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The Proper Role of After-acquired Evidence in Employment Discrimination Litigation

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THE PROPER ROLE OF AFTER-ACQUIRED EVIDENCE IN EMPLOYMENT DISCRIMINATION LITIGATION†

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A new defense to employment discrimination claims has gained acceptance in the lower courts. Employers who allegedly have discriminated against their employees because of race, sex or age are winning judgments on the basis of after-acquired evidence of employee misconduct.[1] The evidence is "after-acquired" in the sense that the misconduct was unknown to the employer at the time the alleged discrimination occurred[2] but was acquired later, often through the use of discovery

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[1] To date, the bulk of after-acquired evidence cases have arisen under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1988) and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (1988) [hereinafter ADEA]. Those statutes, accordingly, are the primary focus of this Article. Similar issues regarding after-acquired evidence can arise in litigation under other employment discrimination statutes, such as section 1981, 42 U.S.C. § 1981 (1988) or the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (1990) [hereinafter ADA], and the analysis presented here is useful for resolution of claims under those statutes as well.

In addition, questions on the proper use of after-acquired evidence have arisen in common law claims for wrongful discharge. *See, e.g.*, Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 412 (6th Cir. 1992). While this Article may prove useful in such cases, it does not directly address concerns unique to common law claims.

[2] The typical discrimination case is one presenting a claim of individual disparate treatment. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

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

In such cases, an employer denying liability generally will contend it did not base the decision at issue on the protected classification but instead will assert it acted because of a legitimate,

devices in the employee's discrimination action.[3] Lower courts have accepted the proposition that if the employer would have discharged the plaintiff on the basis of the after-acquired evidence, then the defendant is not liable for employment discrimination, and the plaintiff, accordingly, is entitled to no relief.[4]

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nondiscriminatory reason. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254–55 (1981). The question for the trier of fact is then to determine the "true reason" for the employer's action. *Id.* at 256. If the "true reason" is a discriminatory one, then the plaintiff wins. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2748 (1993).

After-acquired evidence cases, in contrast, involve legitimate, nondiscriminatory reasons unknown to the employer at the time the adverse employment decision was made. The question is what role this after-acquired evidence of employee wrongdoing should play in employment discrimination litigation, when the evidence admittedly was not relied upon in making the challenged decision.

To date, this issue has received scant attention in the law reviews. An exception is Mitchell H. Rubinstein, *The Use of Pre-Discharge Misconduct Discovered After An Employee's Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1 (1990). While this Article was in the editing stage, moreover, the following student commentaries appeared: William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by* Wallace v. Dunn Construction Co., 72 NEB. L. REV. 330 (1993); Jennifer Miyoko Follette, Comment, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651 (1993).

In addition, practitioner-oriented journals recently have recognized and discussed the growing importance of this issue. *See* George D. Mesritz, *'After-Acquired' Evidence of Pre-Employment Misrepresentations: An Effective Defense Against Wrongful Discharge Claims*, 18 EMPL. REL. L. J. 215 (1992); Morley Witus, *Defense of Wrongful Discharge Suits Based on Employee's Misrepresentation*, 69 MICH. BAR. J. 50 (1990); Douglas L. Williams & Julia A. Davis, *Title VII Update—Skeletons and a Double-Edged Sword*, ALI-ABA (1991); *New Defense For Bias Suits: Attack*, FULTON COUNTY DAILY REPORT, Mar. 12, 1993.

[3] *See, e.g.*, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993); Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302, 304–05 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (Aug. 10, 1993); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 412 (6th Cir. 1992); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1177–78 (11th Cir. 1992); Reed v. Amax Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992); Moodie v. Federal Reserve Bank of N.Y., 831 F. Supp. 333, 334 (S.D.N.Y. 1993); Smith v. Equitable Life Assur. Soc., 60 Fair Empl. Prac. Cas. (BNA) 1225, 1228 (S.D.N.Y. 1993); Russell v. Microdyne Corp., 830 F. Supp. 305, 307 (E.D.Va. 1993); O'Day v. McDonnell-Douglas Helicopter Co., 784 F. Supp. 1466, 1468 (D. Ariz. 1992); Bonger v. American Water Works, 789 F. Supp. 1102, 1105–06 (D. Colo. 1992); Bazzi v. Western & Southern Life Ins. Co., 808 F. Supp. 1306, 1308–09 (E.D. Mich. 1992); Benson v. Quanex Corp., 58 Fair Empl. Prac. Cas. (BNA) 743, 745 (E.D. Mich. 1992); Coller v. Thermal Science, Inc., 63 Fair Empl. Prac. Cas. (BNA) 93 (E.D. Mo. 1992); McKennon v. Nashville Banner Pub. Co., 797 F. Supp. 604, 605–06 (M.D. Tenn. 1992), *aff'd*, 63 Fair Empl. Prac. Cas. (BNA) 354 (6th Cir. 1993); Grzenia v. Interspec., Inc., 1991 WL 222105 *1–2 (N.D. Ill. 1991); Livingston v. Sorg Printing Co., 49 Fair Empl. Prac. Cas. (BNA) 1417, 1418 (S.D.N.Y. 1989). In many of these cases, it is doubtful whether the evidence ever would have been discovered by the employer had the discrimination claim not been brought.

The Eleventh Circuit, in one of the few cases rejecting the after-acquired evidence defense, denies any reduction in the plaintiff's backpay remedy based on after-acquired evidence unless the defendant proves it would have discovered the evidence independent of the litigation. *Wallace*, 968 F.2d at 1182. *See also* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323–24 (D.N.J. 1993). For discussion of this point, see *infra* notes 161–67 and accompanying text.

[4] *See Milligan-Jensen*, 975 F.2d at 304–05; *Johnson*, 955 F.2d at 414; Dotson v. United States

Those courts granting judgment to the defendant do so without resolving the discrimination claim.[5] Their discussion of the employer's conduct generally is limited to a conclusory recitation of the alleged discrimination; the opinions then proceed to describe with great specificity the misconduct with which the plaintiff is charged.[6] This rhetorical imbalance[7] tends to submerge the central feature of the after-

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Postal Serv., 977 F.2d 976, 977–78 (6th Cir. 1992) (per curiam), *cert. denied*, 113 S. Ct. 263 (1992); Paglio v. Chagrin Valley Hunt Club Corp., 966 F.2d 1453 (6th Cir. 1992) (unpublished order); Washington v. Lake County, 969 F.2d 250, 256–57 (7th Cir. 1992); Reed v. Amax Coal Co., 971 F.2d 1295, 1297 (7th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 707 (10th Cir. 1988); *Russell*, 830 F. Supp. at 308; *O'Day*, 784 F. Supp. at 1468–69; *Bonger*, 789 F. Supp. at 1105–06; *McKennon*, 797 F. Supp. at 605–06; Sweeney v. U-Haul Co., 55 Fair Empl. Prac. Cas. (BNA) 1257, 1259–60 (N.D. Ill. 1991); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 520 (D. Kan. 1991); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 660 (D. Utah 1990); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 994 (D. Kan. 1989).

[5] *See* Rubinstein, *supra* note 2, at 4. The Sixth Circuit, moreover, has granted judgment in an after-acquired evidence case, despite the district court's determination that discrimination had occurred. *Milligan-Jensen*, 975 F.2d at 303. As bluntly stated by the Sixth Circuit, whether the defendant discriminated is "irrelevant." *Id.* at 304–05. The Supreme Court granted certiorari to determine whether the Sixth Circuit's denial of a remedy to the plaintiff was proper; certiorari was dismissed, however, when the parties settled the case. *Milligan-Jensen*, 114 S. Ct. at 22.

[6] *See, e.g., Summers*, 864 F.2d at 702–03. A notable exception to this approach is *Milligan-Jensen*, 975 F.2d at 304–05. There, the district court had found for the plaintiff on her sex discrimination claim, detailing the stark evidence of disparate treatment on which it had relied. Milligan-Jensen v. Michigan Tech. Univ., 767 F. Supp. 1403, 1406–10 (W.D. Mich. 1991). Plaintiff, the only female public safety officer for the University, was told she had the "lady's job" as a "meter maid," was issued the "woman's badge" number and was criticized for her uniform and dress while her male co-workers were not. *Id.* at 1409. The district court, however, reduced plaintiff's backpay award by 50%, due to after-acquired evidence, obtained through discovery, that plaintiff had not revealed a driving under the influence conviction on her employment application. *Id.* at 1416–17. The Sixth Circuit reversed, finding the resume fraud dispositive of plaintiff's claim, despite the finding of intentional discrimination. *Milligan-Jensen*, 975 F.2d at 304–05.

Another exception is the Seventh Circuit's decision in Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993). In that case, the trial court had granted JNOV to the defendant, after a jury determined that the defendant had committed willful violations of the ADEA, based on after-acquired evidence that the plaintiff had inflated his educational credentials on his resume. 1991 WL 203799 *1–2 (W.D. Ill. 1991). In reversing, the Seventh Circuit detailed the evidence of age discrimination and retaliation by the company, and reinstated the plaintiff's verdict. *Kristufek*, 985 F.2d at 366–68. It is unclear, however, whether the Seventh Circuit believed the after-acquired evidence irrelevant to liability or whether it believed the jury had rejected the defendant's assertion that it would have fired the plaintiff had it known of the falsification. There is language in the case pointing in both directions. *Compare* 985 F.2d at 369 *with* 985 F.2d at 370. Moreover, despite upholding the jury verdict, the appeals court modified the award to deny all backpay and attorneys' fees from the time the fraud was discovered. *Id.* at 371.

[7] The EEOC has recognized this point, arguing that a liability determination on the discrimination claim should occur in after-acquired evidence cases, not only because such evidence is not liability limiting, but also because the extent and nature of the defendant's wrongdoing may be important in fashioning relief. As the agency stated, "[t]he court bears witness to the wrongful conduct of the plaintiff but not to the illegal conduct of the employer. Such a skewed perspective would invariably tip the scales in favor of the after-acquired evidence and undermine the effective enforcement of the anti-discrimination statutes." Amicus Brief for EEOC at 14, O'Day v. McDonnell-Douglas Helicopter, 92-15625 (9th Cir. 1992). *See also* Mesritz, *supra* note 2, at 225–26.

acquired evidence defense; a court that recognizes the defense as a total bar to relief grants an employer absolution even for outrageously discriminatory conduct.

Applications of the after-acquired evidence defense have proliferated rapidly.[8] In the wake of initial judicial acceptance of the defense, apparently few defense counsel have missed the opportunity to turn a plaintiff's deposition into a search for her own wrongdoing.[9] It is unlikely that employment discrimination plaintiffs have become more dishonest or otherwise "flawed" in recent years; instead, employers have found a judiciary willing to deny relief to a plaintiff who is a wrongdoer and have pursued this avenue aggressively. Since few workers are perfect, the courts' acceptance of the after-acquired evidence defense has the potential to extinguish a large number of otherwise viable claims.

Employers not only have been winning most of the after-acquired evidence cases in the lower federal courts, but they have been winning them early, at the summary judgment stage.[10] Courts routinely accept as sufficient the affidavit of a company official stating that the employer would have discharged the plaintiff had the company been aware of

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[8] Within the last four years, numerous reported cases have used after-acquired evidence to dispose of plaintiffs' discrimination claims. *See supra* note 4. There is, of course, no way of knowing how many additional cases are settled, dismissed or never filed because of the developing recognition of this defense.

As recently noted by the court in Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1254 (N.D. Ohio 1993), "the after-acquired evidence doctrine is gaining increasing acceptance among state courts. In courts applying federal law, the trend is clearly in favor of its application." *See also* Williams & Davis, *supra* note 2, at 6 (noting trend of decisions to accept after-acquired evidence as defense not only to remedy but to liability).

[9] *See supra* note 3 and accompanying text. Indeed, in a jurisdiction accepting the after-acquired evidence defense, an employer's lawyer would be remiss were she not to engage in such an inquiry during discovery. As one defense lawyer has candidly advised: "Management attorneys should respond to this favorable development by routinely searching for pre-employment misrepresentations as a potential defense in all discharge litigation. Employers in turn should maximize the probability that 'after-acquired' evidence is available as a defense by revising employment applications to elicit even more specific information." Mesritz, *supra* note 2, at 215. *See also* Witus, *supra* note 2.

[10] While the courts have viewed after-acquired evidence as an affirmative defense, placing the burden on defendants to show they would have fired or refused to hire the plaintiff had they known of the wrongdoing, *see* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178 (11th Cir. 1992) (recognizing after-acquired evidence has been viewed by most courts as affirmative defense), Williams & Davis, *supra* note 2, at 7 (same), defendants typically have satisfied this burden through submitting an affidavit from a company official so stating. Although the courts have recognized that these affidavits are "self-serving," they nonetheless have found them a sufficient basis on which to grant summary judgment for the defendant, because "there is no evidence to rebut the declaration that [defendant] would have terminated the plaintiff's employment had her actions been discovered." Bonger v. American Water Works, 789 F. Supp. 1102, 1107 (D. Colo. 1992).

the after-acquired evidence.[11] The affidavit is treated as determinative despite its self-serving and hypothetical assertions.[12]

The after-acquired evidence defense in its current form amounts to an enormous loophole in the interpretation of our civil rights laws that must be closed. These are not isolated cases involving egregious employee wrongdoing.[13] Instead, they are cases that provoke renewed

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[11] *See, e.g.*, Washington v. Lake County, 969 F.2d 250, 256 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 414 (6th Cir. 1992); McKennon v. The Nashville Banner Pub. Co., 797 F. Supp. 604, 608 (M.D. Tenn. 1992); Bonger v. American Water Works, 789 F. Supp. 1102, 1106 (D. Colo. 1992); O'Day v. McDonnell-Douglas Helicopter Co., 784 F. Supp. 1466, 1468–69 (D. Ariz. 1992); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 659 (D. Utah 1990). The EEOC, in its amicus curiae brief to the Sixth Circuit in the *McKennon* case, has criticized reliance on employer affidavits and has urged adoption of an "objective evidence" standard. Amicus Curiae Brief of EEOC, McKennon v. Nashville Banner, No. 92-5917 (6th Cir. 1992).

