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Protecting the Wolf in Sheep's Clothing: Perverse Consequences of the McKennon Rule

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PROTECTING THE WOLF IN SHEEP'S CLOTHING: PERVERSE CONSEQUENCES OF THE MCKENNON RULE

by

Jenny B. Wahl*

Suppose an employer accused of discrimination learns during litigation that the plaintiff had fabricated a college degree, hidden a prior criminal conviction, or stolen confidential documents. Will evidence of the concealed misconduct shield the employer from liability? Not under *McKennon v. Nashville Banner Publishing Co.*[1] In this landmark case, the U.S. Supreme Court determined that such plaintiffs might obtain relief even if the "after-acquired" evidence would have led to lawful termination or lawful failure to hire if defendants had uncovered it when it occurred.

Most commentators applaud *McKennon*, complaining only that it does not go far enough in combating employer discrimination. Left unacknowledged, however, are the potentially perverse consequences of the ruling. *McKennon* dilutes the effectiveness of labor-market signaling because it protects the wolf in sheep's clothing as well as the sheep. The unintended result of this well-intentioned rule may be reduced productivity, poorer matches of workers to jobs, higher turnover, and increased costs of hiring and assessment. By rendering signals less reliable, *McKennon* complicates the employer's task of distinguishing the sheep from the wolves. Consequently, the ruling may increase the incidence of statistical discrimination, particularly in the form of pre-hire screening. At the same time, *McKennon* erodes the benefits of acquiring human capital and marketable skills to people with statutorily protected traits. In sum, despite its praiseworthy objectives, *McKennon* may well worsen labor-market conditions for minorities and others covered by discrimination laws.

What follows is, first, a description of the typical scenarios that arise in after-acquired-evidence cases and the law surrounding *McKennon*. Section II discusses how the economic literature on information and signaling applies to such cases; section III elaborates upon the motives behind and the perversities of *McKennon*; and section IV offers conclusions.

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[1] 513 U.S. 352 (1995). The Court had granted a writ of certiorari in a related Sixth Circuit case, which was settled before the decision. *See* Milligan-Jensen v. Mich. Tech. Univ., 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 509 U.S. 943 (1993), *cert. dismissed*, 509 U.S. 943 (1993).

I. THE LEGAL BACKGROUND

A. *Anatomy of an After-Acquired-Evidence Lawsuit: Case Law Leading up to McKennon*

In the typical after-acquired-evidence case, the plaintiff complains of discriminatory treatment by a former, current, or prospective employer.[2] The employer offers an initial defense, claiming to have fired, disciplined, or rebuffed the plaintiff for legitimate reasons. During discovery, however, the employer finds evidence of job misconduct or résumé fraud that would have resulted in dismissal or refusal to hire had the defendant known earlier of the bad acts. Résumé fraud typically consists of misrepresentation of educational or work experience qualifications, concealment of misconduct in a previous job, or failure to report previous criminal convictions.[3]

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[2] Most federal claims have been brought under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified in scattered sections of 42 U.S.C. and Supp. V), or the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988 and Supp. V). Future federal claims will likely also involve the Americans with Disabilities Act. Plaintiffs have also filed assorted state claims -- for example, under Michigan's Elliott-Larsen Civil Rights Act. MICH. COMP. LAWS ANN. § 37.2201-11 (West 1999).

[3] According to various sources, résumé fraud seems rampant in the U.S. Thorndike Deland Associates conducted a survey of human resource managers in 1992. *See False Credentials*, HRMAGAZINE, July 1992, at 20, 22. These managers observed that falsifying credentials was commonplace, particularly in the areas of job performance, compensation history, and personality traits. *Id*. at 20, 22. Vericon Resources reported that 80 percent of job applications contain lies of some sort, particularly about education. Sherryl D. Wade, *Vericon Plays 'To Tell the Truth' with Résumés*, ATLANTA BUS. CHRON., Dec 16, 1991, at 26A. One international recruiter found "that more than 30 percent of job seekers lie on their résumés, not including lies-of-omission." Robert Half, *Managing Your Career*, MGMT. ACCT., May 1989, at 15. A 1988 study found that almost 1/3 of résumés misstated dates of employment by 3 months or more. Moreover, "11 [percent] of job applicants lied about why they had left previous jobs, 4 [percent] fudged job titles, 3 [percent] listed fake emp loyers, 3 [percent] fabricated jobs, and 3 [percent] pretended to have a college degree." Joan E. Rigdon, *Deceptive Résumés Can Be Door-Openers But Can Become An Employee's Undoing*, WALL ST. J., June 17, 1992, at B1; *see also* Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees'* [sic] *Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 1 n.2 (1990) (noting that employers find that 10 percent of job applicants lie, mostly about their criminal records and medical history); David D. Kadue & William J. Dritsas, *The Use of After-Acquired Evidence in Employee Misconduct and Résumé Fraud Cases*, 44 LAB. L. J. 531, 532 n.5 (1993) (offering anecdotal evidence that 10 to 20 percent of plaintiffs make significant misstatements or omissions on their job applications). Kadue and Dritsas also cited a study which indicates that up to "33 percent of 15- to 30-year-olds are willing to lie on a résumé." *Id.* at n.5. (citing Dale R. Crider, *Resume Fraud Complicates Firing Claims*, NAT'L L.J., Dec. 7, 1992, at 17). *See also* Rosemary Alito, *Résumé Frauds May Forego Right to Sue*, N.J. L.J., April 27, 1992, at S6

1. Cases that Ordered Summary Judgment for the Employer

Before *McKennon*, many courts agreed that, if after-acquired evidence would have caused the plaintiff to be fired (or never hired initially), the employer defendant was entitled to summary judgment. Judges in these cases largely decided that the plaintiff, by virtue of his or her misrepresentations, simply had no legal standing to pursue a discrimination claim. The leading case of *Summers v. State Farm Mutual Auto. Ins. Co.* came from the Tenth Circuit.[4] The Sixth and Eighth Circuits, most district courts, and many state courts followed *Summers.*[5]

a. Job Misconduct.

In *Summers*, plaintiff V. Ray Summers, a 56-year-old Mormon, claimed he was fired from his job as an insurance field-claims representative because of his age and religious affiliation. State Farm, on the other hand, cited Summers's unsatisfactory job performance, poor attitude, and inability to get along with fellow employees and customers as reasons for the discharge. Although the company knew of nine instances in which Summers had doctored records, forged a signature, or possibly submitted fake receipts, State Farm conceded that it had not fired the plaintiff for these acts. For these offenses, the company had put Summers on probation for two weeks without pay and warned him to stop his improper conduct. After Summers brought suit, his former employer found that Summers had actually falsified more than 150 records, 18 of them after the probationary period. Summers did not deny doing so. The court of appeals affirmed the district court's granting of State Farm's motion for summary judgment in

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(citing another study that claims that 75 percent of employee applications contain false information). In a bizarre recent incident, the owners of a shell company established in St. Paul revealed that they were not sure of anything on their CEO's résumé, including his name. Mike Hughlett, *Tangled Tale of Equisure Strewn with Allegations*, ST. PAUL PIONEER PRESS, Sept. 4, 1997, at 1E.

[4] 864 F.2d 700 (10th Cir. 1988).

[5] For more detailed discussions of state court verdicts, see Claudia D. Orr, *The Defense of Résumé Fraud and Other "After-Acquired Evidence" of Misconduct under Sixth Circuit and Michigan Case Law*, 70 U. DET. MERCY L. REV. 657 (1993); Alito, *supra* note 3, at 1342. For useful studies of federal cases, see Kadue & Dritsas, *supra* note 3; Kenneth G. Parker, Note, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403 (1993). *See also* Barbara Ryniker Evans & Robert E. McKnight, Jr., *Splitting the Baby on After-Acquired Evidence in Employment Discrimination Cases*, 19 AM. J. TRIAL ADVOC. 241 (1995) (providing a good general survey); Robert F. Thompson III, Note, McKennon v. Nashville Banner Publishing Co.: *The Masquerading Doctor, the "Greatest Treason," and After-Acquired Evidence in Employment Discrimination Suits*, 49 ARK. L. REV. 625 (1996).

this job-misconduct case.[6]

b. Résumé Fraud: Job Qualifications.

