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Employment Law: *McKennon v. Nashville Banner Publishing Co.* and After-Acquired Evidence--A Convincing Resolution to Employer/Employee Misconduct or an Incomplete Assessment of the Issue?

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Employment Law: *McKennon v. Nashville Banner Publishing Co.* and After-Acquired Evidence — A Convincing Resolution to Employer/Employee Misconduct or an Incomplete Assessment of the Issue?

I. Introduction

Since the inception of Title VII of the Civil Rights Act of 1964[1] (Title VII), the Age Discrimination in Employment Act[2] (ADEA), and other federal antidiscrimination laws, employers and employees have been in a silent battle with each other. Employers are cautious in how they approach hiring and terminating personnel, fearing possible litigation based on discrimination. Employees, on the other hand, have powerful statutory remedies available to them when an employer discriminates. Congress enacted Title VII in 1964 to create a "national policy of nondiscrimination" in the workplace by prohibiting discrimination by employers.[3] Similarly, in passing the ADEA, Congress sought to eradicate arbitrary age discrimination against any employee over forty.[4]

The policy of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[5] Title VII attempts to prevent discrimination in employment based on race, color, sex, religion, or national origin.[6] In most instances, courts interpret both Title VII and the ADEA liberally in order to further the goal of ending discrimination in the workplace.[7]

One of the questions associated with Title VII, the ADEA, and other antidiscrimination statutes is whether employees have a legitimate cause of action for wrongful termination based on alleged discrimination when the employer subsequently discovers some form of employee misconduct that would have been a legitimate nondiscriminatory reason for dismissal. After-acquired evidence[8] in an

1. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

2. 29 U.S.C. §§ 621-633(a) (1994).

3. *See* 110 CONG. REC. 13,169 (1964).

4. The United States Supreme Court has recognized that the Age Discrimination in Employment Act prohibits discrimination on the basis of age in hiring, termination, employment opportunities, compensation, and all other terms and conditions of employment against employees and job applicants who are age forty and above. *See* Lorillard v. Pons, 434 U.S. 575, 577 (1978).

5. 29 U.S.C. § 621(b) (1994).

6. *See* 42 U.S.C. § 2000e-2(a) (1994).

7. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (finding that Title VII was "broad-gauged innovation legislation" that should be regarded as "a character of principles which are to be elucidated and explicated by experience, time, and expertise").

8. The term "after-acquired evidence" in the employment context originated in the Tenth Circuit with

employment discrimination case consists of information regarding an employee's job application fraud[9] or misconduct at work[10] that the employer discovers after the employee has been terminated and subsequently files a discrimination claim.[11] An employer that asserts the after-acquired evidence defense has the burden of demonstrating that the employee's misconduct was so severe that he or she would have been terminated immediately upon discovery of the misconduct or not hired in the first place.[12]

In the past, there was a considerable split in the United States Courts of Appeal regarding the application of the after-acquired evidence doctrine. Some circuits, including the Tenth and Sixth, believed that after-acquired evidence was a complete bar to recovery.[13] Other circuits, including the Eleventh and Third, merely decreased the amount of damages an employee could receive.[14] This discrepancy in the circuits concerning after-acquired evidence continued until January 1995, when the United States Supreme Court decided *McKennon v. Nashville Banner Publishing Co.*[15]

Although the *McKennon* decision directly addresses after-acquired evidence in situations where the employee acts in a manner that warrants termination while on the job, the decision fails to consider instances where employees intentionally make material misrepresentations on résumés and job applications in order to secure employment. This note will focus on the Court's decision in *McKennon*, specifically on how the after-acquired evidence doctrine will affect employees asserting a discrimination claim and employers defending such allegations. The impact of *McKennon* on previous Tenth Circuit and Oklahoma cases involving after-acquired evidence will be addressed, as will the ramifications the decision will have on the mixed-motive theory of discrimination. An analysis of how the Court's decision will affect misrepresentations made on résumés and job application forms will also be discussed in order to illustrate that *McKennon* is a cautious decision that fails to completely assess the issue of after-acquired evidence in this context. Additionally, this note will review recent Tenth Circuit opinions regarding after-acquired evidence

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the decision *Summers v. State Farm Mutual Auto Insurance Co.*, 864 F.2d 700 (10th Cir. 1988).

9. *See* O'Driscoll v. Hercules, Inc., 12 F.3d 176, 177-78 (10th Cir. 1994), *vacated*, 115 S. Ct. 1086 (1995).

10. *See, e.g.*, Smith v. Equitable Life Assurance Soc'y, No. 90 Civ. 7742 (JFK), 1993 WL 15485, at *3 (S.D.N.Y. Jan. 8, 1993).

11. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1228 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995).

12. *See* Jay W. Waks, *The U.S. Supreme Court Will Review the 'After-Acquired Evidence' Doctrine and Whether It Bars an Employee's Right to Any Recovery*, NAT'L L.J., June 27, 1994, at B4.

13. *See* O'Driscoll v. Hercules, 12 F.3d 176, 180-81 (10th Cir. 1994), *vacated*, 115 S. Ct. 1086 (1995); Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302, 305 (6th Cir. 1992); Dotson v. United States Postal Serv., 977 F.2d 976, 978 (6th Cir. 1992); Summers v. State Farm Mut. Auto Ins. Co., 864 F.2d 700, 709 (10th Cir. 1988).

14. *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1238 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1184 (11th Cir. 1992).

15. 115 S. Ct. 879 (1995).

and analyze the prospective course of Tenth Circuit decisions in light of the *McKennon* decision.

