evidence is sufficient if it raises a genuine issue of fact as to whether or not the plaintiff was discriminated against).

[53] *McDonnell Douglas*, 411 U.S. at 807.

[54] *Burdine*, 450 U.S. at 256.

[55] Weinstein, *supra* note 41, at 283, n.10.

[56] 429 U.S. 274 (1977).

[57] *Id.* at 276. The case involved a teacher who claimed that he had been fired for exercising his free speech rights. *Id.* at 274.

[58] *Id.* at 287.

[59] *Id.*

[60] *Id.*

[61] 490 U.S. 228 (1989).

[62] *Id.* at 258.

show that a legitimate reason caused it to decide as it did, then the employer can avoid all liability, regardless of discrimination.[63]

II. THE AFTER-ACQUIRED EVIDENCE DOCTRINE

In any discrimination case, if the employer is to defeat a plaintiff's claim, evidence of a lawful reason for an employment action is essential.[64] In recent years, the federal courts have been faced with a new defense in employment discrimination cases, after-acquired evidence.[65] After-acquired evidence is evidence of employee misconduct that is found by the employer after the employer terminates the employee, usually during discovery in a lawsuit.[66] The misconduct can range from pre-hire misrepresentation, such as resume fraud,[67] to post-hire misconduct, such as bad acts while on the job.[68] The circuit courts have differed in their allowance of such evidence; the Sixth and Tenth Circuits have leaned to the side of the employer,[69] allowing the after-acquired evidence to serve as a complete defense to the employer's responsibility for restitution.[70] Other circuits addressing this issue, including the Seventh and Eleventh Circuits,[71] have only allowed such newly-discovered evidence to go to limit a plaintiff's recovery.[72] Thus, after-acquired evidence can be very valuable to an

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[63] *Id.*

[64] *See* Pauline Yoo, *The After-Acquired Evidence Doctrine*, 25 COLUM. HUM. RTS. L. REV. 219, 222–23 (1993) (noting that in pretext cases and mixed-motive cases, an employer must present a legitimate, nondiscriminatory reason for its acts).

[65] *See* Rebecca H. White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 49 (1993). Most of the cases dealing with after-acquired evidence have involved claims brought under Title VII or the ADEA. *Id.* at 49, n.1.

[66] Brown, *supra* note 42, at 381.

[67] *See, e.g.*, Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992) (employee was found to have misrepresented on a job application that he had never been convicted of a criminal offense); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992) (employee misrepresented her educational background on her resume).

[68] *See, e.g.*, Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) (employee falsified claims records while on the job), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

[69] *See, e.g.*, *Honeywell*, 955 F.2d at 413; *Summers*, 864 F.2d at 708.

[70] *See* Cheryl K. Zemelman, *The After-Acquired Evidence Defense to Employment of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 176 (1993).

[71] *See, e.g.*, Kristufek v. Hussmann Food Serv., 985 F.2d 364 (7th Cir. 1993); Wallace v. Dunn Constr., 968 F.2d 1174 (11th Cir. 1992), *vacated*, 32 F.3d 1489 (1994).

[72] *See* Zemelman, *supra* note 70, at 176.

employer, as it can totally or partially diminish the effect of an employer's discrimination.[73]

In after-acquired evidence cases, courts have had to grapple with several different aspects of the doctrine.[74] Courts have had to decide how the evidence should be used; the evidence could provide a complete or partial defense to the suit.[75] If the defense is found to be only a partial limit to the plaintiff's recovery, questions of remedy exist.[76] The standard to be followed has also been an issue;[77] courts have struggled over whether the employer has to show that the employee would have been fired, or would not have been hired;[78] the evidence needed to meet these standards may differ.[79]

A. *Pre-*McKennon *Approaches to the Use of After-Acquired Evidence*

Though after-acquired evidence is a fairly new defense to employment discrimination claims,[80] use of the doctrine has grown in popularity in a short time.[81] However, use of such evidence varied depending upon the circuit in

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[73] *See* Francis J. Connell, III, *Emerging Defenses to Employment Discrimination Claims: After-Acquired Evidence and Stray Remarks*, *in* EMPLOYMENT LITIGATION 1993, at 267 (PLI Litig. & Admin. Practice Course Handbook Series No. H-5164, 1993).

[74] *See* Kenneth G. Parker, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 413 (1993) (noting that several factors are involved in deciding after-acquired evidence cases, including the type of employee misconduct at issue, and the standard that the employer needs to meet to defeat the plaintiff's claim).