[12] It is at least open to question whether the determinative significance routinely accorded to employers' affidavits in these cases is consistent with summary judgment doctrine. The after-acquired evidence defense should be treated as an affirmative defense, with the employer carrying the burdens of production and persuasion. *See supra* note 10. An employer's affidavit should be sufficient to support summary judgment, therefore, only if the affidavit swings the evidence so far in the employer's direction that no reasonable fact-finder could find against the employer on the question of what the employer would have done. *Cf., e.g.*, Bonger v. Wayne County, 950 F.2d 316, 322–23 (6th Cir. 1991) (employer is entitled to summary judgment on affirmative defense only if employer is able to show that the evidence is so one-sided that no reasonable jury could find for plaintiff). If the employer's affidavit fails to pass this threshold test, then it should not matter whether the plaintiff can submit a sufficient counter-affidavit. *See, e.g.*, United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991) (when movant with burden of persuasion makes initial showing that would entitle it to directed verdict at trial, then non-movant must come forward with significant, probative evidence of triable issue of fact). There is at least room for doubt whether an affidavit on the would-have-discharged question, executed by someone under the employer's influence, and making a claim about what the employer would have done, routinely should be treated as conclusive, pretermitting the plaintiff's right to a trial on the question. *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 9.3, at 447 (2d ed. 1993) (if opponent of summary judgment can show some reason why witness might be disbelieved at trial, as, for example, if witness would profit personally from outcome in favor of movant, then summary judgment is inappropriate, because credibility of witness clearly is in issue); *cf. id.* at 447–48 (in many circumstances, only way to counter person's affidavit about his or her own intent is to have person appear at trial and be subjected to formal examination before trier of fact; in such cases summary judgment should be denied).

[13] The majority of the cases involve "puffing" of educational credentials or work experience on the employment application or during the interview. *See, e.g.*, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 366 (7th Cir. 1993); Reed v. Amax Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 411–12 (6th Cir. 1992); Smith v. General Scanning, Inc., 876 F.2d 1315, 1316–17 (7th Cir. 1989); Bazzi v. Western & Southern Life Ins. Co., 808 F. Supp. 1306, 1307 (E.D. Mich. 1992). While such dishonesty is not commendable, it is also not uncommon. According to surveys reported by Professor Rubinstein, "one in ten companies found applicants lying on their resumes." Rubinstein, *supra* note 2, at n.2. A 1988 Equifax Study of 200 randomly selected resumes revealed that 3% misrepresented college degrees, 3% identified false employers, 3% listed nonexistent jobs, 4% misidentified job titles, 11% misrepresented reasons for leaving previous employers and one-third gave inaccurate dates of past jobs. Mesritz, *supra* note 2, at 222; *see also* Williams & Davis, *supra* note 2, at 1.

Some cases, however, involve more serious falsifications, such as a failure to disclose past

discussion of what causation means in employment discrimination law, of what harms discrimination can inflict, and of what remedies Congress intended to provide to persons, who though guilty of wrongdoing, nonetheless were victims of unlawful conduct at the hands of their employers.

This Article criticizes the approach to the after-acquired evidence defense that is emerging in the lower courts. The Article rejects the premise that a plaintiff must be "fire proof" in order to prevail in an employment discrimination action. It argues that after-acquired evidence of a plaintiff's misconduct should have no impact on an employer's liability for discrimination. In liability determinations, the focus should be on what the employer actually did and not on what the employer might have done had it not discriminated.[14] Discriminatory conduct causes harm and deserves legal condemnation even when the conduct would have been justifiable on other grounds.[15]

Accordingly, after-acquired evidence should matter only in determining appropriate remedies. If an employer can demonstrate that it would have discharged the plaintiff on the basis of the after-acquired evidence, then the plaintiff should not be awarded backpay beyond the point at which the employer actually discovers the discharge-generating evidence.[16] Moreover, the plaintiff should not be entitled to

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criminal conduct, *see, e.g.*, Washington v. Lake County, 969 F.2d 250, 252 (7th Cir. 1992); Benson v. Quanex Corp., 58 Fair Empl. Prac. Cas. (BNA) 743, 745 (E.D. Mich. 1992); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 992–93 (D. Kan. 1989), or past terminations by other employers, *see, e.g.*, Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 317 (D.N.J. 1993).

[14] *See infra* notes 80–102 and accompanying text. The Equal Employment Opportunity Commission (EEOC), adopts this approach for Title VII cases. EEOC Decision No. 915-002, Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, 1992 WL 189088 (July 14, 1992) [hereinafter EEOC Enforcement Guidance]. *See also* EEOC's Office of General Counsel's Advice Memorandum, March 1, 1993, 61 EPD ¶ 5371. This Article, for the reasons explored herein, agrees with the EEOC's position and explains why it is well-founded. While the guidelines accurately state how the law should be construed, a detailed analysis of why that position is correct is supplied by this Article.

The 1991 amendments to Title VII, moreover, reinforce the conclusion that after-acquired evidence is not liability limiting. Section 107 of the 1991 Civil Rights Act states that, "[e]xcept as otherwise provided in this title, 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." Pub. L. No. 102-166, § 107 (Nov. 21, 1992).

Section 107 further provides that remedies may be limited when an employer demonstrates it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* For a discussion of § 107 of the 1991 Civil Rights Act, see *infra* notes 134–43, 180–93 and accompanying text.

[15] *See infra* notes 103–33 and accompanying text.

[16] Some courts have so reasoned, as has the EEOC. *See, e.g.*, Smith v. General Scanning, Inc., 876 F.2d 1315, 1319–20 (7th Cir. 1989); EEOC Enforcement Guidance, *supra* note 14. For discussion of this point, see *infra* notes 147–67 and accompanying text.

reinstatement and ordinarily should be denied injunctive relief as well. The principle underlying these limitations on remedies is that even a prevailing plaintiff in an employment discrimination action remains vulnerable to workplace discipline, up to and including discharge, so long as the discipline is imposed for nondiscriminatory reasons. An employer who proves the after-acquired evidence defense should be permitted to treat the plaintiff's employment as at an end from the point at which the employer actually discovers discharge-generating evidence, even when the evidence is discovered as a result of the discrimination claim.[17] Importantly, however, after-acquired evidence should not preclude declaratory relief, partial backpay, attorney's fees, and, if otherwise available, compensatory and punitive damages.[18]

Part I of this Article describes the development of the after-acquired evidence defense. Part II makes the case that after-acquired evidence should have no effect on an employer's liability for employment discrimination. Part III defends the proposition that while a plaintiff should be denied the prospective remedies of full backpay and reinstatement, and ordinarily should be denied injunctive relief if an employer can prove that it would have discharged the plaintiff on the basis of after-acquired evidence, the prevailing plaintiff remains entitled to declaratory relief, attorney's fees, partial backpay, and, where available, compensatory and punitive damages.

I. Development of the After-Acquired Evidence Defense

The after-acquired evidence defense in employment discrimination litigation is of relatively recent origin. While courts had flirted with it from time to time,[19] it was not until the Tenth Circuit Court of Appeals' decision in *Summers v. State Farm Mutual Automobile Insurance*

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[17] *See infra* notes 161–72 and accompanying text.

[18] *See* EEOC Enforcement Guidance, *supra* note 14, at 20–23 and *infra* notes 173–99 and accompanying text.

[19] *See, e.g.*, Smallwood v. United Air Lines, Inc., 728 F.2d 614, 625–26 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984); Kneisley v. Hercules, Inc., 577 F. Supp. 726, 735 (D. Del. 1983).

The National Labor Relations Board, moreover, has wrestled with the question of after-acquired evidence off and on since the late 1950s. Initially, the Board considered after-acquired evidence a total bar to recovery, but not a defense to the underlying unfair labor practice charge. *See* Southern Airways Co. & Int'l Ass'n of Machinists, AFL-CIO, 124 N.L.R.B. 749, 762–65 (1959). It later changed course, finding the after-acquired evidence inadmissible for any purpose. Big Three Welding Equip. Co. & Johnie Cecil Gripon, Rubble C. Gentry, Jr., Guy W. East, 145 N.L.R.B. 1685, 1698–99 (1964). Presently, it allows the after-acquired evidence to cut off backpay liability as of the time the after-acquired evidence was discovered. John Cuneo, Inc., 298 N.L.R.B. No. 125 at 821 (1990). For a discussion of the NLRB's treatment of after-acquired evidence, see Rubinstein, *supra* note 2, at 6–16.

Co. in 1988 that it gained acceptance.[20] In *Summers*, an employer discovered, in the course of trial preparation on its former employee's age discrimination claims, that the employee had committed over 150 instances of records falsifications during his employment as an insurance claims adjuster.[21] The employer promptly moved for summary judgment based on this newly discovered evidence, and the motion was granted.[22] Acknowledging that the after-acquired evidence could not be considered a "cause" for the discharge decision,[23] the court nonetheless found the evidence relevant to the question of injury.[24] Concluding that the after-acquired evidence precluded the granting of any remedy to the plaintiff, the court found no injury and, consequently, no claim.[25]

The *Summers* court explained its reasoning by constructing a colorful hypothetical that would prove influential in the development of the law:

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[20] Summers v. State Farm Mutual Auto. Ins. Co., 864 F.2d 700, 707 (10th Cir. 1988).

[21] The employer had been aware of approximately 10 falsification instances during Summers' employment but had refrained from discharging him because he had not profited from the falsifications. *Id.* at 702. While preparing for trial, it discovered the 150 additional falsifications and asserted that had it known of them, it would have fired Summers. *Id.* at 703.

[22] *Id.* at 707. In granting summary judgment, the court did not determine whether Summers had been fired because of his age. Instead, it granted judgment because it determined the employer would have fired Summers because of the 150 additional falsifications, had it known about them. In granting judgment for the employer, the court termed it "immaterial" whether the falsifications ever would have been discovered had no age discrimination claim been brought, although it noted the falsifications probably would have been discovered anyway since the employer had been monitoring Summers carefully once it learned of the 10 falsifications. *Id.* at n.3.

[23] *Id.* at 704. As the *Summers* court correctly recognized, the after-acquired evidence could not be deemed a cause for the discharge because a causation inquiry focuses on reasons known to the employer and acted upon at the time of the discharge. *Id.* at 704–05. *See infra* notes 80–102 and accompanying text.

[24] *Summers*, 864 F.2d at 705. The Tenth Circuit relied on the Supreme Court's decision in Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, in which the Court found that an employer who acts for both lawful and unlawful reasons can successfully defend itself by proving it would have made the same decision had it relied on the lawful factors alone, 429 U.S. 274, 285–86 (1977). The *Mt. Healthy* Court determined that a different result would place the employee in a better position than he would have been in had he not engaged in protected conduct. *Id.* at 785. The *Summers* court similarly concluded that to allow Summers to proceed with his claim would be to place him in a better position than he would have been in had no discrimination occurred. 864 F.2d at 708.

[25] The *Summers* court appeared to equate a plaintiff's entitlement to a backpay or reinstatement remedy with the existence of an "injury." A plaintiff, however, may be injured, even when no monetary relief is available. *See* Harris v. Forklift Sys., Inc., 114 S.Ct. 367, 371 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (hostile work environment claim actionable under Title VII even though plaintiff suffers no tangible economic detriment). See also *infra* notes 116–33 and accompanying text for discussion of this point.

> To argue, as Summers does, that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a 'doctor.' In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.[26]

Although *Summers* involved employee misconduct occurring on the job, the vast majority of the after-acquired evidence cases following *Summers* have involved pre-hire misconduct, particularly resume fraud.[27] The typical scenario involves a plaintiff fired because of her race or sex who sues to challenge the employer's action; then, during discovery, the employer learns the employee falsified information on the employment application or otherwise misrepresented her credentials or background.[28] On these facts, the employer moves for judgment

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[26] *Summers*, 864 F.2d at 708. This hypothetical has been quoted by a number of courts that have followed the approach adopted in *Summers* to after-acquired evidence. *See, e.g.*, Milligan-Jensen v. Michigan Tech Univ., 975 F.2d 302, 304 (6th Cir. 1992); Washington v. Lake County, 969 F.2d 250, 253 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 415 (6th Cir. 1992); Redd v. Fisher Controls, 814 F. Supp. 547, 552 (W.D. Tex. 1993); Bonger v. American Water Works, 789 F. Supp. 1102, 1105 (D. Colo. 1992); Benson v. Quanex Corp., 58 Fair Empl. Prac. Cas. (BNA) 743, 747 (E.D. Mich. 1992); Punahele v. United Air Lines, Inc., 756 F. Supp. 487, 490 (D. Colo. 1991); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 519 (D. Kan. 1991); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 659 (D. Utah 1990).

[27] *See, e.g.*, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993); *Milligan-Jensen*, 975 F.2d at 305; Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1177–78 (11th Cir. 1992); *Washington*, 969 F.2d at 256–57; Reed v. Amax Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992); *Johnson*, 955 F.2d at 412; Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 (7th Cir. 1989); Smallwood v. United Air Lines, Inc., 728 F.2d 614, 616 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984); Bray v. Forest Pharmaceutical, Inc., 812 F. Supp. 115, 117 (S.D. Ohio 1993); Baab v. AMR Services Corp., 811 F. Supp. 1246, 1255–56 (N.D. Ohio 1993); Agbor v. Mountain Fuel Supply Co., 810 F. Supp. 1247, 1251–52 (D. Utah 1993); George v. Myers, 1992 WL 97788 *1 (D. Kan. 1992); *Benson*, 58 Fair Empl. Prac. Cas. (BNA) at 745; Bazzi v. Western & Southern Life Ins. Co., 808 F. Supp. 1306, 1308–09 (E.D. Mich. 1992); Kravit v. Delta Air Lines, Inc., 60 Fair Empl. Prac. Cas. (BNA) 994, 995–96 (E.D.N.Y. 1992); Benitez v. Portland Gen. Elec., 799 F. Supp. 1075 (D. Or. 1992); Grzenia v. Interspec., Inc., 1991 WL 222105 *1 (N.D. Ill. 1991); *Churchman*, 756 F. Supp. at 520; Sweeney v. U-Haul Co., 55 Fair Empl. Prac. Cas. (BNA) 1257, 1259 (N.D. Ill. 1991); *Punahele*, 756 F. Supp. at 489; Carroll v. City of Chicago, 1990 WL 37631 *1 (N.D. Ill. 1990); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 994 (D. Kan. 1989); O'Driscoll, 745 F. Supp. at 660; Livingston v. Sorg Printing Co., 49 Fair Empl. Prac. Cas. (BNA) 1417, 1418 (S.D.N.Y. 1989).