II. Tenth Circuit Law Prior To McKennon

In 1988, the United States Court of Appeals for the Tenth Circuit decided *Summers v. State Farm Mutual Automobile Insurance Co.*[16] In *Summers*, the Tenth Circuit held that courts should grant a motion for summary judgment to an employer charged with discrimination if the employer can prove that after-acquired evidence of the employee's misconduct, if discovered prior to termination, would have resulted in the employee's dismissal.[17] The court held that summary judgment was appropriate even if the after-acquired evidence was not the reason for the employee's discharge.[18]

In *Summers*, the fifty-six-year-old plaintiff brought an action against his employer for age and religious discrimination.[19] Four years after the plaintiff filed the lawsuit and nearly four years after being terminated, the employer discovered over 150 instances in which the employee had falsified records.[20] Before discovering the plaintiff's egregious acts, the defendant reprimanded the plaintiff for numerous instances of misconduct and informed him that further wrongful actions would lead to termination.[21] The employer asserted that if it had known that the plaintiff was falsifying records, it would have terminated him immediately.[22]

The Tenth Circuit reasoned that the plaintiff did not suffer any injury as a result of the termination because he would have been legitimately fired had the employer known of his misconduct at the time of its occurrence.[23] By affirming the district court's summary judgment ruling, the Tenth Circuit essentially allowed after-acquired evidence to serve as a complete bar to an employee's discrimination claim.[24]

In *O'Driscoll v. Hercules Inc.*,[25] the Tenth Circuit court followed the reasoning in *Summers* regarding after-acquired evidence. The plaintiff, O'Driscoll, was a quality control inspector for the defendant Hercules Inc.[26] The defendant terminated the plaintiff, who subsequently brought an action alleging discrimination

16. 864 F.2d 700 (10th Cir. 1988).
17. *See id.* at 708.
18. *See id.*
19. *See id.* at 702.
20. *See id.* at 703.
21. *See id.*
22. *See id.* at 708.
23. *See id.* at 708-09.
24. The *Summers* court compared the case to a company doctor who is fired because of his age, race, and religion. While defending the action the company discovered that the terminated employee was not a doctor. The court stated that "the masquerading doctor would be entitled to no relief and *Summers* is in no better position." *Id.* at 708.
25. 12 F.3d 176 (10th Cir. 1994), *vacated*, 115 S. Ct. 1086 (1995).
26. *See id.* at 177.

under the ADEA and Title VII.[27] While preparing for trial, the defendant discovered evidence of résumé fraud, including misrepresentations of age, date of graduation from high school, and the age of the plaintiff's son for insurance purposes.[28] Furthermore, the defendant discovered evidence of other fraudulent acts which, if discovered before her termination, would have justified firing her.[29] In support of the defendant's claim for summary judgment, the company presented an employment application which the plaintiff signed at the inception of her employment stating that any misrepresentations would result in immediate termination.[30]

The court relied on three elements originally espoused in *Summers* that must be met in order for a defendant to have a valid defense based on after-acquired evidence. First, the employer must be unaware of the misconduct when it discharges the employee.[31] Second, the misconduct by the employee must be severe enough to justify termination.[32] Third, the employer must prove it would have discharged the employee had it known of the misconduct.[33] The *O'Driscoll* court determined that in light of the *Summers* holding, the plaintiff had the burden to prove that there was a genuine issue of material fact after the defendant established there was after-acquired evidence.[34] The court determined that the plaintiff failed to establish a genuine fact as to whether Hercules would have fired the plaintiff had it known of the repeated misrepresentations.[35] As a result of the false information made by the plaintiff on her employment application, the court precluded her from receiving any relief for her discrimination claim.[36]

III. Oklahoma Law Prior to McKennon

Mosley v. Truckstops Corp. of America[37] is the only case decided by the Oklahoma Supreme Court prior to *McKennon* which addresses the after-acquired evidence doctrine.[38] In *Mosley*, the Oklahoma Supreme Court refused to extend the *Summers* holding regarding after-acquired evidence to a workers' compensation case.[39] In *Mosley*, the plaintiff injured himself while on the job.[40] After seeking

27. *See id.*
28. *See id.* at 178.
29. *See id.* at 177-78.
30. *See id.* at 178.
31. *See id.* at 179.
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.* at 180-81.
37. 891 P.2d 577 (Okla. 1994).
38. In terms of quantity, Oklahoma law is limited in the employment area. The majority of employment discrimination claims are brought in federal court under Title VII or other federal statutes. The *Mosley* case interpreted the Tenth Circuit's decisions on after-acquired evidence and applied it to the worker's compensation area.
39. *See Mosley*, 891 P.2d at 582.
40. *See id.* at 578.

medical advice regarding his injury, the plaintiff contacted his employer concerning his employment status.[41] The plaintiff alleged that his employer fired him after being informed that he intended to file a workers' compensation claim.[42] Conversely, the defendant contended that it terminated the plaintiff for job abandonment because of excessive absences.[43]

After firing the plaintiff, the defendant discovered several additional instances of the former employee's misconduct. In the plaintiff's application for employment, he failed to list a prior felony conviction and included an ex-wife on his health insurance enrollment.[44] Even though there was evidence of employee misconduct, the jury returned a verdict in favor of the plaintiff.[45] The Oklahoma Court of Appeals reversed and remanded the case to decide, inter alia, whether the court should have given a jury instruction consistent with the *Summers* holding.[46]

The Oklahoma Supreme Court held that it was reversible error for the Oklahoma Court of Appeals to reverse and remand the trial court's verdict because the defendant did not request a jury instruction regarding the limitation of damages based on after-acquired evidence.[47] The Oklahoma Supreme Court stated that the Court of Appeals' incorporation of the *Summers* standard into Oklahoma's retaliatory discharge law was incorrect.[48] The court pointed out that the *Summers* rationale had never been extended beyond the realm of civil rights employment discrimination violations.[49] It determined that applying *Summers* to workers' compensation claims under Oklahoma statutory law[50] violated public policy by allowing employers to circumvent the established workers' compensation structure.[51] The court refused to obscure the true issue of the case, retaliatory termination, by requiring a jury instruction on after-acquired evidence.[52]

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41. *See id.* at 579.

