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REMOVING THE EFFECT OF DISCLOSURES FROM FEDERAL EMPLOYMENT DISCRIMINATION: STRIPPING AWAY THE LAST VESTIGES OF THE AFTER-ACQUIRED EVIDENCE DOCTRINE†

INTRODUCTION

An employee is fired because the employer believes her to be too old for her job. The employee then files suit in United States District Court, seeking a remedy under the Age Discrimination in Employment Act ("ADEA"). The ADEA declares it unlawful to discharge or otherwise discriminate against any employee on the basis of age.[1] During the course of pre-trial discovery, the employer learns that when the employee first believed that she was about to be terminated, she began to remove and copy some of the employer's documents for later possible use against the employer. Thus, the employer has discovered that at the time the employee was originally fired, legal grounds for the discharge existed. Prior to 1995, the "after-acquired evidence doctrine" operated as an affirmative defense to such an unlawful and discriminatory dis-

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† This note is dedicated to the loving memory of my Grandfather, Abraham Modell, a self-educated man of tremendous wisdom. He never had anything but the greatest of confidence that through my abilities I would succeed. This confidence meant more to me than he ever knew, and gave me the confidence to achieve all that I have throughout my life. Thanks G-pop.

1. *See* 29 U.S.C. §§ 621-633a (1994). Although I refer to the ADEA, I suggest that this note is not limited to age discrimination. It is routinely recognized that the same arguments and policies hold true for all of the employment discrimination statutes, including the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 (including the modifications to it by the Civil Rights Act of 1991). *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995) (stating that the substantive policy behind all of the anti-discrimination statutes is to eliminate workplace discrimination); Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985) (stating that interpretations of Title VII of the Civil Rights Act of 1964 apply with equal force to the ADEA, because the substantive provisions of the ADEA were adopted wholesale from Title VII).

charge. This evidence entitled the employer to summary judgment in its favor, and the dismissal of the employee's discrimination suit.

In *McKennon v. Nashville Banner Publishing Co.*, the United States Supreme Court held that the after-acquired evidence doctrine cannot act as a complete bar to recovery under employment discrimination statutes such as the ADEA.[2] Allowing after-acquired evidence to act as a bar would prevent these statutes from deterring workplace discrimination and from compensating for harm through damages and injunctive relief.[3] This change in doctrine may ultimately change the way all employment discrimination suits are handled. An employer can often find a reason other than its discriminatory purpose for firing an employee. This is especially true with the recent changes to the Federal Rules of Civil Procedure and the vast amount of open and nondiscretionary pre-trial disclosure now mandated by them. For this reason, the remedies courts craft in wrongful discharge cases such as *McKennon* are now at the forefront of employment discrimination law.

The 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure require mandatory disclosure to the opposing party of most information within a party's possession that relates to facts pleaded with particularity.[4] This change forces employment discrimination plaintiffs to disclose to their former employers any legal grounds for discharge that the employer had at the time of the allegedly discriminatory discharge, assuming the employer notified the plaintiff at the Rule 26(f) discovery conference that after-acquired evidence was one possible affirmative defense. In the circuits that have allowed after-acquired evidence to act as a complete bar to any liability by the employer, the new Rule 26(a) operates to undermine the policies behind the employment discrimination statutes by allowing employers easy access to after-acquired evidence.[5] To relieve this tension between the polices behind the anti-discrimination statutes and Rule 26(a), the Supreme Court had no choice but to hear *McKennon*, and hold that after-acquired evidence could no longer act as a bar to liability in employment discrimination suits, instead only permitting it to be used as a mitigating factor in the damages phase of the litigation.[6]

This note will begin with a historical discussion of the after-

2. *See McKennon*, 115 S. Ct. at 886-87.

3. *See id.* at 884.

4. *See infra* Part II.C.

5. *See* Bob E. Lype, *After-Acquired Evidence in Defending Employment Discrimination Claims*, 61 DEF. COUNS. J. 573, 582 (1994) (stating that "the employer [typically] first learn[s] of the employee's . . . misconduct during the course of discovery").

6. *See McKennon*, 115 S. Ct. at 879.

acquired evidence doctrine. This discussion will encompass both the pre-*McKennon* majority rule, best elucidated in *Summers v. State Farm Mutual Automobile Ins. Co.*,[7] and the modifications of the doctrine by the Supreme Court in *McKennon*. Where appropriate, the policies behind the ADEA will be related to this discussion. The focus will then shift to the mandatory discovery rules. Again, attention will be drawn to likely areas of contention between Rule 26(a) and the ADEA.

The focus of the analysis will be on how, under the *Summers* rule, a defendant-employer could construct a good faith defense based on after-acquired evidence so that it is entitled to mandatory disclosures by the plaintiff-employee on that evidence during the pre-discovery process. This discussion of employer strategies under the *Summers* rule will show how all of these strategies, combined with the mandatory disclosure process, undercut the policies behind the employment discrimination statutes, thereby forcing the Supreme Court to modify the doctrine as it did in *McKennon*. In addition, this note argues that because of the timing factors involved in the disclosure and discovery process, the Supreme Court did not go far enough in its modification of the doctrine. An employee's recovery will still be severely limited because of the short time period between the filing of the complaint and the mandatory disclosures. Thus, Rule 26(a)'s mandatory disclosure obligation still operates to undermine the policies behind the employment discrimination statutes and therefore undercuts the national goal of eliminating discrimination from the workplace. Finally, the retaliation provisions of Title VII and the ADEA will also be frustrated, since an employer will no longer have to seek out after-acquired evidence, which, with the proper discriminatory intent, could be unlawful in and of itself. For these reasons, the *McKennon* Court should have eliminated the after-acquired evidence defense from the face of employment discrimination law.

I. BACKGROUND

A. Proving a Case of Individual Disparate Treatment Employment Discrimination

Disparate treatment is defined as "[t]he employer [treating] some people less favorably than others because of [some protected characteristic]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differenc-

7. 864 F.2d 700 (10th Cir. 1988).

es in treatment."[8] "[L]iability depends on whether the protected trait . . . actually motivated the employer's decision."[9] The question of motivation can often be very difficult to prove. Short of a direct statement by the hiring employer to the employee such as "You are too old and therefore I am not going to hire you," this key element of intent to discriminate will have to be inferred from the employer's conduct. In a series of decisions spanning twenty years, the Supreme Court has stepped in and defined the elements of proof of inferred discrimination.[10]

A plaintiff must first establish a prima facie case of discrimination. The plaintiff must prove four elements: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied for and was qualified for a job the employer was trying to fill; (3) even though the plaintiff was qualified, he or she was rejected; and (4) the employer continued to seek applicants with qualifications comparable to the plaintiff.[11] If the plaintiff is able to establish this prima facie case, which appears to be very easy to do,[12] an inference that the employer acted with discriminatory intent arises.[13] The prima facie case creates an inference of discrimination because its elements eliminate the most common nondiscriminatory reason for the plaintiff's rejection, namely, that the plaintiff was not qualified.[14]

Once the plaintiff has established this prima facie case, the burden of production then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the [employment decision]"[15] in order to rebut the inference of discrimination. The burden that shifts, however, is not the ultimate burden of persua-

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8. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

9. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

10. *See infra* notes 11-30 and accompanying text.

11. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also* O'Connor v. Consolidated Coin Corp., 116 S. Ct. 1307, 1309-10 (1996) (stating that various circuits have "applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas*" to claims brought under the ADEA). This prima facie case can be modified in many ways. For example, Justice Scalia, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993), would require the plaintiff in order to make out a prima facie case to show not only that the job remained open, but that it was eventually filled by someone outside of the plaintiff's protected class (e.g., the employer who rejected the black applicant eventually filled the job with a white applicant). Furthermore, the prima facie case need not be strictly adhered to by a plaintiff. The elements can vary slightly depending on what type of discrimination of the plaintiff is attempting to prove. *See* BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 10 (2d ed. & Supp. 1987-89).

12. *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 118 (3d ed. 1994).

13. *See* Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

14. *See id.* at 253-54.

15. *McDonnell Douglas*, 411 U.S. at 802.

sion, but only the burden of production. The ultimate burden of persuading the jury that intentional discrimination actually took place always rests with the plaintiff.[16] The only burden to shift is the burden of producing evidence.[17] Thus, the defendant must, through the introduction of admissible evidence, rebut the inference of discrimination established in the plaintiff's prima facie case. This evidence need not persuade the court that those reasons actually motivated the employer's conduct, but needs to raise a genuine issue of fact as to whether discrimination actually existed.[18] If such evidence is produced, the inference that arose from the plaintiff's prima facie case is rebutted, and the burden of production shifts back to the plaintiff.[19] If the defendant cannot articulate a legitimate, nondiscriminatory reason, either summary judgment or a directed verdict will be granted for the plaintiff.

If the defendant has removed the initial inference of discriminatory intent, the plaintiff can still prevail if he can prove that the reasons the defendant proffered were not the real reasons for the rejection or termination.[20] The plaintiff then has a "full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a . . . discriminatory decision."[21] Beside showing that the employer's articulated reason was not the true motivating reason, a plaintiff can show pretext in a variety of other ways, including presenting evidence of the defendant's treatment of the plaintiff, the defendant's general attitude, policy, and practice towards civil rights and minority employment, and statistics of the composition of the defendant's workforce.[22]

In 1993, however, the Supreme Court in *St. Mary's Honor Center v. Hicks*,[23] modified this entire system of proof by adding an element to the plaintiff's burden of proving discriminatory intent.[24] Before *Hicks*, the plaintiff only had to establish pretext by a preponderance of the evidence to raise the inference of discriminatory intent.[25] Under *Hicks*, a plaintiff also has to establish pretext.[26] The Court added that the plaintiff must also prove that he

16. *See Burdine*, 450 U.S. at 253.
17. *See id.* at 254.
18. *See id.* at 254-55.
19. *See id.* at 255-56.
20. *See McDonnell Douglas*, 411 U.S. at 805; *see also* O'Connor v. Consolidated Caterers Corp., 116 S. Ct. 1307, 1309-10 (1996).
21. *McDonnell Douglas*, 411 U.S. at 805.
22. *See id.* at 804-05.
23. 509 U.S. 502 (1993).
24. *See id.* at 514-15.
25. *See* Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).
26. *See Hicks*, 509 U.S. at 506.

was in fact discriminated against, since the plaintiff always retains the ultimate burden of persuasion.[27] The Court rejected the position that a showing of pretext warrants a per se finding of discriminatory intent.[28] It found this an untenable position because the ultimate question to be answered in all disparate treatment cases is whether it is more likely than not that the defendant intentionally discriminated against the plaintiff in an employment decision, not whether the proof system laid out in Supreme Court decisions has been followed to the letter.[29] These burdens and methods of proof are used only when there is no direct evidence.[30]

A similar problem arises if the employer, although clearly acting out of a discriminatory motive, has one or more legitimate business reasons for the employment decision at the time of that decision. In *Price Waterhouse v. Hopkins*,[31] the Supreme Court held that once a plaintiff proves that some protected characteristic played "a motivating part" in an employment decision, the burden of persuasion then shifts to the employer to prove, by a preponderance of the evidence, that "it would have made the same decision even if it had not taken the plaintiff's [protected characteristic] into account."[32] With the Civil Rights Act of 1991, this rule has been changed and liability will be found as long as the plaintiff can prove that the protected characteristic at issue was "a motivating factor for any employment practice."[33] The employer can avoid certain remedies, such as reinstatement and back pay, by a showing that it would have taken the same action in the absence of the improper motive.[34] The Civil Rights Act of 1991 did not take the award of attorney's fees away from plaintiffs.[35] This decision prevented the creation of a huge disincentive to bringing suit. Thus, the *Price Waterhouse* rule is no longer applicable in the liability stage of the trial, but it becomes applicable in the remedy stage.