[28] That after-acquired evidence of employee misconduct most often comes from resumes or employment applications should not be surprising. It is at the pre-employment stage that prospective workers are asked to reveal educational and work histories, criminal records, and personal information. An applicant who has been discharged or convicted of a crime at some point in the past has a strong incentive to conceal that information in order to obtain employment.

in its favor, claiming it would not have hired or would have fired the plaintiff had it known of the falsifications.[29] Courts have granted these motions using various theories. One approach is that, because the employment relationship is contractual, application of the common law of contracts demands dismissal of the claim.[30] Alternatively, some courts have found that the after-acquired evidence precludes the plaintiff from making a prima facie case of employment discrimination.[31]

But the most common theory underlying the after-acquired evidence defense is one relying loosely on the "but for" causation principle established in cases of "mixed motive" discrimination.[32] Under the "but for" approach, liability is not present unless "but for" the discrimination, the adverse employment action would not have occurred. In *Mt. Healthy City School District Board of Education v. Doyle*,[33] *NLRB v. Transportation Management Corp.*,[34] and *Price Waterhouse v. Hopkins*,[35] the United States Supreme Court's "mixed motive" cases, the Court determined that when a defendant, whose employment decisions were based on both lawful and unlawful motives, could prove it would have made the same decision had it not taken the unlawful motives into account, it was entitled to judgment in its favor.[36] Courts in after-ac-

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Similarly, an applicant may inflate her educational credentials or work experience to enhance her chances of employment. Once the employee is hired, the employer's concern is with her ability to do the job, not with her background, and thus it is unlikely that a falsification undiscovered during the hiring process will be uncovered after employment has begun.

After a lawsuit is filed, however, the plaintiff routinely is asked during depositions or other forms of discovery about her background and frequently is questioned on the resume itself. At that point, the employer learns for the first time about the misstatements.

[29] As some courts have recognized, however, there is a distinction between an employer's assertion that it would not have hired an applicant had it known of the fraud and an assertion that it would have fired an employee after learning of the fraud. When the employer has hired the worker, it is a showing that it would have fired the employee for the misstatement that is relevant. See *Reed*, 971 F.2d at 1298, and *infra* note 105 and accompanying text for discussion of this point.

[30] *See, e.g.*, *Johnson*, 955 F.2d at 412; *Benson*, 58 Fair Empl. Prac. Cas. (BNA) at 746–47.

[31] *See, e.g.*, Dotson v. United States Postal Serv., 977 F.2d 976, 978 (6th Cir. 1992); *Livingston*, 49 Fair Empl. Prac. Cas. (BNA) at 1418. *See also* Witus, *supra* note 2, at 52; Williams & Davis, *supra* note 2, at 6.

[32] *See* Williams & Davis, *supra* note 2 (noting "origins" of after-acquired evidence defense are found in Supreme Court's mixed motive cases); Rubinstein, *supra* note 2, at 6. A "mixed motive" case is one in which the employer is found to have acted for a variety of reasons, both lawful and unlawful. For a discussion of mixed motive cases, see, e.g., Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins: *A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495 (1990).

[33] 429 U.S. 274, 785–86 (1977).

[34] 462 U.S. 393, 398–99 (1983).

[35] 490 U.S. 228, 242–43 (1989).

[36] Whether the Court intended its decision in *Mt. Healthy v. Doyle* to be liability-limiting as opposed to relief-limiting was uncertain. *See* Weber, *supra* note 32, at 500 n.25; Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82

quired evidence cases have read these decisions to mean that whenever the employer can show the same adverse employment action would have been justified in the absence of the discriminatory conduct, it is entitled to judgment in its favor, even though the lawful motive was not actually operating at the time the adverse and discriminatory employment decision was made.[37]

The courts have misstepped in going down each of these paths. Neither contract law, the prima facie case approach, nor the "mixed motive" analogy supports using after-acquired evidence to avoid liability.

II. After-Acquired Evidence and Employer Liability

A. *The Contract Law Approach*

As mentioned above, many of the after-acquired evidence cases involve resume fraud or other misrepresentations by plaintiffs during the hiring process. In some of these cases, courts have entered judgment for the defendant by reasoning that since the employer was fraudulently induced to enter into the employment contract, it may void the contract at its initiative and thereby avoid the discrimination claim.[38] Additionally, courts have reasoned that an employee may not successfully sue for breach of contract if good cause to terminate the contract existed, whether or not the employer knew of the cause at the time of discharge.[39] However, not just any untruth or nondisclosure will

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Colum. L. Rev. 292, 308 (1982). In *Price Waterhouse*, however, the Court made clear that an employer who proves it would have made the same decision without regard to the unlawful factor is entitled to a finding of no liability. 490 U.S. at 242. This aspect of *Price Waterhouse* was congressionally overruled in § 107 of the 1991 Civil Rights Act. *See infra* notes 134–42 and accompanying text.

[37] *See, e.g.*, Washington v. Lake County, 969 F.2d 250, 255–56 (7th Cir. 1992); Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700, 707 (10th Cir. 1988). While recognizing that mixed-motive cases differ from after-acquired evidence cases, these courts view the mixed-motive decisions as sufficiently analogous to provide the appropriate framework for resolving after-acquired evidence claims. *See infra* notes 73–79 and accompanying text.

[38] *See* cases cited *supra* note 30. *See also* Bazzi v. Western & Southern Life Ins. Co., 808 F. Supp. 1306, 1309–10 (E.D. Mich. 1992) (applying same analysis to state law breach of contract claim). Commentators have urged employers to use this approach. *See, e.g.*, Witus, *supra* note 2, at 51; Mesritz, *supra* note 2, at 223; Rubinstein, *supra* note 2, at 16.

[39] *See* cases cited *supra* note 30; *see also* Jewish Ctr. of Sussex County v. Whale, 432 A.2d 521, 525 (N.J. 1981) (employer entitled to rescind employment contract upon discovering fraudulent misrepresentations on employee's resume); Odoneal v. Henry, 12 So. 154, 155 (Miss. 1892) ("If good and sufficient reasons for appellee's discharge existed, the appellants may set them up on trial by way of defense, though they may not have known of them at the time of the discharge."); Loos v. George Walter Brewing Co., 129 N.W. 645, 646 (Wis. 1911) (same holding); Von Heyne

void the contract. Instead, the misrepresentation must have been material, must have been related to the hiring decision, and must have been relied upon by the employer in deciding to hire the plaintiff.[40]

While the employment relationship is contractual,[41] and while this reasoning might be appropriate were plaintiff bringing a claim for breach of contract,[42] contract principles may not be routinely transplanted into the law of employment discrimination. Employment discrimination statutes impose on employers a duty not to discriminate on the basis of the prohibited factor. This obligation does not depend upon the agreement of the parties, and it is not waivable.[43] While an employer may be able to avoid contractually imposed obligations, such as an obligation not to fire without just cause, by pointing to a plaintiff's wrongdoing, the duty not to discriminate is statutorily, not contractually, imposed.[44] Thus, that misrepresentations may be a defense

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v. Tompkins, 93 N.W. 901, 906–07 (Minn. 1903) (same holding). See Witus, *supra* note 2, who urges this approach. *See also* Rubinstein, *supra* note 2, at 6, 16.

[40] Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 414 (6th Cir. 1992); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 325 (D.N.J. 1993). *See* Mesritz, *supra* note 2, at 218.

Materiality and reliance both are necessary elements for a claim of fraud. Walsh v. Ingersoll-Rand Co., 656 F.2d 367, 369 (8th Cir. 1981). When a claim of fraudulent concealment, or failure to disclose, is presented, a duty to disclose also must be established. *Id.* Whether applicants owe a duty of disclosure to prospective employers is questionable, and in the after-acquired evidence context, stretching the defense to encompass a failure to disclose unrequested information has been rejected. DeVoe v. Medi-Dyn, 782 F. Supp. 546, 552–53 (D. Kan. 1992).

For misstatements, however, duty is not a necessary element for the fraud claim, Stewart v. Jackson & Nash, 976 F.2d 86, 88–89 (2d Cir. 1992), and the after-acquired evidence cases generally involve active misrepresentations by applicants or employees.

Courts confronting after-acquired evidence defenses to employment discrimination claims, regardless of the theory used in accepting the defense, have required that the plaintiff's wrongdoing meet these tests of materiality and reliance to prevent "an employer from combing an employee's file after a discriminatory termination to discover minor, trivial or technical infractions for use in a *Summers* defense." O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 659 (D. Utah 1990).

[41] *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 176–77 (1989); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975).

[42] But see ELKOURI & ELKOURI, HOW ARBITRATION WORKS (4th ed. 1986) for a discussion of how arbitrators handle after-acquired evidence in "just cause" cases arising under a collective bargaining agreement. *See also* United Paperworkers v. Misco, 484 U.S. 27, 29 (1987); Rubinstein, *supra* note 2, at n.6, n.10.

[43] In other words, a covered employer and employee could not agree, as an enforceable term of their employment contract, that the employer was free to discriminate on the basis of race or sex. Should discrimination occur, the employee could bring her Title VII claim, regardless of the contract's terms. C. SULLIVAN, M. ZIMMER, R. RICHARDS, EMPLOYMENT DISCRIMINATION § 35.2 (2d ed. 1988). See also Older Workers Benefit Protection Act, 29 U.S.C. § 623(f)(2) (1990), which permits waiver of *accrued* claims under the ADEA under the conditions established by the statute. Waiver of future claims is not permitted.

[44] *Massay*, 828 F. Supp. at 325; Bazzi v. Western & Southern Life Ins. Co., 808 F. Supp. 1306, 1310 (E.D. Mich. 1992).

to contractual liability is not dispositive on the question of statutory liability. Whether statutory liability exists is a question of statutory construction, not of contract law.[45]

An interesting twist on the contractual analysis was argued by Judge Godbold in his dissent in *Wallace v. Dunn Construction Co.*, a case brought before the Eleventh Circuit.[46] According to Judge Godbold, a plaintiff who lies to get a job lacks standing to complain of subsequent discrimination because she did not "properly come into the status of employee."[47] Because Title VII and other employment discrimination statutes only proscribe discrimination in employment, one who achieves her employment status through falsehoods is not an "employee" for Title VII purposes, he reasoned, and thus cannot claim to be "aggrieved" by the employer's wrongful conduct.[48]

Under Title VII, however, the "term 'employee' means an individual employed by an employer."[49] Nothing in Title VII states or suggests that an individual who lied to get a job is not employed. Nor do other laws make that distinction.[50] The IRS, for example, would be unlikely to agree with Judge Godbold that an individual who gained her employment through false pretenses is not employed. Instead, employment status under Title VII and other employment discrimination statutes is determined either by employer control,[51] by an "economic realities" test,[52] or by a "hybrid" form of these two.[53] These tests, and

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The common law of contracts does not impose a duty not to discriminate. At common law, an employer, absent an agreement to the contrary, is free to fire its employees for any reason it pleases, even one "morally wrong." Payne v. Western & A.R.R. Co., 81 Tenn. 507 (1884). Federal law, through statutes such as Title VII, § 1981, the ADEA and the ADA, imposes the nondiscrimination obligation on employers without regard to any private agreement to the contrary.

[45] See *infra* notes 57–146 and accompanying text for a discussion of the statutory construction issue.

One could say that a duty to comply with employment discrimination statutes is a duty implied into the employment contract. But that does not alter the inquiry. It is a statutory duty, not a contractually assumed one, that is at issue in suits alleging violations of the statutes.

[46] 968 F.2d 1174, 1185 (11th Cir. 1992).

[47] *Id.* at 1187.

[48] *Id.* at 1188.

[49] 42 U.S.C. § 2000e(f) (1988). The statute applies to discrimination that arises out of employment and not to discrimination that occurs in other contexts.

[50] *See, e.g.*, 29 U.S.C. § 623 (1988) (ADEA). Professor Rubinstein, discussing after-acquired evidence in worker's compensation cases, describes what has become known as "Larson's rule," which states that "employment obtained through false pretenses is nonetheless employment." Rubinstein, *supra* note 2, at 21–22.

[51] *See* Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979).

[52] *See* EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984); Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983).

[53] *See* Cobb v. Sun Papers, Inc., 673 F.2d 337, 341 (11th Cir. 1982), *cert. denied*, 459 U.S. 874 (1982).

their variants, long have been used to determine whether an individual is an employee.[54] When a plaintiff performs services for an employer under its direction and control, she is an employee, however wrongfully she may have gained that status.[55]

Judge Godbold's reasoning, while couched in terms of standing, essentially is directed toward whether a plaintiff who lied her way into a job is really "aggrieved" when she thereafter is discriminated against. This is but another way of asking whether such a plaintiff has been injured or harmed by discriminatory conduct when the defendant can show it would not have hired or would have fired the plaintiff had it known of her wrongdoing.[56] Whether denominated as a question of standing, causation or injury, the question remains the same: does Title VII extend protection against discrimination when an employer would have been justified in taking action against the plaintiff for nondiscriminatory reasons, even though it took the action for discriminatory ones? We explore the resolution of that question in Part C below.

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[54] *See* Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (FLSA). Most of the questions of employee status have involved distinguishing employees from independent contractors. For general discussion of the various tests, see C. SULLIVAN, ET AL., *supra* note 43, § 1.2; Patricia Daliton, Comment, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CINN. L. REV. 203, 207–16 (1984).

[55] It is useful to compare the examples relied upon by Judge Godbold with the employee wrongdoer in after-acquired evidence cases. According to Judge Godbold, "[a]n employee who had circumvented the hiring process and had her name placed on the payroll by a collaborator or, worse yet, having had her name fraudulently entered on a 'padded' payroll, never reported for work but received paychecks that were split between her and her collaborator," would not be an employee for Title VII purposes. 968 F.2d 1174, 1188 (1992) (Godbold, J., dissenting). But his examples involve persons who are not in fact performing services under the direction and control and for the benefit of the covered employer. That persons whose names fraudulently appear on a payroll and who perform no work are not employees is hardly a convincing argument for excluding those who do work for the employer.