42. *See id.*

43. *See id.*

44. *See id.* at 580.

45. *See id.*

46. *See id.* The court of appeals reversed the jury verdict in the trial court because it believed that a jury instruction regarding after-acquired evidence could have affected the award of damages in the case. *See id.* at 581. This analysis is similar to the United States Supreme Court holding in *McKennon*, discussed *infra* notes 62-93 and accompanying text.

47. *See Mosley*, 891 P.2d at 580 n.8.

48. *See id.* at 583.

49. *See id.* at 582.

50. Before amendment in 1994, title 85, section 5 of the Oklahoma Statutes provided:

> No person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of Title 85 of the Oklahoma Statutes, or has testified or is about to testify in any such proceeding. Provided no employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties.

85 OKLA. STAT. § 5 (1991) (amended 1994).

51. *See Mosley*, 891 P.2d at 583.

52. *See id.*

Instead of applying the Tenth Circuit's holding in *Summers*, the Oklahoma Supreme Court in *Mosley* reaffirmed prior precedent that any federal court standard an Oklahoma court adopts is not a complete acceptance of federal employment discrimination law as applied to state-based retaliatory discharge claims.[53] The *Mosley* court referred to *Mantha v. Liquid Carbonic Industries*,[54] which held that an employer's use of post-termination reasons to justify the dismissal of an employee would stand in direct conflict with previous Oklahoma court holdings.[55] Due to the established state case law and the Oklahoma workers' compensations statute, the *Mosley* court concluded that the *Summers* rationale would be inconsistent with Oklahoma retaliatory discharge jurisprudence.[56]

Even though Oklahoma courts have not ruled on a case involving after-acquired evidence in the area of employment discrimination, the Oklahoma Supreme Court's holding in *Mosley* suggests that the state would not bar a discrimination claim under *McKennon* even if there was evidence of résumé or job application misrepresentations. The Oklahoma Supreme Court stated in *Mosley* that the Tenth Circuit's decision in *Summers* was contrary to public policy because it interfered with the function of state statutes.[57] Therefore, it is likely that Oklahoma courts will allow plaintiffs to bring wrongful termination claims against former employers under state antidiscrimination statutes even if there is after-acquired evidence of résumé or job application fraud.

The Oklahoma Supreme Court recently implied that it would not bar a plaintiff's claim for wrongful termination under state antidiscrimination statutes. In *Brown v. Ford*,[58] the United States District Court for the Western District of Oklahoma certified five questions to the Oklahoma Supreme Court.[59] The fifth question, "If

53. *See* Buckner v. General Motors Corp., 760 P.2d 803, 806 (Okla. 1988).

54. 839 P.2d 200 (Okla. Ct. App. 1992).

55. *See id.* at 203; *see also Buckner*, 760 P.2d at 806; Thompson v. Medley Material Handling, Inc., 732 P.2d 461, 463 (Okla. 1987). *Thompson* is a retaliatory discharge case. The *Thompson* court held that "when retaliatory motivations comprise a significant factor in an employer's decision to terminate an employee, even though other legitimate reasons exist to justify termination, the discharge violates the intent of section 5." *Thompson*, 732 P.2d at 463.

56. *See Mosley*, 891 P.2d at 583. There are several Oklahoma cases discussing retaliatory discharge involving workers' compensation claims. *See* Buckner v. General Motors Corp., 760 P.2d 803 (Okla. 1988); Thompson v. Medley Material Handling, Inc., 732 P.2d 461 (Okla. 1987); Elzy v. Forrest, 739 P.2d 999 (Okla. 1987); Pierce v. Frankin Elec. Co., 737 P.2d 921 (Okla. 1987). These cases established four requirements that must be met in a retaliatory discharge case involving workers' compensation claims: (1) that the protection of title 85, section 5, of the Oklahoma Statutes is limited to good faith actions taken by an employee who has suffered a work-related injury; (2) that an employer may, without incurring tort liability, discharge an employee who is physically unable to perform job duties; (3) that the employee must offer evidence to establish circumstances giving rise to a legal inference that discharge was significantly motivated by retaliation for the exercise of statutory rights; and (4) that if retaliation motivations comprise a significant factor in an employer's decision to terminate an employee, even though other legitimate reasons exist to justify the termination, the discharge violates the intent of section 5. *Mosely*, 891 P.2d at 584.

57. *See id.* at 583.

58. 905 P.2d 223 (Okla. 1995).

59. *See id.* at 225.

the answer to question 5 [sic 4] is 'Yes,' does the doctrine of after-acquired evidence of employee misconduct bar all relief in an action for retaliatory termination?"[60] Since the Oklahoma Supreme Court answered the fourth question in the negative, it did not need to discuss after-acquired evidence. However, the second footnote in the case implies that the *McKennon* rationale will be followed when analyzing situations involving Oklahoma antidiscrimination law.[61]

IV. McKennon v. Nashville Banner Publishing Co.

The United States Supreme Court in *McKennon v. Nashville Banner Publishing Co.*[62] attempted to settle the dispute between the Circuits regarding the use of after-acquired evidence of employee misconduct as a defense in discrimination actions.[63] Although *McKennon* centered on the application of after-acquired evidence to the ADEA, the unanimous decision also appears to apply to Title VII, as well as the Americans with Disabilities Act[64] (ADA) and the Equal Pay Act[65] (EPA).[66]

A. Facts

The petitioner in the action, Christine McKennon, worked for the respondent, Nashville Banner Publishing Company, as a secretary for over thirty years.[67] Nashville Banner terminated McKennon when she was sixty-two years old, allegedly as part of a cost reduction plan.[68] Prior to her dismissal, McKennon thought that the company was going to fire her because of her advanced age.[69] During her final year of employment, McKennon copied several confidential documents regarding Nashville Banner's financial condition for "insurance" and "protection" against the possibility of being terminated.[70]

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60. *Id.*

61. The Oklahoma Supreme Court stated:

> We understand the *fifth* question as calling upon us to settle the issue whether an employer may interpose after-acquired evidence of an employee's on-the-job misconduct as a supervening ground for termination to defeat *all* liability for an earlier wrongful discharge. While we need not answer this question today, we note that *McKennon v. Nashville Banner Publishing Co.*, ___ U.S. ___, ___, 115 S. Ct. 879, 884, 130 L. Ed. 2d 852 (1995), which dealt with a federal statutory claim for age discrimination would afford helpful guidance to resolving this issue in the context of a state common-law claim.

