EMPLOYMENT DISCRIMINATION—EMPLOYER'S LIABILITY—AFTER-ACQUIRED EVIDENCE DOES NOT COMPLETELY SHIELD EMPLOYERS FROM LIABILITY FOR TERMINATING EMPLOYEES IN VIOLATION OF FEDERAL ANTIDISCRIMINATION ACTS—*McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995).

Suppose Ms. Smith, a fifty-one-year-old woman, worked at ABC Corporation (ABC) for twenty-one years where she consistently received above-average ratings on her performance appraisals. After Ms. Smith's supervisor retired, ABC hired Mr. Johnson, who believed that female and older employees cannot be effective in the age of optical scanners, megabytes, and electronic mail. Mr. Johnson fired Ms. Smith, who subsequently filed a complaint charging that the termination violated both Title VII of the Civil Rights Act of 1964 (Title VII)[1] and the Age Discrimination in Employment Act (ADEA).[2]

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[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1988) (as amended 1991). Title VII provides, in relevant part:

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

Id. § 2000e-2(a).

Many states, such as New Jersey in its Law Against Discrimination, maintain laws that protect a broader range of individuals than Title VII. *See* N.J. STAT. ANN. § 10:5-12 (West 1993) (enumerating the classes of individuals covered under the Law Against Discrimination).

The New Jersey Law Against Discrimination provides, in relevant part:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
> a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

N.J. STAT. ANN. § 10:5-12; *see also infra* note 2 (discussing the Age Discrimination in Employment Act, which represents the federal act prohibiting discrimination based upon age).

[2] Age Discrimination in Employment Act, 29 U.S.C. §§ 621-633a (1988). The ADEA states, in relevant part:

During discovery, ABC found that Ms. Smith misstated her educational background on the employment application, which constitutes grounds for immediate dismissal at the company. Ms. Smith's conduct, although dishonest, is not a rare occurrence.[3] ABC wants to know how this after-acquired evidence[4] could be

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

Id. § 623.

The ADEA further states that "[t]he prohibitions in this chapter [the ADEA] . . . shall be limited to individuals who are at least 40 years of age." *Id.* § 631.

[3] *See* Charles S. Mishkind & Louise B. Wright, *Update on Recent Trends in the Law: After-Acquired Evidence, Fraudulent Joinder, and Alternative Dispute Resolution*, 20 EMPLOYEE REL. L.J. 115, 116 (1994) (stating that studies found that between 30% to 40% of employees made false comments regarding their work history for the purpose of gaining employment).

[4] *See* George D. Mesritz, *Update on Recent Trends in the Law: The Age Discrimination in Employment Act*, 21 EMPLOYEE REL. L.J. 107, 108 (1995) (defining after-acquired evidence as an employee's misconduct that is discovered after discharge that would have justified termination); Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 96-97 (1995) (describing after-acquired evidence as an affirmative defense that allows an employer to avoid liability if it uncovers employee misconduct which was not known at the time of the discharge). After-acquired evidence is not limited to resumé fraud, but has also been applied in other situations where the employee violated company policies. Bob E. Lype, *After-Acquired Evidence in Defending Employment Discrimination Claims*, 61 DEF. COUNS. J. 573, 581 (1994); *see generally* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995) (reviewing after-acquired evidence when an employee made copies of confidential documents); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988) (considering the after-acquired evidence doctrine when an employee falsified insurance claim reports).

Normally, after-acquired evidence becomes important when, during the company's investigation of a discrimination lawsuit, it finds that the employee bringing the suit committed an act that would have caused the company to fire or never hire the employee. Lype, *supra*, at 573. The company alleges that because of the after-acquired evidence, the employee cannot claim that they suffered damages resulting from the discriminatory firing. *Id.* This affirmative defense has been compared to the "unclean hands" defense. R. Shawn Wellons, Comment, *Plaintiff's Bane: The After-Acquired Evidence Defense and Title VII Discrimination Suits*, 29 WAKE FOREST L. REV. 1325, 1328 (1994). The unclean hands doctrine states:

> [O]ne who has defrauded his adversary in the subject matter of the action will not be heard to assert right in equity. Under this doctrine, a court of equity may deny relief to a party whose conduct has been ineq-

used as a defense to Ms. Smith's wrongful termination suit.

Congress enacted antidiscrimination legislation such as Title VII and the ADEA to address problems associated with discriminatory employment practices and to deter employers from making employment decisions based on discriminatory factors.[5] The judiciary has developed three classifications of liability when considering employment discrimination cases: disparate treatment,[6]

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uitable, unfair, and deceitful, but doctrine applies only when the reprehensible conduct complained of pertains to the controversy at issue.

BLACK'S LAW DICTIONARY 1524 (6th ed. 1990).

5 Wellons, *supra* note 4, at 1330; Samuel A. Mills, Note, *Toward An Equitable After-Acquired Evidence Rule*, 94 COLUM. L. REV. 1525, 1527 (1994); *see generally* 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION, § 2.1, at 33-38 (2d ed. 1988) (discussing the purposes of Title VII). Although slavery ended approximately 100 years prior to the Civil Rights Act of 1964, until the Act was passed state and federal governments tolerated and sometimes promoted discrimination. Wellons, *supra* note 4, at 1329-30. Congress enacted Title VII to eliminate discrimination based on color, religion, race, sex, or national origin in the workplace. *Id.* at 1330.

The purpose of the ADEA was to eliminate arbitrary employment discrimination based on age. 29 U.S.C. § 621(b). The ADEA clearly defines the Congressional purpose and intent within the statute. *Id.* § 621. The statute expressly states:

> Congressional statement of finding and purpose
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> (a) The Congress hereby finds and declares that—
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> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
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> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
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> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
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> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
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> (b) It is therefore the purpose of this chapter [the ADEA] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Id.; *see also* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1988) (listing the reasons and provisions of a federal antidiscrimination statute aimed at alleviating employment actions against disabled individuals).

6 *See* 1 PAUL H. TOBIAS ET AL., LITIGATING WRONGFUL DISCHARGE CLAIMS, § 2:12, at 25 (Supp. 1994) (defining disparate treatment as the less favorable treatment of an individual because of an illegitimate reason stated in an antidiscrimination statute) (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15

systemic disparate treatment,[7] and systemic disparate impact.[8] The

(1977)); *see also infra* notes 11-13 and accompanying text (defining three different classifications for disparate treatment cases).

[7] *See* 1 SULLIVAN ET AL., *supra* note 5, § 2.2, at 38 (stating that systemic disparate treatment entails a pattern of discrimination against a classification of individuals protected by Title VII, including formal policies or systems of employment meant to discriminate against a class based on race, color, religion, sex, or national origin). An inference that the employer has discriminated can be drawn from statistics. *See International Bhd. of Teamsters*, 431 U.S. at 337-39 (using statistical information to establish a prima facie case of discrimination under Title VII); *see also infra* text accompanying note 12 (discussing the criteria for establishing a prima facie case of discrimination); *see generally* 1 SULLIVAN ET AL., *supra* note 5, § 3.3, at 63-66 (illustrating how statistics may be used to prove discrimination). Once statistics are used to establish employment discrimination, the burden shifts to the defendant to show that legitimate reasons existed for not hiring the individual applicant. *See International Bhd. of Teamsters*, 431 U.S. at 339-40 (explaining that statistical evidence is not irrefutable, but that the burden shifts to the defendant to proffer legitimate reasons for the apparent discrimination). One problem with using statistics is defining the statistical pool to use when making or refuting the discrimination claim. *See* 1 SULLIVAN ET AL., *supra* note 5, §§ 3.3.1-3.3.2, at 66-73 (explaining the problems encountered when using statistics to establish a prima facie case of discrimination); CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS A-29 (Federal Judicial Center rev. ed. 1984) (discussing the relevancy of statistical evidence); *see, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308-12 (1977) (struggling to determine the proper statistical analysis in a case involving alleged discrimination by a school district in the hiring of teachers).

The two recognized affirmative defenses to claims brought under the systemic disparate treatment theory are that the employer's hiring criteria is a bona fide occupation qualification (BFOQ) or that the alleged discrimination is part of an affirmative action plan. 1 SULLIVAN ET AL., *supra* note 5, § 3.5, at 105. A BFOQ defense must be essential to the business needs or for the safety of a third party to be upheld by the courts. *See, e.g.*, Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 206-07 (1991) (stating that a rule not allowing women who plan on having children to work with material that is potentially dangerous to unborn offspring is not a BFOQ as it discriminates against women and does not protect against dangers to third parties or customers). A voluntary affirmative action plan must be designed to remedy prior discrimination whether by plan or circumstance, must not trammel the rights of the parties not receiving favorable treatment, and must be temporary. RICHEY, *supra*, at A-66; *see also* Johnson v. Transportation Agency, 480 U.S. 616, 630 (1987) (applying requirements of voluntary affirmative action plan to county transportation agency plan).

[8] *See* 1 SULLIVAN ET AL., *supra* note 5, § 2:2, at 38-39 (explaining that there are generally two major classes, disparate treatment and disparate impact, but further subdividing disparate treatment into individual disparate treatment and systemic disparate treatment). Disparate impact occurs when an employment practice or procedure, although neutral on its face, discriminates against a group protected under Title VII. 1 TOBIAS ET AL., *supra* note 6, § 2:14, at 33; RICHEY, *supra* note 7, at A-10; *see, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 427-28, 436 (1971) (stating that job requirements of a high school diploma and passing two employment tests can lead to liability under Title VII if the requirements do not relate to satisfactory performance of the position).

Similar to after-acquired evidence scenarios, the circuit courts are split regarding whether disparate impact cases can be brought under the ADEA. *Compare* Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996) (deciding that disparate

after-acquired evidence doctrine concerns itself primarily with the treatment of a particular individual, thus only individual disparate treatment[9] analysis is relevant to the application of the doctrine.[10] Over time, individual disparate treatment law has evolved into three classifications: pure discrimination or direct evidence cases,[11] pretext,[12] and mixed-motive cases.[13] Case law involving

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impact claims cannot be brought under the ADEA) *with* Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992) (stating that disparate impact claims may be brought under the ADEA). *See infra* notes 18-21 and accompanying text (discussing the split between the circuit courts when considering the impact of after-acquired evidence).

The Supreme Court had the chance to settle the controversy regarding the availability of the disparate impact theory in pursuing ADEA claims, but declined the invitation. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (1993). Many commentators believe that if the Supreme Court does decide to rule on the availability of the disparate impact theory under the ADEA, the Court will rule that such theory does not apply. *See* Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 543 (1995) (concluding that the Court's approach in *Hazen Paper* leads the author to believe that disparate impact will not be allowed under the ADEA); *see generally* Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995) (arguing that the Court should not and will not allow a plaintiff to bring an ADEA claim using the disparate impact theory).

9 *See supra* note 6 and accompanying text (defining and discussing the use of individual disparate treatment in employment law).

10 *See* Kenneth G. Parker, Note, *After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 408 (1993) (explaining that after-acquired evidence cases do not involve the treatment of a group or class of people, thus not qualifying for systemic disparate treatment, nor do they involve a policy that is neutral on its face that disproportionately impacts a group, thus not allowing for systemic disparate impact).