The Tenth Circuit and district courts within it also granted summary judgment in cases involving fraudulent reporting of job qualifications. In *Bonger v. American Water Works*, for example, Rosie Bonger had worked as a human resources director for a water company.[7] The interviewer who had screened candidates for Bonger's position had rejected all applicants who did not have college degrees and a minimum number of years of experience in the human resources field. Bonger was fired, allegedly for poor performance. She claimed instead that her discharge was motivated by her sex and national origin. (Bonger was Hispanic.) While the action was pending, the company learned that Bonger did not have a college degree and had taken nearly three thousand pages of confidential personnel files and given them to her attorney just before being fired. The company successfully established that it would have legitimately terminated Bonger for résumé fraud or job misconduct, no matter what.

The principal case concerning job qualifications, however, is from the Sixth Circuit: *Johnson v. Honeywell Information Systems, Inc.*[8] Mildred Johnson, a black female

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[6] Another job misconduct suit that resulted in summary judgment for the employer is *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466 (D. Ariz. 1992). Summers tried to use two Ninth Circuit cases to support his position. In *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985), the plaintiff was denied employment as a letter sorter. The Postal Service prevailed in the district court. The plaintiff appealed, saying that the district court should have admitted evidence that the Postal Service did not know of the plaintiff's epilepsy at the time it rejected her for a job, but discovered her handicap afterward. The plaintiff's strategy backfired: the appellate court determined that this evidence would not have been admissible to enlarge the defendant's basis of rejection, but was admissible to rebut the applicant's claim that she was physically qualified for the job. In *Nanty v. Barrow Co.*, 660 F.2d 1327 (9th Cir. 1981), the plaintiff (an American Indian) was rejected for a job as a truck driver. Three days later, two Caucasians were hired on the basis of superior qualifications. The district court found that the plaintiff was not qualified and gave judgment to the defendant. The appellate court reversed, however, saying that superior qualifications are not relevant in determining whether discrimination existed. Yet such evidence, according to the court, is relevant to the question of whether Nanty would have been hired absent discrimination. This court essentially advocated an additional determination of whether the plaintiff had a right to the job or monetary relief. Despite Summers's pleas, the Tenth Circuit court decided that the cases instead buttressed the defendant's arguments.

[7] 789 F. Supp. 1102 (D. Colo. 1992).

[8] 955 F.2d 409 (6th Cir. 1992). For other cases that advocated summary judgment on the basis of misrepresented job qualifications, *see* Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir., 1981), *cert. denied*, 456 U.S. 915 (1982); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656 (D. Utah 1990), *aff'd*, 12 F.3d 176 (10th. Cir. 1994), *vacated*, 513 U.S. 1141 (1995); Grzenia v. Interspec, Inc., No. 91-C290, 1991 WL 222105 (N.D. Ill. Oct. 21 1991); Agbor v. Mountain Fuel

employed as a field-relations manager, initially brought suit in state court alleging breach-of-contract violation of Michigan's Elliott-Larsen Civil Rights Act. The case was later removed to federal district court. Honeywell maintained that the company had fired Johnson for refusing to improve her availability, flexibility, knowledge, and willingness to follow directions. During the discovery period, Honeywell found that Johnson had falsely claimed on her job application that she had a college degree and significant work experience. (Johnson had replied to a newspaper advertisement that specified these attributes as necessary qualifications for the position.) Honeywell stated that it would not have scheduled Johnson for an interview, much less hired her, if the company had known of the fabrications. The appellate court agreed, further concluding that Honeywell had adequate and just cause to dismiss Johnson. Consequently, it decided that Johnson was not entitled to relief, affirming the district court's directed verdict for Honeywell on the Elliott-Larsen claim and reversing the denial of Honeywell's motion for summary judgment on a wrongful discharge claim.

c. Résumé Fraud: Misconduct in Previous Jobs.

The Sixth Circuit also granted employers summary judgment in cases where plaintiffs had failed to reveal pertinent information about misconduct in previous jobs. In *Dotson v. U.S. Postal Service*, for example, the plaintiff was terminated as a part-time letter carrier due to a physical condition that limited his ability to carry mail.[9] After Dotson initiated an action claiming disability discrimination, the defendant discovered that Dotson had omitted prior health and employment information on his job application - including the fact that he was dismissed from previous jobs at a state prison and an A&P warehouse. The defendant successfully established that Dotson's untruthfulness would have precluded his being hired initially.

d. Résumé Fraud: Prior Criminal Convictions.

Supply Co., 810 F. Supp. 1247 (D. Utah 1993); Rich v. Westland Printers, 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993); Bray v. Forest Pharm., Inc., 812 F. Supp. 115 (S.D. Ohio 1993). *See also* Carroll v. City of Chicago, No. 87-C8995, 1990 WL 37631 (N.D. Ill. Mar. 21, 1990); Sweeney v. U-Haul Co., 55 Fair Empl. Prac. Cas. (BNA) 1257 (N.D. Ill. 1991).

[9] 977 F.2d 976 (6th Cir. 1992), *cert. denied*, 506 U.S. 892 (1992). For other cases that advocated summary judgment for employers when plaintiffs had failed to reveal misconduct in previous jobs, *see* Smallwood v. United Airlines, Inc., 728 F.2d 614 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984); Freeman v. Kansas State Network, Inc., 719 F. Supp. 995 (D. Kan. 1989); Carroll v. Chicago, 1990 WL 37631 (N.D. Ill. 1990); Sweeney v. U-Haul Co., 55 Fair Empl. Prac. Cas. (BNA) 1257 (N.D. Ill. 1991); Churchman v. Pinkerton's Inc., 756 F. Supp. 515 (D. Kan. 1991); Kravit v. Delta Air Lines Inc., 60 Fair Empl. Prac. Cas. (BNA) 994 (E.D.N.Y. 1992); George v. Meyers, No. CIV. A.91-2308-O, 1992 WL 97788 (D. Kan. Apr. 24, 1992); Greene v. Standard Register Co., 60 Fair Empl. Prac. Cas. (BNA) 1151 (W.D. Mich. 1992); Rich v. Westland Printers, 62 Fair Empl. Prac. Cas. (BNA) 379 (D. Md. 1993); Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994).

Sixth-Circuit defendants received summary judgment as well when plaintiffs had neglected to report previous criminal convictions. In *Milligan-Jensen v. Mich. Tech. Univ.*, for instance, the plaintiff indicated on her job application for the position of Public Safety Officer that she had never been convicted of an offense more serious than a minor traffic violation.[10] She also signed a statement acknowledging that misrepresentation of facts was grounds for dismissal regardless of when discovered by her employer. After the plaintiff sued for age and sex discrimination, the defendant found that she had in fact omitted a prior conviction for driving under the influence of alcohol. The appellate court reversed the district court's judgment for her and ordered the district court to enter judgment for her former employer.

Employers received summary judgment in similar cases brought in the courts for the Eastern District of Michigan and the District of Kansas.[11] In the Michigan case, a black male named Foster Benson worked as a manual laborer for Quanex Corporation for three months. He resigned, saying he was taking another job. In fact, Benson went to a drug rehabilitation center. Afterwards, he reapplied to Quanex, which refused to re-hire him. Benson then complained that he had been racially harassed at work and that his voluntary resignation amounted to a constructive discharge. During discovery, Quanex found that Benson had lied about his employment history and misrepresented his criminal record. Instead of working at General Motors, as he had claimed on his job application, Benson was at the time incarcerated for robbery. Moreover, Benson had acknowledged in writing that he understood that falsification of information on the application would be grounds for discharge. In the Kansas case, the plaintiff sued her former employer for alleged racial and sexual harassment. During discovery, the employer found that she had not revealed a felony conviction for fraud committed on a state agency and three terminations for cause by former employers.

2. Cases that Departed from Summary Judgment for the Employer

Although many pre-*McKennon* courts embraced a rule of summary judgment for employers in after-acquired-evidence cases, others emphatically rejected it. Why? Because it highlighted the undeserving plaintiff rather than the potentially unsavory defendant. In at least some cases, the defendant arguably had fired (or had not hired) the plaintiff because of the plaintiff's race, age, gender, or other immutable characteristic - in other words, doing what discrimination statutes sought to prevent. Courts opposed to summary judgment therefore focused on remedies.[12] The two

[10] 975 F.2d. 302 (6th Cir. 1992), *cert. granted*, 509 U.S. 903 (1993), *cert. dismissed*, 509 U.S. 943 (1993).

[11] Benson v. Quanex Corp. Mich. Seamless Tube Div., 58 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Mich. 1992); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989).