[75] *Compare* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1184 (11th Cir. 1992) (partial defense), *vacated*, 32 F.3d 1489 (1994) *with* Summers v. State Farm Auto. Mut. Ins. Co., 864 F.2d 700, 709 (10th Cir. 1988) (full defense).

[76] *See, e.g.*, *Wallace*, 968 F.2d at 1181–82. The court settled on the recommendation that prospective remedies are not available in after-acquired evidence cases, but that back pay is allowed up until the date that the employer can show by a preponderance of the evidence that the evidence would have "materially altered" the employment relationship. *Id.*

[77] *See* Parker, *supra* note 74, at 413.

[78] *Compare* Washington v. Lake County, Ill., 969 F.2d 250, 257 (7th Cir. 1992) (standard was whether the employee would have been fired if the resume fraud were discovered) *with* Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 414 (6th Cir. 1992) (question was whether an employee would not have been hired without the misrepresentation on her application).

[79] *See* William S. Waldo et al., *Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims*, 9 LAB. LAW. 31, 49 (1993).

[80] *See* White & Brussack, *supra* note 65, at 49.

[81] *See* David D. Kadue, *When What You Didn't Know Can Help You: Employers' Use of After-Acquired Evidence of Employee Misconduct to Defend Wrongful Discharge Claims*,

which the case is brought.[82] Before *McKennon*, three distinct approaches to the use of after-acquired evidence existed in the courts.[83]

The so-called majority approach to after-acquired evidence held that evidence of employee misconduct provided a complete defense to the discrimination claim.[84] This approach was most notably exemplified by the Tenth Circuit's decision in the *Summers* case,[85] and has come to be known as the "*Summers* rule."[86] In *Summers*, an employee raised age and religious discrimination claims.[87] However, four years later, during discovery, the employer found that Summers had falsified records in at least 150 instances.[88] In granting the employer's motion for summary judgment, the court stated that even though State Farm may have been guilty of discrimination, Summers' misconduct was admissible evidence, relevant to his claim.[89] The court compared Summers to one masquerading as a doctor who sues after a wrongful discharge—the doctor would get no relief, as he was never qualified for the job.[90] Thus, the evidence of Summers' misconduct was found to preclude any and all relief.[91]

A less harsh approach to the use of after-acquired evidence was developed in the Seventh Circuit;[92] after-acquired evidence did not preclude all relief, but limited recovery to back pay, up until the date the evidence was discovered.[93] In *Kristufek v. Hussmann Food Service Co.*,[94] the court held that while resume fraud precluded any forward-looking recovery, the plaintiff could still receive back pay up until the actual date that the evidence was discovered.[95] The court

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27 BEVERLY HILLS B.A. J. 117, 117 (1993) (noting the increase in reported cases applying the doctrine within the last five years).

[82] *See* Zemelman, *supra* note 70, at 176.

[83] *See* James G. Babb, Comment, *The Use of After-Acquired Evidence as a Defense In Title VII Employment Discrimination Cases*, 30 HOUS. L. REV. 1945, 1946–47 (1994).

[84] *See* Babb, *supra* note 83, at 1956; *see also* Jennifer M. Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 651 (1993).

[85] Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

[86] *See* Follette, *supra* note 84, at 661.

[87] *Summers*, 864 F.2d at 702.

[88] *Id.* at 703.

[89] *Id.* at 708–09.

[90] *Id.* at 708.

[91] *Id.*

[92] *See* Babb, *supra* note 83, at 1961.

[93] *Id.*

[94] 985 F.2d 364 (7th Cir. 1993).

[95] *Id.* at 369–71.

felt that allowing back pay beyond the date that the employee's misconduct was discovered would be too punitive towards the employer.[96]

A third approach to the use of after-acquired evidence emerged in the Eleventh Circuit in the case of *Wallace v. Dunn Construction.*[97] In *Wallace*, the court found that after-acquired evidence could be used to lessen the plaintiff's back pay recovery if the employer could prove that it would have discovered the evidence, regardless of the discrimination suit.[98] The court rejected the *Summers* complete defense rationale, but held that the remedies of front pay and reinstatement were unavailable to a dishonest employee.[99]