Moreover, Title VII, the statute at issue in *Wallace*, permits "individuals" to assert a cause of action. As courts have reasoned, this encompasses persons who are not technically employees of the employer in question but who have been aggrieved by discrimination affecting their employment opportunities. *See* Doe v. St. Joseph's Hosp., 788 F.2d 411, 422 (7th Cir. 1986). As stated by the court in Mitchell v. Tenney:

> employee status is not necessarily the primary focus of, nor a threshold requirement to maintaining, a Title VII action. While an individual's status with an employer is not unimportant, the focus must be on whether the defendant can subject him to the type of acts Title VII was intended to prohibit.

650 F. Supp. 703, 707 (N.D. Ill. 1986).

[56] This is, for example, the way the *Summers* court, and most of its progeny, considered the issue. *See Summers*, 864 F.2d at 708.

B. *The* McDonnell-Douglas *Prima Facie Case*

To establish a claim of disparate treatment, a plaintiff must prove the defendant acted with an intent to discriminate. Because direct evidence of discriminatory intent is often difficult to obtain, the Supreme Court in *McDonnell-Douglas Corp. v. Green* established a framework by which plaintiffs can present a circumstantial case of intentional discrimination.[57] When a plaintiff claims, for example, that she was not hired because of her race, she establishes a prima facie case of discrimination when she shows that she was in the protected class, was qualified for the job, was not hired, and the employer continued to seek applicants.[58] The establishment of the prima facie case passes to the employer the burden of articulating a legitimate, nondiscriminatory reason for the failure to hire.[59]

In after-acquired evidence cases, some courts, when confronted with a plaintiff's misrepresentations or other misconduct, have found the plaintiff not qualified for the position in question.[60] Upon finding the plaintiff would thus be unable to make out a prima facie case using the *McDonnell-Douglas* factors, these courts have then granted summary judgment to defendants.

This use of *McDonnell-Douglas* in the after-acquired evidence cases reflects a misunderstanding of the purpose of the test. *McDonnell-Douglas* is designed to provide plaintiffs a method of establishing intent to discriminate. It is not an exclusive method of proof; even when a plaintiff cannot satisfy the four prongs of *McDonnell-Douglas*, she still can establish a prima facie case by presenting other evidence sufficient to create an inference of discriminatory intent.[61]

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[57] 411 U.S. 792, 802 (1973); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

[58] McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[59] *Id.*; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253–54 (1981). *Burdine* clarified that the burden passing to the defendant is one of production. *Id.* at 255. Plaintiff retains the ultimate burden of persuasion on the question of discriminatory intent. *Id.* at 253–54. *See also* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993).

[60] *See* cases cited *supra* note 31. For example, if the job required a college degree and plaintiff fraudulently claimed to have had one, she would not be considered qualified for the job because she lacked the requisite qualifications. *See* Witus, *supra* note 2, at 52.

[61] Notari v. Denver Water Dep't, 971 F.2d 585, 589–90 (10th Cir. 1992).

The *McDonnell-Douglas* prima facie case, as the Supreme Court has explained, creates an inference of discriminatory intent because through satisfying the test, the plaintiff has eliminated the two most likely reasons for his rejection—the absence of a vacancy or a lack of qualifications. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977). But an inference of discriminatory intent can be established through other kinds of circumstantial evidence, such as differences in treatment of persons similarly situated. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281 (1976).

In after-acquired evidence cases, however, the question is not whether the employer's action was discriminatorily motivated. That impermissible motive has been established, or at least assumed, for purposes of the analysis.[62] Thus, the four-prong *McDonnell-Douglas* test, used to establish a prima facie case, and designed to ferret out intentional discrimination, has no role to play. Because employer intent has been admitted, proven or assumed, a plaintiff's inability to make out a circumstantial case of intentional discrimination using the *McDonnell-Douglas* factors is irrelevant. There is an intent to discriminate. The question is whether it is actionable.

C. *The "Mixed Motive" Analogy*

The classic disparate treatment case presupposes a single motive for an employer's decision, a motive that is either lawful or unlawful.[63] But sometimes an employer is found to have acted out of several motives, both lawful and unlawful. These cases have become known as "mixed motive" cases.[64] When confronted with the after-acquired evidence defense, most courts have been guided by the Supreme Court's treatment of these mixed motive cases.[65]

In *Price Waterhouse v. Hopkins*, the Court considered whether a defendant who acted from mixed motives could be liable under Title VII.[66] The Court concluded that once the plaintiff shows the unlawful motive was a substantial motivating factor in the employer's decision, the burden of persuasion passes to the defendant to prove it would have made the same decision even if it had not taken the unlawful motive into account.[67] If the defendant carries this burden, it avoids

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[62] *See supra* note 5 and accompanying text.

[63] *McDonnell-Douglas*, 411 U.S. at 804, and *Burdine*, 450 U.S. at 253, were both premised on a single motive for the employer's decision.

[64] See Weber, *supra* note 32, at 498–500, for a description of the mixed-motive concept. Professor Weber notes the term "duplicative cause" accurately describes mixed-motive cases "because two causes, either of which would alone cause the harm, operate simultaneously." *Id.* at 499.

[65] *See, e.g.*, Wallace v. Dunn Constr., 968 F.2d 1174, 1180–81 (11th Cir. 1992); Washington v. Lake County, 969 F.2d 250, 255 (7th Cir. 1992); Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700, 798 (10th Cir. 1988); Williams & Davis, *supra* note 2, at 1–3.

[66] 490 U.S. 228, 240–41 (1989).

Ann Hopkins alleged she had been discriminated against on the basis of sex when she was denied partnership by Price Waterhouse. *Id.* at 231. The trial court found Hopkins' sex had played a role in the partnership decision but also credited the accounting firm's legitimate reason for its decision—that Hopkins lacked interpersonal skills. 618 F. Supp. 1109, 1113–14, 1119 (D.D.C. 1985).

[67] 490 U.S. at 251–53.

liability.[68] The *Price Waterhouse* decision, foreshadowed by the Court's earlier decisions in *Mt. Healthy*[69] and *Transportation Management*,[70] thus accepted a "but for" causation test for Title VII liability.[71] While the *Price Waterhouse* plurality and dissent differed over who should bear the burden of proving the presence or absence of "but for" causation, i.e., of proving that but for discrimination, the adverse act would not have occurred, all agreed it was a necessary element for liability.[72]

After-acquired evidence cases are not mixed motive cases.[73] In mixed motive cases, both lawful and unlawful reasons motivate the employer's action; both are actually relied upon by the employer at the time the decision is made.[74] In after-acquired evidence cases, however, it is the unlawful motive alone that actually was operating at the time

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[68] *Id.* The trial court had ruled that an employer's demonstration that it would have made the same decision anyway was relief, not liability, limiting. 618 F. Supp. 1109, 1120–21 (D.D.C. 1985). The court of appeals disagreed, holding that when a defendant can prove, through clear and convincing evidence, that it would have made the same decision anyway, it avoids not only relief but liability. 825 F.2d 458, 470–71 (D.C. Cir. 1987). The court of appeals held, however, that the defendant did not, in this case, carry such a burden. *Id.* at 472. The Supreme Court agreed, but required the defendant to carry its burden only by a preponderance of the evidence, not a clear and convincing, standard. 490 U.S. 228, 253 (1989).

[69] 429 U.S. 274, 285–86 (1977).

[70] 462 U.S. 393, 398–99 (1983).

[71] *Price Waterhouse* was a plurality decision, and the plurality insisted it was rejecting a "but for" approach to causation under Title VII. 490 U.S. at 240–41. But as Justice Kennedy correctly points out in his dissent, the plurality endorsed a but for theory of causation by allowing the employer to avoid liability by showing it would have made the same decision anyway. *Id.* at 281 (Kennedy, J., dissenting). The disagreement between the plurality and dissent was over who should bear the burden of proof. *Id.* at 287 (Kennedy, J., dissenting). *See* Charles A. Sullivan, *Accounting for* Price Waterhouse: *Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1126 n.67 (1991). The dissent would require the plaintiff to retain the ultimate burden of persuasion on the issue of but for causation, whereas the plurality, together with Justices White and O'Connor, approved shifting to the defendant the burden of proving an absence of but for causation once the plaintiff shows the unlawful factor was a substantial motivating factor in the employment decision. *Price Waterhouse*, 490 U.S. at 250.

For discussion of *Price Waterhouse*'s but for approach, see Weber, *supra* note 32, at 501. Professor Weber thinks the plurality's view of causation is correct and objects to the plurality's permitting the employer to avoid liability when it would have made the same decision anyway. *Id.* He believes the Court should have found causation and thus liability satisfied and should have viewed the employer's "mixed motives" as relevant only to questions of remedy. See also Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 454 (1982), who criticizes *Mt. Healthy* as departing from common law but for concepts. According to Professor Eaton, causation is established at common law whenever the wrongful act is a substantial factor in producing an injury. *Id.*

[72] *See supra* note 71.

[73] The EEOC correctly recognizes this distinction. EEOC's Office of General Counsel's Advice Memorandum, 61 CCH EPD ¶ 5371 (1993). *See also* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 322 (D.N.J. 1993).

[74] *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–86 (1977); *Price Waterhouse*, 490 U.S. at 250; Williams & Davis, *supra* note 2, at 1–3.

of the adverse action; the lawful "motive" is discovered after the fact. Yet, because mixed motive cases endorse a "but for" causation model, with its hypothetical inquiry into what would have happened if the employer had not discriminated, they are seen as support for acceptance of the after-acquired evidence defense.[75] If the employer can show it would have been justified in making the same decision for nondiscriminatory reasons, then the discrimination is not viewed as causing the plaintiff any harm in an after-acquired evidence case.[76]

At first glance, mixed motive cases, with their hypothetical "but-for" constructs, do seem relevant. In mixed motive cases, employees who have given their employers ample reason to fire them are not shielded from the consequences of their wrongdoing because the employer also considered their race or sex in making the employment decision.[77] When the employer shows it would have reached the same result had it relied on the lawful factors alone, the discrimination is not seen as causing any harm to the worker.[78] Similarly, in after-acquired evidence cases, an employee whose wrongdoing is not discov-

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> "Mixed-motive" cases, of which *Price Waterhouse v. Hopkins* is the latest, are analogous to this case and therefore provide guidance in deciding which standard is appropriate. In a mixed motive case, an employer has taken an adverse employment decision against an employee in part because of a non-discriminatory reason. As in a "resume fraud" case, the issue in a mixed motive case is whether the plaintiff has actually been injured, and the court is required to undergo a hypothetical inquiry as to what the company would have done under different circumstances . . . .
> [An after-acquired evidence case] is similar to the claim in *Price Waterhouse* that the plaintiff would have been fired anyway, even assuming some discrimination occurred. The same evidentiary framework is therefore appropriate. In situations involving 'after acquired' evidence, the employer must show by a preponderance of the evidence that, if acting in a race-neutral manner, it would have made the same employment decision had it known of the after-acquired evidence.

Washington v. Lake County, 969 F.2d 250, 255 (7th Cir. 1992).

[76] *See, e.g., id.*; Reed v. Amax Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 415 (6th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988); O'Day v. McDonnell-Douglas Helicopter Co., 784 F. Supp. 1466, 1469 (D. Ariz. 1992).

[77] *See, e.g.*, EEOC v. Alton Packaging Corp., 901 F.2d 920, 925 (11th Cir. 1990).

[78] This is the impact of *Price Waterhouse*. *See supra* notes 67–72 and accompanying text. *Price Waterhouse* and its predecessor, *Mt. Healthy*, have been heavily criticized for permitting defendants to avoid liability when they acted in part for discriminatory motives. *See, e.g.*, Brodin, *supra* note 35, at 311–23; Eaton, *supra* note 71, at 454–55; Weber, *supra* note 32, at 520; Zimmer & Sullivan, *The Structure of Title VII Individual Disparate Treatment Litigation:* Anderson v. City of Bessemer City, *Inferences of Discrimination and Burdens of Proof*, 9 HARV. WOMEN'S L. J. 25, 47–51 (1986). In the 1991 Civil Rights Act, Congress responded to these criticisms by providing that liability is established once plaintiff shows the unlawful factor was a motivating factor, even if, lawful factors also motivated the decision. Pub. L. No. 102-166, § 107 (Nov. 21, 1991). For a discussion of § 107 of the 1991 Civil Rights Act, see *infra* notes 134–42 and accompanying text.

ered until after her termination, but whose wrongdoing would have led to her termination had it been discovered earlier, is viewed as unharmed by the employer's discriminatory conduct.[79]

A legal distinction, however, between motives actually operating at the time of the adverse employment decision, and those which could have, but did not, motivate the employer, has been long recognized in employment discrimination doctrine.[80] The Court endorsed this distinction in *McDonnell-Douglas v. Green*,[81] its first individual disparate treatment case. In *McDonnell-Douglas*, the plaintiff employee, Percival Green, was not rehired following his participation in an unlawful stall-in at his former employer's plant. Green claimed the failure to rehire him was racially motivated. *McDonnell-Douglas* claimed it had not rehired him because of his wrongdoing.[82] The Court proceeded to lay out the burdens of proof in an individual disparate treatment case, a tripartite allocation designed to determine whether the employer had acted for the lawful reason, as it claimed, or for the unlawful reason, as claimed by Green.[83]

In *McDonnell-Douglas*, the Court accepted that Green had engaged in wrongdoing against his employer and further accepted that the wrongdoing would have justified a failure to rehire him.[84] Nonetheless, it remanded for a determination of the reasons why the rehiring decision in fact had been made.[85] If it was done because of race, McDonnell-Douglas was liable to Green, notwithstanding the existence of lawful reasons that would have justified the adverse action if those lawful reasons in fact did not motivate the employer.[86]

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[79] *See* sources cited *supra* note 65.

[80] "The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made.*" Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989). As stated by one civil rights lawyer, criticizing the after-acquired evidence doctrine, "the law is clear that courts are required to evaluate the employer's conduct as of when the alleged discrimination occurred." Remarks of Joseph Sellers, quoted in "New Defense to Bias Suit Attacks," *supra* note 2. *See also* EEOC Advice Memorandum, *supra* note 14.

[81] 411 U.S. 792, 803–04 (1973). *See* Brodin, *supra* note 35, at 307 n.69; Sullivan, *supra* note 71, at 1134–36.

[82] McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 796 (1973).

