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Prejudice, like the spider, makes everywhere its home. It has neither taste nor choice of place, and all that it requires is room. If the one prepares her food by poisoning it to her palate and her use, the other does the same. Prejudice may be denominated the spider of the mind.

Thomas Paine[1]

INTRODUCTION

Congress designed Title VII of the Civil Rights Act of 1964 (Title VII)[2] and the Age Discrimination in Employment Act of 1967 (ADEA)[3] to combat the more overt forms of discrimination in the workplace. Case law interpretations employing similar analyses have strengthened this common bond over time.[4] Passage of the Civil Rights Act of 1991 (CRA),[5] however, seriously disrupted the purpose behind Title VII and the ADEA.[6] The CRA amended Title VII to counteract four inherently anti-plaintiff Supreme Court decisions from 1989.[7] However, the CRA left the ADEA, Title VII's "statutory cousin,"[8] unchanged in regard to these decisions. Thus, much of the analysis employed under Title VII may no longer be applicable in the ADEA context. This Survey examines how the United States Court of Appeals for the Tenth Circuit has decided Title VII and ADEA cases during the past year, noting

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1. FORTY THOUSAND QUOTATIONS 1374 (compiled by Charles N. Douglas, 1917).

2. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e17 (1988 & Supp. V 1993)).

3. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

4. *See* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1093 (1993); *see also* Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979).

5. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

6. *See* Eglit, *supra* note 4, at 1101-02.

7. *See* 42 U.S.C. § 1981 (Supp. 1993). The four decisions are: Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 900 (1989) (holding that the limitations for filing an ADEA claim run from the date when the seniority system was adopted rather than the date plaintiffs suffered injury); Martin v. Wilks, 490 U.S. 755, 762-65 (1989) (refusing to bar an action by persons who did not intervene in a pending lawsuit that might have affected their interests); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (holding that in a Title VII case, an employer had the burden of producing evidence of a "business justification" for the employment practice challenged as discriminatory); Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (holding that employers may not be found liable under Title VII if they can prove that they would have made the same hiring decision if they had not taken gender into account). Of these cases, however, *Wards Cove* is the only one specifically mentioned in the CRA. Congress noted that, "(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Antonio . . . has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protection against unlawful discrimination in employment." Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (Supp. V 1993)).

8. Howard Eglit noted that Title VII and the ADEA are "statutory cousins." Eglit, *supra* note 4, at 1103.

differences as well as similarities.[9]

First, in *Hurd v. Pittsburg State University*,[10] the court held that Congress intended the ADEA[11] to abrogate state immunity under the Eleventh Amendment.[12] This decision, which allows claims against state agencies to be brought in federal court, differs from previous decisions where courts declined to rule directly on this question.[13]

Second, in *O'Driscoll v. Hercules, Inc.*,[14] the court determined that "serious and pervasive misconduct" is not a threshold requirement for application of the "after-acquired evidence doctrine."[15] This expansion of *Summers v. State Farm Mutual Automobile Insurance Co.*[16] would have solidified the indubitable nature of this defense within the Tenth Circuit.[17] However, the United States Supreme Court limited the impact of both *Summers* and *O'Driscoll* via its recent decision in *McKennon v. Nashville Banner Publishing Co.*[18]

Finally, in *Griffith v. Colorado Division of Youth Services*,[19] the Tenth Circuit called into question previous decisions allowing nominal damages in Title VII actions where monetary loss had not been proven.[20] Because nominal damage awards entitle plaintiffs to "prevailing party"[21] status, *Griffith* would have severely limited the number of claims litigated. The discrimination

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9. The Survey period includes Tenth Circuit opinions decided between Sept. 1, 1993 and Dec. 31, 1994.

10. 29 F.3d 564 (10th Cir.), *cert. denied*, 115 S. Ct. 321 (1994).

11. Section 4(a) of the ADEA provides in relevant part:

> It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a) (1988).

12. *Hurd*, 29 F.3d at 565. The Eleventh Amendment to the United States Constitution states that, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." U.S. CONST. amend. XI.

13. *See* EEOC v. Wyoming Retirement Sys., 771 F.2d 1425, 1428 (10th Cir. 1985) (declining to determine whether Congress enacted the ADEA pursuant to § 5 of the Fourteenth Amendment because it found that the Eleventh Amendment did not bar an action against the state of Wyoming); *see also* EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (declining to decide whether Congress enacted the ADEA pursuant to § 5 of the Fourteenth Amendment after finding that the ADEA was a valid exercise of Congressional authority under the Commerce Clause).

14. 12 F.3d 176 (10th Cir. 1994).

15. *Id.* at 179.

16. 864 F.2d 700 (10th Cir. 1988).

17. *O'Driscoll*, 12 F.3d at 179-80. Other circuits have held that the after-acquired evidence doctrine does not preclude a finding of liability but only affects the available remedies. *See, e.g.*, Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1228 (3d Cir. 1994).

18. 115 S. Ct. 879 (1995).

19. 17 F.3d 1323 (10th Cir. 1994).

20. *See e.g.*, Baker v. Weyerhauser Co., 903 F.2d 1342 (10th Cir. 1990) (awarding $1 in nominal damages to a papermill employee who claimed sexual harassment based upon a hostile work environment).

21. "Prevailing party" status allows a litigant to recover attorneys fees. This provides an incentive to many attorneys who might not normally take valid civil rights cases due to the enormous cost of litigation.

alleged in *Griffith*, however, occurred prior to enactment of the Civil Rights Act of 1991.[22] Nominal damages are mostly a moot issue after the 1991 Act. Yet, attorney's fees are potentially affected in cases currently in dispute involving discrimination that occurred prior to 1991.

I. A HISTORY OF THE CHANGES IN TITLE VII AND THE ADEA

Title VII prohibits discrimination in employment "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[23] Although Title VII does not expressly refer to sexual harassment, it has long been recognized that Title VII's protection against employment discrimination includes the right to be free from gender-related harassment.[24]

A major advancement in sexual harassment claims occurred when the Equal Employment Opportunity Commission (EEOC) promulgated guidelines which expressly defined sexual harassment as a violation of § 703 of Title VII.[25] In 1986, the Supreme Court followed suit stating, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[26]

The Civil Rights Act of 1964, however, offered only limited remedies to those who had suffered discrimination.[27] In November of 1991, President Bush ushered in a new era of active civil rights enforcement with the Civil Rights Act of 1991.[28] The Act amended five statutes, including Title VII and the ADEA.[29] It expanded the Civil Rights Act of 1964 by allowing compensatory damages, punitive damages, and jury trials in cases of intentional discrimination under Title VII.[30] As a caveat, however, Congress placed limits upon compensatory and punitive damage awards by limiting recovery according to the size of the violating employer's company.[31]

Furthermore, punitive damages are only available in cases of intentional discrimination where the plaintiff succeeds in proving that the defendant dis-

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22. The Civil Rights Act of 1991 changed many characteristics of Title VII. *See infra* text accompanying notes 23-44.

23. 42 U.S.C. § 2000e-2(a)(1) (1988).

24. *See* Garber v. Saxon Business Prod., 552 F.2d 1032, 1032 (4th Cir. 1977) (per curiam) (holding that compelling female employees to submit to the sexual advances of male supervisors constitutes a violation of Title VII); *see also* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (declaring that Title VII should be interpreted liberally to prohibit a racially discriminatory environment), *cert. denied*, 406 U.S. 957 (1972).

25. 29 C.F.R. § 1604.11(a) (1994).

26. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).

27. Prior to the Civil Rights Act of 1991, compensatory and punitive damages were not allowed in Title VII cases. *See* Eglit, *supra* note 4, at 1203-08.

28. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

29. The Act also amended three other statutes: The Americans with Disabilities Act (ADA) of 1990, The Civil Rights Act of 1866, and The Civil Rights Attorney's Awards Act of 1976.