11 *See* BLACK'S LAW DICTIONARY 460 (6th ed. 1990) (defining direct evidence as "[e]vidence that directly proves a fact, without an inference or presumption"); Parker, *supra* note 10, at 408 (stating that pure discrimination cases arise "when the employer's discriminatory motive is the sole cause for the adverse employment decision"). In rare instances, a "smoking gun" can be found that allows for a clear determination that discrimination occurred. *See* EEOC v. Alton Packaging Corp., 901 F.2d 920, 923 (11th Cir. 1990) (holding that supervisor's statements that if he were in charge he would not hire any African-Americans constituted direct evidence of discrimination); Slack v. Havens, 522 F.2d 1091, 1092-93 (9th Cir. 1975) (addressing case of supervisor using derogatory language to minorities whom he forced to perform menial tasks). Usually, pure discrimination cases evolve into mixed-motive scenarios. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 237-38 (1989) (deciding that sexist comments by a partner in a public accounting firm did not constitute direct evidence and thus applying a mixed-motive analysis); *see also infra* note 46 (discussing the history of mixed-motive analysis and its affect on after-acquired evidence); *infra* note 13 (defining the mixed-motive doctrine).

12 *See* BLACK'S LAW DICTIONARY 1187 (6th ed. 1990) (defining a pretextual reason as one that is given as a cover for the actual reason or motive).

The Supreme Court in *McDonnell Douglas Corp. v. Green* stated that the plaintiff carries the initial burden in a Title VII case of establishing the prima facie elements of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). A

both Title VII and the ADEA utilize these classifications.[14] Remedies under Title VII include reinstatement, back pay, front pay, compensatory damages, and punitive damages.[15] The ADEA's re-

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plaintiff can establish this by showing that: (1) he or she belongs to a protected class; (2) he or she was qualified for a job for which he or she applied; (3) despite these qualifications, he or she was rejected for the position; and (4) after the rejection, the employer continued to seek applications for the position from others with the same qualifications. *Id.*

The *McDonnell Douglas* prima facie discrimination analysis can be modified for actions where the employee claims he was discriminatorily discharged as follows:

1. The plaintiff is a member of a protected class;
2. Plaintiff was qualified for the job from which he was discharged;
3. Plaintiff was satisfying the normal requirements of the job; and
4. Plaintiff was the object of adverse action.

Some courts add a fifth element:

5. Plaintiff was replaced by a non-minority member.

1 TOBIAS ET AL., *supra* note 6, § 2:12, at 25 (footnotes omitted).

After the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer, who must provide a legitimate and nondiscriminatory reason for rejecting the employee's application. *McDonnell Douglas*, 411 U.S. at 802.

In *Texas Dep't of Community Affairs v. Burdine*, the United States Supreme Court announced that once the defendant articulates a legitimate, non-discriminatory reason for the dismissal, the burden of persuasion rests on the plaintiff to demonstrate that the employer's proffered reason for the decision was not the actual reason for the employment decision, but was in fact pretextual. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Twelve years later, the United States Supreme Court clarified its ruling in *Burdine*, stating that even if the reasons are pretextual, the plaintiff must still prove that the employer intended to discriminate. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993); *see generally* Susan J. Schleck, Note, 25 SETON HALL L. REV. 696 (1994) (discussing in detail the case of *St. Mary's Honor Center v. Hicks*); *see also infra* note 46 (reviewing mixed-motive cases).

The burden of proof for an ADEA claim parallels the shifting burden in a pretextual Title VII situation except that in an ADEA scenario, to establish a prima facie case, the plaintiff only needs to prove that he or she was replaced by a younger person. 1 TOBIAS ET AL., *supra* note 6, § 2:46, at 111; *see also* Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1111, 1113 (1st Cir. 1989) (denying summary judgment to the defendant when the plaintiff used statistical evidence to prove prima facie case of age discrimination); Fink v. Western Elec. Co., 708 F.2d 909, 916-17 (4th Cir. 1983) (illustrating use of shifting burden analysis to overturn the district court's judgment in favor of plaintiff).

[13] Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1224 (3d Cir. 1994), *cert. granted, and vacated*, 115 S. Ct. 1397 (1995); Parker, *supra* note 10, at 408-09. A mixed-motive case occurs when the employer has both a legitimate and a discriminatory motive for firing an employee. Parker, *supra* note 10, at 409; *see supra* notes 11-12 (discussing how a pure discrimination or direct evidence case becomes a mixed-motive case); *see also infra* note 46 (analyzing the history and the current law regarding mixed-motive cases).

[14] *See supra* notes 11-13 and accompanying text (analyzing the case law under each of these classifications).

[15] 42 U.S.C. § 2000e-5(g); 42 U.S.C. § 1981a. Back pay is the difference between what the employee has earned and what the employee would have earned if still employed from the time of the employment decision to the date of the judgment. 1

medial provisions allow for reinstatement, promotion, lost wages, and additional liquidated damages equal to the amount of such lost wages.[16]

Even though many aspects of employment discrimination law have evolved since the enactment of federal antidiscrimination statutes the circuit courts, prior to the United States Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*,[17] were split over the proper use of after-acquired evidence.[18] The Tenth Cir-

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TOBIAS ET AL., *supra* note 6, § 2:50, at 122. A similar definition of back pay states that it is "[a] determination by a judicial or quasi judicial body that an employee is entitled to accrued but uncollected salary, wages or fringe benefits." BLACK'S LAW DICTIONARY 138 (6th ed. 1990). Back pay includes lost salary including overtime, raises, promotions, fringe benefits, bonuses, and vacation amounts. 2 SULLIVAN ET AL., *supra* note 5, § 14.4.4, at 27. The plaintiff must mitigate damages and the back pay shall be reduced by the amount that the employee earned or could have earned during this period. 2 *Id.* § 14.4.5, at 30.

Although courts usually prefer reinstatement, front pay should be used as a substitute if reinstatement does not present a reasonable alternative. 1 TOBIAS ET AL., *supra* note 6, § 2.50, at 122. Front pay includes the expected loss of earnings from the date of trial until the expected date of retirement. 1 *Id.* In addition, punitive damages are allowed under Title VII, subject to a limit of the total relief allowed for compensatory and punitive damages combined. *See* 42 U.S.C. § 1981a(b)(3) (listing the amount of compensatory and punitive damages a plaintiff may receive based on the size of the employer). Prior to the Civil Rights Act of 1991, remedies under Title VII were limited to equitable relief, such as injunctions and reinstatement, and the only form of compensatory relief was back pay. *See id.* § 2000e-5(g) (listing remedies available under Title VII prior to the Civil Rights Act of 1991), *amended by* 42 U.S.C. 1981a(a)(1) (Supp. 1992).

16 *See* 29 U.S.C. § 626(b) (stating that the remedial provisions detailed in 29 U.S.C. §§ 211, 216, and 217 (part of the Fair Labor Standards Act (FLSA)), should be used for the ADEA). The relevant part of the FLSA allows for recovery of lost wages, reinstatement, promotion, liquidated damages in the case of willful conduct that equals the actual damages, attorneys' fees, and costs, but does not allow for punitive or compensatory damages. 29 U.S.C. § 216 (1988); *see generally* 1 TOBIAS ET AL., *supra* note 6, § 2:50, at 121-28 (explaining the remedies available under the ADEA). The lost wages award typically is calculated as wages lost plus fringe benefits less an offset for amounts the plaintiff earned or could have earned. 2 SULLIVAN ET AL., *supra* note 5, § 20.8.3, at 416. Although the statute does not allow for the recovery of front pay, many critics and courts argue that such a remedy should be allowed. *See* Peter Janovsky, Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 FORDHAM L. REV. 579, 590-91 (1984) (arguing that the remedy is an important step in making an older person feel whole and that the ADEA shares similar goals to Title VII and should be afforded the broad use of the same remedies); *see also* Maxfield v. Sinclair Int'l, 766 F.2d 788, 795-96 (3d Cir. 1985) (allowing for front pay where reinstatement was not possible), *cert. denied*, 474 U.S. 1057 (1986).

17 115 S. Ct. 879 (1995).

18 *See* Wellons, *supra* note 4, at 1342-50 (explaining the different opinions among the various circuits). The state courts were also divided over the proper use of after-acquired evidence. *Compare* Jordan v. Johnson Controls, Inc., 881 S.W.2d 363, 366 (Tex. Ct. App. 1994) (allowing employer to use after-acquired evidence as a complete bar to the plaintiff's relief) *with* Preston v. Phelps Dodge Copper Prod. Co., 647 A.2d 364, 370 n.8 (Conn. App. Ct. 1994) (authorizing the use of after-acquired evidence

cuit, which pioneered the after-acquired evidence doctrine, stated that after-acquired evidence completely bars any recovery for the plaintiff.[19] The Seventh Circuit modified that rule, allowing recovery in certain situations, such as where the employer may not have fired the employee even if it knew of the after-acquired evidence.[20] In the Third and Eleventh Circuits, after-acquired evidence cannot limit all damages unless the employer shows it would have discovered the after-acquired evidence absent the discrimination and the subsequent lawsuit.[21]

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only to mitigate the amount of damages). The New Jersey Supreme Court had the opportunity to rule on after-acquired evidence but declined. *See, e.g.*, Nicosia v. Wakefern Food Corp., 136 N.J. 401, 416-17, 421, 643 A.2d 554, 562, 564 (1994) (deciding the case on the grounds of an implied contract arising from employee handbook and refusing to rule on the impact of after-acquired evidence).

19 *See* Lype, *supra* note 4, at 573 (explaining that *Summers* is considered the seminal case in after-acquired evidence) (citing Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 709 (10th Cir. 1988)); *see also* Rebecca Hanner White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 55-56 (1993) (stating that courts flirted with the after-acquired evidence before *Summers*, but only after the Tenth Circuit's decision did the doctrine gain acceptance); *see also infra* notes 43-49 and accompanying text (reviewing the facts and the Tenth Circuit's opinion in *Summers*).

The Sixth and Eight Circuits followed the rule set forth by the Tenth Circuit. *See* Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1405 (8th Cir. 1994) (requiring the employer in an application fraud scenario to show only that they would not have hired the employee if they knew of the misstatement); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 415 (6th Cir. 1992) (committing the Sixth Circuit to the rule that after-acquired evidence bars all relief for the plaintiff); Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302, 304-05 (6th Cir. 1992) (ruling that recovery is completely barred if the employer could show that they would not have hired or would have fired the employee if they knew of the employee's conduct prior to the termination), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993); McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 608 (M.D. Tenn. 1992) (stating that under after-acquired evidence analysis, the defendant only needs to prove that had the employer known of the conduct, the plaintiff would have been fired, and that the after-acquired evidence establishes legitimate reasons for the termination), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995). The Supreme Court disposed of *McKennon* by arriving at a new standard for using after-acquired evidence. *See McKennon*, 115 S. Ct. at 886-87; *see also infra* text accompanying notes 126-40 (discussing the Supreme Court's analysis of *McKennon*).

20 *See* Washington v. Lake County, 969 F.2d 250, 256 (7th Cir. 1992) (stating that the proper standard for allowing after-acquired evidence as a complete bar to recovery is whether the employer would have fired the employee and not whether the employer would not have hired the employee); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993) (requiring the employer to prove that it would have fired the employee and not that it could have fired the employee).