Brown, 905 P.2d at 225 n.2.

62. 115 S. Ct. 879 (1995).

63. *See* James H. Coil, III & Lori J. Shapiro, *Two Wrongs Don't Make a Right: The Supreme Court Limits After-Acquired Evidence in Employment Discrimination Actions*, EMPLOYEE RELATIONS L.J., Summer 1995, at 93.

64. 42 U.S.C. §§ 12101-12213 (1994).

65. 29 U.S.C. §§ 201-206 (1994).

66. *See Supreme Court Limits After-Acquired Evidence in Bias Cases*, LIABILITY WEEK, Jan. 30, 1995, *available in* 1995 WL 8596424.

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

68. *See id.*

69. *See id.* at 883.

70. *See id.*

During depositions regarding McKennon's claim of age discrimination, she admitted to stealing these documents.[71] A few days after the depositions, Nashville Banner wrote McKennon a letter restating its decision to terminate her due to misconduct.[72] The letter also stated that had the company known of her copying confidential documents, it would have terminated her at once for that reason.[73]

B. Procedural History

Nashville Banner filed for summary judgment against McKennon, stating that her conduct warranted termination.[74] For purposes of the summary judgment argument, Nashville Banner conceded that it did terminate McKennon because of her age.[75] The United States District Court for the Middle District of Tennessee granted summary judgment for Nashville Banner, holding that McKennon's conduct warranted termination and that she could not recover back pay or any other remedy under the ADEA.[76] The United States Court of Appeals for the Sixth Circuit affirmed, following the holding of the *Summers* court.[77] The United States Supreme Court granted certiorari[78] to resolve the split between the circuits as to whether after-acquired evidence is a complete bar to recovery for an employee who has allegedly been discriminated against by the employer.[79]

C. Holding

The Supreme Court held that the *Summers* rationale was far too strict in allowing an employer to completely escape liability from an employment discrimination allegation simply because of wrongful employee conduct.[80] The Court reasoned that it would contradict the deterrence and compensation objectives of the ADEA to bar liability for alleged discrimination completely as a result of after-acquired evidence.[81] The Court determined that the policies of antidiscrimination legislation support the notion that an employee should be able to prove his or her discrimination claim in court even if the employee engaged in acts that would result

71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See* McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 605 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1994).
77. *See* McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 540 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995).
78. *See* McKennon v. Nashville Banner Publishing Co., 114 S. Ct. 2099 (1994).
79. The following cases discuss the after-acquired evidence doctrine: Welch v. Liberty Mach. Works, 23 F.3d 1403 (8th Cir. 1994); Smallwood v. United Air Lines, 728 F.2d 614 (4th Cir. 1994); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995); Kristufek v. Hussman Foodservice Co., 985 F.2d 364 (7th Cir. 1993); Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992).
80. *See McKennon*, 115 S. Ct. at 885.
81. *See id.* at 884.

in termination.[82] It discerned that a complete bar to recovery, such as in *Summers*, discourages employers from evaluating their own practices and procedures aimed toward eliminating discrimination against protected classes.[83]

However, the Court realized that employers have a legitimate business interest in terminating employees who misbehave while on the job.[84] Therefore, the Court ruled that an employee who files a discrimination claim cannot become immune from stated employment policies established by the employer.[85] In order to placate employers' interests, the Court limited the amount of compensation a terminated employee can receive if there is after-acquired evidence regarding wrongful conduct. Although the Court recognized that each case must be determined individually, it stated that, "as a general rule . . . neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds" upon reinstatement.[86]

In order to achieve an equitable result, the Court stated that the purpose of compensation is for the employee to be placed in the same position as if the discrimination had not occurred.[87] The Court applied a two-step analysis to determine the amount of back pay that should be awarded to the employee. First, trial courts must calculate back pay from the date of the unlawful termination to the date of discovery of the after-acquired evidence.[88] Second, courts should "consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party."[89] The Court justified its position by stating that an absolute rule barring recovery of back pay would undermine the efforts of the ADEA to alleviate the effects of age discrimination in the workforce.[90]

The Supreme Court's decision in *McKennon* focused on whether to affirm the *Summers* holding barring any relief for the employee or to overrule the decision and allow some recovery because of the discriminatory practice. The Court decided that, in applying after-acquired evidence as a defense to an ADEA claim, some relief is proper if there was discrimination.[91] Of particular importance is the Court's statement that, "[w]hen confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees."[92] Such dicta illustrates the Court's commitment to eliminating discrimination in the workplace even if there is evidence of employee misconduct. The Court decided that evidence of employee wrongdoing

82. *See id.* at 885.
83. *See id.* at 886.
84. *See id.*
85. *See id.*
86. *Id.*
87. *See id.*
88. *See id.*
89. *Id.*
90. *See id.*
91. *See id.* at 884.
92. *Id.* (quoting 29 U.S.C. § 626(b) (1994)).

in a discrimination case may require the employer only to pay the employee back pay from the time of the discriminatory practice to the moment the company discovers the misconduct.[93]

V. Analysis

A. Impact of the McKennon Decision on Summers

The Supreme Court's decision in *McKennon* severely limited the *Summers* rationale, but it did not overrule it. In rejecting the *Summers* absolute bar theory, the Court pointed out that *Summers* does not take into account the period between termination and discovery of after-acquired evidence.[94] In *Summers*, it appears from the language of the opinion that the court hurriedly decided that the plaintiff was not entitled to relief based upon his egregious conduct. The Supreme Court's holding in *McKennon* mandates a careful weighing of the evidence before any determination can be made with respect to the amount of relief awarded. The Court did not overrule *Summers* to the extent that after-acquired evidence of employee misconduct is irrelevant. Instead, the Court tempered its reasoning with equitable principles to establish that there must be a careful weighing of all the issues.