[12] Some courts considered assigning liability to employers but no damages.

leading cases came from the Eleventh and Third Circuits. The Seventh Circuit also eventually repudiated a summary-judgment rule.

a. Résumé Fraud: Prior Criminal Convictions.

The Eleventh Circuit made its position clear in *Wallace v. Dunn Construction Co.*[13] In this case, a female construction-crew flagperson named Joyce Neil alleged inadequate compensation, sexual harassment, and retaliatory discharge. In depositions, the employer learned that Neil had lied on her job application about a prior conviction for possession of cocaine and marijuana. The court refused to grant summary judgment to Dunn, strongly disagreeing with the reasoning in *Summers*. The *Wallace* court said that the *Summers* ruling improperly ignored the lapse of time between Summers's discharge and the discovery of the misconduct that would have legitimatized Summers's termination. According to the court, *Summers* also undermined Title VII of the Civil Rights Act: *Summers* invited employers to avoid liability by rummaging through an employee's background for flaws instead of acting to eliminate discrimination. The court went so far as to envision this implausible scenario:

> *Summers* encourages an employer with a proclivity for unlawful motives to hire a woman -- despite knowledge of a legitimate reason that would normally cause the employer not to employ her -- to destroy any evidence of such knowledge, to pay her less on the basis of her gender, to sexually harass her until she protests, to discharge her, and to "discover" the legitimate motive during the ensuing litigation, thus escaping any liability for the unlawful treatment of the erstwhile employee.[14]

The majority opinion in *Wallace* therefore suggested that courts should limit damages in after-acquired-evidence cases rather than eliminating employer liability. It determined that reinstatement or front-pay relief was inappropriate in a *Summers* setting. The court also conceded that limiting back pay awards and fees made sense if the employer proved it would have discovered the after-acquired evidence apart from the lawsuit. Judge Godbold dissented, however, asserting that the court should dismiss the suit. He argued that the plaintiff would not have been hired if she had not lied on her application; she therefore had no standing to sue. Judge Godbold also pointed out that the employer was at risk of suits for harm to the public on the grounds of respondeat superior or negligent hiring.

Understandably, employers preferred the "no liability" rule promulgated by *Summers* to a "no damages" rule, in part because the latter might affect the company's standing with its insurance carrier or the EEOC whereas the former would not.

[13] 968 F.2d 1174 (1992), *aff'd in part and rev'd in part*, 62 F.3d 374 (11th Cir. 1995).

[14] 968 F.2d at 1180-81.

b. Résumé Fraud: Job Qualifications.

The Third Circuit court refused to grant an employer summary judgment in *Mardell v. Harleysville Life Insurance Co.*[15] Here, the plaintiff claimed she was a victim of age and sex discrimination. Her employer fired her for allegedly poor job performance. During discovery, the employer learned that Mardell had lied on her résumé, saying falsely that she had a college degree and substantial relevant work experience. Following *Summers*, the district court granted summary judgment for the defendant. But the Third Circuit, like the Eleventh, decided to break ranks with other courts and held that after-acquired evidence could not be used to determine an employer's liability for discrimination. This court explicitly shifted the emphasis from the plaintiff's standing to sue under discrimination statutes to the defendant's allegedly discriminatory actions. As in *Wallace*, the *Mardell* court decided that remedies rather than liability should be the center of attention. Specifically, it suggested that damages should accrue until the date of judgment.[16]

c. Résumé Fraud: Prior Criminal Convictions Redux.

The Seventh Circuit wrestled with the question of summary judgment in after-acquired-evidence cases. It adopted the rule, with modifications, in the 1992 case of *Washington v. Lake County, Ill*. Here, a former jailer named Eddie Washington alleged that his termination was racially motivated.[17] According to his employer, Washington was fired because of his arrest for criminal sexual assault. (These charges were later dropped.) At the time of Washington's discharge, his employer did not know that the man had falsely reported a clean criminal record on his job application.

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[15] 31 F.3d 1221 (3d Cir. 1994), *vacated in part*, 65 F.3d 1072 (3d Cir. 1995). For other cases that did not grant summary judgment in cases of misrepresented qualifications or unreported misconduct in current or previous jobs, *see* Boyd v. Rubbermaid Commercial Products, Inc., 62 Fair Empl. Prac. Cas. (BNA) 1228 (W.D. Va. 1992); Rupley v. Rorer Pharm. Corp., No. 90-C5597, 1992 WL 37121 (N.D. Ill. 1992); Ikpoh v. Central DuPage Hosp., No. 90-C7146, 1992 WL 211074 (N.D. Ill. Aug. 21, 1992); Smith v. Equitable Life Assurance Soc'y, 60 Fair Empl. Prac. Cas. (BNA) 1225 (S.D.N.Y. 1993); Russell v. Microdyne Corp., 65 F.3d 1229 (4th Cir. 1995); Massey v. Trump's Castle Hotel & Casino, 838 F. Supp. 314 (D. N.J. 1993); Moodie v. Federal Reserve Bank, 831 F. Supp. 333 (S.D.N.Y. 1993); Cooper v. Rykoff-Sexton, Inc., 64 Fair Empl. Prac. Cas. (BNA) 972 (Cal. Ct. App. 1994); *see also* Smith v. General Scanning Inc., 876 F.2d 1315 (7th Cir. 1989) (in dicta). In the case of *Baab v. AMR Service Corp.*, 811 F. Supp. 1246 (N.D. Ohio 1993), the court concluded that the plaintiff had suffered no legal damage because her employer proved that it would have discharged her had it known of her falsified medical and employment history. But this court also determined that the after-acquired-evidence doctrine established in *Summers* did not bar the claim of intentional infliction of emotional distress.

[16] This court later had to comply with the *McKennon* rule, awarding damages only up to the date of discovery. Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072 (3d Cir. 1995).

[17] 969 F.2d 250 (7th Cir. 1992).

In fact, Washington had pled guilty to criminal trespass in 1974 and was convicted of third-degree assault in 1981, although he served no jail time. Understandably, his employer (the Lake County Sheriff's Department) never would have hired Washington - or would have fired him immediately - had it known the truth. The trial court granted summary judgment to his employer. In order to affirm, the appellate court held the following: an employer must show by a preponderance of the evidence that, acting in a non-discriminatory manner, it would have discharged the employee upon learning of the misrepresentation. The sheriff's department could not prove that it always fired lying employees, in part because it unearthed no evidence of other employees who had lied. But the court decided that, given the nature of the plaintiff's crimes, the burden shifted to Washington to produce affirmative evidence that he would not have been fired if treated in a race-neutral fashion. Washington could not do so. As a result, the defendant met the standard set by the court and won summary judgment.

Note, however, the subtlety of the Seventh-Circuit approach. In a case decided the same year as *Washington*, the plaintiff had denied any felony convictions on his job application. In fact, he had earlier been convicted of armed robbery. Although the employer might have fired the employee upon learning of the conviction, the court found no proof that it would have done so. Unlike in Washington's case, the court refused to bar this plaintiff's Title VII suit.[18]

d. Résumé Fraud: Job Qualifications Redux.

The Seventh Circuit solidified its stance in the 1993 case of *Kristufek v. Hussmann FoodService Co.*[19] Here, plaintiff Arthur Kristufek argued that he had been fired because of his age and because he had opposed terminating an older secretary. Kristufek's employer maintained that the man was let go because of a corporate reorganization. During discovery, the defendant found that Kristufek had falsely claimed to have earned a bachelor's degree and completed graduate coursework. The district court barred Kristufek from any recovery of damages, entering a judgment notwithstanding the verdict. But the appellate court remanded the case, saying that Kristufek's lies did not preclude his recovery for retaliatory discharge. The court advised, however, that Kristufek's back pay award and attorneys' fees should be reduced to reflect the time at which the company discovered Kristufek's lies.

B. The McKennon Case

Like the *Summers* case, *McKennon* dealt with misconduct discovered after an

[18] Reed v. AMAX Coal Co., 971 F.2d 1295 (7th Cir. 1992) (dismissed by the court on other grounds).