[83] *See supra* notes 57–59 and accompanying text.

[84] "Respondent admittedly had taken part in a carefully planned 'stall in,' designed to tie up access to and egress from petitioner's plant at a peak traffic hour. Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it." 411 U.S. at 803.

[85] *Id.* at 804.

[86]

> While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the

McDonnell-Douglas demonstrates that in resolving individual disparate treatment claims, what is determinative is the factor actually motivating the decision at issue.[87] That the plaintiff is a wrongdoer does not relieve the employer from liability for its own discriminatory conduct.[88] After all, Percival Green was regarded by the Court as a wrongdoer. But the Court found that his wrongdoing did not justify denying him relief if the employer in fact acted for discriminatory reasons. Instead, the focus is on the employer's actual motivation in taking the adverse action. If the employer acted for unlawful reasons, then it has violated Title VII, even if other, lawful reasons, such as the plaintiff's misconduct, would have justified the employment decision.[89]

> Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext . . . . In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a covering for a racially discriminatory decision.

411 U.S. at 804–805. *See also* Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989) (even if individuals selected were better qualified than plaintiff, plaintiff could still recover if her race motivated employer's decision).

[87] Sullivan, *supra* note 71, at 1134–36. Professor Sullivan, who convincingly argues the above point in reference to *McDonnell-Douglas*, also points out that in *Price Waterhouse* itself, the Court accepted that the accounting firm would have been justified in refusing to make someone a partner who had poor interpersonal skills. *Id.* at 1134. But if the firm would not in fact have made the decision absent discrimination, then Title VII liability would attach. *Id.*

At least one court has recognized this distinction in the after-acquired evidence context. See Smith v. Equitable Life Assurance Soc'y, 60 Fair Empl. Prac. Cas. (BNA) 1225, 1227 (S.D.N.Y. 1993) ("McDonnell-Douglas, which sets forth the shifting burdens in a Title VII case, clearly presupposes a 'legitimate, nondiscriminatory reason known to the employer at the time of discharge'"), in which the court found after-acquired evidence insufficient basis for summary judgment. *Summers* itself conceded this point but found the after-acquired evidence nonetheless dispositive. 864 F.2d 700, 705 (10th Cir. 1988).

[88] *See* Weber, *supra* note 32, at 534. As Professor Weber notes, "[p]revailing conceptions of morality do not excuse wrongful conduct on the ground that the victim is not meritorious, innocent or vulnerable." *Id.* He explains that when an employer has engaged in intentional discrimination:

> [I]t has treated the victim as less than human. Its conduct, moreover, has reinforced the powerlessness and coercion that women and minorities experience. Just as contributory negligence does not bar liability for intentional torts or for wanton and willful misconduct, the victim's job failings should not bar liability for intentional discrimination.

Id. Professor Weber's remarks were directed toward the *Price Waterhouse* decision, which permitted employers to avoid liability even though they engaged in intentional discrimination. But they are equally applicable to after-acquired evidence cases.

[89] *See supra* notes 80–88. This focus on the actual motives operating at the time of the employment decision is necessary to prevent defendant from avoiding liability too easily. As commentators have recognized, "plausible justifications" for an employment decision can almost always be found after the fact. *See* Brodin, *supra* note 35, at 321, quoting Thomas G.S. Christensen & Andrea H. Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1322 (1968).

But in after-acquired evidence cases, unlike in *McDonnell-Douglas*, the plaintiff's wrongdoing is unknown to the defendant, frequently because the plaintiff herself has concealed it. Thus, while the employer's motivation is based on an unlawful reason,[90] it has been "deprived" of the opportunity to act out of mixed motives and thereafter to avoid liability by demonstrating it would have made the same decision anyway.[91] Reliance on mixed motive cases, therefore, could be viewed as an effort by the courts to place the employer in the situation it would have been in had it known of plaintiff's wrongdoing.

The problem with this approach is that it expands the "but for" causation analysis beyond the scope actually approved by the Supreme Court.[92] Although *Price Waterhouse* endorsed a "but for" approach to causation in mixed motive cases,[93] it was careful to limit consideration to the motives actually operating at the time of the adverse decision.[94] As the plurality observed:

> [P]roving 'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.' An employer may not, in other words, prevail in a mixed motive case by offering a legitimate and

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[90] Sullivan, *supra* note 71, at 1134–35. As stated earlier, some after-acquired evidence cases involve a finding that the employment action was motivated by a discriminatory reason, see Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302, 304–05 (6th Cir. 1992), whereas in others, the unlawful animus is assumed for purposes of deciding the case, *see* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988).

[91] It is not appropriate to assume the employer would have acted for the lawful reason alone in the face of a finding or assumption that it in fact did act for unlawful reasons.

[92] This point has not been lost on all lower courts. Some have correctly refused to follow *Summers* on this basis. *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178–79 (11th Cir. 1992); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 322 (D.N.J. 1993); Moodie v. Federal Reserve Bank of N.Y., 831 F. Supp. 333, 335–36 (S.D.N.Y. 1993). *See also* EEOC Enforcement Guidance, *supra* note 14.

[93] *See supra* note 71 and accompanying text.

[94] The plurality's emphasis on the factors operating at the time the decision was made could not have been clearer. As it stated:

> The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*. . . . When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.
>
> . . .
>
> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant was a woman.

> sufficient reason for its decision if that reason did not motivate it at the time of the decision.[95]

Thus, the "but for" causation approach approved in *Price Waterhouse* focuses exclusively on the actual motive for the decision at issue.[96] *Price Waterhouse* does not relieve an employer from liability when it could have acted for lawful reasons but in fact did not act for those reasons. Mixed motive cases, like the pretext cases exemplified by *McDonnell-Douglas*, regard liability for employment discrimination as established if the unlawful motive actually caused the decision at the time it was made.[97] Accordingly, reliance on mixed motive analysis to avoid liability in after-acquired evidence cases is incorrect.[98]

That actual, not hypothetical, motivations are what matter for liability in employment discrimination law perhaps can be better understood by considering the following example. Assume an employer with a bias against women who resolves to fire a worker because of her sex. Before the employer takes action for the discriminatory reason, however, the woman shoots her supervisor and is fired for that reason

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490 U.S. 228, 250 (1989). *See* Sullivan, *supra* note 71, at 1134; Williams & Davis, *supra* note 2, at 3.

[95] *Price Waterhouse*, 490 U.S. at 256. *See also id.* at 261 (White, J., concurring) ("[W]here the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof."). *But see id.* at 278 (O'Connor, J., concurring) (burden that shifts to defendant is burden to show "that the decision would have been justified by other, wholly legitimate considerations").

[96] *See supra* notes 92–95 and accompanying text. *See also* Amicus Curiae Brief of EEOC, O'Day v. McDonnell-Douglas Helicopter Co., 92-15625 (9th Cir. 1992) (recognizing after-acquired evidence is not relevant to liability because it did not motivate employer at time decision was made); EEOC Enforcement Guidance, *supra* note 14.

[97] *See, e.g.*, EEOC v. Alton Packaging Corp., 901 F.2d 920, 925 (11th Cir. 1990).

[98] Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178–79 (11th Cir. 1992); Moodie v. Federal Reserve Bank of N.Y., 831 F. Supp. 333, 335–36 (S.D.N.Y. 1993); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 322 (D.N.J. 1993); Smith v. Equitable Life Assurance Soc'y, 60 Fair Empl. Prac. Cas. (BNA) 1225, 1227 (S.D.N.Y. 1993). As the Seventh Circuit stated in *Kristufek*:

> A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge. The deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for the discharge which might otherwise have been used, but was not. The after discovered alternate reason comes too late. That remains our view of the law.

985 F.2d at 369 (quoting Smith v. General Scanning, 876 F.2d 1315, 1319 (7th Cir. 1989)). *See also* Williams & Davis, *supra* note 2, at 3, 7.

In *Hussmann Foodservice*, however, despite the language quoted above, it is unclear whether the Seventh Circuit believed the after-acquired evidence was irrelevant to liability or whether the jury had necessarily rejected defendant's claim that it would have fired plaintiff had it known of resume falsifications. 985 F.2d at 370.

alone. No liability under Title VII would exist, even though the employer harbored a bias, because the unlawful reason did not actually motivate the discharge.[99] While the employer had bad thoughts, Title VII does not prohibit bad thoughts.[100] It only prohibits wrongfully motivated acts.[101] Thus, whatever an employer's subjective feelings may be, it is only when it acts on those motives that liability will attach.

Conversely, when an employer *does* act for the unlawful reason, it has violated the statute. Just as a court will not entertain a hypothetical inquiry as to whether the employer might have discriminated had its opportunity to do so not been preempted, it should not consider whether the employer would have acted for lawful reasons had its unlawful conduct not occurred. Actual, not hypothetical, motivation is what matters, whether in a mixed motive or a pretext case.[102]

1. Nondeterminative Discrimination

Mixed motive cases, while focussing on actual motivation, do permit an employer to avoid liability when its discriminatory motivation was nondeterminative[103] or when the discrimination made no difference to the outcome of the employment decision.[104] Similarly, in after-

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[99] *Cf. infra* notes 108–11 and accompanying text.

[100] *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring) ("The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts."). *See* 100 Cong. Rec. 7254 (1964) (remarks of Senator Case). See also Sullivan, *supra* note 71, at 1123 n.64, who, while agreeing Congress did not and constitutionally could not bar thoughts or their expression, says it could and did bar "prejudice in action." Thus, discrimination that is not outcome determinative can be prohibited without Title VII becoming a "thought control" bill.

[101] Sullivan, *supra* note 71, at 1123 n.64.

[102] Moreover, a "business justification" defense has never been accepted for claims of disparate treatment. Employers are not permitted to discriminate simply because they have good business reasons for doing so. Los Angeles v. Manhart, 435 U.S. 702, 707–08 (1983); Phillips v. Martin-Marietta Corp., 400 U.S. 542, 544 (1971); Parson v. Kaiser Aluminum, 727 F.2d 473, 477–78 (5th Cir. 1984).

Section 105(2) of the 1991 CRA spells this out, providing that "a demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination." Pub. L. No. 102-166, § 105 (Nov. 21, 1992).

The after-acquired evidence defense smacks of a "business necessity" approach. While the employer has discriminated, it argues that good business reasons for the employment decision now somehow should excuse the employer's wrongdoing. Since these are disparate treatment, not impact, cases, arguments about good business reasons for discrimination should be given no credence.

[103] The term "nondeterminative discrimination" comes from Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 89–93 (1986).

[104] In the *Mt. Healthy* case, for example, the Sixth Circuit concluded, on remand from the

acquired evidence cases, courts have reasoned that the discrimination was nondeterminative because the injury would have occurred had the employer known of the plaintiff's wrongdoing.[105] Thus, the discrimination is viewed as not causing any injury to the plaintiff.[106]

The difference between a mixed motive case, in which a defendant could successfully avoid liability under *Price Waterhouse*, and an after-acquired evidence case is that in an after-acquired evidence case, the discrimination *was* determinative.[107] In a mixed motive case, the employer demonstrates that the same event would have happened at the same time even had it not discriminated, whereas in an after-acquired evidence case no such showing is possible. The employer's wrongfully motivated act preempted its opportunity to act for lawful reasons.

Supreme Court, that Doyle would have been fired for the lawful reasons alone, even if his protected speech had not been taken into account. 670 F.2d at 61.

[105] The courts, however, have required the defendant to prove it would have taken the action had it known of plaintiff's wrongdoing. Thus, evidence of a policy of discharging employees for dishonesty, coupled with sworn testimony from the employer that it would have acted on the evidence had it been aware of it, has been required. As stated by the court in Reed v. Amax Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992), "[W]e must require similar proof to prevent employers from avoiding Title VII liability by pointing to minor rule violations which may technically subject the employee to dismissal but would not, in fact, result in discharge."

When disputed issues of fact exist over whether the plaintiff engaged in the wrongdoing or whether defendant really would have acted on the wrongdoing, summary judgment has been denied. *See, e.g., id.* at 1298–99 (summary judgment granted on other grounds); Punahele v. United Air Lines, Inc., 756 F. Supp. 487, 489 (D. Colo. 1991); Flesner v. Technical Communications Corp., 575 N.E.2d 1107, 1110 (Mass. 1991).

Also, some courts have recognized that when the claim is one for discriminatory firing, the defendant cannot prevail on an after-acquired evidence defense by showing it would not have hired the plaintiff. It must show it would have fired him. As noted by the Seventh Circuit in Washington v. Lake County, 969 F.2d 250, 254 (7th Cir. 1992), an employer who may not have hired an employee had it known of his resume fraud may not have fired him upon discovering the fraud if he was performing the job successfully. *See also* Baab v. AMR Services Corp., 811 F. Supp. 1246, 1257 (N.D. Ohio 1993); Bonger v. American Water Works, 789 F. Supp. 1102, 1106 (D. Colo. 1992).

[106] *See, e.g.*, Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302, 304–05 (6th Cir. 1992) ("This court, in *Johnson*, adopted the view that, if the plaintiff would not have been hired, or would have been fired, if the employer had known of the falsification, the plaintiff suffered no legal damage by being fired.").

[107] The Eleventh Circuit recognizes this distinction, viewing *Summers* as inconsistent with the *Mt. Healthy* rule "that the plaintiff should be left in no worse a position than if she had not been a member of a protected class or engaged in protected opposition to an unlawful employment practice." Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179 (11th Cir. 1992). *See also* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 322 (D.N.J. 1993); *but see* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 97 n.311 (1991), who finds the after-acquired evidence cases "only make sense on a pure 'but for' theory." He criticizes the cases, however, as inconsistent with the policy bases of Title VII.

As Professor Richard Wright has observed, in discussing causation theory in tort law, actual causation necessarily is present in what he describes as cases of "preemptive causation."[108] These "preemptive causation" cases, a category into which after-acquired evidence cases neatly fit, are those where events that would have been sufficient to cause the injury are preempted by the defendant's wrongful act.[109] In such cases, the wrongful act "clearly was a cause of the injury, since it was a necessary element of the set of actual antecedent conditions that was sufficient for the injury."[110] Other actions that may well have occurred, but in fact did not, are not properly deemed a cause of the injury but instead are merely preempted potential causes.[111] The preemptive wrongful act caused the loss, while the second, preempted, act did not.