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27. *See id.* at 514-15.

28. *See id.* at 515-16. The dissent in *Hicks* found that proving pretext also proves discriminatory intent, and therefore under *Burdine*, a plaintiff should not have to prove both. *See id.* at 534-35 (Souter, J., dissenting).

29. *See id.* at 510-11; *see also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (finding that a district court should not decide the issue of discriminatory intent any differently than it decides any other issue of fact since the issue always is whether it is more likely than not that the employer discriminated against the employee).

30. *See Aikens*, 460 U.S. at 715 (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

31. 490 U.S. 228 (1989).

32. *Id.* at 258.

33. 42 U.S.C. § 2000e-2(m) (1994).

34. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

35. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i).

The distinction between mixed motive and after-acquired evidence analysis is important to understand. Mixed motive analysis applies when, at the time of the firing, there is direct evidence of discriminatory intent along with contemporaneous evidence of a nondiscriminatory reason for the decision.[36] After-acquired evidence analysis applies where the only motive present at the time of the employment decision was unlawful under the ADEA or Title VII, whether proven by direct evidence or inferred through *McDonnell Douglas* and its progeny.[37] The employer does not discover the legitimate grounds for firing the employee until after the employee was fired for the allegedly discriminatory reason. This distinction is important because the mixed motive analysis was affected by the Civil Rights Act of 1991, and courts have held that this change does not apply to cases in which after-acquired evidence is present.[38]

B. The After-Acquired Evidence Doctrine

1. The Pre-*McKennon* Majority Rule: *Summers* and its Progeny

The after-acquired evidence doctrine operates when an employer discovers other justifications for discharge, having already fired an employee for an allegedly discriminatory reason.[39] The after-acquired evidence must be such that the employer would have fired the employee had the employer known of the evidence at the time of the discharge.[40] The seminal case in defining this doctrine and its role in employment discrimination litigation was *Summers v. State Farm Mutual Automobile Ins. Co.*[41] The *Summers* court, however, took much of its analysis from an older Fourth Circuit

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36. *See Price Waterhouse*, 490 U.S. at 260 (White, J., concurring).

37. *See* Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160, 1166-68 (6th Cir. 1996) (determining the after-acquired evidence defense is not properly utilized until after reaching the threshold issue of whether an employer intentionally discriminated against its employee).

38. *See McKennon*, 115 S. Ct. at 885; *see also* Tory E. Griffen, Note, *McKennon v. Nashville Banner Publishing Co.: The Future Role of After-Acquired Evidence in Employment Discrimination Litigation*, 74 OR. L. REV. 781, 786-802 (1995) (stating that the Civil Rights Act of 1991 does not work to limit remedies in after-acquired evidence cases because the Supreme Court expressly stated that the mixed motive analysis the 1991 Act modified is analytically distinct from after-acquired evidence analysis).

39. The doctrine has been utilized in a number of contexts, but the most prevalent are resume or employment application fraud, document theft, and undiscovered poor job performance. *See infra* notes 124-37, and accompanying text.

40. *See, e.g.*, Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 90-97 (1995); Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 191-93 (1993).

41. 864 F.2d 700 (10th Cir. 1988).

case, *Smallwood v. United Airlines, Inc.*[42] After the decision in *Summers*, the doctrine gained approval in a majority of the circuits that considered the issue.[43]

The *Summers* rule itself is very simply and easily stated. What is difficult to understand is the rationale that the *Summers* court and the other circuits have used to justify it, especially in light of what the Supreme Court has said on the subject.[44] The rule simply states that after-acquired evidence may preclude a court from granting any relief to the plaintiff.[45] The substantive issue of whether the defendant intentionally discriminated is never reached if the defendant is able to show that the employee would have been discharged regardless of the discriminatory motive, had the misconduct been known at the time of the discharge.[46] The elements of the *Summers* rule, as applied by later courts, are: "(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."[47] There is no requirement that the employee's conduct was "serious or pervasive," but only that it could have justified a legal discharge or refusal to hire.[48]

The facts of *Summers* illustrate exactly how the rule operated before the Supreme Court overruled it. State Farm discharged Summers, a claims representative, because of a continuation of suspicious claims and poor work attitude after he had been placed on probation.[49] Summers claimed, however, that State Farm fired him because of his age and religion.[50] During pretrial discovery, State

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42. 728 F.2d 614 (4th Cir. 1984).

43. *See, e.g.*, Welch v. Liberty Machine Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994) (citing the *Summers* rationale in deciding to award summary judgment to an employer in a wrongful discharge action alleging discrimination on the basis of disability); O'Driscoll v. Hercules Inc., 12 F.3d 176, 180-81 (10th Cir. 1994) (awarding summary judgment for the employer on the grounds that under *Summers*, the employee's actions would have justified termination), *vacated, remanded*, 115 S. Ct. 1086 (1995); McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), *rev'd* 115 S. Ct. 879 (1995); Washington v. Lake County, Ill., 969 F.2d 250, 253 (7th Cir. 1992) (applying the *Summers* rationale to a mixed-motive employment discrimination case); Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409, 415 (6th Cir. 1992) (applying the *Summers* rationale in awarding summary judgment in favor of an employer in a civil rights action).

44. See *infra* Part II.B.2.

45. *See Summers*, 864 F.2d at 708.

46. *See id.*

47. *O'Driscoll*, 12 F.3d at 179; *see also Johnson*, 955 F.2d at 414 (requiring employer to show that the after-acquired evidence provides valid and legitimate grounds for discharge).

48. *O'Driscoll*, 12 F.3d at 179.

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

50. *See id.* at 702 (noting that Summers was a fifty-six year old member of the Mor-

Farm learned of over 150 instances of falsification of records by Summers.[51] They were granted summary judgment based on this after-acquired evidence.[52]

In affirming the summary judgment ruling of the district court, the Tenth Circuit made two basic assumptions concerning this type of case. First, the court gave very little weight to the reasons that State Farm gave for their discharge of Summers at the time of the firing. The court only considered the evidence of the new misconduct that was revealed during pretrial discovery. The court found that the newly discovered legitimate reason for the discharge rendered the alleged discriminatory reason irrelevant.[53] Second, the court assumed that State Farm was at least partially motivated, at the time of the discharge, by Summers' age and religion.[54] However, the court found the presence of a discriminatory motive to be irrelevant. They relied on the *Mt. Healthy* line of mixed motive cases, which hold that an employer can be partially motivated by an illegal purpose and not be liable for a wrongful discharge if the employee would have been fired for the legal reason alone.[55]

Thus, the *Summers* court concluded that the serious misconduct that State Farm discovered during discovery predated the firing of Summers for a discriminatory reason, and that State Farm would have fired Summers at the earlier date had it known of the misconduct at the time.[56] Summers could not receive any relief because while the after-acquired evidence is not relevant to the cause of his discharge, it is relevant to his ability to receive damages, since he should have been fired anyway.[57] According to

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mon Church).

51. *See id.* at 703.

52. *See id.*

53. *See id.* at 704.

54. *See Summers*, 864 F.2d at 708.

55. *See id.* at 705; *see also* Mt. Healthy City School Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977) (discussing the importance of motivation); Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (concluding that an employer can prove by a preponderance of the evidence that the employer would have made the same employment decision even without considering the employee's protected characteristic). The *Summers* court reasoned that the discriminatory motive is irrelevant because the employee could have been fired at the same time for the legitimate reason, even though that reason was discovered later. *See Summers*, 864 F.2d at 708; *see also* Smallwood v. United Airlines, Inc., 728 F.2d 614, 623 (4th Cir 1984) (stating that in "after-the-fact" cases such as this, the newly acquired evidence is to be treated with the same weight as any other evidence, and if believed leads to a dismissal of the case under *Mt. Healthy*). The *Price Waterhouse* line of cases was overruled by Congress with the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(m) (1994) (stating that in order for a plaintiff to recover in a mixed motive case, the plaintiff need only prove that a characteristic such as race or sex was "a motivating factor for any employment practice"). For a further explanation of this point, see *supra* notes 32-35 and accompanying text.

56. *See Summers*, 864 F.2d at 708.

57. *See id.* at 704. The *Summers* court justified this by stating that "[t]o argue . . .

the *Summers* court, no damages should be granted at all, not even back pay from the date of discharge, because, based on the after-acquired evidence, the plaintiff had no legal right to the job in the first place.[58] This rationale fails for many reasons, and it led the Supreme Court to overturn the *Summers* rule in *McKennon*.[59]

2. *Summers* Questioned: The Transition From *Summers* to *McKennon v. Nashville Banner Publishing Co.*

In 1994, the Supreme Court finally granted certiorari to an after-acquired evidence doctrine case in order to settle the split among the circuits.[60] A majority of the circuits had followed *Summers* in allowing after-acquired evidence to act as a complete defense to discriminatory practices by an employer.[61] A growing minority of the circuits, however, was beginning to see flaws in this reasoning. This minority began to hold that after-acquired evidence could not be used as an affirmative defense in an employment discrimination suit, but could be used in the damages phase of the litigation to eliminate certain remedies such as front pay and reinstatement.[62] *Mardell v. Harleysville Life Ins. Co.*[63] provides the best example of the pre-*McKennon* line of cases. The *Mardell* court held that after-acquired evidence was irrelevant at the liability stage of the litigation because the employer did not know of the employee's misconduct when the employee was fired.[64] Thus, the employer could only have had a discriminatory motive, and the plaintiff was entitled to recovery if the prima facie case of disparate treatment was established.[65] This reasoning sets after-acquired evidence cases apart from mixed motive cases, where an employer possesses a discriminatory motive and a non-discriminatory, legitimate reason for firing the employee at the time of discharge.[66] The court stressed the traumatic and dehumanizing effect

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that this after-acquired evidence should be ignored is utterly unrealistic." *Id.* at 708.

58. *See id.* at 708; *see also Smallwood*, 728 F.2d at 626 (finding an award of back pay untenable because the plaintiff should not have been hired in the first place).