[19] 985 F.2d 364 (7th Cir. 1993).

employee was fired. Christine McKennon alleged that she lost her secretarial job because of her age; she filed suit under the Age Discrimination in Employment Act (ADEA). Her employer, *The Nashville Banner*, contended that it dismissed her as part of a staff cutback. In conducting discovery, the newspaper's lawyers found that McKennon had taken home several confidential documents in violation of company policy. If the *Banner* had discovered her action, it would have fired her, as McKennon herself acknowledged. As in various earlier Sixth-Circuit cases and as in *Summers*, the Court of Appeals for the Sixth Circuit viewed the after-acquired evidence as a complete bar to relief.[20]

The Supreme Court saw otherwise. In a unanimous opinion, the court refused to adopt a "no-relief" rule. Instead, successful plaintiffs in cases like *McKennon* can recover back pay from the time of discriminatory discharge to the date after-acquired evidence comes to light - the remedy proposed in *Kristufek*. The Court suggested that reinstatement and front pay typically are inappropriate, provided employers can establish that after-acquired evidence would in fact have led to termination. But the Court did leave open the possibility of additional remedies under "extraordinary equitable circumstances."[21]

The Court pointed to the purpose of the ADEA in formulating its opinion. Along with Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the National Labor Relations Act, the Equal Pay Act, and the Fair Labor Standards Act, the ADEA is intended to wipe out workplace discrimination. The award of back pay, according to the Court, is one means of restoring people to the position they would have occupied absent the discrimination.

The *McKennon* court also addressed the "flyspecking" issue raised in *Wallace*. Specifically, it noted that a defendant's potential liability for a prevailing plaintiff's attorneys' fees, as well as sanctions imposed under Rule 11, should discourage

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[20] McKennon claimed she took the documents because she feared for her job security. She argued that her case differed from *Summers* because her action directly related to the discrimination she was about to suffer. The appellate court dryly noted that adopting McKennon's "nexus" argument would require applying it in cases where the plaintiff stole money from his employer in anticipation of a wrongful discharge. McKennon v. Nashville Banner Pub. Co., 9 F.3d 539, 543 n.8 (6th Cir. 1993).

[21] Before *McKennon*, virtually all courts had concluded that, if the plaintiff's behavior warranted a discharge, reinstatement and front pay were unsuitable remedies. Disallowing equitable remedies rests on the argument that the plaintiff has "unclean hands" and therefore is not entitled to equitable relief. But the Supreme Court has previously rejected this argument in public policy cases and therefore included the "extraordinary" language in *McKennon*. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), *rev'd*, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

pointless, time-consuming, or abusive discovery.[22]

C. Beyond McKennon: Recent Commentaries, Guidelines, and Cases

Most commentators suggest that the *McKennon* court should have favored the plaintiff even more than it did. Many scholars and judges point out that the defendant knew about the misconduct only because the plaintiff brought a discrimination suit after losing her job. They argue that, in some cases, a non-discriminating employer might never have fired the plaintiff. Consequently, a remedy that focuses on the date of finding evidence may fail to place the plaintiff where he or she would have been without the discrimination. After-acquired evidence should influence remedies only if a defendant would have discovered the information without a lawsuit, according to these critics.[23]

Others suggest alternative plaintiff-friendly remedies. One writer contends that front pay is appropriate in cases like *McKennon*, where the plaintiff's misconduct supposedly would not have occurred but for employer discrimination. Another suggests reinstatement as a typical remedy because it would send a stronger message to discriminatory supervisors, who do not typically bear the financial burden of damage payments but would have to confront a reinstated worker on a daily basis.[24]

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[22] This reinforces standards set in *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991, 994 (D. Kan. 1989) and *Churchman v. Pinkerton's Inc.*, 756 F. Supp. 515, 520 (D. Kan. 1991).

[23] For example, *see* Mardell v. Harleysville Life Insurance Co., 31 F. 3d 1221 (3rd Cir. 1994), and Judge Morris Arnold's dissent in Welch v. Liberty Machine Works, Inc., 23 F. 3d 1403 (8th Cir. 1994). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). At least two commentators have suggested barring after-acquired evidence unless the employer could have discovered it in the ordinary course of business. Michelle M. Whitney, Note, *The After-Acquired Evidence Doctrine and its Effect on Recovery in Employment Discrimination Claims*, 31 LAND & WATER L. REV. 663 (1996); Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89 (1995). Texas and Montana courts actually have barred after-acquired evidence in some circumstances. *See* Lohmann v. Towers, Perrin, Forster, & Crosby, Inc., No. H-91-3586, 1992 WL 548195 (S.D. Tex. Oct. 28, 1992); Flanigan v. Prudential Fed. Sav. & Loan Ass'n, 720 P.2d 257 (Mont. 1986).

[24] Andrea Calvaruso, *Two Wrongs Don't Make A Right: The Supreme Court Strikes Down the After-Acquired Evidence Doctrine*, 46 SYRACUSE L. REV. 1321 (1996); Leona Green, *Mixed Motives and After-Acquired Evidence: Second Cousins Benefit from 20/20 Hindsight*, 49 ARK. L. REV. 211 (1996). Others who support *McKennon* or suggest extending it include Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 LAB. LAW. 43 (1993); Elissa J. Preheim, Note, *Discrimination, Deceit, and Legal Decoys: The Diversion of After-Acquired Evidence and the Focus Restored by* McKennon v. Nashville Banner Publishing Company, 71 IND. L. J. 235 (1995); Lisa R. Petersen, Note, *A Final Resolution of the Dispute Surrounding After-Acquired Evidence as a Defense to Employment Discrimination*, 1995

The EEOC guidelines issued in December 1995 elaborate upon the issue of employer behavior after a plaintiff has filed a lawsuit.[25] Under the guidelines, employers who seek evidence of past wrongdoing may be guilty of retaliation against the worker. Accordingly, if employers who are sued for discrimination try to obtain evidence of previous worker fraud or misconduct, they may face EEOC sanctions as well as court-imposed penalties for abusive discovery.

A host of after-acquired-evidence cases have arisen since *McKennon*. In most, the courts have suggested that plaintiffs are entitled at least to back pay. The following paragraphs sketch out major post-*McKennon* developments.

Job misconduct cases thus far primarily have involved misappropriation of documents or unproductive behavior. In *Castle v. Rubin*,[26] plaintiff Castle was fired for poor performance during her probationary period at the U.S. Treasury. She sued, claiming to be a victim of sex discrimination. Although the defendant later discovered that Castle had plagiarized extensively instead of writing original training materials, the court felt bound by *McKennon* to award back pay. The court did not, however, adopt the plaintiff's argument that she was entitled to far more compensation because she would have been tenured by the time the defendant found the evidence of plagiarism. In *Sigmon v. Parker Chapin Flattau & Klimpl*,[27] the New York plaintiff was a female

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UTAH L. REV. 943 (1995); Pamela M. Martey, Note, *"The Last Temptation is the Greatest Treason: To Do the Right Deed for the Wrong Reason": After-Acquired Evidence in Employment Discrimination Claims:* McKennon v. Nashville Banner Publishing Co., 28 CREIGHTON L. REV. 1031 (1995); Carolyn L. Whitford, Note, *While the United States Supreme Court Waves Goodbye to the After-Acquired Evidence Doctrine, It May Allow the Employer to Hold a Card Up Its Sleeve in* McKennon v. Nashville Banner Publishing Co., 74 NEB. L. REV. 374 (1995); Tricia Lynne Landthorn, Comment, *Two Wrongs Can Make A Right:* McKennon v. Nashville Banner Publishing Co. *and the After-Acquired Evidence Doctrine*, 56 OHIO ST. L. J. 1019 (1995); Tory E. Griffin, Note, McKennon v. Nashville Banner Publishing Co.: *The Future Role of After-Acquired Evidence in Employment Discrimination Litigation*, 74 OR. L. REV. 781 (1995); Thompson, *supra* note 5; Martin Adler, *Nailing down the Coffin Lid: the Rise and Fall of the After-acquired Evidence Doctrine in Title VII Litigation*, 39 N.Y.L. SCH. L. REV. 719 (1994); Sharona Hoffman, *The After-Acquired Evidence Rule: The Best of All Possible Worlds?* 22 EMPLOYEE REL. L.J. 79 (1996); Sheldon J. Stark & Margaret J. Sande, *Here's the Dirt on 'After-Acquired' Evidence Since* McKennon, TRIAL, Sept. 1997, at 28.

[25] EEOC Notice No. 915.002 (December 14, 1995), *in* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EMPLOYER EEO RESPONSIBILITIES : PREVENTING DISCRIMINATION IN THE WORKPLACE, THE LAW AND EEOC PROCEDURES (Technical Assistance Program, Apr. 1996).