30. Note, however, that punitive damages may not be awarded against governmental entities. 42 U.S.C. § 1981a(b)(1) (Supp. V 1993).

31. 42 U.S.C. § 1981a(b)(3). A plaintiff may recover a maximum of $300,000 from employers who have more than 500 employees in each of 20 or more calendar weeks and a maximum of $50,000 from employers with between 14 and 101 employees.

criminated "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[32] The legislative history and structure of the Civil Rights Act of 1991 indicate that punitive damages are recoverable only in particularly egregious instances of intentional discrimination.[33]

Title VII did not provide for jury trials prior to the 1991 Act. After the 1991 Act, however, either party may insist upon a jury trial where the plaintiff requests compensatory or punitive damages.[34] The 1991 Act also specifies that juries should not be informed of the damage caps[35] to ensure that juries do not return lower verdicts than they might otherwise have rendered.[36]

The Civil Rights Act of 1991 also amended some provisions of the ADEA. Specifically, it amended section 7(e) of the ADEA by eliminating the two/three year statute of limitations and mandating the 180-360 day filing requirements in Title VII.[37] Further, it requires the EEOC to provide notice to the parties upon termination of its investigation, and to provide claimants ninety days after receipt of such notice in which to file a civil action.[38]

For the most part, Title VII and ADEA decisions have been consistent.[39] The 1991 Act, however, brought several changes. Unlike Title VII, the Civil Rights Act of 1991 does not amend the ADEA to allow punitive and compensatory damages in intentional discrimination cases.[40] Congress's failure to provide such damages under the ADEA implies its acquiescence in the ADEA arena to Supreme Court decisions found intolerable in the Title VII context.[41] Apparently, age discrimination is not as important as race or sex discrimination.

The Civil Rights Act of 1991 is also silent as to whether the "substantial factor" requirement set forth in *Price Waterhouse v. Hopkins*[42] applies to the

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32. 42 U.S.C. § 1981a(b)(1).

33. 137 CONG. REC. S15,483-84 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth that punitive damages may only be awarded in egregious cases).

34. 42 U.S.C. § 1981a(c) (Supp. V 1993).

35. 42 U.S.C. § 1981a(c)(2).

36. "The bill specifically provides that the jury shall not be informed of the existence or amount of the caps on damage awards. Thus, no pressure, upward or downward, will be exerted on the amount of jury awards by the existence of the statutory limitations." 137 CONG. REC. S15,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth).

37. 29 U.S.C. § 626(d)-(e) (1988 & Supp. V 1993).

38. 29 U.S.C. § 626(e).

39. The text of the ADEA is largely identical to that of Title VII of the Civil Rights Act of 1964. The only major difference is that the term "age" has been substituted in the ADEA for the Title VII phrase "race, color, religion, sex or national origin." Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972). Because the prohibitions in both acts are similar, the Supreme Court has found interpretations under Title VII equally applicable to the ADEA. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 120 (1978). Note that Title VII decisions are not applicable to the ADEA where the issue is one of specific statutory construction and the statutory language differs. Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 88 (1993).

40. *See, e.g.*, Lee v. Sullivan, 787 F. Supp. 921, 930 (N.D. Cal. 1992).

41. *See* Eglit, *supra* note 4, at 1206 n.365 (citing Catherine Ventrell-Monsees, *Ageism: The Segregation of a Civil Right*, EXCHANGE ON AGEING, LAW & ETHICS, BULLETIN No. 8, Spring 1992, at 1 (paper presented at the annual meeting of the Gerontological Society of America, Nov. 24, 1991)).

42. 490 U.S. 228 (1989). In a claim of sex discrimination, a plaintiff must prove that gender was a substantial or "motivating" factor in the employer's decision. *Id.* at 244.

ADEA. There is also no clear answer as to whether the Civil Rights Act of 1991 overturned *Lorance v. AT&T Technologies, Inc.*,[43] which held that the statute of limitations runs from the date of the discriminatory act as opposed to the date of the injury.[44] Against this backdrop, this Survey now examines how the Tenth Circuit has decided cases involving both Title VII and the ADEA.

II. A REJECTION OF FEDERALISM AND THE "PLAIN STATEMENT" RULE?: *HURD V. PITTSBURG STATE UNIVERSITY*[45]

A. *Background*

The cornerstone of federalism is the unbending concept that both the Union, and the States which comprise it, have certain powers in which the other should not interfere.[46] The Tenth Amendment to the U.S. Constitution was intentionally designed to limit the powers of the federal government.[47] All powers not specifically granted to the federal government are retained by the states.[48]

The Eleventh Amendment's immunity provision[49] further solidifies this fortress of federalism by forbidding private parties from bringing suit against states in federal court absent congressional intent to abrogate the amendment. Therefore, the main question is, when does legislation enacted by Congress evince a desire to abrogate the Eleventh Amendment? Results differ depending on whether the statute was enacted pursuant to the Commerce Clause or section 5 of the Fourteenth Amendment.

Courts are very hesitant to infer congressional intent to override Eleventh Amendment immunity when statutes are enacted merely in accordance with

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43. 490 U.S. 900 (1989)

44. 42 U.S.C. § 2000e-5(e)(2) overrides *Lorance* in that:

> [f]or purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or a provision of the system.

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

45. 29 F.3d 564 (10th Cir.), *cert. denied*, 115 S. Ct. 321 (1994).

46. As James Madison noted in THE FEDERALIST NO. 10:

> [I]t clearly appears, that the same advantage which a Republic has over a Democracy, in controlling the effects of faction, is enjoyed by a large over a small Republic, — is enjoyed by the Union over the States composing it. . . . The influence of factitious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.

THE FEDERALIST NO. 10, at 64 (James Madison) (Jacob E. Cooke ed., 1982).

47. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

48. For the unconventional view that the Tenth Amendment refers to state powers created by the Constitution rather than residual powers, see 3 WILLIAM W. CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 36-37 (1980).

49. *Supra* note 12.

the Commerce Clause.[50] In *National League of Cities v. Usery*,[51] the Supreme Court held that the Fair Labor Standards Act, which required state and local governments to comply with minimum wage and overtime pay requirements, was unconstitutional.[52] The Court acknowledged the plenary powers of Congress to regulate pursuant to the Commerce Clause.[53] According to the Court, however, the states also have plenary powers in matters of state sovereignty that are implicit in the Tenth Amendment's guarantee of federalism.[54] State sovereignty, in and of itself, therefore imposes external limits on Congress's ability to regulate under the Commerce Clause with regard to issues affecting a state's separate and independent existence.[55] Importantly, *National League*'s holding was limited to statutes enacted pursuant to the Commerce Clause.[56]

Conversely, when Congress legislates under the enforcement clause of the Civil War Amendments (section 5 of the Fourteenth Amendment),[57] the Supreme Court has rejected the assertion that state functions which relate to sovereignty are inviolate.[58] Section 5 states that, "[t]he Congress shall have the power to enforce by appropriate legislation, the provisions of this article."[59] According to the Court, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments [prohibiting racial inequality] 'by appropriate legislation.'"[60] "Those amendments were specifically designed as an expansion of federal power and a limit of state sovereignty."[61]

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50. National League of Cities v. Usery, 426 U.S. 833, 851 (1976). The Court is not hesitant, however, when Congress legislates pursuant to the Fourteenth Amendment and expresses its intent to override state immunity. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984). Note that Congress does not need to explicitly state its legislative intent. The Court liberally construes congressional intent when it considers legislation passed pursuant to § 5 of the Fourteenth Amendment. Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980).

51. 426 U.S. 833 (1976).

52. *Id.* at 856. The Fair Labor Standards Act of 1938 (FLSA), as originally promulgated, excluded the states and their political subdivisions from its definition of "employer." *See* ch. 676, § 3(d), 52 Stat. 1060 (1938). This was changed via later amendments. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 58 (codified as amended at 29 U.S.C. § 203(d) (1988)).