59. *See infra* Part I.B.3.

60. McKennon v. Nashville Banner Publishing Co., 114 S. Ct. 2099 (1994).

61. *See supra* note 43 and accompanying text.

62. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1238 (3d Cir. 1994) (stating that after-acquired evidence is inadmissible at the liability stage but may be used in the remedies phase); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 370 (7th Cir. 1993) (noting that after-acquired evidence is not admissible in an employment discrimination suit but can be used in the damages phase); Wallace v. Dunn Construction Co., 968 F.2d 1174, 1181-82 (11th Cir. 1992) (observing that after-acquired evidence that employee lied on application is not a legitimate cause for terminating the employee).

63. 31 F.3d 1221.

64. *See id.*

65. *See id.* at 1228-30. *See supra* notes 31-38 and accompanying text for a comparison of how after-acquired evidence differs from mixed motive analysis.

66. *See Mardell*, 31 F.3d at 1229.

that discrimination causes its victim.[67] Whether an employee lacked a legal right to a job because of prior misconduct or misrepresentations later discovered does not change the nature of the employer's intentionally discriminatory conduct or its damaging effect on the employee victim.[68] The court illustrated this point by analogizing to tort law:

> Imagine . . . an employer which intentionally batters an employee who procured his or her position through fraud or who falsified company records. The *Summers* rationale would bar the employee's recovery in an appropriate action because the employee had no "right" to be where he or she was at the moment of his or her injury. Surely that result flies in the face of reason and the whole body of tort law.[69]

The *Mardell* court concluded that this question does not depend on whether an employee has a right to a job, but instead depends on whether an employer violated federal law.[70]

This court also found the *Summers* rule to have completely ignored the harm to society that is done by an employer who intentionally discriminates. This country has a "forceful public policy vilifying discrimination," and while "the employee's misconduct or fraud is a possible wrong against the employer . . . the employer's discrimination is a wrong against the employee *and* society at large."[71] The balance must be struck for the latter over the former. This is linked to a key point that the *McKennon* Court recognizes—a refusal to grant liability undermines both the deterrent and compensatory policies of the anti-discrimination statutes.[72] The deterrent policy is accomplished by placing an economic value on the acts of the employer and by exposing that employer's wrongs to the general community.[73] The compensatory policy is accomplished by placing the employee in a position no worse off than he or she would have been had the discrimination never taken

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67. *See id.* at 1231-33.

68. *See id.*

69. *Id.* at 1231.

70. *See id.* at 1233.

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

72. *See id.* at 1235-1238 (describing how the *Summers* rule undermines the key policies behind Title VII and the ADEA: deterrence of future acts of employment discrimination and compensation for those employees who had been harmed by the discriminatory actions of their employers).

73. *See id.* at 1235. This policy is needed to encourage other employers to take steps to educate themselves and their employees about the civil rights of their employees. *See id.*

place.[74] According to the *Mardell* court, the best way to accomplish these policies, taking the after-acquired evidence into account, is by denying the plaintiff any front pay or reinstatement, and allowing recovery of back pay only to the date at which the employer discovered the after-acquired evidence.[75]

Thus, when the Supreme Court granted certiorari in the *McKennon* case, it was faced with a clear conflict. Should an employee be denied relief for discrimination because that employee should not have been hired in the first place, per *Summers*? Or, should the Congressional mandate against discrimination in employment be upheld by allowing after-acquired evidence to only operate as a bar to remedies that depend on an employee's continued right to employment, such as front pay and reinstatement, per *Mardell*? This conflict necessitated a balancing of the right of employees to be free from discriminatory conduct by their employers with the right of an employer to run its business and have freedom in its personnel decisions. The balance struck by the court in *McKennon* resulted in the elimination of the *Summers* rule and the weakening of the after-acquired evidence doctrine.

3. *Summers* Overturned: *McKennon v. Nashville Banner Publishing Co.*

Christine McKennon had worked for the Nashville Banner for thirty years.[76] At the time of her discharge she was sixty-two years old, and had heard rumors that the company was going to begin to discharge some of its older workers.[77] In anticipation of being fired, McKennon began to copy confidential Banner files, for both "insurance" and "protection" should she be fired.[78] When the Banner fired her, she sued the company under the ADEA.[79] During discovery disclosures,[80] the Banner learned of the files that McKennon had pilfered and immediately notified her that these acts were violative of her employment responsibilities.[81] The Ban-

74. *See id.* at 1237.

75. *See id.* at 1239-40. This remedy balances the interest of the employee in being compensated for the harm that the employer caused and the interests of the employer in not ignoring the after-acquired evidence and maintaining some level of managerial discretion and control in hiring and firing decisions. *See id.*; *see also* Kristufek v. Hussmann Food Service Co., 985 F.2d 364, 369-70 (7th Cir. 1993) (granting remedy of back pay to employee in after-acquired evidence case, but doing so by distinguishing *Summers* on the fact that the employer in that case had knowledge of the employee's misconduct before he was fired, and in this case the employer possessed no such knowledge).

76. *See McKennon*, 115 S. Ct. at 882.

77. *See id.* at 883.

78. *See id.*

79. *See id.*

80. It should be emphasized that the Banner learned of McKennon's misconduct during *discovery disclosures*, and not through its own effort. *See id.*

81. It should be noted that McKennon's acts were probably also a breach of the im-

ner also notified her that it would have fired her at the time if it had known that she had been copying files.[82]

The district court granted the Banner's motion for summary judgment based on this after-acquired evidence, holding that McKennon's misconduct constituted legal grounds for her termination.[83] The Sixth Circuit unanimously affirmed.[84] Thus, the issue before the Supreme Court was "whether all relief must be denied when an employee has been discharged in violation of the ADEA and the employer later discovers some wrongful conduct that would have led to discharge if it had been discovered earlier."[85] The Supreme Court answered with a unanimous no, holding that after-acquired evidence cannot act as a per se bar to liability in an ADEA suit.[86]

The Court began its analysis by looking at the overall scheme of the employment discrimination statutes. The purpose of these statutes is the elimination of all discrimination in the workplace, whether it is based on race, color, sex, religion, national origin, or age.[87] The Court noted that this eradication of workplace discrimination is accomplished through both the compensation of victims of discriminatory acts and the deterrence of future discriminatory acts.[88] "It would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act."[89] The denial of relief in any employment discrimination case where the discrimination actually occurred frustrates the objectives of the statutory scheme against employment discrimina-

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plied duty of loyalty that every employee owes to her employer. *Cf.* NLRB v. Local 1229, IBEW, 346 U.S. 464, 472 (1953) (emphasizing the common "contractual relation between employer and employee that is born of loyalty to their common enterprise").

82. *See id.*

83. *See* McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 608 (M.D. Tenn. 1992).

84. *See McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir. 1993) (following *Summers*).

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

86. *See id.* at 886 (stating that an absolute rule barring recovery would undermine the ADEA's objective).

87. *See id.* at 884.

88. *See id.*; *see also* Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976) (noting that federal courts have discretion to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief the court deems appropriate"); Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (observing that the method of deterrence used here was ordering petitioners to implement a system of "plantwide" seniority); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) (indicating that cooperation and voluntary compliance were selected as the preferred means of meeting the goal of eliminating those practices and devices which discriminate on the basis of race, color, religion, sex, or national origin).

89. *See McKennon*, 115 S. Ct. at 884.

tion. Thus, the per se rule of *Summers* had to be overturned to avoid frustrating the policies of these statutes.[90]

The remaining question that the Court addressed was the role that after-acquired evidence would play if it was no longer a complete defense for an employer. The Court ruled that it should only come into play as a mitigating factor at the remedial stage of the litigation.[91] Equitable remedies such as reinstatement to the employee's old position, which is one remedy available under the employment discrimination statutes, should not be available.[92] Equity requires that a party must come into court with clean hands.[93] A plaintiff who could have been fired had the employer discovered the proper grounds in a timely manner probably does not have clean hands.[94] Furthermore, the Court also had to consider the legitimate interests of the employer under the ADEA to handle non-discriminatory decisions of hiring and firing free from government interference.[95]

Thus, in balancing the deterrent and compensatory policies of the statutes, the Court concluded that the proper remedy to be afforded to a plaintiff in this scenario is back pay calculated from the date of the discharge to the date that the employer discovered the after-acquired evidence.[96] It is unfair to expect an employer to ignore evidence of a legal grounds for discharge once discovered.[97] Therefore, "[w]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee . . . would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."[98]

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90. *See id.* at 884-85 (stating that the decision in *Summers* is inapplicable in the present case because unlike *Summers*, which was a mixed motives case, the sole basis for firing McKennon was an unlawful motive).

91. *See id.* at 886.

92. *See id.* (concluding that reinstatement would be "inequitable and pointless" because the employer would have and will terminate the employee in any event).

93. The doctrine of unclean hands states that "a court of equity may deny relief to a party whose conduct has been inequitable, unfair, and deceitful, but . . . only when the reprehensible conduct complained of pertains to the controversy at issue." BLACK'S LAW DICTIONARY 1524 (6th ed. 1990); *see also McKennon*, 115 S. Ct. at 885 (stating a litigant's clean hands are a prerequisite for receiving equitable relief).

94. *See McKennon*, 115 S. Ct. at 886 (holding that the employee's wrongdoing must be taken into account when awarding damages).

95. *See id.*

96. *See id.*

97. *See id.* (declaring that this holds even if the evidence might not have been discovered absent the suit).

98. *Id.* at 886-87. Although the Court never explicitly stated which party would have the burden of proof in a case in which the defendant is using after-acquired evidence, it seems from the quoted language that the burden of proof would fall on the employer. *See id.*

C. *The 1993 Amendments to the Federal Discovery Rules*

In 1993, the Federal Rules of Civil Procedure were amended to include a provision for mandatory disclosure of witness names, documents, and a computation of damages at a very early stage in the litigation—prior to the start of formal discovery.[99] Mandatory means a party must make these disclosures within ten days of the Rule 26(f) discovery conference.[100] Thus, a party is not allowed to await a request for the material covered under this rule. This rule puts in place a series of disclosure requirements that must be followed by the litigants unless a court imposes other disclosure rules or rejects all such disclosure requirements.[101]

There are several reasons given for the adoption of this provision. By requiring parties to disclose the basic information that the opposing party needs to prepare for trial or make an informed decision about discovery without the receipt of any formal discovery request, both the discovery and trial processes are facilitated

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99. The amendments were incorporated into Rule 26(a), which states in part:

> (a) Required Disclosures; Methods to Discover Additional Matter.
> (1) Initial Disclosures. . . . [A] party shall, without awaiting a discovery request provide to other parties:
> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information *relevant to disputed facts alleged with particularity in the pleadings*, identifying the subjects of the information;
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party *that are relevant to disputed facts alleged with particularity in the pleadings*;
> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and
> . . . .
> . . . [T]hese disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

FED. R. CIV. P. 26(a)(1) (emphasis added).