B. *The Standards Used in After-Acquired Evidence Cases*

In deciding after-acquired evidence cases, courts have had to choose the standard that the employer must meet when offering the evidence; the employer has either had to show that had the evidence been known, the employee "would not have been hired" or "would have been fired."[100] The distinction has been important to the employer who is trying to use such evidence to cut off the plaintiff's recovery.[101] How much evidence is needed to defeat a claim has also been an issue.[102]

A careful analysis of which standard to apply is found in *Washington v. Lake County, Illinois*,[103] in which the court rejected the use of a "would not have been hired" standard in resume fraud cases.[104] The court felt that a "would have been fired" standard better matched a mixed-motive type analysis, as an employer must show that it would have made the same decision to discharge the plaintiff, regardless of his or her protected status.[105] The "would not have been hired" approach was found irrelevant to employees who are discharged and then found to have been dishonest, because a misrepresentation may prove immaterial if the employee has proven to be a capable worker.[106]

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[96] *Id.* at 371.

[97] 968 F.2d 1174 (11th Cir. 1992).

[98] *Id.* at 1182.

[99] *Id.* at 1181.

[100] *See* Connell, *supra* note 73, at 279.

[101] *See id.*

[102] *See* Waldo, *supra* note 79, at 35–36.

[103] 969 F.2d 250 (7th Cir. 1992).

[104] *Id.* at 256.

[105] *Id.* at 255; *accord* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 886 (1995).

[106] *Washington*, 969 F.2d at 254.

In order to meet a "would have been fired" standard, an employer must demonstrate several things.[107] The employer must show that the misconduct occurred prior to termination,[108] that the misconduct was unknown to the employer,[109] and that the misconduct was material.[110] The employer can use affidavits, employee applications, and company discharge policies to prove that the same decision would have been made, regardless of when the evidence was discovered.[111]

III. THE BEST APPROACH TO THE USE OF AFTER-ACQUIRED EVIDENCE

Of the three approaches to the use of after-acquired evidence, the one that provides the best solution to the problem is the one created in the Seventh Circuit and followed by the Supreme Court in *McKennon*, as it takes into consideration all the factors involved.[112] This approach, in which after-acquired evidence can be used only at the remedies stage, allows partial recovery for discriminatory treatment.[113] This scheme best serves the dual purposes of deterrence and compensation[114] and is consistent with prior employment discrimination cases,[115] including cases decided under the National Labor Relations Act (NLRA),[116] from which employment discrimination cases have taken their remedies.[117] This approach is also harmonious with the 1991 Congressional Amendments to Title VII.[118]

A. *Consistencies with Antidiscrimination Purposes and Policies*

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[107] *See* Waldo, *supra* note 79, at 35–36.

[108] *See, e.g.*, Bonger v. American Water Works, 789 F. Supp. 1102, 1106 (D. Colo. 1992); *accord* Calhoun v. Ball Corp., 866 F. Supp. 473, 475–76 (D. Colo. 1994) (holding that post-termination employee misconduct cannot be used to preclude recovery).

[109] *See* O'Driscoll v. Hercules, Inc., 12 F.3d 176, 179 (10th Cir. 1994).

[110] *See* Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 414 (6th Cir. 1992).

[111] *See* Waldo, *supra* note 79, at 41.

[112] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 228–29 (1989) (noting that the plaintiff's right to be free from discrimination should be balanced with the employer's right to make employment decisions).

[113] *See, e.g.*, Kristufek v. Hussmann Food Serv. Co., 985 F.2d 364 (7th Cir. 1993).

[114] *See* Babb, *supra* note 83, at 1976.

[115] *See, e.g., Price Waterhouse*, 490 U.S. at 228; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[116] 29 U.S.C. §§ 151–168 (1988 & Supp. V 1993).

[117] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 419–20 (1975) (noting that the back pay provisions of the NLRA are the basis for those of Title VII).

[118] Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in various sections of 42 U.S.C.).

The Supreme Court's approach to after-acquired evidence best serves the policies behind federal antidiscrimination laws such as Title VII and the ADEA.[119] These statutes were created to combat discriminatory employment practices.[120] As well, a discrimination suit should put the plaintiff in the same position in which he or she was in before the discrimination.[121]

The Supreme Court echoed the beliefs of many commentators when it found that the *Summers* rule failed to take into account the goals of antidiscrimination legislation.[122] The Court recognized the public interest in the enforcement of antidiscrimination laws; a plaintiff is not only suing for his or her personal vindication, but is also carrying out the congressional policy of reducing discrimination.[123] The Court found that barring all recovery to a plaintiff because of after-acquired evidence disserves both the deterrent policies and make-whole provisions behind federal antidiscrimination laws.[124]