21 *See* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1237 (3d Cir. 1994) (requiring that the employee be placed in the same position prior to the discriminatory firing); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180-81 (11th Cir. 1992) (stating that allowing after-acquired evidence to completely bar an employee's recovery contradicts the purposes of antidiscrimination legislation).

In *McKennon v. Nashville Banner Publishing Co.*,[22] the United States Supreme Court resolved the controversy among the various circuit courts regarding the proper use of after-acquired evidence in federal employment discrimination cases.[23] In announcing a compromise between the circuits, Justice Kennedy, writing for a unanimous court, determined that although after-acquired evidence does not vindicate an employer's discriminatory actions, recoverable back pay is limited to the time between the discriminatory action and the discovery of the employee's misconduct.[24]

Christine McKennon worked as a secretary for the Nashville Banner Publishing Company (Nashville Banner).[25] After nearly forty years of excellent service,[26] Nashville Banner fired McKennon to reduce payroll expenses.[27] McKennon, who was sixty-two years old at the time of the discharge,[28] filed a complaint alleging age discrimination in violation of the ADEA.[29] During discovery, McKennon revealed that while employed, she photocopied and subsequently removed confidential documents belonging to Nashville Banner.[30] After learning of this conduct, Nashville Banner once

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22 115 S. Ct. 879 (1995).

23 *Id.* at 883; *see also supra* notes 19-21 and accompanying text (explaining the various circuits' analyses of the standards for using after-acquired evidence).

24 *McKennon*, 115 S. Ct. at 882, 884, 886-87. Although the Supreme Court did not accept the rationale proffered by several circuits allowing after-acquired evidence to serve as a complete bar to recovery, the Court limited the back pay the plaintiff could recover and denied front pay relief. *Id.* at 886.

25 McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 605 (M.D. Tenn. 1992), *aff'd*, 9 F.3d 539 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995). Mrs. McKennon worked in various positions throughout her employment with Nashville Banner, but for most of her career, she was a secretary. Brief for Petitioner at 2, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995) (No. 93-1543).

26 McKennon v. Nashville Banner Publishing Co., 9 F.3d 539, 540 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995). McKennon started working for Nashville Banner in May 1951 and was terminated on October 31, 1990. *Id.* The company consistently rated her work performance as excellent. *Id.*

27 *McKennon*, 797 F. Supp. at 605. Nashville Banner cited its need to downsize as the motive for McKennon's release. *Id.*

28 *Id.*

29 *Id.*; *see supra* note 2 (providing relevant provisions of the ADEA).

30 *McKennon*, 797 F. Supp. at 605. This was revealed in the deposition of McKennon taken on December 18, 1991. *Id.* These documents included payroll ledgers, income statements, interoffice memorandums, and agreements between the company and a manager. *Id.* at 605-06. McKennon stated that she copied these documents as "protection," because she feared her employment status was in jeopardy. *Id.* at 606. She based these fears on company management actions, including conversations asking her to retire, the company forwarding retirement information to her, loss of company privileges, and longer work weeks. Sprang, *supra* note 4, at 92.

again terminated McKennon,[31] stating that copying and removing confidential documents violated her employment responsibilities.[32] Nashville Banner's president asserted that had the company known of McKennon's behavior earlier, she would have been fired immediately.[33]

Armed with the after-acquired evidence of McKennon's misconduct, Nashville Banner filed a motion for summary judgment in the United States District Court for the Middle District of Tennessee.[34] The district court granted Nashville Banner's summary judgment motion.[35] The Court of Appeals for the Sixth Circuit, exercising de novo review,[36] affirmed the district court's application of the after-acquired evidence doctrine.[37]

The United States Supreme Court granted certiorari[38] to decide if after-acquired evidence completely bars relief when a company discharges an employee in violation of the ADEA.[39] In reversing the Sixth Circuit's decision, the Court determined that the proper remedy restores the employee to the same position he or she was in absent the employer's discrimination.[40] Justice Kennedy further held that the trial court must determine the proper amount of damages on a case-by-case basis.[41] The Court articulated that the beginning point of such recovery should be back pay,

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

32 *Id.*

33 *McKennon*, 797 F. Supp. at 608.

34 *Id.* at 605, 606.

35 *Id.* at 608. The district court relied upon the after-acquired evidence doctrine. *Id.* To rely on the doctrine, Nashville Banner needed to prove that if it had known of the conduct it would have fired McKennon and that the after-acquired evidence established legitimate reasons for the termination. *Id.* The district court ruled that the affidavit of the company president, accompanied by the "nature and materiality" of McKennon's actions, provided adequate cause for her dismissal even though Nashville Banner did not know of such conduct at the time of her termination. *Id.*

36 *McKennon*, 9 F.3d at 541.

37 *Id.* at 543. Similar to the district court, the circuit court focused on statements by Nashville Banner officials that they would have fired McKennon if they had known of her conduct. *Id.* at 543 (citing Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302, 304-05 (6th Cir. 1992)). In addition, the court investigated McKennon's claim that her actions amounted to defensive maneuvers to protect her job. *Id.* The court determined that such motives are irrelevant, because the only determinative question is "whether the employer would have fired the plaintiff employee on the basis of the misconduct had it known of the misconduct." *Id.* (citing *Milligan-Jensen*, 975 F.2d at 304-05).

38 114 S. Ct. 2099 (1994).

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

40 *Id.* at 886, 887. The Court noted that this principle is difficult to determine with precision. *Id.* at 886.

41 *See id.* (stating that the appropriate remedy must be determined based upon the "factual permutations" of each case).

calculated from the termination date through the date on which the employer discovered the additional information.[42]

The Tenth Circuit pioneered the after-acquired evidence doctrine in *Summers v. State Farm Mutual Automobile Insurance Co.*[43] In *Summers*, a claims representative was allegedly fired in violation of both the ADEA and Title VII.[44] During discovery, the employer found that the employee had falsified claims reports, an offense that it previously warned him could result in termination.[45] In analyzing the facts of the case, the circuit court analogized an after-acquired evidence case to a mixed-motive case because both occur when an employer has legitimate and discriminatory reasons for firing an employee.[46] Comparing the facts presented to a hypothetical scenario in which a company fires a doctor in violation of

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42 *Id.*

43 864 F.2d 700, 704-09 (10th Cir. 1988); *see* Lype, *supra* note 4, at 573 (noting that *Summers* is the seminal case regarding after-acquired evidence).

44 *Summers*, 864 F.2d at 701, 702. Summers was a 56-year-old member of the Mormon Church at the time of his termination. *Id.* at 702. He alleged that State Farm terminated him because of his age and religion. *Id.*; *see supra* note 1 (reciting the relevant provisions of Title VII) and *supra* note 2 (listing the relevant provisions of the ADEA).

45 *Summers*, 864 F.2d at 702-03. Prior to the termination, State Farm warned Summers several times about falsifying claims documents. *Id.* at 702. State Farm did not fire Summers because of this conduct, but stated poor attitude and interpersonal skills as the cause of termination. *Id.* at 702-03. While preparing for trial, State Farm discovered that Summers had falsified over 150 records, including 18 after they issued the last warning. *Id.* at 703. After discovering this information, State Farm renewed a previous motion for summary judgment. *Id.*

46 *See id.* at 705 (comparing the situation in *Summers* to a mixed-motive case); *see also supra* note 13 (defining a mixed-motive case).

The *Summers* court cited two cases, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* and *Smallwood v. United Airlines, Inc.*, as legal authority for its decision. 864 F.2d at 705.

Mt. Healthy involved a nontenured teacher who, among other things, made obscene gestures to female students and leaked information regarding teacher dress codes to a radio station. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281-82 (1977). When the school refused to rehire the nontenured teacher, the employee claimed that his First and Fourteenth Amendment rights were violated. *Id.* at 276. The Court ruled that in mixed-motive cases, the plaintiff carries the initial burden of proof to show that his actions were constitutionally protected and that such conduct amounted to a "substantial factor" in the decision not to rehire him. *Id.* at 287. Upon such a showing, the defendant must show by a "preponderance of the evidence" that it would not have rehired the employee if the conduct never occurred. *Id.*

Similarly, the plaintiff in *Smallwood* brought an ADEA claim against United Airlines, challenging the airline's policy of not processing applications for flight officers older than 35. Smallwood v. United Airlines, Inc., 728 F.2d 614, 615 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984). Besides stating that the age requirement represented a bona fide occupational qualification, the airline claimed that because of Smallwood's conduct at a previous airline, it would not have hired the plaintiff any-

Title VII and later discovers that the individual was not really a doctor,[47] the court ruled that Mr. Summers did not deserve any

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way. *Id.* at 615. The court determined that the question is whether the employer, following the normal procedure, would have hired the applicant. *Id.* at 626.

More recently, the United States Supreme Court announced its standard for mixed-motive cases in *Price Waterhouse v. Hopkins*, where a female senior manager at an accounting firm brought suit against the firm under Title VII after she was refused consideration for a promotion to partner. Price Waterhouse v. Hopkins, 490 U.S. 228, 231-32, 238 (1989). Justice Brennan, delivering the opinion for the plurality, stated that if the defendant can show that the same employment decision would have been made absent the illegitimate motive, the plaintiff cannot recover damages. *Id.* at 258 (Brennan, J., plurality opinion).

In regards to Title VII actions, Congress reacted to *Price Waterhouse* by enacting the Civil Rights Act of 1991. White & Brussack, *supra* note 19, at 77-78; *see also* James G. Babb, Comment, *The Use of After-Acquired Evidence as a Defense in Title VII Employment Discrimination Cases*, 30 HOUS. L. REV. 1945, 1949-50 (1994); Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 187-90 (1993).

To prove liability in a mixed-motive case, the Civil Rights Act of 1991 requires:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (Supp. 1992).

On the issue of remedies for mixed-motive cases, the Civil Rights Act of 1991 provides that:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in absence of the impermissible motivating factor, the court —
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Id. § 2000e-5(g)(2)(B).

Although commentators hold mixed opinions regarding the effect of the Civil Rights Act of 1991 on after-acquired evidence cases, many agree that when the courts analogize this evidence with mixed-motive cases, there will normally be a finding of liability on the part of the employer, but the question remains as to the relief available. *See* Wellons, *supra* note 4, at 1335-36 (stating that according to the Civil Rights Act of 1991, punitive and compensatory damages are available in mixed-motive cases); White & Brussack, *supra* note 19, at 78-79 (postulating that liability attaches when there is a showing of discrimination and after-acquired evidence shall only determine appropriate remedies); Babb, *supra*, at 1949-50 (interpreting the Civil Rights Act of 1991 as stating that all the plaintiff has to show to establish employer's liability is a discriminatory motive); Mills, *supra* note 5, at 1541-43 (explaining that the Civil Rights Act of 1991 contains remedies available when the employee can establish the mere existence of a discriminatory motive).