100. Rule 26(f) reads as follows:

> [T]he parties shall, as soon as practicable . . . meet to discuss the nature and basis of their claims and defenses . . . to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan.

FED. R. CIV. P. 26(f).

101. *See* FED. R. CIV. P. 26(a) advisory committee notes.

and expedited.[102] Thus, the exchange of basic information between the parties becomes accelerated and unnecessary delay in the litigation process is eliminated.[103] The amendments accomplish these goals by making certain later modes of discovery unnecessary, since the information has already been provided. These goals are accomplished by focusing the remaining discovery, narrowing the issues and information for trial, facilitating trial preparation by placing key information in the hands of both sides early in the process, and opening the possibility for a quick settlement.[104] This rule was based on the experience of experimental rules of district courts, authorized under the Civil Justice Reform Act of 1990.[105]

The operation of Rule 26(a)(1) is fairly simple in theory, which is not to say that it is simple in practice.[106] The duty to disclose the names of people with discoverable information relevant to the dispute under Rule 26(a)(1)(A) applies whether the information will support or harm the disclosing party's case, and the disclosure must state the general topic about which that person possesses information.[107] None of this is meant to place an undue burden on the disclosing party.[108] Instead, Rule 26(a)(1)(B)'s directive to disclose documents relevant to the dispute is meant to act as a replacement for routine document requests that accompany most lawsuits under Rule 34. It also is meant to help parties decide what documents they want to compel the other party to turn over under Rule 34 and to avoid future disputes over document production.[109] Additionally, it is not necessary to give an itemized list of all documents and tangible items; only a description and categorization of the locations of potentially relevant documents is needed.[110]

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102. *See id.*

103. *See id.*; *see also* Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Time Again for Reform?*, 138 F.R.D. 155 (1991) (examining two competing efforts to reform the discovery process); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989) (finding discovery form has had no benefits on the adversarial process).

104. *See* FED. R. CIV. P. 26(a) advisory committee notes.

105. *See* Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 43 n.305 (1995).

106. For example, the question of what exactly is a "disputed fact alleged with particularity" has spawned satellite issues for litigation that either district court judges or magistrate judges now have to manage.

107. *See* FED. R. CIV. P. 26(a) advisory committee notes.

108. *See id.* (stating that disclosure should not be burdensome and will be helpful to other parties).

109. *See id.*

110. *See id.*

The most difficult issue in this area is interpreting the meaning of the phrase "relevant to disputed facts alleged with particularity in the pleadings"[111]. First, vague averments that satisfy typical notice pleading requirements will not compel a party to disclose any information under Rule 26(a).[112] Second, the greater the specificity and clarity of the averments in the pleadings, the more complete the disclosures under Rule 26(a) will be.[113] Third, disclosures are not limited to statements in the pleadings, but will be defined and narrowed by the discussions during the Rule 26(f) discovery conference.[114] Finally, this rule simply calls for the parties to act with common sense when making these disclosures, keeping in mind the policies and purposes that this rule is meant to serve.[115]

These new rules have not gone without their fair share of criticism, evidenced by the fact that around half of the judicial districts have opted out of them in one way or another.[116] They have also been publicly criticized, most notably by Justice Scalia.[117] First, he asserted that these new rules add a further layer of discovery by forcing litigants and district court judges to litigate exactly what items are relevant to disputed facts, whether those facts were alleged with particularity, and whether each party adequately made its initial disclosures.[118] Thus, while these rules are intended to save time and expense in the litigation process, they may actually have the exact opposite effect by adding this new layer of discovery to all civil cases. Second, Justice Scalia argued that these rules are inconsistent with the notion of our adversarial civil justice system.[119] The new rules obligate attorneys to turn over to the opposing side information that is damaging to their own case. In addition, these disclosure mechanisms place too great of a strain on the ethical duty of an attorney to represent the client's interests.[120] These arguments become exceptionally relevant to the discussion of the operation of the after-acquired evidence doctrine under this new regime of mandatory

111. FED. R. CIV. P. 26(a)(1)(A).
112. *See* FED. R. CIV. P. 26(a) advisory committee notes.
113. *See id.*
114. *See id.*
115. *See id.*
116. Although 49 out of the 94 federal judicial districts have opted out of the initial disclosure requirements of Rule 26(a), 20 of the opt-out districts have adopted local rules to cover mandatory disclosures. *See Implementation of Rule 26's Disclosure Requirements*, 10 NO. 4 FED. LITIGATOR 115 (June 1995).
117. *See* Amendments to Federal Rules of Civil Procedure, 507 U.S. 1089, 1096 (1993) (Scalia, J., dissenting).
118. *See id.* at 1099.
119. *See id.* at 1100.
120. *See id.*

disclosures.[121] It is exactly the result that Justice Scalia predicted that helped to undermine the *Summers* rule and caused the eventual eradication of this rule by the Supreme Court in *McKennon*.

II. THE CONFLICT BETWEEN RULE 26, THE *SUMMERS* RULE, AND THE POLICIES BEHIND THE ANTI-DISCRIMINATION STATUTES: HOW THE STATUTES ARE CIRCUMVENTED THROUGH MANDATORY DISCLOSURES OF AFTER-ACQUIRED EVIDENCE

A. Preliminary Steps That an Employer Must Take to Assure That After-Acquired Evidence is Available for a Summary Judgment Motion

The basic goal of any employer who becomes a defendant in an employment discrimination suit is summary judgment.[122] Since the after-acquired evidence doctrine was one weapon that an employer had within its arsenal in which to gain summary judgment, it becomes crucial to look at exactly what an employer had to do, pre-*McKennon*, to increase the likelihood that summary judgment would be granted based on after-acquired evidence. Once the employer's strategy is clarified, it is easier to see exactly how Rule 26(a) fits into this strategy.

The biggest impact that the *Summers* rule had in the employment setting occurred in the formulation of personnel policies.[123] Commentators have suggested various pre-employment procedures for an employer to follow to maximize the effectiveness of the after-acquired evidence doctrine. For example, an employer should state clearly on the employment application itself, or within a personnel policy manual, that resume fraud or application misrepresentations will result in suspension, investigation, and possible discharge.[124] Under the *Summers* rule, this statement will clearly aid an employer in showing that a discharge would have resulted at that time had the deception been known.[125] Furthermore, the

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121. *See infra* Parts II-III.

122. *See* Ellen M. Martin, *Dispositive Motions in Federal Employment Discrimination Cases*, C780 ALI-ABA 859, 863 (1993).

123. *See* James A. Burnstein & Steven L. Hamann, *Better Late Than Never—After-Acquired Evidence in Employment Discrimination Cases*, 19 EMPLOYEE REL. L.J., 193, 202-03 (1993) (discussing how the after-acquired evidence doctrine should affect personnel policies); George D. Mesritz, *"After-Acquired" Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims*, 18 EMPLOYEE REL. L.J., 215, 216 (1992) (stating that the "ability to use 'after-acquired' evidence as a defense . . . depends on whether the employer laid the necessary groundwork by eliciting detailed information before the employee was hired").

124. Burnstein & Hamann, *supra* note 123, at 202-03.

125. *Id.* An example of a well written disclaimer on an employment application is, "I understand . . . that the submission of any false information in connection with my appli-

questions on employment applications should be narrowed so that the background information elicited can easily be double-checked for its veracity.[126] These narrowly tailored questions allow an employer to complete a thorough background check of an employee to screen out persons who have misrepresented themselves.[127]

It is insufficient for an employer to have the above-mentioned application and background procedures if the employer omits others. First, the employer must make sure that its rules concerning resume fraud and application misrepresentation are uniformly followed throughout the company.[128] A failure to do so will bolster an employee's subsequent discrimination claim by providing additional evidence of disparate treatment.[129] Second, an employer should not wait to fire an employee once it learns or knows of some legitimate grounds for termination.[130] A failure to do so in a timely manner will make it hard for an employer to assert that it learned of legitimate grounds only after a discharge for a discriminatory purpose.[131] Waiting to fire the employee suggests the employer has a pretextual reason for firing the employee.

Of course, all of these policies refer to situations that serve to minimize any need for after-acquired evidence in the first place. If the policies function properly, employees with improper credentials or shady backgrounds will not be hired in the first place. These policies also create a paper trail that the employer can use after an employee sues for discharge due to an allegedly discriminatory purpose. This should be done prior to any discovery, so that the employer's attorney knows exactly what is to be sought in the discovery conference.[132] At this point, the detailed applications,

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cation for employment, whether or not on this document or not, may be cause for immediate discharge at any time thereafter . . . ." Mesritz, *supra* note 123, at 216 (quoting the employer's policy from Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409 (6th Cir. 1992)).

126. *See* Mesritz, *supra* note 123, at 222-23. These questions should contain specific references to degrees obtained, dates, addresses, and phone numbers of all schools attended, jobs held, levels of experience at prior jobs, and specific reference to felony convictions. *See id.*

127. Some studies have found that up to 30% of job applicants have either inflated their credentials or hidden embarrassing facts about their past. *See* David G. Savage, *Digging Up Dirt on Fired Worker Won't Kill Bias Suit*, L. A. TIMES, Jan. 24, 1995, at A11; *see also* Joan E. Rigdon, *Deceptive Resumes Can be Door Openers but Can Become an Employee's Undoing*, WALL ST. J., June 17, 1992, at B1 (stating that around one-third of all resumes include misrepresentations).

128. *See* Burnstein & Hamann, *supra* note 123, at 202-03.

129. *See id.*

130. *See id.*

131. *See id.*

132. *See* Lype, *supra* note 5, at 582 (implying the need for quick action after a termination in order to assure that after-acquired evidence issues are properly framed for discovery).

resume, any notes from pre-employment interviews, etc., should be scrutinized for any errors that the employer did not discover.[133] In addition, the use of credit agencies and private investigators has also been suggested as a means of gathering information that the employee omitted or misrepresented on his application or resume.[134]

The discovery of on-the-job employee misconduct through post-termination investigations also plays a pivotal role in this context and can assist an attorney in framing the issue before the discovery conference. Examples include immediate internal audits of expense reports, time records, and expense records, going through an employee's personnel file with a fine-toothed comb, and the questioning of supervisors and co-workers.[135] The employer hopes that some on-the-job misconduct will be discovered so that he can claim that he had a legal rationale under which to fire the employee, even though the employer was unaware of this fact at the time.[136]

The interplay between the employer's goal of minimizing personnel mistakes, the above-mentioned techniques that should be utilized to achieve that goal, the *Summers* rule, and the undermining of the policies behind the employment discrimination statutes that occur through mandatory disclosures is best understood in light of the role that discovery plays in employment discrimination cases. All of these factors further the policies that Rule 26(a) was amended to reflect—the exchange of basic information in the preparation for discovery and trials and the elimination of unnecessary delays in the litigation process.[137] Obviously, information that tends to show the existence of after-acquired evidence is basic information that an employer-defendant needs for trial preparation. If this information leads to summary judgment, the litigation process will then be significantly accelerated. Under *McKennon*, the presentation will not result in summary judgment for the employer, but instead a verdict for the employee and the resulting mitigation of the employer's damages.