The Supreme Court was wise to reject the *Summers* rule, as the rule was wrong for several reasons. First, the rule allowed evidence that the employer did not know existed at the time of discrimination to be used against an injured employee.[125] Second, the *Summers* rule punished the victim/employee for bringing the suit,[126] as he or she was denied any and all relief.[127] The plaintiff should not be placed in a worse position for having brought the suit than he or she would have been absent the discrimination,[128] and that was what the *Summers* rule did.[129] A further problem with *Summers* was that the employer went unpunished for its discriminatory practices.[130]

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[119] *See* Babb, *supra* note 83, at 1973.

[120] *See Albermarle*, 422 U.S. at 417–18.

[121] *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977).

[122] *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995); *see also* Babb, *supra* note 83, at 1955–60; Brown, *supra* note 42, at 400–04; Parker, *supra* note 74, at 435; Weinstein, *supra* note 41, at 311–17.

[123] *See McKennon*, 115 S. Ct. at 884. The court cited such cases as Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977) and *Albermarle*, 422 U.S. at 415 to back up its "private attorney general" rationale. *Id.*

[124] *McKennon*, 115 S. Ct. at 884.

[125] *See, e.g.*, Follette, *supra* note 84, at 663; Weinstein, *supra* note 41, at 306–07.

[126] *See* Follette, *supra* note 84, at 664.

[127] *See* Babb, *supra* note 83, at 1960 (noting the harshness of the *Summers* rule in denying all relief to the victim).

[128] *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[129] *See* Weinstein, *supra* note 41, at 308.

[130] *See* Babb, *supra* note 83, at 1973–74; Follette, *supra* note 84, at 663–64; Weinstein, *supra* note 41, at 309.

Those addressing the after-acquired evidence issue have argued that the *Summers* approach encouraged employers to create low thresholds for legitimate termination and may have led to employers rummaging around in employees' pasts for potential flaws.[131] The Eleventh Circuit worried about the problem of "sandbagging," in which an employer could hire a member of a protected class with knowledge of misconduct on the part of that employee, destroy evidence of that knowledge, treat the employee poorly, and then escape liability if the employee brings suit because of the employee's past misconduct.[132] The Supreme Court felt that its approach in *McKennon* would not lead to such techniques, as sanctions under Rule 11 of the Federal Rules of Civil Procedure, and the fact that attorney's fees can be awarded under the ADEA, would deter sandbagging.[133]

The proper solution to the after-acquired evidence problem should balance the employee's right to be free from discrimination with the employer's right to make managerial choices.[134] Allowing such evidence to be used only at the remedies stage of a case, and only allowing back pay up until the date that the evidence was discovered, strikes the correct balance between the two parties.[135] If the evidence is allowed as a complete defense, then the employer goes unpunished, and the discrimination goes unredressed.[136] As well, if the employee is allowed back pay up until the date of judgment or prospective relief, the employee is better off for having been discriminated against.[137] The Supreme Court in *McKennon* felt that allowing back pay up until the date of discovery both provided redress for the ADEA violation and prevented infringement of an employer's rights.[138] The Court chose not to allow use of an "unclean hands" rationale to defeat an employee's claims, as it felt that the broad remedial purpose of statutes like the ADEA prohibited application of that equitable doctrine.[139] The Court sought to balance the employer's managerial

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[131] *See* Yoo, *supra* note 64, at 228.

[132] Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180 (11th Cir. 1992), *vacated*, 32 F.3d 1489 (1994). Sandbagging could be a great problem for groups such as undocumented workers, as an employer could hire them, pay them less, treat them badly, and be safe from discrimination suits, due to their illegal status. *See* Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Worker Reports and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 616–20 (1994).

[133] *McKennon*, 115 S. Ct. at 887.

[134] *See* Parker, *supra* note 74, at 428–29.

[135] *See* Babb, *supra* note 83, at 1977.

[136] *See* Samuel A. Mills, *Toward an Equitable After-Acquired Evidence Rule*, 94 COLUM. L. REV. 1525, 1539 (1994).

[137] *See* Yoo, *supra* note 64, at 241.

[138] *McKennon*, 115 S. Ct. at 886.