[47] *Summers*, 864 F.2d at 708.

relief.[48]

Although *Summers* laid the groundwork for the after-acquired evidence doctrine, it left many questions unanswered.[49] After *Summers*, different circuit courts promulgated various versions of the after-acquired evidence doctrine.[50] The circuit courts' analyses can be divided into three categories: allowing after-acquired evidence to be a total defense to discrimination claims,[51] placing limitations on the employer's ability to use this evidence as a complete bar to recovery,[52] and not allowing the employer to use after-acquired evidence for the purpose of limiting back pay.[53]

In *Johnson v. Honeywell Information Systems, Inc.*,[54] the Sixth Circuit first elucidated its view of the after-acquired evidence doctrine.[55] Although the employee brought suit under state discrimination law,[56] the decision illustrated the circuit court's general acceptance of the doctrine.[57] *Johnson* involved a field relations

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[48] *Id.* In essence, the Sixth Circuit allowed an employer to raise the defense of "unclean hands," which holds that despite the extent of the discrimination, the employee's relief is barred and the employer is rewarded because of the employee's misconduct. *See* Wellons, *supra* note 4, at 1328 (describing the unclean hands doctrine); *see also supra* note 4 (defining the unclean hands doctrine).

[49] *See* Babb, *supra* note 46, at 1956-60 (questioning whether the employer in the resumé fraud scenario has to prove that the employee would have been fired if this evidence was known and further inquiring as to what represents a material falsification); Lype, *supra* note 4, at 574-75 (inquiring whether the *Summers* rule foreclose all liability on the part of the employer or only damages and also questioning the severity of the misconduct that will trigger application of the after-acquired evidence rule).

[50] *See* Wellons, *supra* note 4, at 1342-50 (discussing the different views adopted by the various circuits concerning the proper use of after-acquired evidence).

[51] *See supra* note 19 (providing a list of cases decided by the Sixth and Eighth Circuits that follow the *Summers* doctrine). The Sixth Circuit followed the *Summers* decision blindly, providing minimal analysis or comment and allowing for a complete bar of all recovery. Sprang, *supra* note 4, at 107.

[52] *See supra* note 20 (listing cases decided by the Seventh Circuit that modified the extreme ruling in *Summers*). The Seventh Circuit had not expressly rejected *Summers* but, rather, had created some limitations to the doctrine. Sprang, *supra* note 4, at 109-12 (discussing the Seventh Circuit's interpretation of the after-acquired evidence doctrine).

[53] *See supra* note 21 (noting the cases in the Third and Eleventh Circuits that did not allow after-acquired evidence to limit all remedies). The Eleventh Circuit is representative of the circuit courts that did not allow after-acquire evidence as a complete bar to any recovery of damages. Lype, *supra* note 4, at 578.

[54] 955 F.2d 409 (6th Cir. 1992).

[55] *See id.* at 412 (stating that the Michigan Supreme Court had not yet addressed this issue and, therefore, it was one of first impression).

[56] *Id.* at 410. The action was brought under Michigan's Elliot-Larsen Civil Rights Act. *Id.*; *see* MICH COMP. LAWS ANN. § 37.2701-37.2804 (West 1985) (containing the relevant parts of the Elliot-Larsen Civil Rights Act).

[57] *Johnson*, 955 F.2d at 415. Specifically, the court stated that because the Sixth Circuit followed the *Summers* rule, plaintiff could not recover if the company showed

manager who claimed that she was discharged in retaliation for insisting that affirmative action goals be met.[58] During discovery, the employer found that Johnson had misrepresented her credentials on the employment application.[59] The application stated that falsification of the application may be cause for immediate discharge.[60] The court framed the relevant question regarding Honeywell's reliance on the misrepresentation as whether the employer would have hired Johnson if the resumé fraud had been known.[61] After establishing that the resumé fraud was material to the company's hiring decision,[62] the court denied all relief to Johnson.[63]

The Sixth Circuit reiterated its position on after-acquired evi-

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that Johnson would not have been hired or would have been fired because of the resumé fraud, regardless of Honeywell's behavior. *Id.*

58 *Id.* at 411. Johnson's job responsibilities included overseeing compliance with affirmative action goals and responding to Equal Employment Opportunity Commission (EEOC) requests. *Id.* She claimed that the retaliatory discharge violated Michigan's Elliot-Larsen Civil Rights Act. *Id.* That section provides:

> Two or more persons shall not conspire to, or a person shall not
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

MICH. COMP. LAWS ANN. § 37.2701 (West 1985).

59 *Johnson*, 955 F.2d at 411. Johnson had falsified her educational background by stating that she had received a Bachelor of Arts degree from the University of Detroit when she in fact had only completed four courses at the university and merely audited two others. *Id.* Johnson also had exaggerated some of her prior work experience and submitted false information pertaining to periods where she was unemployed. *Id.* at 412.

60 *Id.* at 411. The employment application signed by Johnson stated: "I understand . . . that the submission of any false information in connection with my application for employment, whether on this document or not, may be cause for immediate discharge at any time thereafter should I be employed by Honeywell." *Id.* (omission in original).

61 *Id.* at 414.

62 *Id.* The court stated that to allow summary judgment for the employer on a resumé fraud claim, the resumé fraud must be material, directly related to determining the candidate's credentials for employment, and relied upon by the employer. *Id.* Honeywell produced an affidavit by the employment relations manager who hired Johnson in 1976, stating that if he had known of Johnson's actual education, he would not have even interviewed her. *Id.* Ironically, Johnson's supervisor did not possess a college degree either. *Id.*

63 *Id.* at 415. The Sixth Circuit showed its acceptance of the after-acquired evidence doctrine as described in *Summers* by stating that:

> We agree with the reasoning of the court in *Summers* . . . . Because Honeywell established that it would not have hired Johnson and that it would have fired her had it become aware of her resumé fraud during her employment, Johnson is entitled to no relief, even if she could prove a violation of Elliot-Larsen.

Id. By adopting the rule that after-acquired evidence bars all the employee's remedies, the Sixth Circuit gave credibility to the Tenth Circuit's opinion and allowed for

dence in *Milligan-Jensen v. Michigan Technological University*.[64] After being fired allegedly for having a criminal record, Milligan-Jensen brought an action in federal court under Title VII, alleging sex discrimination and retaliatory discharge.[65] While preparing for trial, the defendant learned that Milligan-Jensen had previously been convicted of driving under the influence and had omitted this fact from her employment application.[66] The district court, using a mixed-motive analysis, found for the plaintiff.[67] The circuit court acknowledged the Sixth Circuit's adoption of the *Summers* rule and reversed the district court's grant of relief.[68]

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the proliferation of the after-acquired evidence doctrine. Wellons, *supra* note 4, at 1345.

64 975 F.2d 302, 304-05 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993). Although the Supreme Court granted certiorari to review *Milligan-Jensen*, the two sides subsequently settled, thus not allowing the Court to rule on after-acquired evidence. Mishkind & Wright, *supra* note 3, at 116.

65 *Milligan-Jensen*, 975 F.2d at 302-03. Milligan-Jensen was the sole female security officer at the university. *Id.* at 303. In her preliminary 30-day evaluation, Milligan-Jensen was cited for a uniform violation, although a male officer who committed the same violation did not receive any citation. *Id.* In addition, Milligan-Jensen was reassigned a badge number "that had always been assigned to a woman" and was ordered to work the "bump shift," an equivalent position to a meter maid. *Id.* After Milligan-Jensen complained to the Director of Human Resources, her supervisor confronted her and asked her the following rhetorical questions: "You're the woman, aren't you?" and "You've got the lady's job. Don't you like it?" *Id.* After the 90-day probationary period expired, she was fired because she "spent too much time in the office and did not satisfactorily complete her probation period." *Id.*

In its provision prohibiting retaliatory discharge, Title VII states:

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

42 U.S.C. § 2000e-3(a).

66 Milligan-Jensen v. Michigan Tech. Univ., 767 F. Supp. 1403, 1410 (W.D. Mich. 1991), *rev'd*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993).

67 *Id.* at 1415-16, 1418; *see supra* notes 13 and 46 and accompanying text (defining and discussing the mixed-motive doctrine). The trial court found that the school failed to prove that it would have terminated Milligan-Jensen absent the unlawful motives. *Milligan-Jensen*, 767 F. Supp. at 1415. The district court used the equitable powers conferred by Title VII and reduced the plaintiff's back pay award by 50%. *Id.* at 1417.

68 *Milligan-Jensen*, 975 F.2d at 304-305. The circuit court stated that the trial court incorrectly attempted to balance the equities. *Id.* The circuit court reiterated the ruling in *Johnson*, stating that once the defendant proves that the plaintiff would not have been hired or would have been fired if the falsification was known, the plaintiff cannot recover damages even if discrimination was present. *Id.* (citing Johnson v. Honeywell Info. Sys., 955 F.2d 409 (6th Cir. 1992).

In the 1994 case *Welch v. Liberty Machine Works, Inc.*,[69] the Eighth Circuit chose to join the Sixth Circuit in adopting the rule set out in *Summers*.[70] Welch, a machinist, was fired a week after developing an injury requiring surgery, and he brought an action under both the Employee Retirement Income Security Act (ERISA)[71] and the Missouri Human Rights Act.[72] Welch claimed the defendant fired him to avoid paying his medical bills.[73] During depositions, the defendant learned that Welch lied on the job application regarding his prior employment history.[74] According to a written statement on the application, such misconduct was cause for dismissal.[75] The Eighth Circuit announced that in an "application fraud" context, the *Summers* rule should be applied if the employer establishes that it would not have hired the employee had it known of the misrepresentation.[76]

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69 23 F.3d 1403 (8th Cir. 1994).

70 *Id.* at 1405.

71 29 U.S.C. § 1140 (1988). Section 510 of the Employee Retirement and Income Security Act states:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

Id.

72 *Welch*, 23 F.3d at 1404. Welch alleged that he had been fired because of a handicap. *Id.* Such termination would be a violation of the Missouri Human Rights Act, which states, in relevant part:

> It shall be an unlawful employment practice:
> (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or handicap of any individual:
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap.

MO. ANN. STAT. § 213.055(1) (Vernon Supp. 1996).

73 *Welch*, 23 F.3d at 1404.

74 *Id.* Welch intentionally omitted that he worked in a similar capacity for another firm and was fired after a month for unsatisfactory job performance. *Id.*

75 *Id.* The job application asked for an "accurate, complete full-time and part-time employment record" and further stated that "any misstatement or omission of fact on this application shall be considered cause for dismissal." *Id.*

76 *Id.* at 1405. Although the court followed the *Summers* rule, the court reversed the summary judgment order as the only evidence presented regarding whether the employee would not have been hired was an affidavit from its president. *Id.* at 1405-06. The court ruled such an affidavit represented a self-serving document and that absent any other proof, such affidavit could not sustain a summary judgment motion. *Id.* at 1406.

The Seventh Circuit placed limitations on the Sixth Circuit's interpretation of the after-acquired evidence doctrine in *Smith v. General Scanning, Inc.*[77] Smith worked for the defendant, General Scanning, Inc. (GSI) in its Boston office and was subsequently transferred to the Chicago facility.[78] When the defendant notified Smith that his services would no longer be required because the office was closing, Smith filed an age discrimination claim under the ADEA.[79] During discovery, Smith conceded that he had misstated his education on his resumé.[80]

The district court found that this misstatement precluded any recovery for Smith, even if GSI had discriminated against him.[81] Although the circuit court affirmed the district court's granting of summary judgment in favor of GSI,[82] the court liberalized the rigid rule stating that after-acquired evidence operates as a complete bar to recovery.[83] The court further indicated that if an ADEA viola-

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77 *See* Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 (7th Cir. 1989) (stating that the principle concern is the lawfulness of the termination). The case was a rehearing of a previously dismissed case. *Id.* at 1316. In the previous case, the plaintiff failed to satisfy the statutorily mandated state filing procedure. Smith v. General Scanning, Inc., 832 F.2d 96, 100 (7th Cir. 1987).