[26] 78 F.3d 654 (D.C. Cir. 1996).

[27] 901 F. Supp. 667 (S.D.N.Y. 1995).

lawyer fired after returning from maternity leave. She claimed sex discrimination and poor treatment by her colleagues; the defendants pointed out the radical decrease in hours billed by Sigmon and legitimate needs for reductions in force. During discovery, the defendants found that Sigmon had taken and copied several confidential documents located in the room allotted to her for her job search. In the Iowa dispute of *Walters v. U.S. Gypsum*,[28] a forklift operator was fired, allegedly for poor performance, absenteeism, and abuse of coworkers. She claimed disability discrimination. The defendant later found that Walters frequently had come to work under the influence of beer or marijuana.

Cases of résumé fraud after *McKennon* have yielded false reports of college degrees or work experience, obscuring of criminal records, failure to report firings from previous jobs, and misleading health information. For example, in *Petrovich v. LPI Service Corp.*,[29] the plaintiff claimed that his employer fired him because he was Serbian, not because he couldn't do his job. The defendant later found that Petrovich had omitted references to previous jobs and falsified his credentials and experience. Petrovich then claimed that someone else had prepared his résumé so he should not be held responsible for errors within it. Although the court did not adopt Petrovich's argument -- apparently because the man had had time to read his prepared résumé -- it left the door open for remedies in addition to back pay. In the Fifth Circuit case of *Patterson v. PHP Healthcare Corp.*,[30] the plaintiff allegedly was fired for insubordination, tardiness, and inability to work constructively with others. He filed a race discrimination charge against his employer, who subsequently discovered that Brown had been earlier convicted of burglary (although his record was later expunged). A Michigan plaintiff in *Wright v. Restaurant Concept Management, Inc.*[31] also claimed race discrimination after he was fired for insubordination from his position as a restaurant manager. The defendant later found that Wright had earlier been convicted for felonious assault after engaging in a six-hour standoff with police. In the Kentucky dispute of *Toyota Mfg. Co. U.S.A., Inc. v. Epperson*,[32] the Toyota company discharged a probationary employee under established company policy when he did not return from disability leave after six months. He claimed disability discrimination. Toyota then discovered that Epperson had neglected to disclose his termination from previous jobs and his substantial medical problems. Although the court awarded damages, one judge wrote a furious dissent, arguing that damages in this case constituted a reward for gross fraud.

One interesting issue that has arisen is this: should the *McKennon* standard apply in ordinary breach-of-contract cases as well as in discrimination cases? Some courts

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[28] 537 N.W. 2d 708 (Iowa 1995).
[29] 949 F. Supp. 626 (N.D. Ill. 1996).
[30] 90 F.3d 927 (5th Cir. 1996).
[31] 532 N.W.2d 889 (Mich. Ct. App. 1995).
[32] 945 S.W.2d 413 (Ky. 1996).

seem inclined to say "yes."[33] A few have said "no". For example, in *Crawford Rehabilitation Services v. Weissman*,[34] the plaintiff protested her termination after she took an unauthorized day off. In fact, her employer had explicitly denied permission for the holiday. Her employer later discovered that Weissman had failed to report a previous termination for cause and had lied about her job experience. The court decided that *McKennon* did not entitle this plaintiff to any damages. In the South Carolina case of *Lewis v. Fisher Service Co.*,[35] the plaintiff was fired when he made secret tape recordings of conversations with his supervisor, then replayed them for co-workers. He protested, saying that the company handbook provided for progressive discipline except in cases of very serious offenses. The defendant later found that Lewis had engaged in similar tape-recordings in previous jobs. The court suggested that the after-acquired evidence, coupled with the "serious-offense" clause in the handbook, should permit the employer to avoid all liability.

II. AN ECONOMIC VIEW OF AFTER-ACQUIRED-EVIDENCE CASES

A. Economic Models of Statistical Discrimination and Signaling

Most economists are reluctant to use pure discrimination as the leading explanation for differences in job-market experiences between blacks and whites, women and men, and the like. Pure discrimination -- the unequal treatment by employers of equally productive people -- is costly. Gary Becker's seminal work demonstrates that, in a competitive market, discriminating employers would lose money and go out of business.[36]

Yet job-market differences persist, so economists have turned to alternative explanations to account for them. Edmund Phelps, Dennis Aigner, and Glen Cain pioneered the notion of using statistical discrimination as a way to explain wage differentials.[37] Their models presume that employers can observe the quality of job

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[33] S. Med. Health Sys., Inc. v. Vaughn, 669 So. 2d 98 (Ala. 1995); *see also* Gassman v. Evangelical Lutheran Good Samaritan Soc'y, Inc., 921 P.2d 224 (Kan. Ct. App. 1996), *aff'd*, 933 P.2d 743 (Kan. 1997).

[34] 938 P.2d 540 (Colo. 1997).

[35] 495 S.E.2d 440 (S.C. 1998).

[36] GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2nd ed. 1971); *see also* STUDIES IN LABOR MARKETS (Sherwin Rosen ed. 1981); IMPLICIT CONTRACT THEORY (Sherwin Rosen ed. 1994); ESSAYS ON THE ECONOMICS OF DISCRIMINATION (Emily P. Hoffman ed. 1991). *But see* Francine D. Blau & Marianne A. Ferber, *Discrimination: Empirical Evidence from the United States*, 77 AM. ECON. REV. 316 (1987). Blau and Ferber offer data showing that blacks and women are paid lower wages and encounter higher unemployment than otherwise comparable white males. *Id.* at 319.

[37] Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV.

applicants via some testing mechanism. Test scores yield only imperfect information about quality, however, so employers may base wage offers on other observable information such as skin color or sex. If employers are risk-averse and test scores are less reliable for, say, blacks and women, then white males may receive better offers.[38] This effect is exacerbated if employers believe that blacks and women are less productive on average, perhaps because of pre-labor-market discrimination in schooling or housing.

In these sorts of models, employers have incentives to design superior tests in order to increase profits. An employer who develops a better test could hire blacks and females at a wage higher than they could make elsewhere, but lower than the white-male wage. At the same time, blacks and women have incentives to acquire qualifications like better education or good references that send signals to employers. These signals permit employers to get past imperfect test results, skin color, and sex.[39] Clear signals of individual productivity lessen employer reliance on flawed testing mechanisms and group characteristics.

More recent statistical-discrimination models have focused on differences in labor market experience other than wages.[40] Bradford Cornell and Ivo Welch, for example,

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659 (1972); Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 INDUS. & LAB. REL. REV. 175 (1977). *See also* Kenneth J. Arrow, *Models of Job Discrimination*, *in* RACIAL DISCRIMINATION IN ECONOMIC LIFE 83 (Anthony H. Pascal ed., 1972); Melvin Reder, *Human Capital and Economic Discrimination*, *in* HUMAN RESOURCES AND ECONOMIC WELFARE 71 (Ivar Berg ed., 1972); Glen G. Cain, *The Economic Analysis of Labor Market Discrimination: A Survey*, *in* 1 HANDBOOK OF LABOR ECONOMICS 693 (Orley Ashenfelter & Richard Layard eds., 1986); Rein Haagsma, *Statistical Discrimination and Competitive Signalling*, 36 ECON. LETTERS 93 (1991); Gerald S. Oettinger, *Statistical Discrimination and the Early Career Evolution of the Black-White Wage Gap*, 14 J. LAB. ECON. 52 (1996). The Spring 1998 issue of the Journal of Economic Perspectives also contains a thoughtful set of papers. *See* Glenn C. Loury, *Discrimination in the Post-Civil Rights Era: Beyond Market Interactions*, 12 J. ECON. PERSPS. 117 (1998).

[38] In these models, this is true at least for candidates with test scores above a certain level.

[39] *See* A. Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355 (1973) (the classic work on signaling in the labor market); *see also* A. MICHAEL SPENCE, MARKET SIGNALING (1974); Joseph E. Stiglitz, *The Theory of Screening, Education, and the Distribution of Income*, 65 AM. ECON. REV. 283 (1975).