In contrast, in a mixed motive case where the defendant prevails, the wrongful motive was not a necessary causal element.[112] Rather, the employer demonstrates that the discrimination, while it occurred, in fact did not cause the loss in the "but for" sense. The "but for" test, endorsed in *Price Waterhouse*, focuses on the motivations actually operating at the time of the adverse decision, and regards an act as a cause of an injury "if and only if, but for the act, the injury would not have occurred."[113] Because the injury would have occurred anyway, the discrimination is nondeterminative.

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[108] Richard Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1775 (1985).

[109] Professor Wright supplies the following example: "D shoots and kills P just as P was about to drink a cup of tea that was poisoned by C." D's shot is the preemptive cause, and the poisoning is not a cause "because its potential effects were preempted." *Id.* at 1175–76.

For our purposes, the discriminatory motive is the shot and the after-acquired evidence is the poison. While the after-acquired evidence would have caused the termination, the discrimination preempted it from doing so.

[110] *Id.* at 1794–95. *See also* Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968).

[111] Wright, *supra* note 108, at 1795, 1798.

[112] Professor Wright terms these cases of "duplicative causation," where more than one cause actually was present. *Id.* at 1776. As he explains:

> The key to the overdetermined causation cases, therefore, is the distinction between duplicative and preemptive causation. In each case, an empirical judgment must be made: was the tortious aspect of the defendant's conduct a necessary element in a set of *actual* antecedent conditions that was sufficient for the occurrence of the injury . . . .

Id. at 1796 (emphasis added).

[113] *Id.* at 1775. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989). Professor Gudel criticizes *Price Waterhouse's* adoption of a "but for" approach to liability. He would impose liability even in cases of nondeterminative discrimination, because "if discriminatory acts are to be illegal, there should be a penalty for committing them even if the same result would have been [reached absent the discrimination.]" Gudel, *supra* note 107, at 97–99; *see also* Eaton, *supra* note 71, at 455; Stonefield, *supra* note 103, at 134.

But it is only *nondeterminative* discrimination that avoids liability under *Price Waterhouse*.[114] In preemptive causation cases, the discrimination *is* determinative. It did actually cause the firing, or the failure to hire, even if that event otherwise would have occurred once the defendant discovered the wrongdoing. Moreover, the defendant might never have discovered the plaintiff's wrongdoing, absent the defendant's discrimination and the resulting litigation,[115] further reinforcing the determinative nature of the defendant's discrimination.

2. Existence of an Injury

In some after-acquired evidence cases, the courts have conceded the existence of causation.[116] But they have denied liability on the theory that when the harm would have occurred even if there had been no discrimination, there is no "injury" and thus no claim.[117] This raises the question of what an "injury" is for purposes of federal employment discrimination statutes.

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[114] In other words, if the discrimination did make a difference, defendant loses. If the lawful reasons standing alone would not have caused the employer to do what it did, the discrimination was determinative.

See Weber, *supra* note 32, at 508, who criticizes *Price Waterhouse* for departing from tort law liability concepts. According to Professor Weber, in intentional tort cases, full liability is imposed when the unlawful motive is the dominant one. *See also* Eaton, *supra* note 71, at 454–56.

[115] *See supra* note 3 and accompanying text.

[116] That is, these courts concede the discrimination was the actual cause for the employer's act. The *Summers* court, itself, recognized causation was present. 864 F.2d at 708. Professor Wright's point is to force recognition that causation is present in preemptive causation cases. The issue of liability, he says, is not a causal one. Wright, *supra* note 108, at 1798–99.

[117] *See, e.g.*, Washington v. Lake County, Ill., 969 F.2d 250, 255 (7th Cir. 1992); Reed v. Amax Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992); *Summers*, 864 F.2d at 708; Russell v. Microdyne Corp., 830 F. Supp. 305, 308 (E.D. Va. 1993); O'Day v. McDonnell-Douglas Helicopter Co., 784 F. Supp. 1466, 1469 (D. Ariz. 1992); Punahele v. United Air Lines, Inc., 756 F. Supp. 487, 490 (D. Colo. 1991); Grzenia v. Interspec., Inc., 1991 WL 222105 *2 (N.D. Ill. 1991). As Professor Weber also observes, "most commentators have analyzed *Mt. Healthy* not as a case lacking proof of causation but as a case in which the Court applied remedial policy ideas to limit relief that otherwise would be justified by the harm the defendant actually caused." Weber, *supra* note 32, at 524 n.221.

Professor Wright agrees that for "preemptive causation" cases, the question is not one of causation but of damages, which brings issues of policy into play. In tort cases, he would approve a no liability finding when the preemptive condition was nontortious. *See* Wright, *supra* note 108, at 1798–1801. *See also* James A. Henderson, Jr., *A Defense of the Use of the Hypothetical Case to Resolve the Causation Issue—The Need for an Expanded, Rather than a Contracted Analysis*, 47 TEX. L. REV. 183, 201–12 (1969). Whether the policies of employment discrimination law support absolving from liability a defendant who has acted out of unlawful motives is explored below.

Professor Brodin, *supra* note 36, at 311–23, views causation issues as policy questions in disguise. He urges an expansive view of causation under Title VII because of its societal goal of deterring behavior, not simply compensating the victim.

One form of injury is the adverse employment decision itself. When an individual is fired, she is injured economically.[118] It is this form of injury upon which most courts focus in after-acquired evidence cases. Courts reason that a termination that is fully justifiable on lawful grounds is not an injury at all.[119] This argument has some appeal in cases of nondeterminative discrimination. Although discrimination occurred, it did not result in any tangible detriment or the loss of any benefit.[120] But when the discrimination is determinative, as it is in after-acquired evidence cases,[121] the discrimination does result in a tangible loss. While the employee presumably would have been fired upon the employer's discovery of her wrongdoing, the fact remains that she was fired *when* she was fired because of her sex or race.[122] Thus, she at least suffers an economic loss for the time period between the unlawful discrimination and the employer's discovery of the wrongdoing.[123]

Moreover, an injury occurs whenever an employee is the victim of discrimination, even when that discrimination is nondeterminative. When an employee is treated differently because of her protected status, that is an injury to her self-esteem and to her dignity.[124] That

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[118] She loses, for example, the salary and benefits she was receiving from her job.

[119] *See* cases cited *supra* note 116.

[120] Mixed motive cases, in which the employer carries its burden of persuasion, fit into this category. The plaintiff is placed in no better or worse position, economically speaking, than he would have been in absent the discrimination. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–86 (1977). Title VII, however, has goals beyond mere victim compensation, as the critics of *Mt. Healthy* have convincingly pointed out. *See, e.g.*, Brodin, *supra* note 35, at 317–18. Professor Brodin argues that denying liability in cases of nondeterminative discrimination gives discriminators no incentive to change their conduct. *Id.* "Indeed, the refusal of the court to take *some* action against such 'harmless' discrimination might actually encourage the continuation of such conduct." *Id.* at 318.

[121] *See supra* notes 103–15 and accompanying text.

[122] Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992) (recognizing discrimination deprived plaintiff of employment for period of time, even if employer would have fired her after learning of her wrongdoing); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 322–23 (D.N.J. 1993) (same).

[123] *Id.* There are after-acquired evidence cases, however, in which the discrimination, while determinative, results in no out-of-pocket loss. In Smallwood v. United Air Lines, 728 F.2d 614, 615 (4th Cir. 1984), for example, plaintiff was denied employment under defendant's policy of refusing to consider anyone over a certain age for employment. *Id.* The court rejected the airline's BFOQ defense, and an ADEA violation was established. *Id.* at 623. On remand, however, it was established that plaintiff would not have been hired anyway due to misappropriation of funds while working for another airline. *Id.* at 626–27. Under these circumstances, the court denied plaintiff any backpay or instatement. *Id.* at 626.

This result is correct. What plaintiff was deprived of when the employer refused to consider him because of his age was a chance to be considered further. By requiring the further consideration, plaintiff received all the equitable relief to which he was entitled. *See also* East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 n.9 (1977); Murnane v. American Airlines,

the discrimination may result in no out-of-pocket loss makes it no less painful an affront.[125] In *Price Waterhouse*, the Court chose to subordinate this latter form of injury to the employer's managerial interests, essentially regarding the harms of nondeterminative discrimination as not actionable under Title VII.[126] The Court's recent decision in *United States v. Burke*, at first glance, echoes this approach.[127] Although recognizing that discrimination causes "grave harm" to its victims, the Court found that Title VII was not aimed at redressing "tort-like personal injuries," given the statute's remedial focus on economic harm.[128]

Inc., 667 F.2d 98, 101–02 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). For discussion of this point, see Stonefield, *supra* note 103, at 134–36; EEOC's Amicus Brief, *supra* note 7, at 8.

[124] Justice O'Connor so recognizes in her concurrence in *Price Waterhouse*, 490 U.S. at 265 (1989) (O'Connor, J., concurring). For a full elaboration of this point, see Brodin, *supra* note 35, at 318–20; Weber, *supra* note 32, at 531–34; Note, *An Evaluation of the Proper Standard of Causation in the Dual Motive Title VII Context: A Rejection of the 'Same Decision' Standard*, 35 DRAKE L. REV. 209, 221–22 (1985–86); Comment, Bibbs v. Block: *Standard of Causation and Burden of Proof in Individual Disparate Treatment Action Under Title VII*, 42 WASH. & LEE L. REV. 1439, 1447–48 (1985). As Professor Stonefield points out, emotional harm generally will be the "most significant injury" in cases of nondeterminative discrimination. Stonefield, *supra* note 103, at 125.

The EEOC agrees with these commentators. In its amicus brief to the Ninth Circuit in *O'Day v. McDonnell-Douglas Helicopters*, the agency stated, "[f]rom the Commission's perspective, the most troubling aspect of the *Summers* decision is the Court's suggestion that a victim of unlawful discrimination has suffered no 'injury' when he was engaged in conduct that would justify his rejection or termination." The public interest has been injured, says the EEOC, and "discrimination suits vindicate more than the economic interests of the individual victim."

[125] *See* sources cited *supra* note 124.

Some courts, considering an after-acquired evidence defense to state law civil rights claims or claims of emotional distress, have found the availability of compensatory or punitive damages a sufficient basis for refusing to apply the defense. The existence of these damages, they say, makes clear a compensable injury exists. *See, e.g.*, Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1262 (N.D. Ohio 1993); Bazzi v. Western & Southern Life Ins. Co., 808 F. Supp. 1306, 1310 (E.D. Mich. 1992).

Such damages are available under § 1981, and the 1991 Civil Rights Act makes compensatory and punitive damages now recoverable under Title VII and the ADA. Pub. L. No. 102-166, § 102 (Nov. 21, 1991).

[126] 490 U.S. 228, 239 (1989) (weighing employer's managerial freedom against employee's right to gender neutral decision).

[127] 112 S. Ct. 1867, 1873–74 (1992).

[128] *Id.* at 1874. At issue in *Burke* was whether backpay awards under Title VII were taxable as income. The Court held that they were. *Id.* at 1874. Whether backpay awards are taxable after the 1991 Civil Rights Act is a question the Court did not resolve. It noted, however, that Congress's addition of compensatory and punitive damages, as well as jury trials, as part of Title VII's remedial scheme, "signals a marked change in its conception of the injury redressable by Title VII . . . ." *Id.* at 1874 n.12.

The dissent took issue with this characterization, finding the addition of compensatory and punitive damages did not change the nature of the injury but merely provided additional remedies for that injury. *Id.* at 1878 (O'Connor, J., dissenting). That the statute has separate provisions on liability and remedy supports the dissent's point. *See* Zimmer & Sullivan, *supra* note 78, at 48.

Burke, however, rejected application of tort-like principles to Title VII claims.[129] The Court recognized that in tort law, it is the right to damages that makes a wrong a tort.[130] By refusing to regard a Title VII claim as a tort-like personal injury, the Court presumably also was rejecting the application of a right to damages as an essential element of a Title VII claim. Indeed, that no such element is required is supported by the Court's decisions in *Meritor Savings Bank v. Vinson* and *Harris v. Forklift Systems, Inc.*, in which the Court held that hostile work environment sexual harassment claims were actionable under Title VII, notwithstanding the absence of any tangible economic detriment or psychological injury.[131]

In any event, after-acquired evidence cases do not involve nondeterminative discrimination; a tangible out-of-pocket injury usually has occurred.[132] Moreover, as we discuss below, Congress now has amended Title VII to make clear that nondeterminative discrimination is actionable, recognizing that even when discrimination made no difference to the outcome of the employment decision, liability for the discrimination nonetheless should be imposed.[133]

D. *The 1991 Civil Rights Act*

Largely in response to a series of 1989 Supreme Court decisions, Congress enacted the Civil Rights Act of 1991.[134] One of the decisions affected by the Act was *Price Waterhouse.*

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[129] *Burke*, 112 S. Ct. 1827, 1873 (1992).

[130] *Id.* at 1871. *See also* Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1251 (1988).

[131] *Harris*, 114 S. Ct. at 371; *Meritor*, 477 U.S. at 67–68. See Gudel, *supra* note 107, at 96–101, who argues that Title VII is not a tort action but a statute that prohibits certain acts. Accordingly, he says, use of tort law's "but for" model is inappropriate. *Id.* at 97. Professor Gudel advocates analyzing all disparate treatment cases as sexual harassment cases are analyzed, focusing on whether a person has been treated differently because of her sex, without regard to motive or the presence of make-whole relief. *Id.* at 95. *See also* Belton, *supra* note 130, at 1242.

[132] *See supra* notes 120–23 and accompanying text.

[133] *See infra* notes 134–42 and accompanying text. Whether these amendments apply retroactively is a question the Supreme Court has agreed to consider during its upcoming term. Landgraf v. USI Film Prods., 968 F.2d 427, 432–33 (5th Cir. 1992), *cert. granted in part*, 113 S. Ct. 1250 (1993); Harris v. Roadway Express, Inc., 973 F.2d 490, 495–97 (6th Cir. 1992), *cert. granted in part*, 113 S. Ct. 1250 (1993).

[134] "The purposes of this Act are . . .

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace . . . .

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."
Pub. L. No. 102–166, § 3 (Nov. 21, 1991).