78 *Smith*, 876 F.2d at 1316.

79 *Id.* at 1316-17. According to General Scanning, Inc. (GSI), it had to close the office due to flat sales and lower profits. *Id.* At the time of the reduction in force, Smith was 60 years old. *Id.* at 1317. GSI claimed that it based the decisions regarding which employees would retain their jobs on seniority and job knowledge, not on age. *See id.* at 1320 (revealing that Smith had less seniority and had received lower rankings on performance evaluations). For a discussion of the relevant provisions of the ADEA, see *supra* note 2.

80 *Smith*, 876 F.2d at 1317. The job required a Bachelor of Science degree; Smith stated on his application that he had not only earned this degree but also a master's degree. *Id.* Smith never earned either degree. *Id.* at 1319.

81 *Id.* at 1319. The district court denied recovery because the after-acquired evidence precluded Smith from showing that he was actually qualified for the position, as was required to establish a prima facie case of discrimination. *Id.*; *see supra* note 12 and accompanying text (discussing the *McDonnell Douglas* prima facie case of employment discrimination).

82 *Smith*, 876 F.2d at 1322. The circuit court stated that the company had legitimate reasons for undergoing a downsizing, and Smith's lack of seniority and inferior product knowledge, as well as lower evaluations, constituted valid reasons for his dismissal. *Id.* The court added that the ADEA should not interfere with a corporation's good faith employment decision. *Id.*

83 *See id.* at 1319 (criticizing the district court's application of the burden-shifting analysis). The circuit court recognized that although Smith's job evaluations did show a downward trend, he was still performing the job acceptably even though he lacked a college degree. *Id.* Moreover, the court lectured, the issue was the lawfulness of the termination, and the "resumé fraud clearly had nothing to do with that; it surfaced only after Smith was terminated." *Id.* In essence, the court compromised and split the blame between the parties by not granting either a total victory. Babb, *supra* note 46, at 1961.

tion existed, a discharged employee's proper remedy is back pay from the time of the dismissal to the time the resumé fraud was discovered.[84]

The Seventh Circuit further defined its interpretation of the after-acquired evidence doctrine in *Reed v. Amax Coal Co.*[85] Amax Coal fired Reed, an African-American, for allegedly sleeping on the job.[86] Believing his termination was racially motivated, Reed brought suit against Amax Coal Company under Title VII.[87] Applying the after-acquired evidence doctrine to resumé fraud, the district court granted the defendant's motion for summary judgment on the Title VII claim.[88] The Seventh Circuit clarified its interpre-

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84 *Smith*, 876 F.2d at 1319 n.2. Reinstatement of Smith or front pay would be illogical because once rehired, the employer could fire him for resumé fraud. *Id.* At least one commentator suggests that by limiting the back pay from the time of the hiring decision to the time the evidence was discovered is fair, because by bringing an employment discrimination suit, plaintiffs expose themselves to discovery. *See* White & Brussack, *supra* note 19, at 84 (criticizing the Eleventh Circuit's decision in *Wallace v. Dunn Constr. Co.*, which allowed full back pay in after-acquired evidence cases unless the employer could show that they would have discovered the employee's misconduct absent the discrimination and the subsequent lawsuit); *see also infra* notes 100-10 and accompanying text (discussing the Eleventh Circuit's decision in *Wallace*).

85 971 F.2d 1295, 1298 (7th Cir. 1992) (distinguishing the case at issue from the Tenth Circuit's ruling in *Summers*).

86 *Id.* at 1297.

87 *Id.* Reed based his claim on violations of Title VII, 42 U.S.C. § 1981, and the First Amendment. *Id.* 42 U.S.C. § 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988). The district court granted summary judgment to the defendant on the § 1981 claim, and the First Amendment claim was subsequently not pursued by Reed. *Reed*, 971 F.2d at 1297.

88 *Reed*, 971 F.2d at 1298. Reed failed to include a felony conviction for armed robbery in the appropriate section of the job application. *Id.* The job application indicated that a falsified application was grounds for dismissal. *Id.* The district court based its ruling on *Summers* that after-acquired evidence bars all relief for the plaintiff. *Id.* The court stated that the summary judgment should be upheld because Reed could not prove a prima facie case of discrimination. *Id.* at 1299; *see supra* note 12 (discussing the requirements articulated in *McDonnell Douglas* for proving a prima facie case of employment discrimination). The court commented that Reed failed to address how Caucasian employees received different treatment than African-American employees. *Reed*, 971 F.2d at 1299. In addition, the court submitted that even if Reed established a prima facie case of discrimination, he could not prove that the nondiscriminatory motive proffered by Amax Coal was pretextual. *Id.* According to the court, Reed failed to prove that the company's characterization and resulting penalty for "planned sleep" versus "inadvertent sleep" was a pretext for discrimination. *Id.* at 1300.

tation of the after-acquired evidence doctrine by requiring the employer to prove that the employee would have been fired, not that the employer could have fired him.[89]

In 1992, the Seventh Circuit further refined its position on after-acquired evidence in *Washington v. Lake County, Ill.*[90] After firing Washington, allegedly in violation of Title VII, Lake County found evidence of resumé fraud.[91] Similar to the Tenth Circuit's approach in *Summers*, the Seventh Circuit reviewed mixed-motive case law in its analysis.[92] Promulgating a slightly different interpretation of the after-acquired evidence rule, the court established that the employer must show it would have fired the employee if it had known of the resumé fraud.[93] Despite drawing this distinction

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89 *Reed*, 971 F.2d at 1298. The court interjected that the public policy behind this interpretation is intended to deter employers from seeking minor rules violations to avoid liability under Title VII. *See id.* (stating that to interpret the after-acquired evidence in a manner which bars all recovery regardless of the nature of the misconduct is overly broad).

90 969 F.2d 250, 256 (7th Cir. 1992) (requiring the employer to prove that the employee "would have been fired" had the employer known of the misconduct).

91 *Id.* at 251-52. Washington, a jailer, alleged that a superior "either falsified or exaggerated" 12 policy violations reported in his personnel file because of his race and that such incidents led to his dismissal. *Id.* at 252. As proof, Washington relied on his performance evaluation, conducted approximately two months prior to his dismissal, which gave him all grades of "excellent" or "proficient." *Id.* On the employment application, Washington checked the "No" box adjacent to the question asking about prior convictions. *Id.* at 251-52. The application also contained a provision stating that a misrepresentation may be cause for termination of employment. *Id.* at 252. This provision stated:

> I agree that if any misrepresentation has been made by me . . . , any offer of employment may be withdrawn or my employment terminated immediately without any obligation or liability to me other than for payment, at the rate agreed upon, for services actually rendered . . . .

Id. (omission in original). Washington had previously been convicted of criminal trespass and third-degree assault on two separate occasions. *Id.*

92 *Id.* at 255-56. The court relied heavily on the standard set out in *Price Waterhouse*, which denied relief to plaintiffs in mixed-motive cases if the employer could show that the same decision would have been made absent the discriminatory motives. *Id.* at 255 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989)).

The court briefly mentioned that the Civil Rights Act of 1991 changed elements of the mixed-motive doctrine and that the doctrine may be inconsistent with *Summers*, but declined to specifically address the issue because neither party cited the provision. *Id.* at 255 n.4.; *see supra* note 46 (analyzing the mixed-motive doctrine and its use by the Tenth Circuit in *Summers*).

93 *Washington*, 969 F.2d at 256. The court stated that in mixed-motive cases the inquiry focuses on the time the employer made the adverse employment decision and whether the same result would have occurred without the discriminatory decision. *Id.* The court proclaimed that after-acquired evidence cases should follow the mixed-motive doctrine by considering the resumé fraud at the time of the dismissal, therefore limiting its relevance to whether the employer would have fired the employee. *Id.* Judge Cummings further explained that focusing on whether the employer would

between "would not have hired" and "would have fired," the Seventh Circuit nevertheless upheld the summary judgment ruling in favor of Lake County.[94]

In *Kristufek v. Hussmann Foodservice Co.*, the Seventh Circuit consolidated previous decisions regarding after-acquired evidence.[95] Kristufek accused the defendant, Hussmann Foodservice Co., of firing him in violation of the ADEA.[96] Subsequently, Kristufek admitted that he had misrepresented his credentials during the employment interview.[97] Ruling in favor of Kristufek, the circuit court relied on the company's policy that misstatements on the employment application "may" be cause for termination.[98] On the

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have hired the employee unnecessarily implicates a "property right" in one's job, which is not accurate in employment discrimination law. *Id.* The judge continued by stating that such property right concepts are contrary to common "at will" employment practices within the United States, in which an employee may be fired at any time for any reason. *Id.*

The "would have fired" standard represents a more difficult burden for the employer to prove, especially when the employee satisfactorily performed the functions of the job and received exemplary job reviews. Lype, *supra* note 4, at 581.

[94] *Washington*, 969 F.2d at 256-57. Because Lake County produced affidavits from the Superintendent of the Jail and the County Sheriff, stating that had they become aware of the misrepresentation they would have fired Washington, and Washington could not produce affirmative evidence that he would not have been fired, the motion was upheld. *Id.* at 256. The court distinguished this from another incident where a white employee who was only suspended for three days after being involved in a hit-and-run accident while in uniform, by stating that the other officer did not lie about the conviction, and that the incident did not involve violence. *Id.* at 257.

[95] 985 F.2d 364, 369 (7th Cir. 1993) (concluding that the employer must prove that the employee would have been fired because of the misconduct, not that the company had the right to fire said employee).

[96] *Id.* at 365. This case involved two plaintiffs, Kristufek and McPherson. *Id.* The defendant allegedly fired both because of their age. *Id.* In another count, Kristufek further alleged that he was fired because of his opposition to McPherson's discharge. *Id.* In addition to the general antidiscrimination statutes of the ADEA, the ADEA also contains a provision outlawing retaliatory measures by the employer, which states:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d); *see also supra* note 2 (discussing the general provisions of the ADEA). McPherson, an executive secretary, was 59 years old when discharged, and Kristufek was 57 when fired. *Kristufek*, 985 F.2d at 366.