53. *National League*, 426 U.S. at 840.

54. *Id.* at 842. The federal government's power is "supreme within its sphere of action," but it is, nevertheless, a government of limited powers. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06 (1819).

55. *National League*, 426 U.S. at 845. The Court noted that applying the FLSA requirements to the states would indeed interfere with state autonomy. *Id.* at 851-52. For example, the court noted that FLSA requirements would impose substantial costs on state employers. *Id.* at 846. Increased costs would force states to either raise taxes or cancel programs. *Id.* at 848.

56. *Id.* at 852 n.17.

57. The Civil War Amendments refer to Amendments 13-15 of the United States Constitution. These amendments primarily abolish slavery and guarantee equal protection of the law to all races in the United States.

58. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 177 (1980) (holding that Congress acted permissibly under § 5 of the Fourteenth Amendment when it enacted § 1 of the Voting Rights Act of 1965, which prohibited states from making electoral changes that had a discriminatory effect).

59. U.S. CONST. amend. XIV, § 5.

60. *City of Rome*, 446 U.S. at 179.

61. *Id.*

Although Congress originally passed Title VII pursuant to the Commerce Clause, the 1972 amendments to Title VII, which extend the definition of employers to include states, were enacted pursuant to section 5 of the Fourteenth Amendment.[62] In *Fitzpatrick v. Bitzer*,[63] the Supreme Court held that a state government employer could be held liable for money damages despite the Eleventh Amendment, if it violated the prohibitions against discrimination under Title VII.[64] In this way, the Court extended Fourteenth Amendment rights to state government employees who are the victims of Title VII discrimination. The Court declared that Congress could take steps to enforce the Equal Protection Clause of the Fourteenth Amendment even if such action would ordinarily violate the Eleventh Amendment.[65]

Although federal legislation affecting race and gender discrimination has found refuge in section 5 of the Fourteenth Amendment, the ADEA has not found a similar safe haven. Some courts contend that the ADEA was enacted pursuant to section 5,[66] while others insist that it was enacted pursuant to the Commerce Clause.[67] The Supreme Court added to the confusion by refusing to answer the question definitively. In *EEOC v. Wyoming*,[68] the EEOC argued that Wyoming's mandatory retirement policy, which required game wardens to retire at age fifty-five, violated the ADEA.[69] The Court upheld the ADEA as a valid exercise of Congress's commerce power regardless of the Tenth Amendment, but declined to decide whether the ADEA was also enacted pursuant to section 5.[70] However, the Court reaffirmed that Congress is not limited by Tenth Amendment constraints when legislating under section 5, but is so constrained when legislating under the Commerce Clause.[71]

Prior to its decision in *Hurd v. Pittsburg State University*,[72] the Tenth Circuit had not clearly addressed this important issue. In *EEOC v. Wyoming Retirement System*,[73] the court did not decide whether the ADEA was enacted pursuant to section 5 of the Fourteenth Amendment because the EEOC—instead of a private individual—was suing the state, rendering Eleventh Amendment immunity inapplicable.[74] *Hurd* forced the Tenth Circuit to take a stance on this issue.

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62. Fitzpatrick v. Britzer, 427 U.S. 445, 453 n.9 (1976).

63. 427 U.S. 445 (1976).

64. *Id.* at 456-57.

65. *Id.* at 456. One of the most unusual aspects of this case was the absence of dissenting opinions. In fact, Justice Rehnquist, who later dissented in *City of Rome*, wrote the opinion.

66. *See, e.g.*, EEOC v. Elrod, 674 F.2d 601, 603 (7th Cir. 1982) (concluding that the ADEA is a valid extension of Congress's power under § 5 of the Fourteenth Amendment).

67. *See, e.g.*, McCroan v. Bailey, 543 F. Supp. 1201, 1205-07 (S.D. Ga. 1982) (concluding that the ADEA is a valid extension of Congress's Commerce Clause power).

68. 460 U.S. 226 (1993).

69. *Id.* at 234.

70. *Id.* at 243.

71. *Id.* at 243 n.18. Since the Supreme Court's decision, at least two other jurisdictions have held the ADEA to be enacted pursuant to § 5 of the Fourteenth Amendment. *See* Heiar v. Crawford County, 746 F.2d 1190, 1194 (7th Cir. 1984); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 700 (1st Cir. 1983).

72. 29 F.3d 564 (10th Cir.), *cert. denied*, 115 S. Ct. 321 (1994).

73. 771 F.2d 1425 (10th Cir. 1985).

74. *Id.* at 1428.

B. *Facts*

The plaintiff, a state employee, brought a claim against Pittsburg State University (PSU) alleging discriminatory discharge in violation of the ADEA. In the district court, PSU sought to dismiss the plaintiff's claim by arguing that the Eleventh Amendment provides immunity to the state against a private action in federal court.[75] Both parties agreed that PSU was an agency of the state of Kansas,[76] and that the state law claim for breach of an implied employment contract was barred from federal jurisdiction by the Eleventh Amendment.[77]

Noting that Eleventh Amendment immunity may be abrogated where: (1) Congress evinces an "'unequivocal expression of congressional intent' to do so;" and (2) Congress "authorizes such suits pursuant to section five of the Fourteenth Amendment,"[78] the district court held that the ADEA indeed was enacted pursuant to section five of the Fourteenth Amendment.[79] The district court then relied heavily on the holdings of other jurisdictions to support its contention that the legislative history of the ADEA evinced "'a congressional purpose to prevent arbitrary age discrimination within the protected age group by extending the coverage of the Act to state and local governments.'"[80]

The district court rejected the defense's assertion that Eleventh Amendment immunity was required by the Supreme Court's holding in *Employees v. Missouri Department of Public Health and Welfare*.[81] There, the Court concluded that Congress did not mean to abrogate state immunity under the Fair Labor Standards Act (FLSA), a statute with language virtually identical to the ADEA.[82] The district court distinguished *Employees* by noting that the FLSA was enacted pursuant to the Commerce Clause, while the ADEA was enacted

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75. Hurd v. Pittsburg State Univ., 821 F. Supp. 1410, 1411 (D. Kan. 1993).

76. *Id.*

77. *Id.* The day prior to the *Hurd* decision, the Tenth Circuit specifically noted that "pendent jurisdiction . . . may [not] override the Eleventh Amendment." Mascheroni v. Board of Regents, 28 F.3d 1554, 1559 (10th Cir. 1994) (quoting *Pennhurst*, 465 U.S. at 121). If Eleventh Amendment immunity is not raised as a defense, a federal court may or may not examine the issue. Some jurisdictions adhere to a "mandatory" rule which requires a court to consider Eleventh Amendment immunity sua sponte as a jurisdictional matter, whereas other jurisdictions adhere to a "permissive" rule which merely authorizes a court to raise the issue when not raised by the defendant. *See Mascheroni*, 28 F.3d at 1558-59.

78. *Hurd*, 821 F. Supp. at 1412 (quoting *Pennhurst*, 465 U.S. at 99).

79. *Id.* at 1412. According to the court, the 1974 amendments to the ADEA extended its protection to federal, state, and local government employees. *Id.* The legislative history indicated "a congressional purpose to prevent arbitrary age discrimination." *Id.* (quoting EEOC v. Elrod, 674 F.2d 601 (7th Cir. 1982)). The discrimination prohibited by the ADEA goes to the very essence of the 14th Amendment. *Id.* Even though the ADEA does not expressly state that it was enacted pursuant to § 5, the Supreme Court has previously held that "Congress does not have to recite the words 'Section 5' or 'Fourteenth Amendment' or 'Equal Protection' in order for a statute to be based on it." *Id.* (quoting EEOC v. Wyoming, 460 U.S. 226, 244 (1983)).