By forcing the discovery of certain information earlier in the discovery process, an employer is able to obtain information from the employee before an employee has an opportunity to react to

133. *See id.*

134. *See id.* at 583. This information might include prior convictions, terminations for cause from other employment, and other "damning" information that a prospective employee may, for very good reason at the time, desire to conceal from a prospective employer. See *id.*

135. *See id.* at 583.

136. *See id.*

137. *See supra* notes 102-05 and accompanying text.

the employer's defense.[138] This hastened process allows an employer to learn very early in the litigation process whether there is any substance behind after-acquired evidence defense. Rule 26(a) speeds up this process by requiring the plaintiff to disclose at least the location of certain information at his disposal.[139] But automatic disclosures will require employers to lay out the elements of their affirmative defense, so an employer cannot surprise an employee with the after-acquired evidence defense at trial.[140] Thus, if an employee is aware of the probability of an employer using this defense, the employee's attorney could coach him how to craft the answers to later depositions and interrogatories to defeat summary judgment.[141]

The argument that mandatory disclosures will ultimately hurt an employer fails for several reasons. The duty to disclose works both ways. The defendant's attorney will have information obtained from the plaintiff at his disposal when the further discovery requests are being crafted, and no attorney can coach a witness to lie in response to certain questions. In other words, the rules are meant to help ascertain the truth, and the truth will, in theory, come out. Thus, the element of surprise is not necessary, especially when the after-acquired evidence so clearly favors the employer.

Parallel arguments to those above can be made for the early disclosure of documents.[142] These disclosures are important because many pieces of evidence on which an employer will base his motion for summary judgment will be documents and records. Although this rule requires only disclosure of the location of documents, this will cause little problem for the employer because at least he will be aware of their existence. Examples of the use of documents in after-acquired evidence cases include school records and transcripts to show that an employee lied on either his resume or job application,[143] criminal records to show that an employee

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138. *See* Martin, *supra* note 122, at 875 (stating that by taking a deposition an employer is allowed to resolve plaintiff's inconsistencies at an early stage in the litigation).

139. *See* FED. R. CIV. P. 26(a)(1) (providing that information be disclosed without waiting for a discovery request and even if the party has not completed its investigation or the other party has not made its disclosures).

140. *See* Christopher R. Hedican & Timothy D. Loudon, *The 1993 Amendments to the Federal Rules of Civil Procedure: Their Anticipated Impact on Employment Litigation*, 28 CREIGHTON L. REV. 997, 1011-12 (1995).

141. *See id.*

142. *See* FED. R. CIV. P. 26(a)(1)(B) (requiring "a copy of, or a description by category and location of all documents").

143. *See* Wehr v. Ryan's Family Steak Houses, Inc., 49 F.3d 1150, 1152 (6th Cir. 1995) (noting that employee lied about his employment background and medical history on his resume); Cram v. Lamson & Sessions Co., 49 F.3d 466, 470 (8th Cir. 1995) (noting that employee had falsified her educational qualifications on her job application); Welch v. Liberty Machine Works, Inc., 23 F.3d 1403, 1404 (8th Cir. 1994) (using

lied about past felonies or other convictions,[144] and documents belonging to an employer that the employee either copied or stole.[145] All of these fact patterns are highly relevant because they are all examples of situations where summary judgment was granted under the *Summers* rule to foreclose any remedy to a discriminated-against employee.[146]

These same arguments repeat themselves in the context of the Rule 26(f) discovery conference. Assuming that the employer followed the above procedures so that he has a good faith belief in the availability of the after-acquired evidence defense,[147] the employer will be able to insist, at the discovery conference, upon the disclosure of anything that might indicate the existence of legitimate grounds for dismissal.[148] This insistence includes any information in the plaintiff's past that would have disqualified him for the job in the first place, or plaintiff's performance problems on the job, such that the employer would have had a legal ground on which to fire that employee because of those performance problems.[149]

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employee's failure to disclose a dismissal from a previous place of employment as a basis for granting summary judgment); O'Driscoll v. Hercules, Inc., 12 F.3d 176, 177-78 (10th Cir. 1994) (citing employee's falsifications on employment application, security clearance form, and health insurance application); Kristufek v. Hussman Foodservice Co., 985 F.2d 364, 366 (7th Cir. 1993) (stating that plaintiff lied about educational qualifications on the job application); Washington v. Lake County, Ill., 969 F.2d 250, 252 (7th Cir. 1992) (using personnel records to prove past violations of employer's policy); Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409, 412 (6th Cir. 1991) (citing employee's falsification on her employment application regarding her educational background); Summers v. State Farm Mutual Automobile Ins. Co., 864 F.2d 700, 701 (10th Cir. 1988) (involving employee's falsification of business records); Quillen v. American Tobacco Co., 874 F. Supp. 1285, 1291 (M.D. Ala. 1995) (noting that plaintiff lied on her employment application by misrepresenting her reasons for leaving two previous positions). The majority of after-acquired evidence cases arise in the context of resume or application fraud.

144. *See* Wallace v. Dunn Construction Co., 968 F.2d 1174, 1176-77 (11th Cir. 1992) (noting that employee lied on employment application regarding narcotics conviction); Camp v. Jeffer, Mangels, Butler & Marmaro, 35 Cal. App. 4th 620, 626-28 (Cal. Ct. App. 1995) (observing that the employees had secured employment through misrepresentations on their resumes, specifically that they lied about a prior felony conviction).

145. *See, e.g.*, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 883 (1995) (involving confidential documents regarding the company's financial condition).

146. Keep in mind that *McKennon* reversed these results. Remedies in general are not foreclosed to the plaintiff, only certain remedies that would be inequitable under the circumstances. *See id.* at 886 (holding that remedies are available but that neither reinstatement nor front pay are equitable).

147. *See supra* Part II.A.

148. *See* Martin, *supra* note 122, at 877-78.

149. *See id.* (addressing the information which an employer would seek at the plaintiff's deposition).

B. *How Rule 26(a) Helped an Employer Achieve the Goal of Summary Judgment under the* Summers *Rule*

With this foundation laid, it is appropriate to ask exactly how Rule 26(a)(1) assisted an employer in attaining summary judgment under the *Summers* rule. First, one must look at what "with particularity" in Rules 26(a)(1)(A) and (B) means and how it has been interpreted.

The disclosure requirement is triggered by the allegation of specific events within the pleading.[150] These events are most easily defined by what does not trigger the disclosure requirement. The broad and conclusory notice-pleading requirements of the Federal Rules of Civil Procedure[151] will not trigger this duty of mandatory disclosure.[152] A tremendous incentive is created for an employer to answer the employee's discrimination complaint with specificity and clarity, because the greater the specificity and clarity of the allegations in the answer concerning after-acquired evidence, the more complete the list of potential witnesses and relevant documents the plaintiff will be required to disclose to the employer.[153]

It is with these allegations where all of the employer's incentives in hiring and employment procedures become important. For example, once an employer fires an employee and the employee files a discrimination suit, if the employer then begins an exhaustive search of records, files, employee interviews, contacts the discharged employee's former schools and jobs, and performs other background checks, the employer should have enough information at his disposal to allege a defense of after-acquired evidence with enough particularity to satisfy the prerequisites for disclosure under Rule 26(a)(1). These procedures will enable an employer to gain mandatory disclosures of any previously unknown legal grounds for the discharge of the employee. This point can best be illustrated through some of the recent cases in which Rule 26(a)(1) has been interpreted and applied. It has been held that there is no primacy, or hierarchy of rules, within the Federal Rules themselves.[154] The mechanics and policies of Rule 26(a)(1) are to operate in conjunction with the other rules. They do not take precedence over any

150. *See* CHARLES A. WRIGHT & RICHARD L. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2053 (1994) (discussing mandatory initial disclosures).

151. *See* FED. R. CIV. P. 8(a) (requiring that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief").

152. *See* WRIGHT & MILLER, *supra* note 150, § 2053.

153. *See id.*

154. *See* In re Lotus Dev. Corp. Sec. Litig., 875 F. Supp. 48, 51-52 (D. Mass. 1995) (holding that Rules 26(a)(1) and 9(b) must be reconciled with each other in ruling on a motion to dismiss; neither one on its own is dispositive in a judge's decision of whether to stay disclosures until after a motion to dismiss has been ruled upon).

other rule, nor does any other rule neutralize them. The resolution of any conflicting issues is to be worked out in the pre-disclosure conference under Rule 26(f):[155]

> The pre-disclosure, pre-discovery conference mandated by amended Rule 26(f), followed by the Rule 16[[156]] conference with a judge, leading to an order that would govern disclosure and future discovery . . . will help identify and clarify issues, thus cutting through . . . amorphous and uninformative allegations. In the ideal case, parties would immediately disclose all core information, manifestly pertinent to well-pled allegations; wrangle over the rest; and then—if necessary—file a motion for an order compelling disclosure or discovery pursuant to [Rule] 37.[157]

Thus, judges are to administer Rule 26(a) on a case-by-case basis. The more facts showing the possible existence of after-acquired evidence that an employer can present in the answer to the plaintiff's pleading and at the discovery conference, the stronger the application of Rule 26(a) will be. At least according to *In re Lotus Dev. Corp. Secs. Litig.*, all that is necessary to mandate disclosure are facts from which the inference of the existence of the defense can be drawn.[158] By maximizing pre-lawsuit investigatory tools, an employer should certainly be able to provide enough facts from which the inference of the after-acquired evidence defense can be drawn. This would then trigger the automatic duty of the plaintiff to disclose witnesses, documents, etc., to the employer.[159] Thus, a determination of what is "pleaded with particulari-

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155. *See supra* note 100.

156. Rule 16 provides, in relevant part:

> Rule 16. Pretrial Conferences; Scheduling; Management
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> . . . .
>
> (b) Scheduling and Planning. . . . [T]he . . . judge . . . shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties . . . by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
>
> . . . .
>
> (3) to complete discovery.
>
> The scheduling order may also include
>
> (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted . . . .

FED. R. CIV. P. 16(b).

157. *Lotus*, 875 F. Supp. at 51.