[97] *Kristufek*, 985 F.2d at 366. When hired by the company president as Director of Employee and Community Relations, Kristufek falsely stated that he had earned a Bachelor of Science degree from Drake University and had taken graduate courses at Northwestern University. *Id.* In fact, Kristufek completed only one year at Drake and took a few undergraduate courses at Northwestern. *Id.*

[98] *Id.* at 369, 370. Reviewing Kristufek's claim of retaliatory discharge, the court found that the defendant had an employment policy stating that if an employee misrepresented their qualifications they were subject to discharge, but the policy did not

issue of damages, the court lowered the amount granted by the jury to back pay from the time of termination until the time the resumé fraud was discovered.[99]

The Eleventh Circuit, in *Wallace v. Dunn Construction Co.*, voiced disagreement with the other circuits.[100] One plaintiff, Joyce Neal, alleged that the defendant fired her in violation of the Equal Pay Act[101] and Title VII.[102] When deposing Neal, Dunn Construc-

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say they "will" be fired. *Id.* at 369. The court concluded that although the employer "may" fire the employee for misrepresenting his qualifications, such fact was not strong enough to overcome a proven retaliatory discharge firing. *Id.* In distinguishing the case from the Tenth Circuit's ruling in *Summers*, the court also noted that the misrepresentation was not critical, and that Kristufek performed the job satisfactorily despite not having the educational credentials stated on the employment application. *Id.* at 369-70.

99 *Id.* at 371. By limiting damages, the Seventh Circuit followed the circuit court's previously stated guidelines for damages in after-acquired evidence situations. *Id.*; *see* Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2. (7th Cir. 1989) (stating that the proper damage award in after-acquired evidence situations is back pay from the time of the dismissal to the time that the evidence was discovered). The court also stated that it would be inequitable to further punish the employer once the resumé fraud has been discovered. *Kristufek*, 985 F.2d at 371.

100 Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181-83 (11th Cir. 1992) (arguing that the employee should recover full back pay unless the employer could show it would have discovered the misconduct absent the discrimination and the subsequent lawsuit).

101 29 U.S.C. § 206(d)(1) (1988). The Equal Pay Act (EPA) is part of the Fair Labor Standards Act (FLSA) and states in relevant part:

> No employer having any employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of that employee.

Id.

The EPA also mandates that it is unlawful for an employer

> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

102 *Wallace*, 968 F.2d at 1176. Neal, a flag person at construction sites, claimed that her compensation was inadequate and her discharge was retaliatory, in violation of the EPA. *Id.* at 1185 (Godbold, J., dissenting). Additionally, Neal claimed that a hos-

tion discovered that she had failed to truthfully answer a question on the employment application.[103] In determining the impact of after-acquired evidence, the court attacked the Tenth Circuit's interpretation of the mixed-motive doctrine.[104] Additionally, the court reasoned that the *Summers* approach contradicts the true meaning and policy behind Title VII.[105]

Focusing on the remedies available, the Eleventh Circuit reviewed the purposes of Title VII, and decided that the appropriate remedies must be decided on a case-by-case basis.[106] Although the court refused to grant either front pay or reinstatement,[107] the

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tile work environment existed in violation of 42 U.S.C. § 2000e-2(a)(1) and that the company discharged her in retaliation for complaining about the sexual harassment in violation of 42 U.S.C. § 2000e-3(a). *Id.* at 1176.

[103] *Id.* at 1176-77. To the question, "Have you ever been convicted of a crime?", Neal answered in the negative. *Id.* at 1177 n.2. In fact, prior to completing the employment application at Dunn, Neal had pled guilty to possession of cocaine and marijuana. *Id.* at 1176-77.

[104] *Id.* at 1178-79. The Eleventh Circuit stated that the United States Supreme Court's decision in *Mt. Healthy*, the principle case relied upon by the court in *Summers*, actually contradicts the rule purported by the Tenth Circuit in that case. *Id.* at 1179 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). The court proffered that the *Summers* rule does not account for what would have happened if there were no illegitimate motive. *Id.* Judge Johnson suggested that barring all relief for the plaintiff ignores the *Mt. Healthy* principle that the plaintiff should not be left in a worse position than if he or she were not a member of a class protected by antidiscrimination legislation. *Id.* (citing *Mt. Healthy*, 429 U.S. at 285-86.) The court further used the burden-shifting analysis established by the United States Supreme Court in *Price Waterhouse* to illustrate that the *Summers* doctrine not only ignores the time difference between the discriminatory employment action and the discovery of the employee's misconduct, but also leaves plaintiffs in a worse position than if they were not a member of a protected class. *Id.* at 1180 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 261, 276 (1989)); *see supra* note 46 (discussing *Mt. Healthy*, *Price Waterhouse*, and the mixed-motive doctrine).

[105] *Wallace*, 968 F.2d at 1180. The Eleventh Circuit stated that Title VII's principle purpose is to eliminate employment discrimination by empowering employers to examine their employment practices and achieve equality in employment opportunities. *Id.* (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417, 418 (1975)). In addition, the majority stated that the *Summers* rule gives an employer incentive to rummage through a fired employee's background with the purpose of finding an item that will eliminate all liability. *Id.* Finally, the court expounded that the Tenth Circuit's decision left open the possibility of "sandbagging," meaning an employer might intentionally hire a person who they know has an auspicious past, only to avoid liability if they fire them in violation of Federal antidiscrimination legislation. *Id.* at 1180-81.

[106] *Id.* at 1181. The court reasoned that one of the basic purposes for Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* (quoting *Albemarle Paper Co.*, 422 U.S. at 418). In after-acquired evidence cases, the court must balance the employer's prerogative to make lawful employment decisions with restoring a discrimination victim to the position he or she was in prior to the illegal employment decision. *Id.*

[107] *Id.* The court reasoned that allowing reinstatement or front pay "would go be-

judges determined that full back pay[108] should be awarded unless the employer proves that it would have discovered the after-acquired information absent the wrongful discharge and related litigation.[109] Furthermore, the court applied this after-acquired evidence analysis to the Equal Pay Act claims, and permitted other remedies, including declaratory relief, liquidated damages, and, to some extent, attorneys' fees.[110]

Similar to the Eleventh Circuit's interpretation of the after-acquired evidence doctrine, the Third Circuit strongly disagreed with the *Summers* holding in *Mardell v. Harleysville Life Insurance Co.*[111] Harleysville Life Insurance Co. fired the plaintiff, a branch manager, for poor work performance.[112] The plaintiff alleged that the company fired her in violation of the ADEA[113] and Title VII.[114]

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yond making Neal [the employee] whole," and would infringe upon the employer's rights to lawfully discharge employees. *Id.* at 1182.

108 *See supra* note 15 (defining back pay as the award from the time of the discriminatory firing to the time of the court's decision).

109 *Wallace*, 968 F.2d at 1182. The court rejected the approach proffered in *Smith v. General Scanning, Inc.*, which limited the back pay to the period from the dismissal until the employer learned of the employee's wrongful activity. *Id.* (citing Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2 (7th Cir. 1989)). The court reasoned that limiting back pay places the employee in a worse position than if no discrimination occurred, and would provide a windfall to employers who would have never found out about the after-acquired evidence if not for its violation of antidiscrimination legislation. *Id.* The court further reasoned that if the defendant could not prove that they would have discovered the misconduct without the subsequent litigation, full back pay would be awarded. *See id.* (stating that to end back pay at a point prior to when the company would have discovered the misconduct would not make the employee whole).

110 *Id.* at 1183. The court reasoned that the remedial approach of Title VII and the EPA are similar, with the exception that the EPA's liquidated damages adds a punitive component to the relief that makes the employee whole. *Id.* (citing EEOC v. White & Son Enter., 881 F.2d 1006, 1013 (11th Cir. 1989)). Additionally, the court concluded that this distinction may be disregarded because the EPA damages are related to making the employee whole; in effect, the damages are equal to twice the "make whole" amount. *Id.* After the Civil Rights Act of 1991, remedies available under Title VII have been enlarged. *See* 42 U.S.C. § 2000e-5(g) (reciting remedies in Title VII cases); *see also supra* note 15 (explaining the damages available under Title VII). The court decided that to recover attorneys' fees in this case, the less liberal standards of Title VII, not the broader EPA standards, must be used. *See Wallace*, 968 F.2d at 1183 (comparing 42 U.S.C. § 2000e-5(k) with 29 U.S.C. § 216(b)).

111 31 F.3d 1221, 1222 (3rd. Cir. 1994) (rejecting the *Summers* approach "in favor of one circumscribing the use of after-acquired evidence to the remedies phase of an employment discrimination suit brought pursuant to Title VII or ADEA"), *cert. granted, and vacated*, 115 S. Ct. 1397 (1995).

112 *Id.* at 1222-23. The plaintiff previously had been placed on probation. *Id.* at 1223. Allegedly, sales had declined in the region for which she was responsible and the plaintiff had failed to both correctly implement the marketing strategy and use the computer system. *Id.*

113 *Id.* at 1222; *see supra* note 2 (providing the relevant text of the ADEA). Mardell

Prior to trial, the defendant found that Mardell had made several misrepresentations on her employment application.[115] Based on the after-acquired evidence, the district court granted Harleysville Life's motion for summary judgment.[116]

In assessing the employer's liability, the circuit court refused to compare the case to either a mixed-motive case[117] or a pretext case.[118] The court surmised that the legitimate motive could not have been considered in the decision to terminate Mardell.[119] Therefore, the court stated, the after-acquired evidence should play no role in determining whether discrimination existed.[120] Moreover, the court articulated that the plaintiff must only prove intentional discrimination.[121]

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submitted evidence that she was replaced by a younger male and that her superior often made comments regarding her age, including that she "should be home playing with [her] grandchildren." *Mardell*, 31 F.3d at 1223 (alteration in original).

114 *Mardell*, 31 F.3d at 1222; *see supra* note 1 (quoting relevant parts of Title VII). The evidence showed that Mardell was replaced by a male and that the terms of her probation set requirements that were not imposed on any male employees. *Mardell*, 31 F.3d at 1223. Furthermore, most of the managers did not meet these requirements. *Id.* In addition, Mardell claimed that her superior made several comments regarding her sex, including that more was expected of her because she was female; that she "wasn't one of the boys"; and that the branch manager position was not "a job for a woman." *Id.*

115 *Mardell*, 31 F.3d at 1223. The defendant found that Mardell had not received a Bachelor of Science Degree as claimed on her resumé, a fact which the employee attributed to incorrect records at the University of Pittsburgh. *Id.* The court noted that a college degree was not a prerequisite of the position, and the defendant would have hired the "mental equivalent" of a college graduate. *Id.* Harleysville Life also found that Mardell exaggerated her prior job experience. *Id.* at 1223-24. The employer submitted affidavits stating that had it known of these misrepresentations when interviewing Mardell, she would not have been offered the job. *Id.* at 1224.

116 *Id.* The district court, when granting summary judgment for the defendant, adopted a variation of the *Summers* doctrine and stated that because of the misrepresentation, Mardell suffered no cognizable harm. *Id.*

117 *Id.* at 1228. The court concluded that *Price Waterhouse* held that the employer could rely on a legitimate motive known to it at the time the employment decision was made. *Id.* at 1229. Additionally, the court elucidated that, because the employer could not have known of the employee misconduct at the time of the firing, it could not have relied on such misconduct in making the adverse employment decision. *Id.*; *see supra* note 46 (discussing *Price Waterhouse* and the mixed-motive doctrine).

118 *Mardell*, 31 F.3d at 1228. Judge Becker reasoned that an after-acquired evidence case could not be compared to a pretextual case, because in the pretext analysis the employer would have to be aware of the employee's misconduct at the time of the firing, and in an after-acquired evidence case the employer did not know of the reason. *See id.* (articulating the differences between after-acquired evidence cases and pretext cases); *see also supra* note 12 (explaining the shifting burden of proof in a pretext case).