[40] For example, workers might encounter different hiring, promotion, or unemployment patterns. Explanations for such differences may lie in different underlying quit rates. *See* Michael Sattinger, *Statistical Discrimination with Employment Criteria*, 39 INT'L ECON. REV. 205 (1998). Differences may also lie in residence. *See* Steven Raphael, 51 INDUS. LAB. REL. REV. 505 (1998). Differences in job-market treatment may also result in disparate job-market

set up a model in which employers post fixed wages, then hire from a pool of applicants based on inferred ability.[41] Here, employers screen applicants based on a variety of signals received. If employers can more easily evaluate an applicant who resembles them -- in skin color, sex, religious beliefs, ethnicity, and so forth -- interviewing such a person gives employers more information than interviewing a person of a different race, sex, or background. "Same-group" candidates therefore have a better chance of landing a job.

The Cornell-Welch model, like the wage models, generates incentives for employers to devise lower-cost ways of learning about "other-group" candidates. Moreover, as in wage models, "other-group" candidates have motives to acquire signals that convey information cheaply to prospective employers. Significantly, the Cornell-Welch model also implies that, f employers could choose to evaluate workers on the job (via assessments that cost the same for each worker) rather than screen beforehand, screening discrimination could disappear. But if a law were passed that made firing employees - particularly those in the "other group" - more expensive, employers would have to rely more on *ex ante* interviews than *ex post* evaluations of job performance. Passing such a law would therefore tend to increase employer rejection of "other-group" applicants.

A plausible extension of the Cornell-Welch model could add the assumption that on-the-job evaluations cost more for "other-group" employees. If so, employers would tend to screen out "other-group" applicants and fire "other-group" employees at a relatively higher rate -- not out of prejudice, but rather as a response to greater costs of assessment. Once again, "other-group" individuals would have incentives to invest in signals to overcome the information problem. Again, as well, a law that increased the price of firing employees would also increase the incidence of screening out "other-group" job candidates.

2. The Typical After-Acquired Evidence Scenario: The Plaintiff Sent a False Labor-Market Signal

Signaling models offer a useful way to view after-acquired-evidence cases. In such cases, after-acquired evidence indicates that a plaintiff misrepresented or concealed information from an employer. The employer used the tainted information supplied by the plaintiff as a signal to indicate the suitability of including

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participation. For empirical measurement, see Marjorie Baldwin & William G. Johnson, *Estimating the Employment Effects of Wage Discrimination*, 74 REV. ECON. STAT. 446 (1992).

[41] Bradford Cornell & Ivo Welch, *Culture, Information, and Screening Discrimination*, 104 J. POL. ECON. 542 (1996).

the person in a pool of prospective employees, matching the person with the job, or keeping the person employed. Like the wolf in sheep's clothing, the plaintiff is not what he or she appeared.

In some after-acquired-evidence cases, the plaintiff inflated the amount of human capital acquired, falsely claiming to have graduated from college (obtained a sheepskin, in other words) or gained previous on-the-job experience. Because investment in human capital yields an expected increase in job productivity, clear evidence of such investment -- like a baccalaureate degree or list of satisfied former employers -- cheaply communicates to a potential employer the ability to do a good job.[42] Of course, these attributes also tend to raise wages. Faking a degree or work experience, therefore, means sending a signal that the job applicant is more productive, and thus worth more, than he or she really is.

In other cases, the plaintiff concealed a defect in human capital by not reporting criminal convictions or terminations from previous jobs for fraud. In these instances, the plaintiff deliberately obscured a signal that might have revealed his or her relative incompatibility with the job.[43]

In a third set of cases, the employee committed an initially undiscovered act in the course of his or her current employment. For instance, the worker may have falsified records or filched confidential files. Such an act would signal the

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[42] For discussions of theory and empirical evidence on human capital and productivity, see GARY BECKER, HUMAN CAPITAL (3rd. ed. 1993). *See also* JACOB MINCER, SCHOOLING, EXPERIENCE, AND EARNINGS (1964); Dale T. Mortensen, *Specific Capital and Labor Turnover*, 9 BELL J. ECON. 572 (1978); Boyan Jovanovic, *Firm-Specific Capital and Turnover*, 87 J. POL. ECON. 1246 (1979); John Pencavel, *Higher Education, Productivity, and Earnings*, 22 J. ECON. EDUC. 331 (1991); W. Norton Grubb, *The Varied Economic Returns to Post-Secondary Education: New Evidence from the Class of 1972*, 28 J. HUM. RESOURCES 365 (1993); T. Paul Schultz, *Investments in the Schooling and Health of Women and Men: Quantities and Returns*, 28 J. HUM. RESOURCES 694 (1993); Tracy R. Lewis & David E. M. Sappington, *Choosing Workers' Qualifications: No Experience Necessary?*, 34 INT'L. ECON. REV. 479 (1993); Marc Fox, *Is it a Good Investment to Attend an Elite Private College?*, 12 ECON. EDUC. REV. 137 (1993); Kevin M. Murphy & Finis Welch, *Inequality and Relative Wages*, 83 AM. ECON. REV. 104 (1993); Kevin M. Murphy & Finis Welch, *Occupational Change and the Demand for Skill, 1940-1990*, 83 AM. ECON. REV. 122 (1993); *see generally* JACOB MINCER, THE COLLECTED ESSAYS OF JACOB MINCER (1993).

[43] This is not to say that all criminals are unsuitable for all jobs. But people previously convicted for embezzlement may not be appropriate bank employees, and people jailed for assault might not be seemly hotel concierges.

employee's dishonesty and unproductive attributes - if the employer only knew of it.[44]

III. DISSECTING *MCKENNON*: ITS STATED PURPOSE AND ITS UNINTENDED CONSEQUENCES

Discrimination statutes cover classes of qualified persons who possess some inborn trait: sex, race, age, and so forth. Such laws aim to ensure that workers similarly situated with respect to productive characteristics will not encounter discrimination on the basis of immutable features irrelevant to job performance. Whether they achieve these aims is a matter of controversy - some scholars contend that discrimination laws actually are counterproductive or enforced so inappropriately that they do more harm than good.[45] In part, these contentions arise because economic forces should typically make pure discrimination an unprofitable endeavor.

However, suppose some pure discrimination exists in labor markets, perhaps because of market imperfections or because prejudiced supervisors depart from their employers' profit-making objectives. The rules laid out in *McKennon* are designed to reinforce discrimination statutes by punishing employers who act in a discriminatory fashion -- a laudable goal. Yet *McKennon* may also generate serious consequences that the Supreme Court did not contemplate. By doing violence to the labor-market signaling process, *McKennon* may ultimately harm the very people the Court intended to help.

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[44] Inappropriate behavior on the job is not the sort of signal that Spence discussed. Nevertheless, the logic of signaling easily extends to this situation.

[45] *See* James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Laws: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276 (1990); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); Thomas G. Abram, *The Law, Its Interpretation, Levels of Enforcement Activity, and Effect on Employer Behavior*, 83 AM. ECON. REV. 62 (1993); Mark R. Killingsworth, *Analyzing Employment Discrimination: From the Seminar Room to the Courtroom*, 83 AM. ECON. REV. 67 (1993); Robert S. Follett, et al., *Problems in Assessing Employment Discrimination*, 83 AM. ECON. REV. 73 (1993); James P. Smith, *Affirmative Action and the Racial Wage Gap*, 83 AM. ECON. REV. 79 (1993); Stephen Coate & Glenn Loury, *Antidiscrimination Enforcement and the Problem of Patronization*, 83 AM. ECON. REV. 92 (1993); Richard A. Epstein, *The Subtle Vices of the Employment Discrimination Laws*, 29 J. MARSHALL L. REV. 575 (1996).

A. Discrimination Statutes, the Apparent Dilemma of a Summary Judgment Rule, and Administrative Costs

Before *McKennon*, courts that ordered summary judgment for employer defendants typically relied on the argument that plaintiffs in after-acquired-evidence cases had no legal standing. The argument went like this: Under discrimination statutes, someone with an enumerated trait is protected only insofar as he or she is a qualified person. If workers gain or keep jobs under false pretenses, they are not qualified persons because they are not similarly situated with respect to productive characteristics. A worker who falsely claims to have a master's degree in engineering, for example, does not truly resemble a person who has the degree. The educational capital of the two differs and so may the trustworthiness. Although the worker may have an immutable trait listed in discrimination statutes, he or she is not a member of the protected class and therefore cannot be a victim of discrimination under the statutes.