80. *Id.* (quoting *Elrod*, 674 F.2d at 605); *see also* Davidson v. Board of Governors, 920 F.2d 441, 443 (7th Cir. 1990) (noting that Congress made its intention to abrogate 11th Amendment immunity crystal clear by including states in the ADEA definition of "employers" who may be liable for legal and equitable relief).

81. 411 U.S. 279 (1973).

82. *Hurd*, 821 F. Supp. at 1413. The FLSA, like the ADEA, authorizes suits "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b) (1988).

pursuant to section 5 of the Fourteenth Amendment.[83]

C. *Tenth Circuit Decision*

In a one paragraph opinion, the Court of Appeals for the Tenth Circuit affirmed the district court's decision in *Hurd*.[84] Finding that the district court's opinion was "thorough and well-reasoned," Judge McCay merely noted two additional decisions supporting the district court's holding that Eleventh Amendment immunity does not bar actions against a state under the ADEA.[85]

D. *Analysis*

According to the Supreme Court, when a federal statute alters the balance of power between the states and the federal government, Congress must clearly state its intent to extend the statute to the states.[86] This holding is known as the "plain statement rule."[87] The plain statement rule was adopted by the courts, mainly out of concern over Congress's power under the Commerce Clause.[88] In *Gregory v. Ashcroft*,[89] however, a majority of the Supreme Court altered the rule's analysis by refusing to extend the ADEA to state appointed judges.[90] According to the Court, the exception to the ADEA for "appointee[s] at the policymaking level" could include judges, and since Congress did not specifically exempt them from this exception, judges were obviously meant to be included in the exception.[91] The reasoning is flawed, however, because the language of the exception seems an odd way of including "judges" within its parameters. The most accurate interpretation of the plain statement rule is that since judges are not specifically mentioned in the exception, they are covered by the ADEA. In this opinion, the Court essentially expands an extreme state's rights notion at the expense of many victims of discrimination.

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83. *Hurd*, 821 F. Supp. at 1413.

84. Hurd v. Pittsburg State Univ., 29 F.3d 564 (10th Cir.), *cert. denied*, 115 S. Ct. 321 (1994).

85. *Id.* at 564 (citing Heiar v. Crawford County, 746 F.2d 1190, 1194 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985), and Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 700 (1st Cir. 1983)).

86. Atascadero v. Scanlon, 473 U.S. 234, 242-43 (1985); *see generally*, Deanna L. Ruddock, Note, Gregory v. Ashcroft: *The Plain Statement Rule and Judicial Supervision of Federal-State Relations*, 70 N.C. L. REV. 1563 (1992).

87. *See* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

88. *Id.*

89. 501 U.S. 452 (1991).

90. *Id.* at 467.

91. *Id.*; *see also* Ruddock, *supra* note 86, at 1566. Note that the dissent believed that the alteration of *Garcia*'s plain statement rule would simply result in confusion. *Gregory*, 501 U.S. at 477 (White, J., dissenting). According to Justice White:

> [T]he majority's approach is also unsound because it will serve only to confuse the law. . . . The majority does not explain its requirement that Congress's intent to regulate a particular state activity be "plain to anyone reading [the federal statute]." Does that mean that it is now improper to look to the purpose or history of a federal statute in determining the scope of the statute's limitations on state activities?

Id. at 478.

Some scholars have argued that since federalism barriers are beginning to creep into the Commerce Clause analysis, Congress's power under section 5 of the Fourteenth Amendment should be expanded as much as possible.[92] The Tenth Circuit's analysis in *Hurd* apparently adopted this view by side-stepping the plain statement analysis outlined by the Rehnquist Court in *Gregory*. It should follow that if Congress had the power to prohibit gender discrimination under section 5, that power should extend to prohibit age discrimination. In fact, the Tenth Circuit has only brought the ADEA on par with Title VII—its statutory cousin—in this respect. This is a step in the right direction, however, and other circuits should adopt the same view.

III. EMPLOYEE MISREPRESENTATION AND THE "ABSOLUTION"[93] DEFENSE UNDER TITLE VII: *O'DRISCOLL V. HERCULES, INC.*[94]

A. *Background*

While employers should be allowed to introduce evidence that an employee was dismissed because of misconduct in defense to Title VII claims of discrimination, the waters are murkier when the employer seeks to introduce evidence of misconduct unknown at the time of the alleged discrimination.[95] Both the courts and Congress have addressed this issue in some form.[96]

The origins of the after-acquired evidence doctrine are found in *Mount Healthy City School District Board of Education v. Doyle*.[97] In *Mt. Healthy*, a teacher claimed that the school board had taken adverse actions against him for exercising his First Amendment rights.[98] The school board acknowledged that the plaintiff's speech was one of the reasons for the plaintiff's discharge.[99] The school board also contended, however, that the plaintiff was dismissed for using obscene gestures toward students.[100] The Supreme Court

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92. *E.g.*, Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1083 (1993).

93. The strict form of the after-acquired evidence doctrine has been described by some commentators as a form of "absolution." Rebecca H. White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 52 (1993).

94. 12 F.3d 176 (10th Cir. 1994), *vacated*, 115 S. Ct. 1086 (1995).

95. James G. Babb, Comment, *The Use of After-Acquired Evidence as a Defense in Title VII Employment Discrimination Cases*, 30 HOUS. L. REV. 1945, 1946 (1994).

96. In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the plurality opinion, authored by Justice Brennan, rejected the use of after-acquired evidence in mixed-motive cases. *Id.* at 252. Yet, many courts have ignored the holding of *Price Waterhouse*. One court has even used *Price Waterhouse* to support the use of after-acquired evidence in mixed-motive cases. *See* Deshaw v. Lord & Taylor, No. 90 Civ. 0490 (JFK), 1991 WL 107271, at *6 (S.D.N.Y. Jun. 13, 1991) (citing *Price Waterhouse* to permit the use of after-acquired evidence in an ADEA suit). Congress responded to the uncertainties by amending Title VII to read, "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (Supp. V 1993).

97. 429 U.S. 274 (1977).

98. *Id.* at 276.

99. *Id.* at 282-83.

100. *Id.*

held that the school board could escape a finding that discrimination was a "substantial factor" in their refusal to rehire the plaintiff by establishing, by a preponderance of the evidence, that the decision to discharge the plaintiff would have been reached based solely on the use of obscene gestures.[101] This defense has come to be known as the "would have terminated anyway" standard.[102]

The seminal case regarding after-acquired evidence in the Tenth Circuit is *Summers v. State Farm Mutual Automobile Insurance Co.*[103] The plaintiff in *Summers* was satisfactorily employed as a field claim representative for seventeen years, when State Farm discovered that he had forged a signature on one of the claims.[104] State Farm immediately warned the plaintiff that subsequent falsifications would result in termination.[105] Years later, State Farm dismissed the plaintiff, who subsequently filed suit alleging a violation of the ADEA.[106] During discovery, nearly four years after the plaintiff had been terminated, State Farm discovered evidence that the plaintiff had falsified over 150 additional claims.[107]

Relying on *Mt. Healthy*, State Farm argued that the evidence was relevant and should absolutely bar the plaintiff's claim.[108] The Tenth Circuit agreed.[109] According to the court:

> [t]o argue . . . that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company doctor is fired because of his age . . . and the company, in defending a civil rights action, . . . discovers that the . . . employee was not a "doctor." In our view, . . . Summers is in no better position.[110]

Many courts have followed *Summers* by adopting some form of the doctrine.[111]

There are some serious doubts, however, about the proper legal application of *Mt. Healthy* in *Summers*. *Mt. Healthy* was a mixed-motive case in which a valid reason did exist for firing the plaintiff at the time of dis-