Section 107 of the 1991 Act provides that "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."[135] Liability thus attaches when an employment decision is motivated even in part by an unlawful motive and even when the employer can show it would have made the same decision anyway.[136] Congress thus has rejected a "but for" causation approach to Title VII liability. Causation still is required in the sense that the unlawful factor must have been a motivating factor for the adverse decision; bad thoughts alone remain outside the statute's prohibitions.[137] But causation is satisfied whenever the employer permits the unlawful factor to play a role in its employment decisions and even when the discrimination is nondeterminative.[138] While liability attaches when the unlawful factor is a motivating one, section 107 does permit a limitation of remedies when the employer can show "it would have taken the same action in the absence of the impermissible motivating factor."[139] The "but for" analysis endorsed by *Price Waterhouse* thus is removed from the liability stage of the litigation and placed in the remedial stage.

Section 107 only amends Title VII, and not other employment discrimination statutes, such as the ADEA, section 1981 and the ADA. Whether the courts will continue to follow a *Price Waterhouse* approach to liability under these statutes is unclear.[140] But as set forth above, that analysis does not support denying liability in after-acquired evidence

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[135] Pub. L. No. 102-166, § 107 (Nov. 21, 1991).

[136] Not only the language but the legislative history make clear Congress's intent to reject *Price Waterhouse*'s "but for" approach to liability. *See* 137 CONG. REC. H3935, H3948 (daily ed. June 5, 1991); 137 CONG. REC. H4432 (daily ed. June 12, 1991); 137 CONG. REC. H9529 (daily ed. Sept. 7, 1991); 137 CONG. REC. H9532 (daily ed. Nov. 7, 1991); 137 CONG. REC. S15235, (daily ed. Oct. 25, 1991); 137 CONG. REC. S15468, S15242 (daily ed. Oct. 30, 1991).

[137] *See* Sullivan, *supra* note 71, at 1139–45. For a criticism of § 107, see Paul A. Cox, *A Defense of "Necessary Cause" in Individual Disparate Treatment Theory*, 11 ST. LOUIS U. PUB. L. REV. 29 (1992). See also Gudel, *supra* note 107, at 69, who regards § 107 as a "disaster" because it will provide liability for cases of "nondeterminative discrimination" where plaintiff actually was hired for the position in question and because it injects a "motivating factor" analysis into Title VII.

[138] Professor Gudel believes the focus on motivation should be dropped in favor of a focus on the character of the act. He advocates focusing on whether the plaintiff has been treated differently because of her race or sex, rather than focusing on the defendant's intent or motive. Gudel, *supra* note 107, at 70.

[139] Pub. L. No. 102-166, § 107 (Nov. 21, 1991). For a discussion of this aspect of § 107, see *infra* notes 179–92 and accompanying text. See also Brodin, *supra* note 36, at 312–22, 320 n.16, who advocated the approach to causation Congress enacted in the 1991 Civil Rights Act.

[140] Prior to the 1991 Civil Rights Act, *Price Waterhouse* was applied to cases arising under the ADEA. *See, e.g.*, Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 180–81 (2d Cir. 1992).

cases.[141] And for Title VII cases, section 107 confirms that liability exists when an employer in fact acts, even in part, out of unlawful motives.[142]

The EEOC so reads the amended statute. In its Enforcement Guidance on disparate treatment cases, the EEOC addresses the 1991 Act's impact on after-acquired evidence cases and correctly concludes that liability is present when the employer in fact acts for unlawful reasons, regardless of whether it later discovers reasons that would have justified the act.[143] Because the EEOC is the agency responsible for administering Title VII, its determination should be given some measure of deference by reviewing courts, even though its position is reflected only in a "policy guidance," and not in a rule,[144] and even if the EEOC is not entitled to the full measure of deference accorded to agencies with rulemaking or adjudicative power.[145] Its position on liability in after-acquired evidence cases, a position fully supported by the case law and the statute,[146] before and after its amendment, merits respect from the courts.

In summary, after-acquired evidence is not liability limiting. When an employer acts for discriminatory reasons, it has violated the law. Does a liability determination, however, necessarily entitle a plaintiff in an after-acquired evidence case to the full panoply of remedies that would otherwise be available? We turn now to this question.

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[141] *See supra* notes 57–133 and accompanying text.

[142] The lower courts have recognized that § 107 undercuts the *Summers* rationale. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181 (11th Cir. 1992); Washington v. Lake County, 969 F.2d 250, 255 n.4 (7th Cir. 1992); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323 (D.N.J. 1993). But see Williams & Davis, *supra* note 2, at 8–9, who predict that courts will continue to accept the after-acquired evidence defense despite § 107.

[143] EEOC Enforcement Guidance, *supra* note 14. The EEOC asserts that for a defendant to avoid relief under § 107, the legitimate motives "must have been operating at the time of the decision." *Id.* at 20. Thus, after-acquired evidence will not allow an employer to avoid damages under § 107. The Guidance, moreover, expressly disavows the *Summers* approach to after-acquired evidence.

[144] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 71 (1986); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971). *But see* Russell v. Microdyne Corp., 830 F. Supp. 305, 308 (E.D. Va. 1993).

[145] Under Chevron U.S.A. v. Natural Resources Defense Council, Inc., an agency's construction of its enabling act is entitled to deference from the courts whenever the statute is silent or ambiguous, 407 U.S. 837, 833–34 (1984). While agencies that have been confided adjudicative or rulemaking authority may be the only ones entitled to a full measure of *Chevron* deference, see Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071, 2094 (1990), even agencies lacking such power are still entitled to some measure of deference. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 593–94 (1982). The Supreme Court, moreover, has recognized the EEOC's interpretations of Title VII are entitled to deference, notwithstanding the EEOC's lack of enforcement power. *See* sources cited *supra* note 144.

[146] *See supra* notes 57–133 and accompanying text.

III. Remedies in After-Acquired Evidence Cases

A plaintiff who establishes an employer's liability in an after-acquired evidence case can be expected to contend that her wrongdoing should have no effect on the potential remedy. When the wrongdoing undoubtedly would have been discovered in the absence of discrimination, it is easy to reject this contention. But an argument for full remedies has considerable appeal in cases in which the employee's misconduct has been discovered only in the process of litigation on her employment discrimination claim. However, it ultimately must be rejected in these cases as well. If an employer establishes that it would have discharged the plaintiff on the basis of the after-acquired evidence, the employer should be permitted to treat the plaintiff's employment as at an end from the point at which the employer actually discovers the evidence. The plaintiff's backpay award, therefore, should terminate at this point and the plaintiff should be denied reinstatement. Compensatory and punitive damages, however, where otherwise available under the applicable statute, should remain recoverable.

A. *Backpay and Reinstatement*

1. Wrongdoing Discovered Independent of the Litigation

While a backpay and reinstatement award is neither mandatory nor automatic,[147] a plaintiff generally is entitled to "make whole" relief that places her "as near as may be, in the situation [s]he would have occupied if the wrong had not been committed."[148] In most cases, this "make whole" relief results in an award of full backpay to the time of judgment and reinstatement.[149] In after-acquired evidence cases, however, a plaintiff is made whole, in an equitable relief sense, by an award of backpay that ends at the point of the employer's discovery of the plaintiff's wrongdoing, provided the employer can prove the wrongdoing would have resulted in termination under the employer's personnel policies.[150] This is particularly apparent in cases in which plaintiff's wrongdoing was discovered independent of the litigation.

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[147] Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

[148] *Id.* at 418.

[149] *Id.* at 421; Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); *see* Belton, *supra* note 130, at 1258; Sullivan, Zimmer & Richards, *supra* note 43, § 14.4.3. *See generally* Robert Belton, Remedies in Employment Discrimination Law (1992) (excellent discussion of remedial issues).

The reason for denying full backpay and reinstatement in an after-acquired evidence case is straightforward. An employer is free to apply its personnel policies so long as it applies those policies in a nondiscriminatory way.[151] A prevailing plaintiff in an employment discrimination action, like any other employee, should remain subject to nondiscriminatory discipline, up to and including discharge, for violating the employer's policies. An employer who establishes that after-acquired evidence is discharge-generating under its policies should be permitted to treat the employment relationship (and thus backpay) as at an end at the earliest point consistent with the principles underlying employment discrimination law.[152] That point is neither earlier nor

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[150] In determining the ending point for a backpay award in employment discrimination cases generally, the lower courts, following the Supreme Court's lead, have engaged in a hypothetical reconstruction of "the conditions and relationships that would have [existed] had there been no 'unlawful discrimination.'" Teamsters v. United States, 431 U.S. 324, 371–72 (1977); *see* Franks v. Bowman Transp. Co., 424 U.S. 747, 764, 769 (1976) (discussing make whole objective of backpay and remedies). Thus, when the employer can show the employee's job would have been eliminated, *see, e.g.*, Hill v. Spiegel, Inc., 708 F.2d 233, 238 (6th Cir. 1983), or the employee would have been terminated, *see, e.g.*, George v. Farmers Elec. Coop., Inc., 715 F.2d 175, 179 (5th Cir. 1983), for nondiscriminatory reasons, backpay ends at that point, as does a right to reinstatement. Belton, *supra* note 149, §§ 7.3, 9.26 (1992). From time to time, moreover, employee misconduct has served as a bar to reinstatement. *Id.* § 7.35.

While such hypothetical reconstructions are not appropriate at the liability stage, they are appropriate at the remedial stage in determining questions of "make whole" relief. For example, the Civil Rights Act of 1991 limits the availability of Title VII remedies based on the hypothetical question of what the employer would have done in the absence of a discriminatory motive. Civil Rights Act of 1991, § 107 (adopting "but for" test in mixed motive cases to limit Title VII remedies, but not Title VII liability). Section 107 is consistent with the approach taken in *Franks* and *Teamsters*. For a discussion of the relevance of § 107 in after-acquired evidence cases, see *infra* notes 179–91 and accompanying text (arguing Congress did not intend for courts to apply particular remedial limitations of § 107 in such cases).

[151] Employment discrimination statutes prohibit discrimination. They do not otherwise interfere with managerial prerogatives. *See* Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *see also* § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g)(2)(A) ("No order of the court shall require the admission or reinstatement of an individual . . . or the payment to him of any back pay, if such individual was . . . refused employment or suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a)."). *But see* Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to 'Just Cause' Protection Under Title VII*, 2 IND. REL. L. J. 519 (1978).

Section 706(g), however, does not support a *total* denial of backpay in after-acquired evidence cases. The plaintiff *was* fired for a discriminatory reason, and actual victims of discrimination remain entitled to relief. Section 706(g) "merely preserves the employer's defense that the nonhire, discharge, or nonpromotion [of an individual claimant] was for a cause other than discrimination." Belton, *supra* note 130, at 1303 (quoting EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 176 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978)). At the same time, § 706(g) does support the termination of backpay from the point of discovery of the employee's wrongdoing and a denial of reinstatement when the employer can show it would have taken the action on nondiscriminatory grounds. *See infra* note 189 and accompanying text.

[152] *Cf.* note 151 *supra* (citing sources).

later than the actual discovery of the evidence of employee wrongdoing. To allow the employer the benefit of the evidence as of some earlier point, as most lower courts have done in the after-acquired evidence cases, is to give a safe harbor to discrimination. To award full backpay and reinstatement is to give a windfall to the plaintiff and to interfere unjustifiably with the character of the employment relationship.[153]

In a recent article critical of the Supreme Court's *Price Waterhouse* decision, Professor Mark Weber argues that plaintiffs in mixed motive cases deserve full backpay and reinstatement, unless they are incapable of performing the work.[154] Professor Weber's reasoning, which he presumably would apply as well with respect to after-acquired evidence cases, is quite simple. The employer's unlawful discrimination caused harm. The harm was the plaintiff's discharge. The plaintiff deserves compensation for the harm. The imperative of compensation requires reversal of the discharge, i.e., full backpay and reinstatement.[155]

Professor Weber's argument should be rejected, as it has been rejected by Congress in the mixed motive context,[156] because it fails to take into account the competing principle that even a prevailing plaintiff in an employment discrimination case should remain subject to the employer's legitimate managerial discretion. The "harm" done by employment discrimination cannot be defined in the abstract but takes its shape from its context, and its context includes the employer's right to discipline or discharge employees for lawful reasons.

Professor Weber also argues for full remedies in employment discrimination cases, even "when the harm would have happened

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[153] This is the approach advocated by the EEOC. *See infra* notes 192–93 and accompanying text. It is also the approach currently being followed by the NLRB in after-acquired evidence cases. *See* John Cuneo, Inc., 298 NLRB No. 125, at 861 (1990); *supra* note 19 and accompanying text.

In a recent case arising under the National Labor Relations Act, however, the NLRB ordered reinstatement and full backpay to an employee discriminated against because of protected activities, despite an Administrative Law Judge's finding that the employee had lied on the witness stand during the NLRB proceedings. The Board's order was affirmed by the Tenth Circuit. NLRB v. ABF Freight Sys., Inc., 982 F.2d 441, 445–46 (10th Cir. 1992). The Supreme Court has granted certiorari to consider the following issue: "Does employee forfeit remedy of reinstatement with backpay after administrative law judge finds that he purposefully testified falsely during administrative hearing?" ABF Freight Sys., Inc. v. NLRB 113 S. Ct. 2959 (1993).

[154] Weber, *supra* note 32, at 524–39. But see Brodin, *supra* note 36, at 324, who argues that when an employer can show it would have made the same decision anyway, backpay and reinstatement to the plaintiff should be denied.

[155] Weber, *supra* note 32, at 524–25.

[156] *See infra* notes 180–93 and accompanying text (discussing § 107 of the Civil Rights Act of 1991).

anyway,"[157] because imposing full remedies "enhances the deterrent effect of the antidiscrimination laws"[158] and "vindicate[s] the community's moral standards."[159] In an after-acquired evidence case, however, these objectives are sufficiently addressed through the remedies that remain available to a plaintiff even if an employer can establish the after-acquired evidence defense to full backpay and reinstatement.[160] There is no reason, therefore, to overcompensate the plaintiff or to prevent the employer from enforcing nondiscriminatory personnel policies in order to serve these objectives.

2. Wrongdoing Discovered as a Result of the Litigation

To what extent, however, does the above hold true when the evidence of plaintiff's wrongdoing is a "fruit" of the discrimination, i.e., when it is uncovered through discovery on the discrimination claim? This is the most difficult problem posed by after-acquired evidence.