119 *Mardell*, 31 F.3d at 1228.

120 *Id.* at 1228-29.

121 *Id.* at 1229.

The court also addressed the plaintiff's standing, pontificating that to deny standing based on after-acquired evidence runs contrary to the plain meaning of both Title VII and the ADEA.[122] In reviewing possible remedies, the court surmised that the employer could not hide behind the shield of after-acquired evidence.[123] The Third Circuit agreed with the Eleventh Circuit,[124] ruling that full back pay should be awarded unless the employer would have discovered the employee's misconduct absent the discrimination.[125]

The United States Supreme Court, in a short but unanimous decision, finally resolved the circuit court split in *McKennon v. Nashville Banner Publishing Co.*[126] Justice Kennedy divided the opinion into two parts: an analysis of the employer's liability[127] and the remedies available to employees.[128]

In determining whether liability existed, the Supreme Court first examined the policy reasons underlying the ADEA, noting in particular that a violation of the Act could not be disregarded.[129]

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122 *See id.* at 1230-31 (reviewing the issue of standing in after-acquired evidence cases). The court explained that proponents of the "no standing" philosophy argue that one of the elements in establishing a prima facie case of employment discrimination is being qualified for the position, and an individual who materially misrepresents his qualifications cannot be qualified. *Id.* at 1230; *see supra* text accompanying note 12 (discussing the elements of the prima facie case of employment discrimination). The court refuted this argument by stating that the standing argument reviews the employer's subjective qualifications known at the time and not the objective qualifications not known to him. *Mardell*, 31 F.3d at 1230-31.

123 *See Mardell*, 31 F.3d at 1232-33 (stating that when an employer discriminates against an employee, the employee's right to impartial treatment is violated and thus there should be a remedy). The court stated that *Summers* came to an erroneous decision because the Tenth Circuit decided upon an employee's "right" to a job, and not whether the employer discriminated against the employee. *Id.* at 1233. The Third Circuit court further stated that such property right analysis has no place in either Title VII or the ADEA, because these acts presume that all employment is at will and merely protect against discrimination in the workforce. *Id.* In addition, the court added that because the purpose of both these acts is to place an employee in the same position absent the discrimination, the only possible solution was to hold the employer liable. *Id.* at 1237.

124 *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992) (stating that to limit back pay from the time of the discriminatory employment decision until the time that the after-acquired evidence is discovered creates a windfall for the employer).

125 *Mardell*, 31 F.3d at 1240. The court reasoned that by limiting the back pay award to the period between the date of the discrimination and the date the misconduct was discovered, the employee would not have been placed in the same position in which he or she would have been had no discrimination occurred. *Id.* at 1239.

126 115 S. Ct. 879, 883 (1995).

127 *Id.* at 883-85.

128 *Id.* at 885-86.

129 *Id.* at 884. The dual purpose of the ADEA is to protect employees and to elimi-

Justice Kennedy next questioned the *Summers* court's reliance on mixed-motive cases, concluding that such cases do not apply to after-acquired evidence.[130]

Even though the Justices found liability on the part of the employer, the Court had a more difficult time determining the appropriate remedy.[131] Although rejecting the applicability of the unclean hands doctrine to federal antidiscrimination legislation,[132] the Court acknowledged that an employer's legitimate motive cannot be ignored.[133] In fashioning the appropriate remedy in an af-

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nate discrimination in the workplace. 29 U.S.C. § 621(b). The Court stated that these purposes would not be met if after-acquired evidence barred all relief available to the employee. *McKennon*, 115 S. Ct. at 884.

130 *McKennon*, 115 S. Ct. at 885. Justice Kennedy articulated that mixed-motive cases try to distinguish between the proper motive and the discriminatory motive, and in this case the discriminatory motive operated as the sole reason for the termination. *Id.* (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977)). The *Summers* court had relied on the mixed-motive doctrine to bar all liability, where the Eleventh and Third Circuits used the rationale now adopted by the Court in *McKennon*. *Compare* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 705-06 (10th Cir. 1988) (relying predominantly on *Mt. Healthy* to deny all relief to a plaintiff in an after-acquired evidence case) *with* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179-81 (11th Cir. 1992) (rejecting the *Summers* court's use of *Mt. Healthy* and relying on *Price Waterhouse* to state that the mixed-motive doctrine does not apply to after-acquired evidence situations) *and* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1229-30 (3d Cir. 1994) (agreeing with *Wallace* and ruling that the mixed-motive doctrine is irrelevant when discussing after-acquired evidence); *see supra* note 46 (reviewing the mixed-motive doctrine and the use of the doctrine by the *Summers* court).

131 *See McKennon*, 115 S. Ct. at 885-86. The transcripts of the oral arguments indicate that although the Court reviewed potential liability on the part of the employer, the true concern was the appropriate remedy. *See generally* United States Supreme Court Official Transcript (Nov. 2, 1994), McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (No. 93-1543) (demonstrating that the Supreme Court from the beginning assumed there was liability and was focusing on the appropriate remedy available).

132 *McKennon*, 115 S. Ct. at 885. The Court declared that the unclean hands doctrine has been rejected where a private individual brings an action that serves an important public purpose. *Id.* at 885 (citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968)).

In *Perma Life*, after franchisees of a muffler organization brought an antitrust action against the franchisor, the Court rejected the franchisor's claim that the plaintiffs could not recover because they knew of the relevant provisions in the franchise agreement and profited from such agreement. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 137-39 (1968). In the resumé fraud scenario, no nexus exists between the plaintiff's misstatement and economic loss to the plaintiff, therefore limiting the defense of unclean hands. McGinley, *supra* note 46, at 184; *see also supra* note 4 (defining the unclean hands doctrine).

133 *McKennon*, 115 S. Ct. at 886. The Court stated that the purpose of employment discrimination law is not regulation of the workplace but the prohibition of discrimination by an employer. *Id.* The Court essentially struck a balance between deterrence and punishment of discrimination in the workplace, and an employer's rights and concerns of enforcing rules and policies relating to employee conduct. James H.

ter-acquired evidence case, Justice Kennedy determined that the employee's recovery must be reviewed on a case-by-case basis.[134] The Court did, however, establish certain parameters for this remedy, including disallowing front pay and reinstatement.[135] Justice Kennedy further stated that the "starting point" for computing back pay should encompass the time between the date of termination and the date the employer discovered the employee's misconduct.[136]

The Court implied that the "would have fired" standard should be used to determine whether the employer can submit after-acquired evidence to reduce the damages.[137] In addition, the

Coil III & Lori J. Shapiro, *Two Wrongs Don't Make A Right: The Supreme Court Limits After-Acquired Evidence as a Defense in Employment Discrimination Actions*, 21 EMPLOYEE REL. L.J. 93, 100 (1995).

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

[135] *Id.* Similar to the Third, Seventh, and Eleventh Circuits, the Court found it would be pointless to order reinstatement if the employer will simply terminate the employee for their misconduct. *Id.*; *cf.* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1239 (3d Cir. 1994) (suggesting that in after-acquired evidence cases, the employee's misconduct can eliminate remedies such as reinstatement); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181 (11th Cir. 1992) (ruling that it would be inappropriate for a court to order either front pay or reinstatement); Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2 (7th Cir. 1989) (stating that the Seventh Circuit will not allow front pay or reinstatement).

[136] *McKennon*, 115 S. Ct. at 886. The Court refused to follow the lead of the Eleventh and Third Circuits, which essentially required the employer to ignore the material obtained during discovery. *Cf. Wallace*, 968 F.2d at 1182 (holding that the employer could only limit back pay if it could show that it would have discovered the misconduct absent the discrimination and resulting lawsuit); *Mardell*, 31 F.3d at 1239-40 (holding essentially the same for the Third Circuit). The Court instead adopted the view expounded by the Seventh Circuit. *See McKennon*, 115 S. Ct. at 886 (proffering that once the employer discovers the information in the course of discovery, such information could not be ignored); *cf. Smith*, 876 F.2d at 1319 n.2 (establishing that if back pay were awarded, it would be calculated from the time of the dismissal to the time the misconduct was discovered).

Although the Court did not mention other damages, such as liquidated damages and attorneys' fees, some commentators believe that by not limiting these remedies, the plaintiff may still recover them. *See* Nina Joan Kimball, *A Plaintiff's Perspective on the Much Debated After-Acquired Evidence Rule*, MASS. L. WKLY, May 22, 1995, at B12. This is consistent with the Civil Rights Act of 1991 determination of damages in a mixed-motive case where the employer would have taken the same action regardless of the discriminatory motive. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) (stating that declaratory relief, attorneys' fees, and costs would still be recoverable); *see also supra* notes 15-16 and accompanying text (listing damages available under Title VII and the ADEA).

[137] *McKennon*, 115 S. Ct. at 886-87. The Court determined that the employer "must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated" if the after-acquired evidence had been known at the time of the discharge. *Id.* Again, this standard comports with the standard set forth by the Seventh Circuit. *Cf.* Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992) (applying this standard for the first time in the Seventh Circuit).

Commentators read this language to mean that the employer must meet a sub-

Court expressed concern that employers would undertake extensive discovery to limit remedies when an employee was discriminated against, but listed mechanisms to combat this defense such as the awarding of attorneys' fees and sanctions available under the Federal Rules of Civil Procedure.[138]

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stantial burden in proving that it would have fired the employee for the action, and not that it could have fired him. Kimball, *supra* note 136, at B5. Such a burden requires the employer to establish distinct areas of misconduct where termination will clearly result and to separate such misconduct from circumstances where termination may result. Coil & Shapiro, *supra* note 133, at 101; *see also* Lype, *supra* note 4, at 583-84 (reviewing the procedures that an employer must follow and the materiality of the misconduct necessary in order to submit after-acquired evidence as a defense).

In the resumé fraud scenario, the employer must prove that the employment policy stated that an employee would be fired for misstatement on the application, that the policy was in place prior to both the hiring and firing of the employee, that the policy was more than just boilerplate wording on an application, and that the employer followed such policy in previous cases. Kimball, *supra* note 136, at B5 (citing Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403, 1406 (8th Cir. 1994)).

Although most courts interpreted the language to require a "would have fired" standard, the ambiguity in the *McKennon v. Nashville Banner* decision still led at least one lower court to use the "would not have hired" standard. *See* Quillen v. American Tobacco Co., 874 F. Supp. 1285, 1295-96 (M.D. Ala. 1995) (interpreting the Supreme Court's ruling as either a "would not have hired" or "would have fired" standard in a resumé fraud situation).

[138] *McKennon*, 115 S. Ct. at 887. The Court noted that the ADEA allows judges to award attorneys' fees, which should be awarded if the employer engages in such extensive discovery. *Id.*

In addition, the Court stated that the Federal Rules of Civil Procedure guard against frivolous actions. *Id.* The appropriate section of the Federal Rules states, in relevant part:

> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys,

Although this case concerned a violation of the ADEA, the Court indicated that *McKennon* applies to all federal antidiscrimination acts.[139] Based on the new interpretation of the after-acquired evidence doctrine, the Court reversed the Sixth Circuit's grant of summary judgment in favor of Nashville Banner and remanded the case for further proceedings.[140]

Applying *McKennon* to the hypothetical situation discussed at the beginning of this Note, Ms. Smith would receive back pay from the time ABC fired her until the time it discovered the misstatements on the application.[141] This ruling seems both unfair and in conflict with the application of the antidiscrimination statutes under common law.[142] The Court's determination allows employers to mitigate their damages solely because they were lucky enough to discover employee misconduct after it violated federal law.[143]

> law firms, or parties that have violated subsection (b) or are responsible for the violation.