158. *See id.*

159. *See* Kelley v. Schwabauer, No. 95-1572-MLB, 1996 WL 447807, at *1 (D. Kan. July 12, 1996) (stating that "a discovery request is relevant unless it is clear that the information sought can have no possible bearing on the subject matter of the action," referring to a motion to compel disclosures under FED. R. CIV. P. 26(a)(1)(B)); *see also* FED. R. CIV. P. 26(a)(1)(A) advisory committee notes (providing that "[a]ll persons

ty," therefore triggering the duty to disclose, hinges on whether a fact is disputed. This dispute should be discussed and settled at the Rule 26(f) discovery conference.[160]

Under Rule 26(a), the existence of an employee handbook or policy manual becomes significant. If a company utilizes a device such as this to inform its employees about company policy and the disciplinary measures that will be taken for a breach of that company policy, an employee will know that an employer can plead after-acquired evidence because the employee knows, based on the manual, that he or she could have been fired had the employer discovered the prohibited conduct.[161] An employer should make this policy manual as extensive as possible to cover all contingencies.

There is one more measure within the Federal Rules that enabled an employer to utilize discovery to gain summary judgment based on after-acquired evidence under the *Summers* rule. This is the Rule 37 sanctions provisions that were installed to ensure that the duty to disclose was adhered to by the parties.[162] Rule 37(b) provides a laundry list of sanctions and penalties that a court may impose for a failure to comply with a granted motion to compel disclosure or a failure to obey a discovery order under Rule 27(f).[163] These sanctions include orders designating the facts that

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with . . . information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party").

160. *See* WRIGHT & MILLER, *supra* note 150, § 2053.

161. *See* Wallace v. Dunn Constr. Co., 62 F.3d 374, 380 (11th Cir. 1995) (describing the after-acquired evidence involved in the case as lying on employee's job application which was explicitly stated in the company's employee handbook as a violation of company policy for which an employee could be terminated).

162. Rule 37 provides, in relevant part:

> Rule 37 Failure to Make Disclosure or Cooperate in Discovery: Sanctions
>
> (a) Motion For Order Compelling Disclosure. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure . . . as follows:
>
> . . .
>
> (2) Motion.
>
> (A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.
>
> . . .
>
> (3) Evasive or Incomplete Disclosure, Answer, or Response. [A]n evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer or respond.

FED. R. CIV P. 37.

163. *See* FED. R. CIV. P. 37(b)(2).

were the subject of the discovery order established for the purposes of the litigation;[164] prohibiting the party who refused to disclose from opposing designated defenses;[165] striking out pleadings either in whole or in part, staying the proceedings until the duty to disclose is complied with, until the entering of a default judgment against the disobedient party, or until a dismissal of the action;[166] and prohibiting the disobedient party from using any of the non-disclosed information as evidence at trial.[167] All of these sanctions create a huge incentive to comply with the duty of automatic disclosure. Depending on the sanction imposed, a failure to comply can have a greater effect on the plaintiff's discrimination claim than the actual disclosure of the after-acquired evidence itself.

Furthermore, because the information that the employer is seeking goes to the heart of the employer's defense under the *Summers* rule, the failure of the employee to comply with the disclosure order also goes to the heart of the defendant's claim. Consequently, the sanctions sought, and probably imposed, will most likely be of a more severe order. Under the *Summers* rule, any of these sanctions would likely result in summary judgment being granted in favor of the employer.

Under the *Summers* rule, if the sanction sought under Rule 37(b)(2)(A) was to bar the plaintiff from contesting the factual validity of the evidence that shows that the plaintiff has failed to disclose the existence of after-acquired evidence, then the existence of the legitimate ground upon which the employer could have fired the employee would be established for the purpose of the trial. There would be no genuine issue of material fact on the issue of the after-acquired evidence.[168] If there was no genuine issue of material fact, summary judgment would be granted for the employer, the employee's discrimination suit would be dismissed, and the deterrent and compensatory policies of the employment discrimination statutes would be frustrated.[169]

This pattern is repeated throughout all of the Rule 37 sanctions for non-disclosure. Under Rule 37(b)(2)(B), if a plaintiff is not allowed to oppose the designated defense of after-acquired evidence because it is that defense to which the disclosures were germane, the employer would again be awarded a summary judgment. The argument for dismissal is obvious, although it should be noted that

164. *See* FED. R. CIV. P. 37(b)(2)(A).
165. *See* FED. R. CIV. P. 37(b)(2)(B).
166. *See* FED. R. CIV. P. 37(b)(2)(C).
167. *See* FED. R. CIV. P. 37(c)(1).
168. *See* FED. R. CIV. P. 56(c) (setting out the standard for summary judgment in federal courts).
169. *See* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 883-84 (1995).

while this severe sanction is only granted in the most extreme cases, this result is immaterial in our context because it is the same as if summary judgment were granted under either 37(b)(2)(A) or (B). All of the Rule 37 sanctions require that the failure to disclose is not harmless to the other party.[170]

Rule 26(a)(1) disclosures, the Rule 26(f) discovery conference, and Rule 37(b) sanctions for non-compliance with the duty to disclose place a very heavy burden on an employment discrimination plaintiff who has had problems in his or her past.[171] It could be argued that this defense of after-acquired evidence is pure guess-work, however, and that Rule 26(a)(1) does not allow fishing expeditions.[172] These disclosures do not, however, rely on clairvoyance, because if an employer followed the employment procedures set out above, the employer would have a good faith belief in the existence of after-acquired evidence. This is all that is required for pleading the defense, with particularity, and triggers the duty of the employee to disclose all after-acquired evidence. That duty is an exceptionally heavy burden for any employment discrimination plaintiff to carry, so heavy that it would be impossible for many plaintiffs to overcome.

This was one of the problems that faced the *McKennon* court. Its solution, however, fails to correct the problem for the employment discrimination plaintiff. Even with the alteration of the after-acquired evidence doctrine under *McKennon*, a plaintiff's remedies are still too limited to deter employers from future acts of discrimination and to compensate the plaintiff for the instant act of discrimination.

III. THE ELIMINATION OF THE AFTER-ACQUIRED EVIDENCE DOCTRINE

The basic reasons that the *McKennon* Court used to overturn the decision of the Sixth Circuit have been explored.[173] These reasons show why the Court decided to adopt the minority view of

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170. *See* FED. R. CIV. P. 37(c)(1); *see also* American Tel. and Tel. Co. v. Shared Communication Servs. of 1800-80 JFK Boulevard, Inc., No. CIV.A.93-CV-3492, 1995 WL 555868, at *3 (E.D. Pa. Sept. 14, 1995) (determining that the failure to disclose was not harmless, even though it was unclear whether all the documents were in the non-disclosing party's possession).

171. This heavy burden on employee-plaintiffs is exceptionally true in light of the fact that it has been estimated that close to one-third of employees have committed some kind of resume or application fraud. *See supra* note 127.

172. *See* Paradigm Sales, Inc. v. Weber Marking Sys., Inc., 151 F.R.D. 98, 99 (N.D. Ind. 1993) (articulating that a discovery "order cannot be construed to require a party to disclose information concerning unpleaded claims and defenses. . . . The court's order requires basic disclosures, not clairvoyance.").

173. *See supra* Part I.B.2.

the circuits, as espoused in *Mardell*, as opposed to the majority view of the circuits as espoused in *Summers*. At this point, these rationales will be reexamined in light of the impact of automatic disclosures in employment discrimination cases that hinge on after-acquired evidence. All of these rationales possess one facet that link them together—the use of after-acquired evidence frustrates the national policy against discrimination in employment, and the use of mandatory disclosures adds to this frustration.

A. Procedural Rules Cannot be Used to Frustrate Substantive Rules of Law

The Supreme Court ruled to prevent summary judgment from being granted in every case where an employer found previously unknown legal grounds for discharge taken with a discriminatory motive. To force a plaintiff to make automatic disclosures to the former employer would often end the employee's discrimination case.[174] This result allows the procedural rules to block a plaintiff's access to the substantive laws and should not be allowed.[175] If unlawful discrimination indeed took place, the plaintiff should at least be able to present its case and have it decided on its merits.[176] After all, everyone is entitled to his or her day in court.[177] In every employment discrimination case, the central issue is whether it is more likely than not that discrimination took place.[178] This determination cannot be made without a court hearing, and due process guarantees the right to be heard where "property is at stake in judicial proceedings."[179]

Given the strong federal mandate against discrimination in employment, one would think that the existence or nonexistence of

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174. It has been noted that the *Summers* rule would create a perverse windfall to the employer, because but for the alleged unlawful discrimination and the litigation that it created, the employer would not have discovered any after-acquired evidence. Thus, the employer, through discovery procedures, is being rewarded for being sued. *See* Wallace v. Dunn Construction Co., 968 F.2d 1171, 1182 (11th Cir. 1992). This is especially true in light of the aggressive tactics that employers are encouraged to take in discrimination suits. *See* John R. Webb, *Discovery in Employment Discrimination Cases: The Employer's Perspective*, PRAC. LITIGATOR, Nov. 1993, at 13 (advising litigators to take the most aggressive approach in discovery after being sued for discrimination, in order to dig up as much dirt on the employee as possible).

175. *Cf.* Hanna v. Plumer, 380 U.S. 460, 475 (1964) (Harlan, J., concurring) (concluding that a federal procedural rule should not be applied when its effect is to seriously frustrate a State's substantive laws).

176. *See* Siegert v. Gilley, 500 U.S. 226, 239 (1991) (Marshall, J., dissenting) (reasoning that parties are entitled to their "day in court" to ensure that they receive the full benefit of argument before the decision of "difficult and important legal issues").

177. *See id.*

178. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

179. Ownbey v. Morgan, 256 U.S. 94, 111 (1921).

discrimination should be reached on its substantive merits. In an after-acquired evidence case under the *Summers* rationale, the employer could admit that discrimination was present but avoid liability by asserting an affirmative defense. When the discovery procedures place that affirmative defense in the hands of the employer, both become tools that prevent the substantive issue of discrimination from being reached on its merits. Thus, the fundamental right to be heard,[180] and the strong federal mandate against discrimination in employment,[181] conflict with the procedural mandatory disclosure rules. The focus now shifts to a determination of which federal policy should take precedence over the other. The answer is clear. In balancing a constitutional right to due process under the Fifth Amendment[182] and the strong federal policy of prohibiting discrimination in employment with the procedural policy of expediting litigation under Rule 26(a), the balance must be struck in favor of the former.

By allowing the procedural rules to prevail, not only will the existence of discrimination never be adjudicated, but the plaintiff will never even make it into court and the policies behind the employment discrimination statutes will be frustrated. This result is especially troublesome where, in this type of case, the procedural rules literally dictate this result. The employment discrimination statutes are intended to deter the employer from future acts of discrimination, to deter all employers generally from committing workplace discrimination of any type, and to compensate those employees who are unfortunate to be victims of workplace discrimination.[183] The unstated assumption in many after-acquired evidence cases is that the employer did intentionally discriminate against an employee based on that employee's age, color, race, gender, religion, or national origin.[184] There is a strong inference that discrimination occurred, because when the employer fired the employee, the employer did not know of a legitimate and legal justification to fire that employee, and only learned of that justification after the employee sued his or her former employer.