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101. *Id.* at 287.
102. *See* Babb, *supra* note 95, at 1951.
103. 864 F.2d 700 (10th Cir. 1988).
104. *Id.* at 702.
105. *Id.*
106. *Id.* at 701-02.
107. *Id.* at 703.
108. *Id.* at 705.
109. *Id.* at 708.
110. *Id.*
111. *See* Dotson v. United States Postal Serv., 977 F.2d 976, 978 (6th Cir.), *cert. denied*, 113 S. Ct. 263 (1992) (following the *Summers* doctrine that after-acquired evidence may be used where a plaintiff omitted current use of prescription drugs on an employment application); Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302, 304 (6th Cir. 1992) (noting commitment to the *Summers* doctrine in denying relief to the plaintiff in a sex discrimination case where she omitted to mention a prior conviction for drunk driving on her employment application), *cert. dismissed*, 114 S. Ct. 22 (1993). *Cf.* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994) (rejecting the *Summers* rule by limiting the use of after-acquired evidence), *vacated*, 115 S. Ct. 1397 (1995).

charge.[112] In *Summers*, the employer acted solely with the intent to discriminate.[113]

In *Wallace v. Dunn Construction Co.*,[114] the Eleventh Circuit rejected the *Summers* rule that after-acquired evidence was an absolute bar to any claim of discrimination.[115] According to the court, "[t]he *Summers* rule is antithetical to the principal purpose of Title VII—'to achieve equality of employment opportunity' by giving employees incentives 'to self-examine . . . employment practices and to endeavor to eliminate' . . . employment discrimination."[116]

Wallace, a case of first impression in the Eleventh Circuit, involved claims of hostile work environment and sexual harassment, as well as retaliatory discharge under the Equal Pay Act (EPA).[117] During a deposition, the defendant discovered that the plaintiff had lied about a previous narcotics conviction on her employment application.[118] It was undisputed that the employer would not have hired the plaintiff had it been aware of the narcotics conviction.[119]

The court agreed that *Mt. Healthy* provided "persuasive guidance concerning after-acquired evidence," but chided the Tenth Circuit for misapplying the doctrine.[120] According to the Eleventh Circuit, *Summers* represented "an unwarranted extension of *Mt. Healthy*" since it effectively

> ignore[d] the lapse of time between the employment decision and the discovery of a legitimate motive. Whereas the *Mt. Healthy* rule excuses all liability based on what actually would have happened absent the unlawful motive, the *Summers* rule goes one step further: it excuses all liability based on what hypothetically would have occurred absent the alleged discriminatory motive assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge.[121]

Mt. Healthy refused to allow membership in a protected class to place plaintiffs in a worse position, yet *Summers* achieved precisely this result.[122]

> The *Summers* rule does not encourage employers to eliminate discrimination. Rather, it invites employers to establish ludicrously low thresholds for "legitimate" termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to escape all liability by rummaging through an unlawfully-discharged

112. *Mt. Healthy*, 429 U.S. at 285.
113. *Summers*, 864 F.2d at 702.
114. 968 F.2d 1174 (11th Cir. 1992), *vacated*, 32 F.3d 1489 (11th Cir. 1994).
115. *Id.* at 1178.
116. *Id.* at 1180 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).
117. *Id.* at 1176.
118. *Id.* at 1176-77.
119. *Id.* at 1185 (Godbold, J., dissenting).
120. *Id.* at 1179.
121. *Id.*
122. *Id.*

employee's background for flaws.[123]

While the Eleventh Circuit refused to allow after-acquired evidence to bar claims of discrimination, it did allow this evidence to go to the issue of available remedies, including attorney fees.[124] The court "agree[d] with the abstract proposition . . . that after-acquired evidence is relevant to the relief due" to the plaintiff.[125] *Wallace* is best viewed as a direct limit on the doctrine as announced in *Summers*.

During the Survey term, the Tenth Circuit was given an opportunity to further define the parameters of the doctrine in *O'Driscoll v. Hercules, Inc.*[126]

B. *Facts*

Dorthea O'Driscoll, a Quality Control Inspector, was terminated by Hercules, Inc. after six years of employment.[127] She brought suit alleging that her termination violated the ADEA.[128]

While preparing for trial, the defendant discovered that O'Driscoll had misrepresented information on her employment application,[129] her health insurance application, and her security clearance application.[130] Hercules maintained that it would have fired the plaintiff had it known about the false statements.[131] In her defense, plaintiff presented evidence that misrepresentations by other employees had not resulted in their termination.[132]

The district court, however, relying on *Summers*, found that the plaintiff had no right to relief in the face of unrefuted evidence that the defendant would have dismissed the plaintiff had it known of her misconduct.[133] Accordingly, the court granted the defendant's motion for summary judgment.[134]

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123. *Id.* at 1180.

124. *Id.* at 1181, 1183.

125. *Id.* at 1181.

126. 12 F.3d 176 (10th Cir. 1994), *vacated*, 115 S. Ct. 1086 (1995).

127. *Id.* at 177.

128. *Id.* The plaintiff also asserted state law claims of wrongful termination and breach of employment contract. *Id.*

129. The specific evidence was that she misrepresented her age, her childrens' ages, her date of high school graduation and the amount of education she had received. *Id.* at 177-78.

130. *Id.* at 178.

131. *Id.* In support of its contention, Hercules offered the following language from the employment application: "I understand that any misrepresentation made by me herein may result in the cancellation of this employment application . . . without any obligation or liability to me other than payment of the rate agreed upon for services actually rendered." *Id.* Hercules also presented affidavits by company management stating that the managers would have fired the plaintiff had they known about her misrepresentations. *Id.*

132. *Id.* The plaintiff's evidence regarding other employees included falsification of time cards and false statements concerning employee's whereabouts while on duty. The plaintiff also noted that Hercules' Management Manual Procedure handbook specified that violations which occurred more than twelve months prior were not to be taken into account by the supervisor in determining disciplinary action for the current violation. *Id.*

133. *Id.*

134. *Id.*

C. *Tenth Circuit Decision*

Initially, the Tenth Circuit rejected the plaintiff's assertion that *Summers* only applies in the face of serious and pervasive employee misconduct.[135] Rather, the court clarified *Summers* by announcing a more lenient three-prong burden of proof that defendants must satisfy to benefit from the doctrine's application: the employer must prove that (1) it was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified the discharge; and (3) it would indeed have discharged the employee, had the employer known of the misconduct.[136]

While deeming serious misconduct as not dispositive, the court did note that the plaintiff's actions represented a pattern of dishonest behavior.[137] Furthermore, O'Driscoll's evidence of other employees who were not fired for dishonesty was irrelevant. According to the court, the plaintiff had not provided any evidence that Hercules had retained other employees who had committed similar infractions equivalent to her numerous misrepresentations.[138]

D. *Analysis*

By giving examples of irrelevant evidence, while failing to define what is relevant, *Summers* and *O'Driscoll* encourage employers to "comb 'an employee's file . . . [for] minor, trivial, or technical infractions.'"[139] If, under *O'Driscoll*, serious or pervasive conduct is unnecessary, what then is required? The *Summers* standard requires the employer to show that it would have fired the plaintiff for the act at issue. Yet, the idea that an employer would actually admit that it would *not* have fired the employee had it known of the misconduct is dubious. Responding to such obvious pitfalls of the doctrine's application, the Supreme Court recently rejected the Tenth Circuit's harsh interpretation of the after-acquired evidence doctrine in *McKennon v. Nashville Banner Publishing Co.*[140]

Ms. McKennon, age 62, claimed that Nashville Banner violated the ADEA by discharging her because of her age.[141] She further asserted that the district court misapplied the after-acquired evidence doctrine by admitting evidence, discovered during a deposition, that she had photocopied sensitive materials—in contravention of handbook policy—for her "protection."[142] Arguing that the after-acquired evidence doctrine should not apply to her case, McKennon attempted to distinguish her case from the employment application

135. *Id.* at 179. According to the court, "there is no threshold requirement of serious and pervasive misconduct" under the *Summers* doctrine. *Id.*

136. *Id.*

137. *Id.* at 179-80.