The Supreme Court in *McKennon* allowed the plaintiff to recover because her reason for stealing the confidential documents was that she feared being terminated based on her age.[95] However, in other situations, the Court might not award back pay or any type of relief because of the egregious nature of the act. For example, if an employer discovers, after terminating the employee for a discriminatory reason, that the employee engaged in sexual harassment of co-workers, the employee might not be entitled to recovery based on a public policy against sexual harassment. The court may determine that a person who violates the same statute that he is asserting for relief, Title VII for example, may not be entitled to recovery. Similarly, after terminating an employee, an employer who discovers that the worker engaged in selling drugs or other criminal activities while on the job might not have to pay any damages since the public policy of deterring such conduct might outweigh any claim of discrimination.[96]

B. McKennon and the Civil Rights Act of 1991

The Civil Rights Act of 1991[97] probably influenced the Supreme Court's decision in *McKennon*. The Supreme Court in *Price Waterhouse v. Hopkins*[98] reaffirmed the rationale expressed in *Summers* that an employer can escape liability if it establishes that it would have fired the plaintiff regardless of discrimination.[99] However, Congress expressly overruled this theory by enacting the Civil Rights Act of

93. *See id.* at 886.
94. *See* Coil & Shapiro, *supra* note 63, at 97.
95. *See McKennon*, 115 S. Ct. at 885.
96. *See* Coil & Shapiro, *supra* note 63, at 97.
97. 42 U.S.C. §§ 1981-2000 (1994).
98. 490 U.S. 228 (1989).
99. *Id.* at 242.

1991.[100] In the Act, Congress amended Title VII to provide that if the protected characteristic (gender, race, religion, etc.) was a "motivating factor" in the decision to terminate or not hire an individual, liability could be found.[101]

The Civil Rights Act of 1991 diminished the impact of mixed-motive discrimination cases like *Price Waterhouse*. In traditional mixed-motive cases, an employer makes an adverse employment decision concerning an employee for both discriminatory and nondiscriminatory reasons. Comparatively, cases involving after-acquired evidence occur when employee misconduct is discovered after an alleged discriminatory act by the employer. Although the timing of discovering employee misconduct distinguishes mixed-motive cases from those involving after-acquired evidence, both hinge on whether the employer's discriminatory practices injured the employee. Under the 1991 Civil Rights Act, if the employee establishes that discrimination played a part in the employer's decision to terminate, the employer can then rebut the argument by stating that the decision to fire the employee would have been made regardless of the discrimination.[102] If the employer can prove this, the Act limits the relief available to plaintiffs to attorney fees, costs, and injunctive relief.[103] The Act forbids awarding back pay, reinstatement, hiring, or promotion.[104] Therefore, some relief is now permitted in mixed-motive cases, as long as the plaintiff can prove that a discriminatory reason was part of the employer's motivation rather than the sole reason for the action.[105]

The *McKennon* decision closed the gap between after-acquired evidence and mixed-motive cases. Some courts suggest that the *Summers* approach to after-acquired evidence was inconsistent with the Civil Rights Act of 1991.[106] Congress' amendments to Title VII in the Civil Rights Act of 1991 made it easier for an employee to assert a successful claim of employment discrimination. Now, even a nondiscriminatory motive is insufficient to bar a discrimination claim completely if there is also evidence of animus toward a protected class.[107] It would have been inconsistent for the Supreme Court in *McKennon* to bar claims under the ADEA in cases where the nondiscriminatory reason to terminate employment is found after the fact.

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100. *See* Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 203 n.203 (1993).

101. 42 U.S.C. §§ 2000e-2, 2000e-5g (Supp. V 1993).

102. *See id.*

103. *Id.* § 2000e-5(g).

104. *See* 42 U.S.C. 2000e-5(g)(2)(B) (1994).

105. *See* Smith v. Conway Org., Inc., 871 F. Supp. 196, 201 (S.D.N.Y. 1994).

106. *See* Schmidt v. Safeway, Inc., 864 F. Supp. 991, 994 (D. Or. 1994) ("*Summers* is . . . inconsistent with section 107 of the Civil Rights Act of 1991 . . . which provides that the employee is a prevailing party for attorney's fees purposes so long as discrimination was a motivating factor in his termination, even if the employer would have taken the same action anyway for other reasons.").

107. 42 U.S.C. § 2000e-5(g)(12)(B) (1994).

C. McKennon and Pre-Employment Fraud

The Supreme Court in *McKennon* addressed whether after-acquired evidence should bar a discrimination claim when the employee's wrongdoing occurs during employment. However, *McKennon* failed to address whether misrepresentations on a job application or résumé warrant awarding back pay to the employee.

A common operation of the after-acquired evidence doctrine involves cases of résumé or job application fraud.[103] The problem of pre-employment misrepresentations is widespread. A 1992 study of two hundred randomly selected résumés revealed that 3% of the applicants falsely claimed they had a college degree; 3% listed false employers; 3% claimed employment at fictitious jobs; 4% listed incorrect job titles; 11% percent did not state the true reason for leaving their previous employer; and almost 33% listed dates of employment that were incorrect by at least three months.[109] According to reports, a significant number of people ages fifteen to thirty are willing to lie, steal, and cheat at work and in school, and 33% said that they would lie on a résumé.[110] Several courts have considered whether the *McKennon* holding covers employee fraud in the application process.