It would be unfair to ignore the fact that any discrimination occurred simply because the procedural rules make the employer

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180. *See id.*

181. *See* 29 U.S.C. § 621(b) (1994) (declaring that it was the intent of Congress "to prohibit arbitrary age discrimination in employment").

182. *See* Lampf, Pleva, Lipkind, Prupis and Pettigrow v. Gilbertson, 501 U.S. 350, 371-72 (1991) (O'Connor, J., dissenting).

183. *See McKennon*, 115 S. Ct. at 884-85.

184. *See* Russell v. Microdyne Corp., 65 F.3d 1229, 1237 (4th Cir. 1995) (noting that when an employer uses after-acquired evidence, the problem of determining the employer's motivation at the time of discharge disappears, since the employer is, in effect, admitting that it was motivated by an unlawful intent).

aware of evidence of employee wrongdoing during pre-discovery disclosures—evidence that may not have been revealed at such an early time and in a manner so disadvantageous to the employee. It is unfair to the employee, and to the nation's policy against all forms of discrimination to allow the employer to escape any liability at all because of procedural mechanics. The issue now becomes what the Supreme Court should have done to remedy this conflict. By limiting the application of the after-acquired evidence doctrine in *McKennon*, the Court took a step toward doing the right thing. Rule 26(a) mandatory disclosures, however, will still operate to limit available remedies to a point where the deterrent and compensatory policies behind the statutes will be frustrated. For this reason, the Court in *McKennon* did not go far enough in limiting the after-acquired evidence doctrine.

B. The Manner in Which the Court Decided to Structure Remedies in After-Acquired Evidence Cases is Inadequate to Further the Policies Behind the Employment Discrimination Statutes

The *McKennon* Court stated that it cannot be totally ignored that the plaintiff engaged in some misconduct.[185] An employer has a legitimate business interest in the operation of his own business, and some deference must be given to the normal and legitimate hiring and firing decisions of the employer.[186] This dichotomy again underscores the importance of the effect that the procedural rules have on the substantive law. Because of the intersection between after-acquired evidence as obtained through discovery and the legitimate managerial decisions of the employer, the Court found that certain remedies are unavailable to the discharged employees, namely front pay and reinstatement.[187] Thus, the Court limits the relief available to a discriminated-against employee in this situation to an award of back pay.[188] This, however, may frustrate the policies behind the anti-discrimination statutes as much as if no damages were allowed to an employee at all.[189]

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

186. *See supra* note 95 and accompanying text.

187. *See supra* notes 92, 146 and accompanying text.

188. *See supra* note 96 and accompanying text.

189. Attorney's fees would still be available to the plaintiff, at the discretion of the court, under both Title VII of the Civil Rights Act of 1964 and the ADEA because under *McKennon*, the employer is found liable for the discriminatory acts, and therefore the plaintiff is the "prevailing party." *See* Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(k) (1994) (establishing that the prevailing party in an employment discrimination suit may be awarded attorney's fees at the court's discretion); Wells v. New Cherokee Corp., 58 F.3d 233, 239 (6th Cir. 1995) (affirming award of attorney's fees in an ADEA suit).

The current state of the law is that the proper method for the calculation of a back pay award in a discrimination suit with after-acquired evidence is to allow back pay only from the date of discharge up to the date on which the employer discovers that a legitimate reason to fire that employee existed.[190] However, this award is inadequate to either deter future acts of discrimination by this or any other employer, or to compensate an employee for having his civil rights intentionally violated. Rule 26(a) states that the initial disclosures are to take place within ten days after the Rule 26(f) discovery conference.[191] Furthermore, the Rules also provide that the discovery conference itself is to take place within seventy-five days from the date that the defendant enters the suit.[192] Therefore, simple addition shows that the date by which the initial mandatory disclosures must take place is eighty-five days from the commencement of the action.[193] Of course, a plaintiff always has the option not to disclose within this time, but this subjects the employee to the onus of Rule 37 sanctions, as explained above.[194] This is obviously not the wisest course of action

190. *See McKennon*, 115 S. Ct. at 886 (adding that the court may also consider extraordinary equitable circumstances affecting the party's interests).

191. *See* FED. R. CIV. P. 26(a)(1).

192. *See* FED. R. CIV. P. 26(f) (providing that the meeting be held at least 14 days before a scheduling order is due under Rule 16(b), which is due at least within 90 days after the defendant enters the suit).

193. It could be argued that the administrative powers granted to the Equal Employment Opportunity under Title VII and the ADEA alter this length of time and therefore the calculable back pay award. If the complainant lives in a state without a state agency charged in that state with handling claims of employment discrimination, the EEOC has up to 180 days from the date of the occurrence of the allegedly discriminatory conduct by the employer to resolve the charges. *See* 42 U.S.C. § 2000e-5(e)(1) (1994). If such a state agency exists, this time limit is extended to 300 days. This will add anywhere from six to ten months to the calculation of a back pay award in the context of after-acquired evidence under *McKennon*. Thus, the average back pay award could be increased from $7,450 to between $22,347 to $32,279. *See infra* note 197 and accompanying text. This added money could go a long way to compensating a plaintiff for being victimized by invidious discrimination.

This will fail, however, to deter unlawful conduct on the part of the employer. Even if a plaintiff's private suit is delayed because of this mandatory resort to agency processes, the limited remedy under the *McKennon* rule will still fail to competently deter employer wrongdoing. An employer can merely view this limited back pay award as a small price to pay to create a composite workforce of its liking. *See infra* note 198 and accompanying text. Furthermore, this lengthy administrative process can be avoided in two situations. First, if the EEOC, after its initial investigation, decides that "prompt judicial action is necessary to carry out the purposes of [Title VII], [it] . . . may bring an action for appropriate . . . relief pending final disposition of such charge." 42 U.S.C. § 2000e-5(f)(2). Second, if after its initial investigation, the EEOC decides that it does not want to pursue the charges, it may issue a right to sue letter, which allows the plaintiff to institute a private cause of action not through the EEOC. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 145 (1994). Therefore, the foregoing analysis should not be affected by these EEOC administrative powers.

194. *See supra* notes 162-67 and accompanying text.

for a plaintiff in this instance. Therefore, assuming that the plaintiff files suit quickly after the discharge, and there is no reason to think that this will not be the case,[195] and that the employer learns of the after-acquired evidence through the initial disclosures as outlined above, the back pay award to which the employee is entitled under the *McKennon* decision is limited to three months' salary or wages. A critical distinction must be drawn between information gained through mandatory disclosures as opposed to ordinary discovery. Although the information may be of the same character regardless of when it is gained, the timing of when the employer gains this information has huge consequences on the employee's back pay award.

Three months' salary, for the average person, is around $7,450.[196] It is unreasonable to think that a $7,450 judgment will vindicate or compensate an employee who has intentionally had his civil rights violated by an employer. Moreover, there is no deterrent value in this amount. If an employer sincerely does not want any African-Americans, or Jews, or women, or older people working in his shop, then $7,450 per discharge[197] may be a small sum to pay to assure that the employer's workforce looks like what the employer wants it to look like. An employer may just treat this payment as if it were any other business expense by passing the cost on to the consumer.[198] This is not a cost of business that consumers should have to pay.[199] This outcome is compounded

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195. The after-acquired evidence itself could be a deterrent to the expeditious filing of one's suit. This will not occur, however, because after-acquired evidence does not become an issue until after the filing of the suit. At the time of the filing, the only issue is the employer's motivation at the time of the discharge. *See* Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1166-68 (6th Cir. 1996) (standing for the proposition that after-acquired evidence is a defense to a claim of discrimination that is only reached if the initial inquiry of whether discriminatory intent existed is found in favor of the employee).

196. *See* BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION, SOCIAL AND ECONOMIC CHARACTERISTICS, OHIO 15 (1993) (stating that the annual median income of a full-time employee in Ohio is $29,796).

197. *See* Wehr v. Ryan's Family Steak Houses, Inc., 49 F.3d 1150, 1153 (6th Cir. 1995) (affirming the district court's decision to grant the plaintiff only $2,000 in back pay, and to deny any awards of compensatory damages).

198. *Cf.* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (explaining that one of the rationale for strict liability in tort in product liability suits is the ability of the defendant-company to pass the cost of the lawsuit onto its consumers through marginally higher prices).

199. *Cf.* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1789 (1983) (citing a growth in the percentage of meritorious unfair labor practice charges along with a corresponding growth in the average back pay award for aggrieved employees, and concluding from this that the financial penalty an employer must pay to the worker "is far too small to be a significant deterrent"); DOUGLAS L. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY 277-78 (3d ed. 1992) (arguing that any award of back pay under the National Labor Relations Act ("NLRA") is insufficient to deter future similar conduct by the same

by the fact that back pay damages are mitigated by the employee's misconduct as represented by the after-acquired evidence.[200]

To examine this point further, it makes sense to look at how the district and circuit courts have interpreted and applied *McKennon*. Most of the courts in crafting their back pay awards have not taken seriously the Supreme Court's mandate that the compensatory and deterrent policies behind the employment discrimination statutes must be fully served.[201] This mandate is especially important when considered in light of the federal courts' reluctance to extend the *McKennon* rationale to state law claims ancillary to the discrimination claim that is before them.[202] If federal courts continue down this path regarding state law claims, the after-acquired evidence doctrine will have to be limited further. After-acquired evidence will then operate as a bar to all pendant state law claims, just as it operated as a bar to federal discrimination suits under the *Summers* rule. Thus, if this doctrine is not limited further or eliminated fully, wronged employees will truly be limited to the remedies of back pay and attorney's fees to vindicate the harm that has befallen them, because they will be restricted from bringing any other claims from which they could receive compensation for their harm.

Not all courts have taken such a restrictive view of *McKennon* as those discussed above. For example, an Illinois district court, in commenting on the deterrent nature of the anti-discrimination statutes as described in *McKennon*, stated:

> [We] remain[] "fundamentally persuaded" that the prospect of individual liability is essential if Congress' intent to deter discriminatory employment practices is to be fully effectuated. . . . [W]e believe that the Seventh Circuit has perhaps too easily dismissed the antidiscrimination statutes' broad remedial purpose—as well

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employer, since the chilling effect of this unlawful conduct on employees seeking union representation is well worth the price to an employer seeking to avoid unionization in its place of business).

200. *See* Weiler, *supra* note 199, at 1789-90 (arguing that the potential deterrent effect back pay awards in unfair labor practice charges under the NLRA might have on employers is severely lessened by the discharged employee's duty to mitigate his or her damages by actively seeking a new job).

201. *But see* Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072, 1074 (3d Cir. 1995) (per curiam) (indicating that the district court, in crafting the appropriate remedy, should be cognizant that one of the principal purposes of Title VII is to make victims of discrimination in employment whole again).