138. *Id.* at 180.

139. *See* Babb, *supra* note 95, at 1958-59 (quoting O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 659 (D. Utah 1990)).

140. 115 S. Ct. 879 (1995).

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

142. *Id.* at 540-41. Ms. McKennon allegedly copied the materials in anticipation of being terminated because of her age. *Id.*

fraud precedents by pointing to the clear nexus between her alleged misconduct and the discrimination claim.[143] Noting that the Sixth Circuit had already adopted *Summers*,[144] the court of appeals rejected the nexus argument and affirmed the lower court's decision.[145]

The Supreme Court granted certiorari[146] to resolve the conflicting circuit opinions regarding the complete denial of relief in after-acquired evidence situations.[147] According to the Court, ADEA violations are not so trivial as to preclude enforcement on a showing of misconduct.[148] The Court held that allowing after-acquired evidence of wrongdoing to bar all relief undermines the purpose of the ADEA—"elimination of discrimination in the workplace."[149]

Importantly, the Supreme Court limited the application of *Mt. Healthy* to mixed-motive firings,[150] thereby rejecting the Tenth Circuit's reasoning in *Summers*. The Court, however, also emphasized the importance of the employee's wrongdoing by eliminating the remedies of front pay and reinstatement in this and similar cases.[151] The appropriate remedy in such cases, is an award of backpay calculated from the date of the unlawful discharge to the date of the acquisition of the evidence.[152] After considering any extraordinary circumstances relating to either party, the resulting figure is the employee's remedy.[153] Perhaps realizing the vagueness of the "would have terminated anyway" standard, the Court explained that the employer must establish that the misconduct was so severe that the employee *in fact* would have been fired on that ground alone had the employer known of it at the time of discharge.[154] Although the court failed to define "in fact," this mandate is stronger than the Tenth Circuit's third prong in *O'Driscoll*. Although the Court declined to expressly overrule *O'Driscoll*,[155] *McKennon* requires employers

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143. *Id.* at 541.

144. Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409 (6th Cir. 1992).

145. *McKennon*, 9 F.3d at 542, 543 n.8. The court stated that "if Mrs. McKennon's nexus theory were adopted, it would apply where an employee takes money from her employer for support of herself in anticipation of an unlawful discharge." *Id.*

146. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

147. In addition to the Tenth Circuit's *Summers* doctrine and the Eleventh Circuit's *Wallace* decision, the Seventh Circuit, in Smith v. General Scanning Inc., 876 F.2d 1315 (7th Cir. 1989), provided yet another analysis. Combining *Summers* and *Wallace*, *Smith* allowed after-acquired evidence to prohibit back pay after the discovery of the misconduct. *Id.* at 1320 n.2. The EEOC has expressly adopted this position. *Revised General Counsel's Memorandum on Civil Rights Act of 1991*, 8 Lab. Rel. Rep. (BNA) No. 718, at 405:7105, 7108 (March, 1993). The Supreme Court, in *McKennon*, ultimately adopted a similar compromise between the employer's concern about misconduct and the employee's rights against discrimination. *McKennon*, 115 S. Ct. at 886; *see also infra* text accompanying notes 148-53.

148. *McKennon*, 115 S. Ct. at 883-84.

149. *Id.* at 884 (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979)).

150. *Id.* at 885. A mixed-motive firing occurs when an employer fires an employee for both lawful and unlawful reasons. *Mt. Healthy* involved a mixed-motive firing; *Summers* did not. *Id.*; *see also supra* text accompanying notes 103-13.

151. *McKennon*, 115 S. Ct. at 886.

152. *Id.*

153. *Id.*

154. *Id.* at 886-87.

155. *Id.* at 885. Subsequently, the Court vacated *O'Driscoll* for reconsideration in light of *McKennon*. *O'Driscoll*, 115 S. Ct. 1086 (1995).

to present more evidence than a mere statement that they would have fired the plaintiff. Thus, employers should protect themselves by explicitly outlining reasons for discharge either in a procedural handbook or through longstanding company policies.

IV. THE DEATH KNELL FOR NOMINAL DAMAGES: *GRIFFITH V. COLORADO DIVISION OF YOUTH SERVICES*[156]

A. *Background*

At common law, courts vindicated the deprivation of "inalienable" rights, which did cause actual injury, by awarding nominal sums of money.[157] Awarding nominal damages without proof of actual injury signified the importance accorded certain rights in society.[158] Prior to the 1991 amendments to the Civil Rights Act, six jurisdictions addressed the question of nominal damages in Title VII actions. Five, including the Tenth Circuit, awarded nominal damages under Title VII.[159] For example, in *Baker v. Weyerhaeuser Co.*, the Tenth Circuit affirmed a district court's award to the plaintiff of one dollar in her "hostile work environment" sexual harassment claim, in addition to $90,000 in actual and punitive damages on a state claim of outrageous conduct.[160]

An award of nominal damages is critical in many cases because courts have held such damages to be a prerequisite to an award of attorney's fees under Title VII. 42 U.S.C. § 2000e-5(k) provides that a court may, in its discretion, allow a prevailing plaintiff to recover attorney's fees in Title VII actions.[161] In order to be deemed prevailing, however, the party must have at

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156. 17 F.3d 1323 (10th Cir. 1994).

157. Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REF. 403, 441 (1993) (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978) (alteration in original)).

158. *Id.*

159. *See* Baker v. Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990) (affirming a $1 nominal damage award in a "hostile work environment" sexual harassment case); Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 905 (11th Cir. 1988); Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986) (affirming a nominal damage award in a sex discrimination case); Katz v. Dole, 709 F.2d 251, 253 n.1 (4th Cir. 1983); Dean v. Civiletti, 670 F.2d 99, 101 (8th Cir. 1982); Joshi v. Florida State Univ., 646 F.2d 981, 991 n.33 (5th Cir. Unit B June), *cert. denied*, 456 U.S. 972 (1981).

160. The court of appeals affirmed based upon the following findings:

> (1) sexual harassment of an employee which creates a hostile or offensive work environment is actionable under Title VII; (2) for such conduct to be actionable it must be sufficiently severe or pervasive to alter the condition of employment [as Baker had demonstrated through the remarks and actions of her co-workers]; (3) damages for emotional distress, however, are not actionable under Title VII; and [since this was the only damage Baker suffered] (4) accordingly, the issues are found in favor of Baker and her nominal damages are assessed at $1.00.

Baker, 903 F.2d at 1343. Note that this case came to trial before the Civil Rights Act of 1991. Thus, there were few Title VII remedies available to plaintiffs in "hostile work environment" cases.

161. 42 U.S.C. § 2000e-5(k) provides that:

> In any action or proceeding under [Title VII] the court, in its discretion, may allow the

least been awarded nominal damages.[162]

The only circuit which has consistently denounced awarding nominal damages in Title VII cases is the Seventh Circuit.[163] In *Bohen v. City of East Chicago*,[164] Judge Easterbrook, acknowledging that a number of courts have found nominal damages to be viable under Title VII, held that "[nominal] damages are not 'equitable relief'" within the meaning of Title VII.[165] Because Title VII's language mandates equitable relief but not damages, the court rejected the plaintiff's claim for attorney's fees.[166] Similarly, in *Swanson v. Elmhurst Chrysler Plymouth, Inc.*,[167] the Seventh Circuit overturned a lower court's decision to provide nominal damages in a sexual harassment claim where a plaintiff could not prove economic harm.[168] The court found that where reinstatement, backpay, and any other sources of compensatory damages are not available, the defendant must prevail on the merits.[169]

The Supreme Court has not addressed the role of nominal damages in defining a "prevailing party" under Title VII. The Court, however, has resolved a similar issue in the context of 42 U.S.C. § 1988. In *Farrar v. Hobby*,[170] the Court declined to allow an attorney's fees award where the plaintiff was awarded only nominal damages.[171] According to the Court, the threshold requirement for being considered a prevailing party is met "when actual relief on the merits of [plaintiff's] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." [172] While the moral satisfaction of winning a lawsuit does not bestow "prevailing party" status,[173] a judgment for damages—compensatory, punitive, or nominal—changes the legal relationship

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prevailing party, other than the Commission or the United States, a reasonable attorney's fee . . . as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (1988).