In *Wallace v. Dunn Construction Co.*,[111] the United States Circuit Court of Appeals for the Eleventh Circuit held that *McKennon* applies to instances of employee fraud in the application process.[112] The plaintiff in *Wallace* asserted numerous claims against the defendant including violations under Title VII, the Equal Pay Act, retaliatory discharge, and for assault, battery, and invasion of privacy.[113] During a deposition of the employee, the defendant learned that the plaintiff had a criminal conviction for possession of marijuana.[114] On the employment application, the plaintiff answered "no" to the question, "Have you ever been convicted of a crime?"[115] The defendant moved for partial summary judgment, claiming that the falsification of the information on the employment application was against company policy and was a legitimate nondiscriminatory reason for termination.[116]

The *Wallace* court reasoned that there are two objectives of antidiscrimination legislation such as the ADEA, Title VII, and the Equal Pay Act: each act grants to the employee "a right of action to obtain the authorized relief."[117] Also, the

108. *See* Waks, *supra* note 12, at B4.

109. *See* Joan E. Rigdon, *Deceptive Résumés Can Be Door-Openers But Can Become an Employee's Undoing*, WALL ST. J., June 17, 1992, at B1.

110. *See* Dennis Kelly, *Lies Part of Students' Lives*, USA TODAY, Nov. 13, 1992, at 1A.

111. 62 F.3d 374 (11th Cir. 1995).

112. *See id.* at 379.

113. *See id.* at 377.

114. *See id.*

115. *Id.*

116. *See id.*

117. *Id.* at 378-79 (quoting McKennon v. Nashville Banner Publishing Co., 115 S. Ct 879, 884 (1995)); *see also* 29 U.S.C. § 216(b) (1994) (authorizing private actions under the Equal Pay Act; 29 U.S.C. § 626(c) (1994) (authorizing private actions under the ADEA); 42 U.S.C. § 2000e-5(f)(1) (1994) (authorizing private right of action under Title VII).

employee seeking redress from the alleged discrimination "vindicates both the deterrence and compensation objectives of the Acts."[118] The *Wallace* court determined that an employee would be barred from obtaining the deterrence and compensation objectives of the antidiscrimination laws if they lacked standing to sue because of misrepresentations on a job application.[119] The court cited two other cases supporting its contention that employees should not be prevented from asserting a claim because of employment application fraud.[120]

An argument can be made that the court's holding in *Wallace* ignores the basic premise that, if the employee had not falsified information on his résumé or application, he would not have been hired and, thus, in a position to be a victim of discrimination. Using a simple "but for" analysis, employees would not have a discrimination claim against the employer "but for" their misrepresenting information on their résumé. As one court has pointed out, the *McKennon* Court did not directly address this situation because the plaintiff's wrongdoing in that case — stealing company documents — occurred after hiring.[121] However, the Supreme Court in *McKennon* did hold that equitable considerations can be used in each case to determine the type of relief that should be awarded.[122]

It has been argued that inquiring into whether the person would have been hired "but for" the résumé fraud fails to recognize employees who perform successfully without adequate qualifications.[123] This argument could apply in limited cases where the misleading information on the résumé or application is not material to the necessary skills for the job. An example of this situation would be a person applying for a sales associate position in a department store who falsely claims on the application that he or she has a college degree.

However, where the misleading information is integral to the position, this analysis does not apply. For example, a person applying as a counselor at a hospital claiming that he or she has a degree in psychology and, if taken to the extreme, a person claiming on a résumé that he or she is a graduate of medical school for a position as a doctor, are both instances where a lack of formal qualifications could be detrimental to satisfactory job performance.

The liability issues surrounding cases involving after-acquired evidence can also be compared to remedies that are available for trespassing. In traditional trespass analysis, a landowner cannot use excessive force to prevent or stop another person from trespassing on his or her property.[124] However, if the trespasser is injured

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118. *Wallace*, 62 F.3d at 379 (quoting *McKennon*, 115 S. Ct at 884).

119. *See id.* at 379.

120. *See* Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1108 (5th Cir. 1995) (holding that *McKennon* applies when an employer discovers that a plaintiff lied on their application about his education); Wehr v. Ryan's Family Steak Houses, Inc., 49 F.3d 1150, 1153 (6th Cir. 1995) (applying *McKennon* where the employer discovered that the plaintiff lied about their employment background and medical history on their résumé).

121. *See Shattuck*, 49 F.3d at 1108 n.3.

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

123. *See Shattuck*, 49 F.3d at 1109.

124. *See* Bethley v. Cochrane, 77 So. 2d 228, 231 (La. Ct. App. 1955) (holding that defendant

while on the landowner's property, he or she can receive damages, but the award can be limited depending on the facts behind the incident.[125] Similarly, an employer that discriminates against an employee cannot be excused from the illegal act simply because the worker misrepresented his or her qualifications in order to secure employment. However, the employee in litigation regarding the discrimination has limited recourse against the employer since he or she lied so they could be hired. The employer can be absolved of any financial liability if the misrepresentation is egregious. Once again, a careful balancing of the equities of each factual scenario must be examined to determine if relief is proper.

As a moral issue, all lies or misrepresentations on résumés or applications are deleterious, regardless of how central they are to an individual's job performance. However, as a practical matter, the more extreme the lie or misrepresentation, the greater chance the employer can prove it would have terminated the employee for the act. The weighing of each lie or misrepresentation could be one of the equities the Supreme Court in *McKennon* advocated in determining if damages are appropriate.