202. *See, e.g.*, Duart v. FMC Wyoming Corp., 72 F.3d 117, 120 (10th Cir. 1995) (affirming the district court's determination that after-acquired evidence still acted as an affirmative defense to claims of breach of contract, promissory estoppel, negligent infliction of emotional distress, and breach of the duty of good faith and fair dealing).

> as the objective of securing "complete justice" to victims of discrimination. . . .[203]

In addition, the Fourth Circuit has noted that an employer, in the discovery of after-acquired evidence, should not receive a benefit from its act of discrimination.[204]

It seems, from canvassing the case law subsequent to *McKennon*, that the majority of the federal judicial districts have reached a reading of *McKennon* that is more inhibiting to the policies of the anti-discrimination statutes than the Supreme Court appeared to be calling for. These interpretations of *McKennon* add to the urgency for the elimination of the after-acquired evidence doctrine. If Rule 26(a)'s mandatory disclosures are operating to limit back pay awards below the level necessary to deter future acts of discrimination, and district and circuit courts are interpreting *McKennon*'s holding to severely restrict the damages available to a plaintiff in a case where the employer has proven that after-acquired evidence is indeed relevant to the damages that the court is going to award, then the Supreme Court's desire for the "elimination of discrimination in the workplace"[205] will go unattained.

C. Retaliation as Another Reason to Eliminate the After-Acquired Evidence Doctrine

Both Title VII and the ADEA provide substantive statutory remedies for retaliation by an employer against an employee based on that employee's opposition to an unlawful employment practice by the employer, or because of an employee's resort to the judicial or administrative processes to remedy another act of discrimination.[206] This section's analysis focuses on the latter type of retaliation—free access—which proscribes retaliation for bringing a lawsuit. The basic premise is that the defense of after-acquired evidence allows an employer to engage in judicially sanctioned retaliation. With the defense as it stands after *McKennon*, an employer has a strong incentive to engage in very aggressive discovery tac-

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203. Lynam v. Foot First Podiatry Ctrs., 886 F. Supp. 1443, 1447 (N.D. Ill. 1995).

204. *See* Russell v. Microdyne Corp., 65 F.3d 1229, 1238 (4th Cir. 1995).

205. *See McKennon*, 115 S. Ct. at 884 (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)).

206. *Compare* 42 U.S.C. § 2000e-3(a) (1994) (providing Title VII's retaliation provision) *with* 29 U.S.C. § 623(d)(1994) (providing substantially similar language to that of Title VII). In particular, Title VII provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this [title], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title].

42 U.S.C. § 2000e-3(a).

tics in order to obtain the limited remedy provided for by *McKennon*. What the employer is doing is using the judicial process as an excuse to go after an employee for filing a discrimination suit. Certainly, an employer should not be punished for utilizing a tool granted by the Supreme Court in aggressively seeking to acquire and use after-acquired evidence. Thus, in order to avoid this legal form of retaliation, the after-acquired evidence doctrine should be eliminated.

To sustain a prima facie showing of retaliation, a plaintiff needs to establish three elements: "1) [T]he employee was engaged in a protected activity; 2) the employee suffered adverse employment action; and, 3) there was a causal connection between the protected activity and the adverse action."[207] Many courts have found unlawful retaliation when they justify some adverse treatment of an employee on grounds that relate to the filing of a discrimination suit.

The most illustrative example that relates to this context is *Womack v. Munson*.[208] There, the employee was previously employed by the county sheriff, discharged, and them employed by the defendant, the state prosecutor, as an investigator.[209] The plaintiff filed a complaint with the EEOC regarding his termination by the sheriff during his employment for the defendant. In the course of its own internal investigation, the defendant questioned the plaintiff, and subsequently discharged him. The court found that the plaintiff had a legal basis to bring a claim of retaliation. Thus, it was clear that the defendant fired the plaintiff because of the allegations in the complaint and because of the plaintiff's participation in the judicial process.[210] *Womack* presents the converse of the after-acquired evidence problem. In *Womack*, the plaintiff was fired because of participation in the legal process; in an after-acquired evidence scenario, the employer utilizes the judicial process to create a justification for why the employee was fired in the first place. If the employer is liable for retaliation in the former scenario, why should he not be in the latter?

In defending against a charge of discrimination, the employer must be careful not to act to infringe on the retaliation provisions.[211] In *EEOC v. United Ass'n of Journeymen*,[212] the court

207. Reed v. Shepard, 939 F.2d 484, 492 (7th Cir. 1991).
208. 619 F.2d 1292 (8th Cir. 1980).
209. *See id.* at 1294.
210. *See id.* at 1297.
211. *See* EEOC v. United Ass'n of Journeymen and Apprentices of the Plumbing Indus., Local 189, 311 F. Supp. 464, 468 (S.D. Ohio 1970) (suppressing statements made by complainant to employer under intimidating circumstances).
212. 311 F. Supp. 464 (S.D. Ohio 1970).

found the interrogation of various employees to be coercive and therefore violative of the retaliation provision.[213] Furthermore, courts have held retaliation existed where an employer retaliates against past employees.[214] Finally, an employer must be careful to ensure that conduct that would otherwise be lawful is not transformed into unlawful conduct by a plaintiff arguing pretext.[215] For example, where an employer fired an employee for a discriminatory reason, but discovered good cause to fire that employee through a program of surveillance that was instituted because the employees were opposing the employer's employment policies, the surveillance was found to be unlawful retaliation.[216]

All of these cases could be summarized as standing for the proposition that to utilize discovery to look for after-acquired evidence is unlawful retaliation, since the employer is looking for evidence with the intent of undermining the plaintiff's discrimination claim. The alternative to this statement is simply, "So what?" What is so wrong with using a discovery tool that the legislature has provided exactly for the purpose of gathering information for trial? What is so wrong is that if the requisite intent to retaliate[217] is present, then the employer has unlawfully retaliated. What is needed is the same pretext analysis as is done under *McDonnell Douglas* and its progeny to determine if the employer has this intent. The best enunciation of this premise comes from the Third Circuit:

> [I]n a normal Title VII or ADEA case, evidence acquired *before* the adverse employment decision might, as a prophylactic measure, be inadmissible altogether if the plaintiff could show that the employer had a practice of thoroughly investigating the information provided in employment applications and interviews by, and of comprehensively reviewing on-the-job performance of, only or primarily only the members of a protected class with the motive to discover flaws justifying an adverse employment action, for such a practice would probably contravene Title VII and

213. *See id.* at 466-68.

214. *See* Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988) (holding that a former employee has standing to sue for retaliation under Title VII); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088-89 (5th Cir. 1987) (holding that a past employee is an 'employee' for the purposes of a retaliation claim under the ADEA).

215. *See supra* notes 20-30 and accompanying text.

216. *See* Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972).

217. If the employee had "opposed any practice, made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]," such requisite intent may be present. 42 U.S.C. § 2000e-3(a) (1994).

> ADEA. . . . [This] defense strategy of investigating employees who file complaints with the intent to discover evidence retroactively justifying or excusing the adverse employment decision may itself violate Title VII and ADEA, and if so it might be contrary to the design of those statutes to allow the employer to benefit from [such] evidence.[218]

Thus, it is easy to visualize how a fishing expedition to find after-acquired evidence could be unlawful retaliation.[219]

If these disclosures operate to require a plaintiff to turn over any after-acquired evidence to the employer at this early stage of the litigation,[220] the ability of a plaintiff to sue an employer for retaliation for use of discovery would be severely stilted. Even if the employer had the intent to discriminate, there would be no corresponding act of retaliation. Thus, this strong disincentive to prevent employers from punishing individuals for filing discrimination suits, and therefore help spur more people to make use of Title VII's and the ADEA's means for redressing discrimination in the workplace, would be removed. These disclosures punish the employee for being discriminated against. The employee is being harmed twice, once by the employer and once by the courts. It is for this reason that the after-acquired evidence doctrine should be eliminated from the face of employment discrimination law.

CONCLUSION

While it is true that there were many instances of after-acquired evidence defenses long before the amendment of Rule 26 in 1993, it is also true that this new rule greatly pushes forward the time in litigation when disclosures are made. This advance in the time-frame of an employer's discovery of a legitimate ground for discharge works to the disadvantage of the employee in exactly the manner sought to be eliminated by the Supreme Court in *McKennon*. By failing to recognize this outcome, the Supreme Court fell short of its goal of removing impediments from the effective operation of the statutory scheme against employment discrimination, and consequently failed to validate the substantive

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218. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1238 (3d Cir. 1994); *see also* Russell v. Microdyne Corp., 65 F.3d 1229, 1240 (4th Cir. 1995) (noting the defendant's cautiousness in seeking discovery of potential after-acquired evidence, in trying to avoid opening itself up to liability for retaliation).

219. *See* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323-24 (D.N.J. 1993) (noting that "[t]he fact that the misconduct was discovered only as a byproduct of the employer's illegal actions cannot be minimized or overlooked").

220. *See supra* Part III.A.

policies of deterrence and compensation. It is apparent that Rule 26 will still have a very severe effect on employment discrimination cases, but not so great as to bar a plaintiff from any recovery at all. It merely limits a plaintiff's recovery to such a point where the policies behind the statutes are undermined. The procedural rules are still allowed to operate to the disadvantage of the substantive operation of and policies behind the substantive law.

The only way to fix this problem is to eliminate the after-acquired evidence defense from employment discrimination law. As long as we take seriously the commitment to eliminate invidious workplace discrimination from the factories, warehouses, and offices that are in business all over our country, the after-acquired evidence defense has no place in discrimination law. The *McKennon* decision has been widely praised as a great decision for workers who belong to protected classes.[221] The effect of this decision, however, will be a limited one, because an employee's ability to receive compensation and vindication for an intentional wrong will not increase by enough of a degree to deter future acts of discrimination by the employer. Thus, statutes such as the ADEA will continue to be frustrated every time an employer successfully uses the defense of after-acquired evidence in the remedial stage of the litigation. The operation of the doctrine may have been altered from an affirmative defense to a mechanism to mitigate damages, but the end result will be the same. The Court feels that back pay is the only equitable remedy appropriate in cases where after-acquired evidence is present. These back pay awards, through the operation of Rule 26(a) and the early discovery of after-acquired evidence in the litigation process, will generally be low, and therefore future acts of discrimination will not be deterred to the extent that the Supreme Court hoped and envisioned. The after-acquired evidence doctrine, although shifted to the damages phase of the litigation, will still operate as "an insidious defense."[222]

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221. *See, e.g.* James H. Coil III & Lori J. Shapiro, *Two Wrongs Don't Make a Right: The Supreme Court Limits After-Acquired Evidence as a Defense in Employment Discrimination Actions*, EMPLOYEE REL. L.J., Summer 1995 93, 93 (calling *McKennon* a "landmark decision" in employer-employee relations).

222. Sheldon J. Stark, *The After-Acquired Evidence Doctrine: An Insidious Defense*, TRIAL, Mar. 1995, at 26, 31.