Whereas this argument is logical and legally supportable, it seems to pose a dilemma: we do not want to reward undeserving plaintiffs, yet nor do we wish to encourage discriminatory behavior by employers. As one court put it: "[a]false statement on an employment application is not be an insurance policy covering bigotry."[46] Suppose an employer fired someone with an immutable trait, unaware that the worker was actually an impostor. Although after-acquired evidence reinforces the defendant's action, the timing of the knowledge cannot rule out a discriminatory motive. To critics of summary judgment, the rule therefore worsened labor market conditions for those whom discrimination statutes sought to protect. Summary judgment cut off any plaintiff who had suffered discriminatory treatment, thus generating a type I error.[47]

To be sure, a departure from summary judgment costs more to administer. Under *McKennon*, for example, employers will face more lawsuits and settle more cases with plaintiffs. Not only will plaintiffs file more lawsuits, per-case

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[46] Bazzi v. Western & S. Life Ins. Co., 808 F. Supp. 1306, 1310 (E.D. Mich. 1992), *rev'd*, 25 F.3d. 1047 (6th Cir. 1994).

[47] A type I error occurs when someone rejects a hypothesis as false when it is actually true.

administrative costs may escalate because *McKennon* leaves many questions for individual courts to resolve.[48] Further, because plaintiffs can potentially recover damages up to the time of discovery of incriminating evidence, they have clear financial incentives to protract the discovery process. However, to opponents of summary judgment, this increased administrative burden simply reflects the cost our society should be willing to pay to deter pure discrimination by employers.

2. Potential Failures of McKennon: Higher Social Costs, More Discrimination, and Lower Investment by Minorities in Productive Capital

Regrettably, added administrative costs are probably not the only outcome of *McKennon*. The *McKennon* rule potentially creates significant other social costs as well. It obscures the value of signals, causing employers to spend more on pre-employment screening and post-hire job evaluations. Worst of all, it may actually increase the incidence of statistical discrimination, divert attention from purely prejudicial employer behavior, and discourage minorities from investing in human capital.

1. Fuzzy signals and the costs of *McKennon* to employers

McKennon essentially reduces the costs to individuals of sending false signals in the labor market. At the same time, it augments costs to employers of evaluating job applicants and existing employees.

Suppose an individual falsely claims to have a college degree. An employer who discovers the lie in the hiring process is economically justified in rejecting the applicant - because the person may not possess the human capital necessary to perform the job and may not be trustworthy. If an employer learns of the lie after the applicant is hired but must still pay damages under *McKennon*, the penalties to applicants of sending a false signal are lower than under a summary judgment rule. Consequently, *McKennon* erodes the value of the educational signal itself. Cumbersome screening methods (and possibly poorer initial matches) will replace the substantial benefits of having an easily conveyed and trustworthy signal.[49]

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[48] One commentator has called for an even greater administrative role for courts in after-acquired-evidence cases than *McKennon* suggests, requesting that they use a comparative fault standard to arrive at damages. Petersen, *supra* note 24.

[49] For discussions of the benefits of good matches, see Robert E. Hall, *Turnover in the*

Certainly, one might argue that employers could help themselves in these cases simply by calling all schools and previous employers, or requiring the submission of transcripts or performance evaluations. However, such measures take time and money, and documents are easily faked. Perhaps more important, self-reported qualifications typically have served as an essential device for an employer to obtain a pool of eligible employees. Yet employers simply cannot afford to rely on self-reporting under *McKennon* as much as they could under a summary judgment rule.

Now suppose a defect in human capital goes unreported because the plaintiff neglects to report previous assault convictions on his or her job application. The person is hired, then fired, allegedly for unruly behavior. An employer might initially overrate the worker's potential productivity on the job. An employer-defendant could also suffer substantial additional economic loss if the plaintiff convinces a court of employer discrimination despite having concealed a shady past. Under *McKennon*, the employer must design more costly mechanisms to check the fit between job and worker because the ruling makes a self-reported "clean-living" signal less reliable.[50]

People send signals on the job that indicate their suitability, just as they do when applying for employment. Indicators of a poor match, such as an employee's falsification of records, are even stronger if they are artfully concealed. Under *McKennon*, the value of apparent-good-behavior signals is smaller, productivity is relatively lower, and matches of workers to jobs are inferior. Employers have incentives to increase surveillance of all employees. At some point, workplace

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Labor Force, 1972 BROOKINGS PAPERS ECON. ACTIVITY 709, and Boyan Jovanovic, *Job Matching and the Theory of Turnover*, 87 J. POL. ECON. 972 (1979). In more recent work, researchers have shown that government regulation of job creation and destruction impairs job-worker matching, leading to decreased average productivity and substantial welfare loss. Hugo Hopenhayn & Richard Rogerson, *Job Turnover and Policy Evaluation: A General Equilibrium Analysis*, 101 J. POL. ECON. 915 (1993).

[50] The case of *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. 4th 620 (Cal. Ct. App. 1995), for example, barred any relief for plaintiffs who never would have been hired. Here, the plaintiffs worked as legal secretaries. On their job applications, they reported that they had never committed any felony. In truth, they previously had been convicted of conspiring to defraud a bank. *McKennon* opens the door for plaintiffs in cases like these to obtain some damages.

privacy issues could well conflict with employers' need to guard against deceitful employees.

2. Fuzzy signals and the costs of McKennon to members of target groups.

Employers generally face greater costs under *McKennon* than under a summary judgment rule, but why may members of target groups suffer? In part, because everyone pays when signals lose clarity. More to the point, fuzzy signals imply that employers may have to resort to supplemental group data on highly visible traits as they make hiring and other employment decisions. By comparison to a summary judgment rule, the *McKennon* rule diminishes the value of signals. This elevates the costs of acquiring information about prospective employees -- particularly those in the "other group " -- and raises employers' reliance (whether prejudicially motivated or not) on information associated with easily observable, immutable characteristics. As the Cornell-Welch model makes clear, a law that increases the price of firing employees -- especially those in the "other group" -- may mean that employers simply screen out "other-group" candidates. By attempting to eliminate true discrimination, the *McKennon* decision thus makes statistical discrimination more likely. In fact, members of target groups may never even have a chance to be plaintiffs. Employers could simply choose to locate in places where few individuals with protected traits reside in order to fend off discrimination-in-hiring charges.[51]

When "other-group" candidates are hired, *McKennon* is far likelier to generate type II errors -- rewarding false claims -- than to reduce type I errors.[52] Why? *McKennon* came before the Court on the express assumption that discrimination was the sole basis for termination. But this overlooks something critical. The *McKennon* court stated that "[t]he employer could not have been motivated by

[51] For discussion, see Abram, *supra* note 45, at 62; Coate & Loury, *supra* note 45, at 92. For many reasons, the United States already has a spatial mismatch between jobs and potential workers. *See* Stephen L. Ross, *Racial Differences in Residential and Job Mobility: Evidence Concerning the Spatial Mismatch Hypothesis*, 43 J. URB. ECON. 112 (1998); Wayne Vroman, *Industrial Change and Black Men's Relative Earnings, in* 12 RESEARCH IN LABOR ECONOMICS (Ronald G. Ehrenberg ed. 1991).

[52] A type II error occurs when someone accepts a hypothesis as true even though it is actually false.

knowledge it did not have."[53] True, but the after-acquired evidence obtained in many cases gave considerable weight to the employer's original rationale for firing (or not hiring) the plaintiff. Plaintiffs who falsely claimed to have college degrees or relevant work experience frequently were dismissed for poor performance, according to defendants.[54] The defendants' claims seem plausible if the level of education and the presence of previous jobs are positively correlated with subsequent work performance. Other plaintiffs who were discharged for poor performance had in fact stolen money or confidential materials from employers, cheated employers, came to work impaired, or lied about their physical health.[55] Again, the defendant's feelings about the quality of the plaintiff's contributions to

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[53] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995). One issue in after-acquired-evidence cases is their resemblance to mixed-motive cases. If a worker is fired for two reasons -- one discriminatory and one not -- the employer can avoid liability if he would have taken the same action absent the discriminatory reason. The problem with applying the mixed-motive reasoning directly to after-acquired-evidence cases is that the employer did not have the damning evidence at the time of making the employment decision – he obtained it only during discovery. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 US 274 (1977), 670 F.2d 59 (6th Cir 1982); Price Waterhouse v. Hopkins, 490 US 228 (1989), *aff'd*, 920 F.2d 967 (1990); Mardell v. Harleysville Life Insurance Co., 31 F. 3d 1221 (3rd Cir. 1994); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991); Heather K. Gerken, Note, *Understanding Mixed Motive Claims Under the Civil Rights Act of 1991: An Analysis of International Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824 (1993).