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139 *See McKennon*, 115 S. Ct. at 884 (postulating that the ADEA is part of a larger scheme of antidiscrimination legislation and inferring that *McKennon* would apply to other federal antidiscrimination acts). The Court stated that the ADEA represents a small part of the common scheme to protect employees from discrimination, which includes Title VII, the Americans with Disabilities Act of 1990, the National Labor Relations Act, and the Equal Pay Act of 1963. *Id.* The Court also stated that "[t]he ADEA and Title VII share common substantive features and also a common purpose." *Id.* Courts have interpreted the ruling in *McKennon* to encompass other federal antidiscrimination statutes such as Title VII. *See* Wehr v. Ryan's Family Steak Houses, Inc., 49 F.3d 1150, 1153 (6th Cir. 1995) ("While *McKennon* involved an ADEA claim, we are persuaded by its language that it applies equally to a Title VII claim."). The Eleventh Circuit, in a rehearing of *Wallace*, also applied the Court's decision to the Equal Pay Act. Wallace v. Dunn Constr. Co., Inc., 62 F.3d 374, 378 (11th Cir. 1995).

140 *Id.* at 887. Upon remand, the Sixth Circuit, in an unpublished opinion, vacated the district court's previous decision. McKennon v. Nashville Banner Publishing Co., 51 F.3d 272 (6th Cir. 1995).

141 *See McKennon*, 115 S. Ct. at 886 (explaining that in after-acquired evidence cases, the employee can recover back pay from the time of the dismissal until the time the evidence was found).

142 *See supra* note 5 and accompanying text (stating that the purposes of antidiscrimination statutes were to deter employers from discriminating in the workplace and from making employment decisions based on discriminatory factors); *see also supra* note 12 and accompanying text (explaining that under a pretextual situation, once the employee establishes a prima facie case of discrimination, the employer may rebut this allegation and force the employee to prove discrimination).

143 *Contra* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (Brennan, J., plurality) (deciding that an employer can only limit its damages in mixed-motive cases when it could show that the same decision would have been made absent the discriminatory motive); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (ruling that the plaintiff could recover damages in a pretext case if she could show that the employment decision proffered by the employer was actually pretextual and the real reason for the firing was discrimination); 42 U.S.C. § 2000e-5(g)(2)(B)

Although the Supreme Court stated that fishing expeditions would be punished,[144] employers will still scrutinize files to limit back pay damages after the discriminatory action is taken, as they did before *McKennon*.[145] In addition, the amount of damages will not be based on the employer's action but rather on the acumen of the attorneys and their ability to prolong or hasten the discovery phase of trial preparation.[146]

The Supreme Court in *McKennon* stated that the mixed-motive doctrine does not apply when considering the employer's liability,[147] but limited damages in after-acquired evidence cases to less than what is recoverable in a mixed-motive case wherein the discriminatory practice was the motivating factor in the decision.[148] Making the distinction between mixed-motive remedies[149] and after-acquired evidence remedies leads to the bizarre situation in

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(stating that in mixed-motive litigation (cases arising under 42 U.S.C. § 2000e-2(m)), the employer can only limit back pay damages if it could show that the same decision would have been made absent the discriminatory motive). In *McKennon*, Justice Kennedy admitted that in after-acquired evidence cases, the sole reason for the employee's termination is an unlawful motive. *McKennon*, 115 S. Ct. at 885.

144 *See McKennon*, 115 S. Ct. at 887 (explaining that the trial court can award attorneys' fees and the plaintiff can seek damages under the Federal Rules of Civil Procedure when an employer attempts to imprudently invoke the after-acquired evidence doctrine); *see supra* note 138 and accompanying text (describing the methods available to limit extensive discovery in after-acquired evidence cases).

145 *Compare* Robert M. Shea, *Posttermination Discovery of Employee Misconduct: A New Defense in Employment Discrimination Litigation*, 17 EMPLOYEE REL. L.J. 103, 109-10 (1991) (advocating scrutiny of the files based on the *Summers* after-acquired rule) *with* Coil & Shapiro, *supra* note 133, at 102 (advocating the same scrutiny after the *McKennon* decision). The employer should conduct appropriate pre- and post-hiring investigations, including, if relevant, attendance records, expense reports, and interview supervisors to discover any wrongdoing. Lype, *supra* note 4, at 582-83. The Supreme Court's statement regarding the severity of the misconduct necessary to invoke the after-acquired evidence rule might limit some of the investigating by the employer. *See McKennon*, 115 S. Ct. at 886-87 (describing the conduct necessary to allow for the use of after-acquired evidence); Coil & Shapiro, *supra* note 133, at 101 (reviewing the severity of the conduct necessary to invoke the after-acquired evidence doctrine as a defense).

146 *See* Kimball, *supra* note 136, at B12 (explaining how the ability of the attorney, including how quickly the attorney could conduct discovery and uncover employee misconduct, may affect the outcome of an after-acquired evidence case).

147 *See McKennon*, 115 S. Ct. at 885 (explaining that mixed-motive cases cannot be relied upon when determining liability in after-acquired evidence cases because, in mixed-motive cases, the nondiscriminatory factor is known at the time of the employee's termination).

148 *Compare McKennon*, 115 S. Ct. at 886 (limiting back pay from the time of discharge to the time of discovery of the evidence) *with* 42 U.S.C. § 2000e-5(g)(2)(B) (stating that full back pay may be granted under the Civil Rights Act of 1991 in mixed-motive litigation (cases arising under §2000e-2(m)) where the underlying factor in terminating the employee was discrimination).

149 *See supra* note 46 (explaining that according to the Civil Rights Act of 1991, in a

which the employee tries to prove that evidence of his wrongdoing is not after-acquired but, rather, that the employer knew of it all along.[150]

The Third and Eleventh Circuits were correct in ruling that back pay should extend to the time of judgment if the employer cannot prove that it would have discovered the misconduct absent the litigation.[151] The reasoning justifying the awarding of full back pay[152] could also justify awards of front pay in certain circumstances. By not allowing front pay, the courts place an employer in a better position than it would have been in had it not discriminated against the employee.[153] Obviously, if there were no employment discrimination, the employer might never have found the employee's misconduct.

Under this Note's proposed analysis, consistent with the

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mixed-motive case, the employer can only limit damages by demonstrating that the same employment decision would have been made absent the discrimination).

150 *See* Ricky v. Mapco, Inc., 50 F.3d 874, 875-76 (10th Cir. 1995) (reviewing a situation in which the employee argued that the information was not after-acquired, but was known to the employer prior to the discriminatory employment decision); *see also supra* note 12 (explaining that if the employee could prove that the information was known to the employer, then the employee could argue that the after-acquired evidence was pretextual); *see also supra* note 46 (explaining the standards for mixed-motive cases). Proving an action using either of these doctrines will lead to a higher damage award. *See supra* text accompanying note 15 (explaining damages in a Title VII case); *see also* 42 U.S.C. § 2000e-5(g)(2)(B) (listing mixed-motive damages codified by the Civil Rights Act of 1991).

151 *See* Wallace v. Dunn Constr. Co., Inc., 968 F.2d 1174, 1182 (11th Cir. 1992) (holding that full back pay is allowed unless the employer could prove it would have discovered the wrongdoing without the discriminatory motive); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1239, 1240 (3d Cir. 1994) (generally agreeing with the Eleventh Circuit's ruling in *Wallace*), *cert. granted, and vacated,* 115 S. Ct. 1397 (1995).

152 *See Wallace,* 968 F.2d at 1182 (ruling that if the employer could not demonstrate that it would have discovered the employee's misconduct absent the discrimination and subsequent litigation, full back pay should be awarded to the employee); *Mardell,* 31 F.3d at 1239 (holding same).

153 *Contra* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 886 (1995) (stating it would be inequitable to order reinstatement if the employer would then legally terminate the employee); *Mardell,* 31 F.3d at 1239 (stating that the court cannot turn a "blind eye" out towards the employee's fraudulent conduct); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 371 (7th Cir. 1993) (holding that the court cannot penalize the employer after the misconduct was discovered); *Wallace,* 968 F.2d at 1181 (ruling that after-acquired evidence should not infringe on an employer's right of free choice in making employment decisions); Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2. (7th Cir. 1989) (noting that it is inequitable for a court to order reinstatement in after-acquired evidence cases). Although the reasoning described by these various courts makes sense for reinstatement, it contradicts the very purpose for allowing front pay as an adequate remedy. *See supra* note 15 (explaining that in certain situations, reinstatement is not feasible; thus, front pay should be considered as an alternative).

Court's opinion in *McKennon*, remedies in each after-acquired evidence situation will be decided on a case-by-case basis.[154] Once the court determines that the after-acquired evidence is relevant based on the Court's determination in *McKennon*,[155] the trier of fact would engage in a shifting burden analysis, similar to that first recited by the Court in *McDonnell Douglas Corp. v. Green*.[156] Once the employee makes out a prima facie case of discrimination, the employer can show credible evidence that it would have discovered the employee's misconduct absent the discrimination. Upon this showing, the burden shifts to the employee to prove that the employer would not have discovered such misconduct.

Although this approach may sound harsh to defendants, employers should do a better job in monitoring their employees and searching out resumé or application fraud.[157] In addition, this approach does not impact upon all employers, but only affects those companies that violate antidiscrimination legislation.[158]

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154 *See McKennon*, 115 S. Ct. at 886 (stating that remedies in after-acquired evidence cases will vary according to the "factual permutations and the equitable considerations" of each case).

155 *See id.* (implying that the "would have fired" standard represents the proper test of relevancy); *see also supra* note 137 and accompanying text (examining the Court's ruling in *McKennon* regarding the standard necessary for the employer to submit after-acquired evidence as a defense).

156 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining that once the employee establishes a prima facie case of discrimination, the employer must proffer a legitimate, nondiscriminatory reason for the dismissal; upon this showing, the burden shifts to the plaintiff to show that such proffered reason is pretextual); *see also supra* note 12 (analyzing in greater detail the shifting burden in employment discrimination cases).

157 *See* Lype, *supra* note 4, at 582 (stating that employers should search for resumé fraud during the interview process and not wait until post-termination to begin this process); *see also* Coil & Shapiro, *supra* note 133, at 102 (explaining that in addition to verifying resumé representations, firms should also monitor their employees' activities).

158 *See* Wellons, *supra* note 4, at 1351 (stating that "[t]he very fact that the [employer] felt compelled to rely upon [after-acquired] evidence is a clear indication that illicit discrimination was the sole reason for the discharge"); *see also* McGinley, *supra* note 46, at 177 (adding that in a resumé fraud situation, if the severity of the misstatement warranted invocation of the after-acquired evidence doctrine, the employee would not be capable of performing the job duties required and would have been fired due to poor performance).