[139] *Id.* at 885.

interests with the employee's interest in invoking the ADEA's antidiscriminatory policies.[140]

Back pay, the preferred remedy in employment discrimination cases,[141] should be awarded to a plaintiff who presents a successful discrimination case.[142] Granting back pay to plaintiffs does not reward plaintiffs for their dishonesty or misconduct, but only serves to make victims whole.[143] Employees never profit from their bad acts, as they are denied the prospective relief that honest plaintiffs would most likely receive.[144] The denial of prospective relief is the key to balancing employer and employee rights; a back pay-only recovery evens the playing field.[145]

B. *Consistencies with Prior Antidiscrimination Case Law*

The Supreme Court's approach to after-acquired evidence in *McKennon* is consistent with prior antidiscrimination case law. The Court found that after-acquired evidence cases were unlike mixed-motive cases, in that after-acquired evidence could not be a legitimate motive for an employment decision, since it was unknown to the employer when the decision was made.[146] However, the Court did find one aspect of mixed-motive analysis useful; mixed motive cases "underscore the necessity of determining the employer's motives in ordering the discharge," which is essential in deciding whether the ADEA has been violated.[147]

Commentators addressing the issue of the application of prior Supreme Court case law to after-acquired evidence cases agree that the mixed-motive analysis of *Mt. Healthy* and *Price Waterhouse* should not be used when evidence is discovered after-the-fact.[148] Decisions following the *Summers* approach[149] have been criticized for their failure to take into account the fact that the nondiscriminatory motive, the after-acquired evidence, does not come

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[140] *Id.*

[141] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975).

[142] *See* Follette, *supra* note 84, at 668.

[143] *Id.*

[144] *See* Zemelman, *supra* note 70, at 211.

[145] *See* Brown, *supra* note 42, at 303.

[146] *McKennon*, 115 S. Ct. at 885.

[147] *Id.*

[148] *See, e.g.*, Ann M. McGinley, *Reinventing Reality–The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 160–61 (1993); Weinstein, *supra* note 41, at 305–06.

[149] *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988), *overruled by* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

to light until after the employer's discrimination has already occurred.[150] Such decisions disregard *Mt. Healthy's* rationale that the employer should escape liability only if it had a legitimate motive to act at the moment of the decision and that this motive was a "substantial and motivating factor";[151] it is not possible for employee misconduct, discovered after the discrimination has occurred, to fit into the "substantial factor" category.[152]

The language of *Price Waterhouse* bolsters the view that an employer should not be able to use after-acquired evidence.[153] The Court stated in its opinion that "an employer may not prevail in a mixed-motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of decision."[154] Thus, any reliance by federal courts on the reasoning of either *Mt. Healthy* or *Price Waterhouse* in the context of after-acquired evidence cases is incorrect;[155] post-hoc rationalization for employment decisions is not a permissible way to defeat a discrimination claim.[156]

The approach followed by the Supreme Court in *McKennon*, in which an employee's own misconduct does not lessen the employer's liability for discrimination, is thus consistent with precedential employment discrimination law, as the employer's unlawful acts do not go unnoticed.[157] As well, the Court's use of the date that the evidence was discovered to end back pay is in alignment with the policies behind the *Mt. Healthy* and *Price Waterhouse* cases, as the victim is not placed in a worse position for having brought the lawsuit.[158] The Supreme Court's approach correctly takes into account the factors involved in antidiscrimination cases,[159] protecting the interests of those involved in such cases—the employee, the employer, and society as a whole.[160]

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150 *See, e.g.*, Weinstein, *supra* note 41, at 294–301 (critically analyzing the Sixth and Tenth Circuits' rationale for following the *Summers* approach).

151 *See* Zemelman, *supra* note 70, at 187.

152 *See* McGinley, *supra* note 148, at 148–49.

153 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

154 *Id.* at 252.

155 *See* Parker, *supra* note 74, at 422 (noting that the correct frame of reference for determining liability is the motive in existence at the time of the employment decision); *see also* Zemelman, *supra* note 70, at 188.

156 *See* Weinstein, *supra* note 41, at 306.

157 *See* White & Brussack, *supra* note 65, at 95 (praising the Seventh Circuit's resolution of the issue, on which the Supreme Court's approach is based).

158 *See* Babb, *supra* note 83, at 1973–74.

159 *See* Follette, *supra* note 84, at 670 (noting that this method of dealing with after-acquired evidence best serves the deterrent and compensatory goals of antidiscrimination legislation).

160 *See* Zemelman, *supra* note 70, at 207.