162. *See supra* note 159 and accompanying text.

163. *See, e.g.*, Trautvetter v. Quick, 916 F.2d 1140, 1147-48 (7th Cir. 1990); Dockter v. Rudolf Wolff Futures, Inc., 913 F.2d 456, 461 (7th Cir. 1990); Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235, 1240 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990).

164. 799 F.2d 1180, 1184 (7th Cir. 1986). This was the Seventh Circuit's first decision regarding nominal damages.

165. *Id.*

166. *Id.*

167. 882 F.2d 1235 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990).

168. *Id.* at 1239-40. Here, the economic harm required was a showing that the harassment resulted in discharge. *Id.*

169. *Id.* at 1240.

170. 113 S. Ct. 566 (1992).

171. *Id.* at 570.

172. *Id.* This definition is a culmination of three previous decisions. *See* Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989) (noting that to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a change in the legal relationship between itself and the defendant); Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (per curiam) (reaffirming that a judgment will constitute relief for purposes of § 1988 only if it affects the behavior of the defendant toward the plaintiff); Hewitt v. Helms, 482 U.S. 755, 760-61 (1987) (observing that respect for the ordinary language of § 1988 requires that a plaintiff obtain some relief on the merits before he can be said to prevail).

173. *Farrar*, 113 S. Ct. at 573-74.

between the parties, as the defendant is thereby required to pay money not previously due.[174]

Despite the plaintiff's prevailing party status in *Farrar*, the Court denied attorney's fees by subjecting the nominal damage award to a reasonableness test.[175] The Court recognized two classes of prevailing parties—those with actual, compensable injuries, and those without such injuries.[176] Those plaintiffs unable to demonstrate actual injuries receive only nominal damages.[177] Both classes of plaintiffs are "prevailing" only for the purpose of guaranteeing enforcement against the defendant.[178] The prevailing party status, however, will not allow a "nominal damages prevailing party" to circumvent case law requiring a reasonably proportionate relationship between a nominal damage award and an attorney's fee award.[179] The Court emphasized that one of the most essential factors in determining the reasonableness of an attorney's fee award is the degree of success obtained.[180] Indeed, the Court determined that when an essential element of the plaintiff's claim for monetary relief is not proven—as is the case for plaintiffs granted nominal damages solely to ensure enforcement against the defendant—"the only reasonable fee is usually no fee at all."[181] Thus, the presence or absence of neither the prevailing party status nor nominal damages were determinative to attorney's fees. The weakness of plaintiff's showing—the absence of actual injury, and the unsuccessful monetary claim—caused the Court's rejection of the claim for attorney's fees.[182]

B. *Facts*

In *Griffith v. Colorado Division of Youth Services*, a female employee accused her male supervisor at the Division of Youth Services ("DYS") in Adams County, Colorado, of racial discrimination and sexual harassment.[183] The defendant supervisor referred to the plaintiff as a "stupid white woman" and forcefully reprimanded her in the presence of others at the division.[184] Following an investigation, the defendant supervisor was discharged.[185]

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174. *Id.* at 574.
175. *Id.* at 575.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*; *see also* Hensley v. Eckerhart, 461 U.S. 424, 436 (1983).
181. *Farrar*, 113 S. Ct. at 575.
182. The dissent noted that the case should have been remanded for a consideration of the reasonableness of the award as the majority did not find that nominal damages could never support the awarding of attorney's fees. *Id.* at 579 (White, J., concurring in part, dissenting in part). The dissent agreed that awarding $280,000 in attorney's fees where the plaintiff had only recovered one dollar in a $17,000,000 suit was excessive as a matter of law. However, the dissent refused to agree that the appropriate award was no fee at all. *Id.*
183. 17 F.3d 1323, 1324 (10th Cir. 1994). Griffith further alleged that she was subjected to retaliation (i.e. denials of promotion) even after Grier, the supervisor, was terminated. *Id.* This case is unusual in that the plaintiff was a white female and the supervisor was a black male. *Id.*
184. *Id.* at 1325. The incidents of sexual and racial discrimination also included: Grier's cursing at Griffith; fondling another female employee in her presence; and his discussion of "helping 'his people.'" *Id.*
185. *Id.*

The district court granted summary judgment to DYS based on uncontroverted facts that the plaintiff received full pay during her administrative leave, suffered no loss in wages or tenure, and was compensated by DYS for therapy sessions due to job-related stress.[186] Since the plaintiff had not suffered any actual damages, the court refused to grant nominal damages under Title VII.[187] The court recognized a split among the circuits regarding the issue of nominal damages,[188] but ruled that because Title VII only provides equitable relief, and since nominal damages are compensatory rather than equitable in nature, the plaintiff was not entitled to nominal damages.[189]

In addition, the plaintiff's contention that her lack of promotion constituted retaliatory discrimination was dismissed.[190] The court found that, in light of a state-wide hiring freeze, Griffith could not demonstrate a specific position denied to her.[191]

C. *Tenth Circuit Decision*

The Tenth Circuit reviewed de novo[192] Griffith's contention that the trial court erred in refusing to award nominal damages,[193] and affirmed the judgment for DYS.[194]

Griffith argued that she was subjected to a "hostile work environment," noting that she had complained to various superiors long before the situation erupted in the spring of 1990.[195] While Griffith acknowledged that "Congress

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186. *Id.*

187. *Id.* Prior to the Civil Rights Act of 1991, remedies available for Title VII discrimination claims were purely equitable incorporating injunctive relief (i.e. reinstatement) or backpay, and in some cases front pay and lost benefits. Attorney's fees and costs for the prevailing party were also available. Maureen E. McClain & Kevin G. Chapman, *Updates in Employment Discrimination*, 491 PRACTICING L. INST. LITIG. ADMIN. PRAC. 7 (1994). Section 102 of the 1991 Act expanded recovery to include compensatory and punitive damages in the limited cases of intentional discrimination. *Id.*

188. *See* Maney v. Brinkley Mun. Waterworks & Sewer Dep't, 802 F.2d 1073, 1076 (8th Cir. 1986) (award of nominal damages will support award of reasonable attorney's fees); Katz v. Dole, 709 F.2d 251, 253 n.1 (4th Cir. 1983) (even if the plaintiff does not regain her position, she might be entitled to nominal damages and attorney's fees); T & S Serv. Assocs. v. Crenson, 666 F.2d 722, 728 n.8 (1st Cir. 1981) (where compensatory damages are not available, courts should consider award of nominal damages). *But see* Landgraf v. USI Film Prods., 968 F.2d 427, 431 (5th Cir. 1992) (nominal damages are legal, not equitable relief and therefore outside the scope of Title VII remedies), *aff'd*, 114 S. Ct. 1483 (1994); King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990) (nominal damages are not available under Title VII); Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235, 1240 (7th Cir. 1989) (nominal damages are not available as equitable relief), *cert. denied*, 493 U.S. 1036 (1990).

189. *Griffith*, 17 F.3d at 1325.

190. *Id.*

191. Griffith's EEOC claim was filed on April 4, 1990. The district court found that no promotions were available to DYS counselors after that date. *Id.* at 1325-26.

192. *Id.* at 1326. The court applied the standard previously set forth by the Tenth Circuit that "[s]ummary [j]udgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Id.* (quoting Russillo v. Scarborough, 935 F.2d 1167, 1170 (10th Cir. 1991)).