[54] *See* Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992); Bonger v. Am. Water Works, 789 F. Supp. 1102 (D. Colo. 1992); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3rd Cir. 1994); Cooper v. Rykoff-Sexton, Inc., 64 Fair Empl. Prac. Cas. (BNA) 972; Duart v. FMC Wyoming Corp., 72 F.3d 117 (10th Cir. 1995); Petrovich v. LPI Serv. Corp., 949 F. Supp. 626 (N.D. Ill. 1996); Barlow v. Hester Indus. Inc., 479 S.E.2d 628 (W. Va. 1996).

[55] *See* Summers v. State Farm, 864 F.2d 700 (10th Cir 1988); Paglio v. Chagrin Valley Hunt Club Corp., No. 91-3983, 1992 WL144674 (6th Cir 1992); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992), *aff'd in part, rev'd in part*, 79 F.3d 756 (9th Cir.1996); Dotson v. U.S. Postal Service, 961 F.2d 1576 (6th Cir. 1992); Greene v. Standard Register Co. 60 Fair Empl. Prac. Cas. (BNA) 1151 (W.D. Mich. 1992); Walters v. U.S. Gypsum, 537 N.W.2d 708 (Iowa 1995); Sigmon v. Parker, Chapin, Flattau & Klimpl, 901 F. Supp. 667 (S.D.N.Y. 1995), Toyota v. Epperson, 945 S.W.2d 413 (Ky. 1996); Vichare v. AMBAC Inc., 106 F.3d 457 (2d Cir. (N.Y. 1996); Gassman v. Evangelical Luth. Good Sam. Soc., 921 P.2d 224 (Colo. 1996). A related case is *Carlson v. WPLGTV-IO, Post-Newsweek Stations*, 956 F. Supp. 994 (S.D. Fla. 1996). *See also* Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (failure-to-hire case).

the job related believably to actual quality. Still other plaintiffs who were fired for insubordination, marginal job performance, or unpalatable behavior had actually committed reprehensible acts in the past.[56] If those who misbehaved in the past are more likely to misbehave in the future, the claims of employer-defendants seem to have merit. In sum, although pure discrimination may have transpired in some after-acquired-evidence cases, the facts frequently indicate otherwise.

Consequently, *McKennon* may well spawn disputes that draw attention away from pure discrimination in the workplace. By de-emphasizing the plaintiff's status, *McKennon* means that members of protected classes will find their educational degrees demeaned, their clean criminal records less noteworthy, and their exemplary work performance less valuable. Those who expected to stand proudly by their accomplishments -- and use these to buttress claims of unfair or prejudicial treatment -- are lumped together with everyone of the same race, sex, religion, or other common trait. Put simply, those who truly encounter discrimination on the job may get lost in the shuffle. Let me explain: the more we can isolate an immutable trait as the only difference between a plaintiff and other workers, the more we might point to pure discrimination on the part of the employer or the employer's representatives. *McKennon* muddies the process. Of course, honest plaintiffs who suffer pure discrimination theoretically would obtain greater damages than *McKennon*-type plaintiffs because they would be more likely to qualify for front pay and reinstatement. But the reality is that resources are scarce and life is uncertain: under *McKennon*, honest people may find it as difficult to distinguish themselves in a courtroom as they do in a job interview. This is especially true because discovery that would flush out a dishonest plaintiff is costly under *McKennon* and the EEOC guidelines: the sanctions on employers for abusive discovery may over-deter them from engaging in any meaningful discovery. One plausible result is an increase in the number of settlements, with settlement amounts

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[56] *See* Sweeney v. U-Haul Co., 55 Fair Empl. Prac. Cas. (BNA) 1257 (N.D. Ill. 1991); Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992); Milligan-Jensen v. Mich. Tech. Univ., 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 509 U.S. 903 (1992), *cert. dismissed*, 509 U.S. 943 (1993); Washington v. Lake County, Ill., 969 F. 2d 250 (7th Cir. 1992); Wright v. Restaurant, 532 N.W.2d 889 (Mich. Ct. App. 1995); Patterson v. PHP Healthcare, 90 F. 3d.927 (5th Cir. 1996); Crawford Rehab. Serv. v. Weissman, 938 P.2d 540 (Colo. 1997); Lewis v. Fisher Service Co., 495 S.E.2d 440 (S.C. 1998); Mathis v. Boeing, 719 F. Supp. 991, 994 (D. Kan. 1989); *see also* Kravit v. Delta Air Lines, 60 Fair Empl. Prac. Cas. (BNA) 994 (E.D.N.Y. 1992) (failure to hire).

failing to distinguish between honest and dishonest plaintiffs and failing to separate prejudiced from unprejudiced defendants.

What might be the ultimate consequence of *McKennon*? Besides an increased incidence of pre-hire screening by employers, *McKennon* creates disincentives to invest in signals, particularly for those with protected traits. Because *McKennon* reduces the informational content of signals, people with traits enumerated in discrimination statutes simply may not find it as worthwhile to acquire costly human capital or other sorts of indicators of productivity. To the extent members of protected classes -- particularly minorities -- historically have invested less in education, training, and other forms of human capital, a legal rule that grants relief to dishonest plaintiffs may well widen the skills gap.[57]

Not incidentally, the strain on court resources imposed by *McKennon* -- particularly if courts extend the *McKennon* reasoning to simple breach-of-contract cases -- aggravates an already troubling trend. Civil rights litigation has expanded far more rapidly over the last three decades than other forms of litigation because legislatures have added types of protected classes, the EEOC has expanded its jurisdiction, and judges have accepted new theories of liability. As some worried commentators point out, these expansions mean that people focus far less on the original target group -- African-Americans. At the same time, the gains of this group have slowed considerably.[58]

IV. CONCLUSION

College degrees, relevant previous experience, spotless criminal records, and evidence of good work performance all send signals to employers that prospective and chosen employees will fit their jobs well. These labor market signals thus perform an economic function by saving on information costs. Integrity of such signals means good matches between workers and jobs, low turnover, high returns to investments in human capital, and a productive economy. These in turn yield

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[57] Younger well-educated blacks of both sexes and black female college graduates earned a lower premium for education even before *McKennon*. David Card & Thomas Lemieux, *Wage Dispersion, Returns to Skill, and Black-White Wage Differentials*, 74 J. ECONOMETRICS 319, 321 (1996); *see also* June O'Neill, *The Role of Human Capital in Earnings Differences Between Black and White Men*, 4 J. ECON. PERSPS. 25 (1990).

[58] *See* Abram, *supra* note 45, at 62; Smith, *supra* note 45, at 79.

lower costs of doing business, which benefits workers and consumers as well as employers. Sound signals also reduce employers' use of immutable characteristics as indicators of productivity, thus decreasing the likelihood of statistical discrimination. In a world of clear signals, courts could therefore focus on ferreting out cases of true workplace prejudice.

The *McKennon* court intended to discourage discriminatory behavior by employers. Yet, by providing redress to plaintiffs with no real legal standing, it also reduced the usefulness of job market signals. One of the most disturbing aspects of the ruling is that members of protected classes will potentially suffer. Increases in pre-hire screening may make finding jobs harder for minorities. Those who are hired may find that proving subtle cases of prejudice has become more difficult. An individual with a protected trait could point to legitimate qualifications and good job performance to support a claim of employer discrimination if signals were reliable; not so when signals lose their shine. As a result, people with protected traits may have less incentive to invest in human capital and to act productively on the job. This in turn could exacerbate existing discrepancies in marketable skills across different groups in the population.

The fallout from *McKennon* is still in progress. Because of the remedial leeway left by the *McKennon* court, the effect on the signaling process is as yet impossible to ascertain empirically. Many law review articles have called for applications of *McKennon* that will enhance plaintiff awards, whereas trial courts generally have squelched equitable relief in cases of severe misconduct.[57] The net impact of *McKennon* will clearly turn upon the way courts tend to apply the ruling.

One last point: the economic boom enjoyed in the U.S. since the *McKennon* ruling has probably meant that at least some rejected job applicants and fired workers have gotten new jobs and gone on with their lives rather than filed lawsuits claiming discrimination. Watching what happens when the economy turns downward will likely enlighten us as to the true implications of *McKennon*.

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[57] *See* Stark & Sande, *supra* note 24, at 30.