In addition to being consistent with prior Supreme Court discrimination cases, the *McKennon* approach is consistent with current case law under the National Labor Relations Act (NLRA).[161] Though the National Labor Relations Board has changed its view on the issue of whether after-acquired evidence should be a complete defense to discrimination,[162] current case law indicates that such evidence should go only to the issue of what remedies are available to an employee.[163] A recent Supreme Court decision, *ABF Freight Systems v. NLRB*,[164] in which an employee who falsely testified was still given damages, ratified the Board's use of after-acquired evidence; the employer's anti-union animus was of greater consequence than the fact that the employee had lied.[165]

C. *Consistencies with the 1991 Amendments to Title VII*

In 1991, Title VII was amended[166]; the 1991 changes made it clear that even a legitimate motive would not totally bar a plaintiff's recovery if discrimination had in fact occurred.[167] The 1991 Act provides remedies of declaratory and injunctive relief to victims, as well as attorney's fees,[168] despite the employee's own misconduct.[169] However, the bad acts on the part of an employee can prevent recovery of compensatory and punitive damages.[170] Under the 1991 Act, once a plaintiff has proven that an unlawful factor, such as gender, race, or religion, has been taken into account by an employer in making an employment decision, the employer is liable as a matter of law.[171]

Though the 1991 Act changed only Title VII, the policies behind the changes can be applied by analogy to the ADEA, since the two statutes are so

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[161] 29 U.S.C. §§ 151–168 (1988 & Supp. V 1993) (text of the NLRA, as amended).

[162] *See, e.g.*, Bird Trucking & Cartage Co., 167 N.L.R.B. 626 (1967) (after-acquired evidence provides a complete defense to an employee's claim).

[163] *See, e.g.*, John Cuneo, Inc., 298 N.L.R.B. 125, 135 (1990).

[164] 114 S. Ct. 835 (1994).

[165] *See* Robert A. Richardson, *The Use of After-Acquired Evidence in Employment Discrimination Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 97, 116 (1993).

[166] Pub. L. No. 102-166, 105 Stat. 1074 (1991).

[167] *See* 42 U.S.C. § 2000e-2(m) (Supp. III 1991) ("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.").

[168] *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) (Supp. III 1991).

[169] *See* White & Brussack, *supra* note 65, at 78–79.

[170] *See* 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. III 1991); *see also* Mills, *supra* note 136, at 1541.

[171] *See* Babb, *supra* note 83, at 1949.

similar.[172] The rationale behind the 1991 Act serves only to bolster the notion that after-acquired evidence should not be a complete defense;[173] the EEOC recently published guidelines on the new amendments, which make clear that the amendments do apply to after-acquired evidence cases.[174] Thus, the new amendments already seem to have eradicated the *Summers* rule that after-acquired evidence provides a complete defense to an employee's claim in Title VII cases.[175] The argument is as follows: if a known, legitimate reason for an employment decision no longer nullifies an employer's liability for discrimination, then an unknown, later-discovered legitimate reason cannot allow an employer's discriminatory acts to go unpunished.[176]

IV. CONCLUSION

After-acquired evidence was a problem in need of a solution; discrimination in employment is prominent in our society,[177] as are reports of employee fraud and misconduct.[178] Though several approaches to the issue have been proposed,[179] the correct approach is that followed by the Supreme Court in *McKennon*, as it best serves the policies and concerns of federal antidiscrimination laws. The Supreme Court's approach takes into account all of the factors involved in after-acquired evidence cases; an employer windfall is prevented, and discrimination is remedied.[180] The Court's rejection of the *Summers* rule, and its adoption of the Seventh Circuit's approach, truly allows two wrongs to make a right.

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[172] *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 883-84 (1995); *see also* Lorillard v. Pons, 434 U.S. 575, 584 (1978).

[173] *See* Mills, *supra* note 136, at 1542; Weinstein, *supra* note 41, at 314.

[174] *See EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, 8 Fair Empl. Prac. Man. (BNA) 405:6915, 6928 (July 7, 1992). The guidelines also state that the date of discovery should be used to end back pay.

[175] *See, e.g.*, Mills, *supra* note 136, at 1543; Weinstein, *supra* note 41, at 315.

[176] *See* Follette, *supra* note 84, at 667.

[177] *See* Zemelman, *supra* note 70, at 203.

[178] *See* McGinley, *supra* note 148, at 204.

[179] *See supra* part II.A.

[180] *See* Babb, *supra* note 83, at 1977.