193. *Id.* Griffith asserted that nominal damages are not only an appropriate relief under Title VII, but are necessary to effectuate the purpose of the Act. *Id.*

194. *Id.* at 1329.

195. *Id.* at 1325.

did limit the scope of remedies under Title VII," she still maintained that hers was a valid cause of action.[196]

The Tenth Circuit acknowledged that employers may be liable under an agency theory[197] as previously set forth in *Hirschfeld v. New Mexico Corrections Department*.[198] According to the *Hirschfeld* test, however, the employer may only be liable if "(1) the harasser acted within the scope of his employment, (2) the employer failed to remedy a hostile work environment brought about by the sexual harassment of which the employer knew or should have known, or (3) the harasser acted under apparent authority from the employer."[199] Noting that there was no evidence presented that DYS had a history of condoning sexual harassment, and there were undisputed facts that DYS had remedied the situation, the court held that "the matters related by Griffith are so isolated, infrequent in terms of total employment service, or so questionable in relation to sexual harassment of Griffith that we agree with the district court that the record contains only conclusory and speculative allegations, none of which meet the *Hirschfeld* test."[200]

The court then addressed the issue of nominal damages. Nominal damages are a "token" recognizing an invasion of the plaintiff's rights despite the absence of actual damages.[201] In an abrupt departure from precedent, the Tenth Circuit adopted the Seventh Circuit's reasoning, holding that nominal damages were compensatory in nature. Since Title VII provides equitable rather than legal relief, nominal damages were withheld entirely.[202]

The court distinguished their previous decisions in *Baker*[203] and *Derr v. Gulf Oil Corp.*[204] by arguing that those cases awarded Title VII plaintiffs nominal damages due to their prevailing party status.[205] The *Griffith* court insisted that *Baker* and *Derr* did not characterize nominal damages as equitable or legal, leaving the court free to decide this issue in *Griffith*.[206]

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196. *Id.*

197. *Id.* at 1330.

198. 916 F.2d 572, 576-79 (10th Cir. 1990).

199. *Griffith*, 17 F.3d at 1330 (citing *Hirschfeld*, 916 F.2d at 576-79); *see also* Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (harasser's employer could be liable as agent); Summers v. Utah, 927 F.2d 1165, 1170 (10th Cir. 1991) (employer may be liable for employee indifference to citizens' rights); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417-18 (10th Cir. 1987) (adopting RESTATEMENT (SECOND) OF AGENCY § 219 (1958) position that employer is liable for employees acting in the scope of employment).

200. *Griffith*, 17 F.3d at 1330.

201. Magnett v. Pelletier, 488 F.2d 33, 35 (1st Cir. 1973) (citing Chesapeake & Potomac Tel. Co. v. Clay, 194 F.2d 888 (1952)).

202. *Griffith*, 17 F.3d at 1327.

203. *Baker*, 903 F.2d at 1342 (affirming the district court's award of $1.00 in nominal damages where other damages (i.e. actual and punitive) had also been recovered).

204. 796 F.2d 340, 344 (10th Cir. 1986) (citing Hensley v. Eckerhart, 461 U.S. 424 (1983) (finding plaintiff was the "prevailing party" because she had succeeded in proving significant issues in the litigation)).

205. *Griffith*, 17 F.3d at 1326.

206. *Id.*

D. *Analysis*

The Civil Rights Act of 1991 is not retroactive.[207] Because Griffith's cause of action accrued in 1990,[208] the Civil Rights Act of 1964 governed the case despite the 1994 date of decision. Although the Tenth Circuit did not speculate as to a result under the Civil Rights Act of 1991, its analysis of the nature between equitable and legal remedies alone has created a dramatic legal shift.

By rejecting its previous decisions in favor of a Seventh Circuit analysis,[209] the court adopted the position that "nominal damages are compensatory in nature and since Title VII provides for equitable, not legal relief, nominal damages must not be awarded under Title VII."[210] The court also adopted[211] the Fifth Circuit's decision in *Landgraf v. USI Film Products*,[212] which defined nominal damages as compensatory and excluded such recovery from Title VII.[213] Since the Fifth Circuit had previously upheld awarding nominal damages in the Title VII context, perhaps the Tenth Circuit was simply adopting the better argument. Despite the approval of nominal damages by most circuits,[214] all agree that Title VII only provides equitable relief.[215] Thus, an award of any damages would seemingly contradict their holdings.[216]

The Civil Rights Act of 1991 provides for compensatory as well as punitive damages; as such, the nature of Title VII changed from equitable to legal.[217] Such a shift brings to the forefront the question of whether nominal damages should be available in Title VII cases. The answer must be affirmative.

As "hostile work environment" cases have previously illustrated, the Civil Rights Act of 1964 left many victims of sexual harassment "a right without a remedy."[218] While the Civil Rights Act of 1991 provides for compensatory and punitive damages, a case could conceivably arise where neither economic nor serious mental damages can be proven. The victim should not remain uncompensated while the perpetrator remains unpunished. "Congress has stated that eradicating discrimination in employment is a national priority of the highest order. Thus, an award of nominal damages would be appropriate [un-

207. *See, e.g.*, Steinle v. Boeing Co., 24 F.3d 1250 (10th Cir. 1994) (citing Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994)).

208. *Griffith*, 17 F.3d at 1325.

209. *See supra* text accompanying notes 163-69.

210. *Griffith*, 17 F.3d at 1327.

211. *Id.*

212. 968 F.2d 427 (5th Cir. 1992), *aff'd*, 114 S. Ct. 1483 (1994).

213. *Id.* at 431.

214. *See supra* note 159.

215. *See, e.g., Swanson*, 882 F.2d at 1240.

216. *See* Anne C. Levy, *Righting the "Unrightable Wrong": A Renewed Call for Adequate Remedies Under Title VII*, 34 ST. LOUIS U. L.J. 567, 567-68 (1990).

217. Compensatory and punitive damages are legal and not equitable in nature. *See* Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 793 (1991).

218. Sharon T. Bradford, Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1630 (1990).

der] Title VII."[219]

Although *Farrar* held that the appropriate attorney's fee award might be none at all where only nominal damages are awarded, perhaps attorney's fees should be viewed as another source of punishing the perpetrators of discrimination and as a message that such behavior will no longer be tolerated.[220] After all, awarding nominal damages while forbidding attorney's fees "vindicates the plaintiff's rights but does not force the defendant employer to . . . alter its relationship with the plaintiff" or consider future improvements in the work environment.[221] Further, denying attorney's fees might discourage attorneys from taking these meritorious cases. The Tenth Circuit will most likely affirm the right to nominal damages in future Title VII cases. However, given *Farrar* and the Tenth Circuit's conservative nature, attorney's fees will not likely be procured where only nominal damages are awarded.

CONCLUSION

During its most recent term, the Tenth Circuit evinced a decidedly conservative view of the status quo. *O'Driscoll* reaffirmed the after-acquired evidence doctrine and would have extended its coverage but for the Supreme Court's recent decision in *McKennon*.

In *Griffith*, the court adopted the more conservative view that nominal damages should not be allowed in Title VII cases. Although the Civil Rights Act of 1991 renders the issue mostly moot, current decisions best indicate the court's future rulings.

The most surprising decision of this Survey period was the Tenth Circuit's holding in *Hurd*. The court's post-Civil Rights Act of 1991 rationale was analogous to its pre-Civil Rights Act of 1991 rationale. *Hurd*, a case where a previous decision decided under Title VII was later adopted in the ADEA context, reflects that the ties between Title VII and the ADEA remain intact.

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219. Yelonsky, *supra* note 157, at 441 (footnote omitted).

220. Note that punitive damages are currently available under Title VII only where "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (Supp. V. 1993).

221. Yelonsky, *supra* note 157, at 441.