The Court held in *McKennon* that after-acquired evidence of employees who commit on-the-job misconduct are not barred from an award of back pay.[126] However, the Court failed to address whether there should be back pay for employees that misrepresent their qualifications for employment.

It does not seem logical in all instances that an employee who intentionally misrepresents his or her qualifications, or lies on an application, would be able to recover back pay for discrimination that would not have occurred without fraudulent actions. Allowing an employee to collect back pay from the time of the discriminatory act to the time of judgment can result in a windfall to certain employees who lied in order to get the job.[127] The United States Supreme Court in *McKennon* stated that the employer's defense of unclean hands no longer applies in the context of after-acquired evidence.[128] However, the trial court can weigh the equities involved in a particular case to determine if any relief is justified. Employees should be on notice that if they decide to file a discrimination claim, there is a possibility of decreased or no relief due to their misconduct.

Although discrimination should not be tolerated regardless of the circumstances, it is debatable whether people who misrepresent their background or qualifications should be able to recover for a discrimination claim. In the absence of discrimination, if an employer discovers that an individual falsified information on a job application or résumé, the person would not be offered a position. Discrimination in employment situations harms employees, regardless of whether they have a legitimate right to be employed.[129] However, the public policy of

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landowner's shooting of plaintiff trespasser was excessive and unreasonable force).

125. *See generally* RESTATEMENT (SECOND) OF TORTS § 77 app. (1966).

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

127. *See* Waks, *supra* note 12, at B4.

128. *See McKennon*, 115 S. Ct. at 885.

129. *See* Robert Brookins, *Policy Is the Lodestar When Two Wrongs Collide: After-Acquired Evidence Under the Age Discrimination in Employment Act*, 72 N.D. L. REV. 197, 221 (1996).

eradicating discrimination in the workforce does not justify an employee reaping damages from an employer that would not have hired the person had there been no pre-employment misrepresentation. It is a basic assumption of Title VII, the ADEA, and other antidiscrimination statutes that the employer/employee relationship is legitimate. If the relationship is tainted due to material misrepresentations made to secure employment, a court could deny a plaintiff recovery on a discrimination claim.[130]

Although Title VII and other antidiscrimination laws are supposed to be less paternalistic than state common laws,[131] they still attempt to protect the integrity of individual worth. Congress recognized the pervasive problems associated with discrimination and passed Title VII to achieve broad social goals.[132] The basic policy behind Title VII and similar antidiscrimination statutes is that all individuals are equal and should not be precluded from employment opportunities because of prejudice toward protected classes.[133]

Because Title VII and other antidiscrimination statutes attempt to improve professional relationships by eradicating discrimination in the workplace,[134] it would be illogical for a court to award an employee damages for discrimination when the employee lied to get the job.[135] Courts would be rewarding impermissible behavior by allowing relief to employees who misrepresent themselves in order to secure employment.[136] Essentially, courts would be discrediting the entire policy behind antidiscrimination statutes if employees who lie to secure employment are allowed relief.

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130. There is a recognizable tension between Title VII and pre-employment material misrepresentations. However, it is necessary to consider that in the absence of intentional discrimination, an individual would not be able to recover under Title VII if the individual falsified statements that would justify termination.

131. *See* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 204 n.99 (1994) (stating that Title VII struck down paternalistic state labor laws); Richard G. Kass, *Early Retirement Incentives and the Age Discrimination in Employment Act*, 4 HOFSTRA LAB. L.J. 63, 108 (1986) (stating that the ADEA was supposed to eliminate paternalistic uses of age discrimination laws); Renée L. Cyr, Note, *The Americans With Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237, 1273 (1992) (stating that Title VII approach for analyzing the ADA is preferred because it is less paternalistic).

132. *See* Note, *supra* note 100, at 190.

133. *See generally* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans With Disabilities Act*, 15 CARDOZO L. REV. 1475, 1485 (1994).

134. *See* H.R. REP. NO. 88-914, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401 (stating that Title VII's purpose was "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin").

135. *Cf.* Williams v. Boorstin, 663 F.2d 109, 117 (D.C. Cir. 1980) (stating that trustworthiness, reliability, veracity, and good judgment are material qualifications for any job).

136. *See generally* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 (3d Cir. 1994) (reporting that the employee Mardell misrepresented, inter alia, that she obtained a Bachelor of Science degree, her professional work experience, and previous job responsibilities), *vacated*, 115 S. Ct. 1397 (1995).

Although material misrepresentations on job applications and résumés should not be a complete affirmative defense for employers in discrimination lawsuits, courts should carefully scrutinize the facts of each case in order to determine if relief is justified. Although résumé and application misrepresentations do not excuse an employer's discriminatory acts, there are some instances where awarding damages to an employee who makes an intentional material misrepresentation to gain employment would be senseless. In light of the *McKennon* holding, employers must implement stringent prescreening techniques of prospective employees.[137] However, such action may not be economically feasible for small companies who hire people for entry-level positions. Additionally, it is imperative that employers clearly state in employment applications that any form of misrepresentation or falsification will result in the applicant not being hired or, if employed, in immediate termination after discovery. Additionally, an employer should make sure that all questions on job applications are completely filled out by prospective employees. These procedures can assist an employer in limiting its potential liability by establishing that the applicant intentionally misrepresented material facts rather than merely overlooked the question.

The *McKennon* decision imposes a heavy burden on employers seeking to use the after-acquired evidence doctrine as a defense to discrimination claims. By holding that an employer must establish that the misconduct was severe enough to warrant termination, the Court increased the employer's burden of proving the employee's conduct constituted a terminable offense.[138] To meet this burden, employers will have to clearly state what actions warrant termination in their employment policy guides. Employers should categorize what actions will be punished by discipline other than firing and what actions will result in termination. For example, an employer should clearly establish in its employment policy guide that stealing from the company or any other criminal activity will result in immediate termination.

The Court's decision also suggests that employers will have to be more stringent in the manner in which they punish individual employees. If a company's employment policy manual states that an employee's conduct will result in termination, the employer should discharge him or her instead of giving the employee a second chance. By enforcing its own policies, the employer, when faced with a discrimination claim, can cite previous examples where similar acts warranted termination.[139]

It is unclear how many preventive measures an employer must take to shield itself from possible discrimination claims by employees who lied on their applications in order to be hired. Even though the employee has the initial burden to prove discrimination,[140] the *McKennon* court heightened the initial burden on

137. *See* Coil & Shapiro, *supra* note 63, at 102.

138. *See id.* at 100-01.

139. *See id.* at 101.

140. The order for establishing a traditional disparate treatment case was first established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and reaffirmed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). Under *Burdine*, once the plaintiff presents a prima facie case of discrimination, the burden shifts to the employer

employers to carefully examine each application and résumé for truthfulness. As a result of the *McKennon* decision, employers will be more reluctant to hire a person without a costly and time-consuming background check in order to confirm the validity of the applicant's information and references.

VI. Tenth Circuit Law Since McKennon

Since the United States Supreme Court's decision in *McKennon*, the Tenth Circuit decided a case involving after-acquired evidence of job application fraud. In December 1995, the court in *Duart v. FMC Wyoming Corp.*[141] affirmed the trial court's granting of summary judgment in favor of the employer and denied the employee relief.[142]

In *Duart*, the plaintiff filed complaints with the Wyoming Fair Employment Practices Commission and the Equal Employment Opportunity Commission against his employer, claiming that the defendant terminated his employment because of his age.[143] He filed two complaints based on Wyoming state law and one based on the ADEA.

The defendant filed a motion for summary judgment which the district court granted. The court followed the Tenth Circuit decision in *O'Driscoll v. Hercules Inc.*[144] and decided that there were material misrepresentations in his résumé which were significant enough to justify termination.[145] Additionally, the district court found that if the defendant had known of the misrepresentations before employing the plaintiff, it would not have hired him in the first place.[146]

The Tenth Circuit stated that since the *O'Driscoll* decision, the United States Supreme Court decided *McKennon* and that, therefore, the holding of *O'Driscoll* was no longer binding law.[147] However, the court noted that even though the plaintiff's material misrepresentations were no longer an absolute bar to recovery, there were other factors that warranted affirming the district court's granting of summary judgment.[148]

The court articulated that although the plaintiff did present a prima facie case of age discrimination, the defendant provided a legitimate nondiscriminatory reason for terminating the plaintiff — poor job performance.[149] Since the plaintiff failed to

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to rebut the inference of discrimination by articulating a legitimate nondiscriminatory reason for its action. *See Burdine*, 450 U.S. at 255. The final burden of persuasion ultimately belongs to the plaintiff. *See id.* at 252-56.

141. 72 F.3d 117 (10th Cir. 1995).

142. *See id.* at 120.

143. *See id.* at 118.

144. 12 F.3d 176 (10th Cir. 1994), *vacated*, 115 S. Ct. 1086 (1995).

145. *See Duart*, 72 F.3d at 118.

146. *See id.*

147. *See id.* at 120.

148. *See id.*

149. *See id.*

show that the defendant's legitimate nondiscriminatory reason was pretextual, the plaintiff's claim failed.[150]

The court also compared the plaintiff's state law discrimination claims with his federal ADEA cause of action. The court noted that since the *McKennon* holding is premised on federal law, state common law claims laws regarding employment discrimination are not bound by the decision.[151] The court affirmed the district court's granting of summary judgment in favor of the employer after assessing the evidence of the plaintiff's state law claims.[152]

The Tenth Circuit's decision in *Duart* reaffirms its strong commitment to employer rights in the wake of the *McKennon* decision. Although the court recognized that *McKennon* softened the strict approach of the previous Tenth Circuit holdings of *Summers* and *O'Driscoll*, the final result was still the same — summary judgment for the employer. *Duart* does address the implications of résumé and job application fraud in light of *McKennon*; however, the decision compliments the traditional Tenth Circuit stance of protecting employer rights. Additionally, the court in *Duart* stated that since state laws are not affected by the *McKennon* decision, there can still be a complete denial of relief for employment discrimination claims involving after-acquired evidence if the case is filed as a state claim.[153]

VII. Conclusion

The United States Supreme Court decision in *McKennon* broadens the realm in which employees can prevail in an employment discrimination claim. It is a cautious decision by the Court to placate the employee without seriously damaging the employer's interests.

The *McKennon* decision obviously limited the Tenth Circuit's decision in *Summers*. However, it is uncertain how the United States Supreme Court will decide cases involving misrepresentations on employment applications and résumés. While some circuits hold that misrepresenting information on an application or résumé does not bar a claim of discrimination, these decisions are merely persuasive on the Tenth Circuit. The Tenth Circuit's recent decision in *Duart* confirms that the court will attempt to protect the employer in cases involving after-acquired evidence. Although the Tenth Circuit did recognize the *McKennon* holding in *Duart*, it still denied relief to the plaintiff based on other factors.

McKennon does appear to strike a balance between an employer's and employee's interests regarding misconduct that occurs after a person has been hired.[154] However, it leaves open the area of pre-employment misrepresentations. Although the law continues to develop in this area, the United States Supreme Court's refusal

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See Supreme Court Limits After-Acquired Evidence in Bias Cases*, *supra* note 66 (stating that the National Chamber Litigation Center, an affiliate of the United States Chamber of Commerce, stated that the ruling was a middle-ground decision that businesses could accept).

to uphold *Summers* is a hint that it would apply the *McKennon* holding to cases involving pre-employment misrepresentations. Until the United States Supreme Court decides the issue, there likely will continue to be debate as to whether pre-employment misrepresentations fall under the *McKennon* rationale.

William D. Fisher