In *Wallace v. Dunn Construction Co.*,[161] the Eleventh Circuit generally embraced the proposition that a plaintiff in an after-acquired evidence case should be entitled to prevail on liability but should be denied some forms of relief otherwise available for employment discrimination: "[I]f [the employer] now has a legitimate motive that would cause [the plaintiff's] discharge, then reinstatement or front pay would go beyond making [the plaintiff] whole and would unduly trammel [the employer's] freedom to lawfully discharge employees."[162] The *Wallace* majority, however, disagreed with the idea that the plaintiff's right to backpay automatically should terminate at the point when the employer actually acquires discharge-generating evidence.[163]

In the view of the *Wallace* majority, an employer who never would have discovered the discharge-generating evidence if the plaintiff had not sued for employment discrimination should not be entitled to take advantage of the evidence to cut off the plaintiff's right to full backpay.[164] To award less than full backpay under these circumstances, according to the *Wallace* majority, would, in a sense, punish the plain-

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[157] Weber, *supra* note 32, at 531.

[158] *Id.*; Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975).

[159] Weber, *supra* note 32, at 533.

[160] *See infra* notes 173–79 and accompanying text (discussing further remedies that remain available).

[161] 968 F.2d 1174 (11th Cir. 1992).

[162] *Id.* at 1182.

[163] *Id.*

[164] *Id.*

tiff for asserting in court the right against employment discrimination and would give the employer a windfall.[165] The *Wallace* court, therefore, would allow early termination of a plaintiff's right to backpay only if an employer could prove that it would have acquired the discharge-generating evidence before judgment in the employment discrimination action whether or not the plaintiff had brought the action.[166]

While the *Wallace* approach to backpay in after-acquired evidence cases at first glance seems correct, ultimately it is wrong. Anyone who contemplates bringing an employment discrimination action must weigh the risk that the defendant will uncover, in preparing for trial, information about the plaintiff that triggers a discharge policy. There is nothing inherently illegitimate about an employer's acquisition of such information through pretrial discovery or through its own pretrial investigation. The *Wallace* court seems to recognize this point in denying reinstatement in after-acquired evidence cases,[167] but then ignores the point on the issue of backpay. If reinstatement should not be available, then full backpay should not be available either, since the basic purpose of backpay is to afford a "make whole" remedy covering the period prior to reinstatement.

An employer's discrimination should not serve as a plaintiff's guarantee of future employment. That the employer learned of the wrongdoing through discovery does not alter the fact that it now knows about conduct that, under nondiscriminatory and thus lawful policies, disqualifies the plaintiff from further employment. It is doubtful Congress intended to require judges, juries or employers to turn a blind eye to this information. While Congress has outlawed discrimination, it has been careful to otherwise preserve managerial prerogatives.

Section 706(g) of Title VII, for example, instructs that a court shall not order backpay or reinstatement when an employer acts for any reason other than discrimination on the basis of race, color, sex, religion, or national origin.[168] By its terms, section 706(g) does not forbid a full backpay or reinstatement remedy in an after-acquired

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[165] *Id.* The Eleventh Circuit's position derives from the notion embodied in *Franks* and *Teamsters* that a prevailing plaintiff is to be placed in the position she would have been in had no discrimination occurred. *See supra* note 150 and accompanying text. When a defendant would not have discovered the wrongdoing absent its own discrimination, full backpay, the court reasons, puts the plaintiff where she would have been had no discrimination occurred.

Franks and *Teamsters*, however, while providing support for the Eleventh Circuit's position, were not after-acquired evidence cases. To read them as mandating full backpay and reinstatement in an after-acquired case is to read them too broadly.

[166] *Wallace*, 968 F.2d at 1182.

[167] *See supra* note 164 and accompanying text.

[168] *See supra* note 151.

evidence case because the employer has discriminated in making the employment decision triggering the litigation. But it suggests a congressional concern over undue interference with management decisions. That the employer acquired evidence of employee wrongdoing through the litigation process simply does not seem to outweigh its managerial right to act on that information. Surely, Congress did not intend, for example, to allow the counterfeit doctor in the *Summers* hypothetical to secure reinstatement.[169]

Section 107 of the Civil Rights Act of 1991, which denies damages, backpay and reinstatement to plaintiffs in mixed motive cases, reflects a similar concern with preserving management prerogatives, although it, too, is *not* dispositive in an after-acquired evidence case.[170] There is nothing to prevent an employer in an after-acquired evidence case from unilaterally rehiring a discharged plaintiff upon its discovery of the after-acquired evidence, thus ending the backpay period, and then immediately discharging the plaintiff on the basis of the after-acquired evidence.[171] This second discharge would present the mixed motive problem, and under section 107, the plaintiff would not be entitled to full backpay or to reinstatement if the employer could sustain the mixed motive defense, although she would remain entitled to compensatory and punitive damages arising from the first discharge. It should not be necessary for the employer to go through a ritual of rehiring and redischarge in order to secure immunity from full backpay and reinstatement.

Finally, it must be remembered that backpay would not be reduced and reinstatement denied unless the employer can prove it would have acted on the basis of after-acquired evidence. Because questions of remedy will arise only in cases in which liability already has been determined, establishing the after-acquired evidence defense to full backpay and reinstatement should prove difficult for employers.

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[169] *See supra* note 26 and accompanying text (discussing *Summers* hypothetical). *See also* Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421, 447 (1986) (§ 706(g) confirms Congress did not intend for courts to order employment of unqualified workers).

[170] See *infra* notes 180–89 and accompanying text for a discussion of § 107.

[171] *See, e.g.*, Chrysler Motors v. Allied Ind. Workers, 2 F.3d 760 (7th Cir. 1993). In that case, an employee was fired for sexually harassing a co-worker, but an arbitrator ordered his reinstatement. The reinstatement order issued after the arbitrator refused to consider other instances of harassment by the employee because the employer was unaware of those additional instances at the time it discharged the worker. After failing in its bid to get the arbitrator's award set aside on the basis of public policy, the employer reinstated the employee, paid him one day's wages, and then fired him, based on other instances of harassment that had not been considered by the arbitrator. The Seventh Circuit upheld the employer's actions, reasoning that the employer retained the right to act on the basis of the after-acquired evidence of wrongdoing.

The credibility of an employer's hypothetical assertions of what it would have done upon learning of the misconduct will be assessed against the backdrop of a liability finding. That liability finding necessarily will have resulted from a rejection of the employer's contention that it did not discriminate. Having already been found not credible on the discrimination claim, an employer presumably will have to have powerful evidence to persuade the judge or jury that it would in fact have acted on the basis of the after-acquired evidence.

This use of after-acquired evidence at the remedial phase may be contrasted with courts' present, and improper, disposition of after-acquired evidence cases by summary judgment at the liability stage, when employers' affidavits routinely are accepted as dispositive.[172] An after-acquired evidence defense presented after a full trial on, and a determination of, liability may be expected to be believed by the fact-finder only in cases of egregious employee wrongdoing. And it is only in those cases that full backpay and reinstatement would be denied.

B. *Compensatory and Punitive Damages*

An employer whose discriminatory conduct causes emotional pain or other damages, or whose especially despicable actions justify an award of punitive damages, should not escape these remedies merely because the employer later discovers a nondiscriminatory basis for discharging the victim. Compensatory damages attributable to the employer's discriminatory conduct and punitive damages, therefore, should be available in after-acquired evidence cases, if they are otherwise awardable under the relevant statute.[173]

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[172] *See supra* notes 11–12 and accompanying text. Moreover, should an employer move for summary judgment at the remedial stage, in reliance on self-serving affidavits making hypothetical assertions, rejection of the motion generally should occur. Because the employer's credibility already will have been put in question by the liability finding, a question of fact on credibility necessarily will exist, making summary judgment improper. *See supra* note 12.

[173] At the federal level, the availability of damages for employment discrimination varies depending on the statutory regime. Under 42 U.S.C. § 1981, compensatory and punitive damages are available for racial discrimination by employers. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 182 n.4 (1989). These damages should be available in after-acquired evidence cases arising under the statute.

Under the ADEA, a prevailing age discrimination plaintiff is not entitled to recover plenary compensatory or punitive damages but is entitled to an award of liquidated damages in an amount equal to double the backpay award if the discrimination was willful. 29 U.S.C. § 626. In an after-acquired evidence case, an ADEA plaintiff's liquidated damages should be reduced commensurate with any reduction in the backpay award.

Under Title VII and the ADA, as amended, prevailing plaintiffs in disparate treatment cases are entitled to compensatory and punitive damages, up to certain statutorily-established caps. 42

As numerous commentators have noted,[174] and as Congress has recognized,[175] discrimination causes its victims to suffer harms that go well beyond lost wages. Discriminatory decisions "inflict psychological injury by stigmatizing their victims as inferior."[176] As Professor Paul Brest points out, discrimination based on immutable characteristics, such as race or sex, is especially harmful, not only because the victim is unable to avoid the discrimination but because too often the injuries are cumulative as well, given the pervasiveness of discrimination in our society.[177] These psychological harms of discrimination are not lessened by the plaintiff's status as a wrongdoer. She remains a victim of the "humiliation, embarrassment and psychological harms" that discrimination inflicts.[178]

There is a real and significant distinction, however, between compensatory damages attributable to the employer's discrimination and compensatory damages attributable to the plaintiff's status of being unemployed. A plaintiff's right to recover compensatory damages for the status of being unemployed should not extend beyond the point at which the employer actually acquires discharge-generating evidence, again because the employer is entitled at that point to treat the employment relationship as at an end, and the employer therefore should not be held legally responsible for the plaintiff's continued lack of a job.

On the other hand, an award of punitive damages serves a deterrent function. The employer who treats his victim "as less than human"[179] by maliciously discriminating against her on the basis of, for example, race or sex, is no less a wrongdoer in an after-acquired evidence case than is the employer's counterpart in a case where no such evidence is discovered. Viewed in terms of the defendant's conduct, there is no meaningful basis for denying punitive damages in an after-acquired evidence case.

U.S.C. § 1981a. Prior to the 1991 Civil Rights Act, Title VII had been construed as not providing for the recovery of such damages. *See* United States v. Burke, 112 S. Ct. 1867, 1874 (1992).

[174] *See supra* notes 124–25 (citing sources).

[175] *See supra* note 173.

[176] Paul Brest, *The Supreme Court's 1975 Term. Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 8 (1976).

[177] *Id.* at 10.

[178] Stonefield, *supra* note 103, at 124–25.

[179] Weber, *supra* note 32, at 534.

C. *Section 107 of the 1991 Civil Rights Act*

As we have previously suggested, section 107 of the 1991 Civil Rights Act supports a limitation of backpay and reinstatement in after-acquired evidence cases. It could be argued that section 107 precludes *any* monetary relief to plaintiffs in after-acquired evidence cases. Such an argument, however, would be incorrect.

Section 107 places a significant limitation on remedies in Title VII mixed motive actions. While liability 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,"[180] an employer who can demonstrate that the same action would have been taken against the plaintiff anyway "in the absence of the impermissible motivating factor"[181] can escape some forms of Title VII relief. Although the employer remains liable for attorneys' fees and costs, and the court is free to impose declaratory or injunctive relief if appropriate,[182] the plaintiff is not entitled to "damages or . . . an order requiring any admission, reinstatement, hiring, promotion or payment."[183]

Section 107, however, should not control remedies in after-acquired evidence cases. First, there is nothing in the text or legislative history of the section to indicate that Congress intended to limit the availability of damages in after-acquired evidence cases.[184] Congress enacted section 107 to modify the Supreme Court's decision in *Price Waterhouse*, a mixed motive case.[185] Second, there is an important difference between the moral culpability of employers in mixed motive cases and in after-acquired evidence cases that could justify the denial of damages in one setting but not in the other.[186] In mixed motive cases,

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[180] Civil Rights Act of 1991, § 107 (codified at 42 U.S.C. § 2000e-2(m)). For a discussion of § 107's impact on employer liability in mixed motive cases, see *supra* notes 134–46 and accompanying text.

[181] 42 U.S.C. § 2000e-5(g)(2)(B).

[182] *Id.*

[183] *Id.*

[184] The legislative history of the 1991 Civil Rights Act is silent in all respects on the question of after-acquired evidence.

[185] *See, e.g.*, Estate of Reynolds v. Martin, 985 F.2d 470, 475 n.2 (9th Cir. 1993) (§ 107 modifies holding of *Price Waterhouse* by providing for liability in mixed motive cases); Washington v. Lake County, 969 F.2d 250, 255 n.4 (7th Cir. 1992) (same).

[186] This is not to suggest that compensatory and punitive damages should be denied in cases of mixed motive discrimination. For the reasons convincingly stated by Professor Weber and others, they should not. See *supra* notes 124–25 and accompanying text for a discussion of these authorities.

Section 107 has been understood, however, to deny compensatory and punitive damages to

employers act from both permissible and impermissible motives, and perhaps in the overall scheme of things such employers should be accorded immunity from compensatory and punitive damages,[187] but it does not follow that employers who act only from unlawful motives and later discover nondiscriminatory reasons that would justify their actions also should be accorded immunity.

In its recently-issued enforcement guidance to agency employees, the EEOC rejects the proposition that section 107 limits the availability of compensatory and punitive damages in after-acquired evidence cases:

> In order for a case to be considered one of "mixed motive," to which Section 107 of the new Act applies, both legitimate and discriminatory motives must have been operating at the time of the decision. If an employer terminates an individual on the basis of a discriminatory motive, but discovers afterwards a legitimate basis for the termination, then the legitimate reason was not a motive for the action.[188]

Although the views of the Commission are not binding, they are the views of the federal agency charged by Congress with the responsi-

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a plaintiff in a mixed motive case when a defendant carries its burden of proving it would have made the same decision anyway. *See* EEOC Advance Policy Guidance; Civil Rights Act of 1991, Law and Explanation ¶ 130 (CCH) (Dec. 5, 1991). Certainly, this reading is consistent with the legislative history of the 1991 Civil Rights Act. Early versions of the bill permitted these damages to be recovered in mixed motive cases. Civil Rights and Women's Equity in Employment Act of 1991, H.R. 1 (June 15, 1991). This provision proved controversial during debates on the legislation. *See, e.g.*, Cong. Rec. H3933, H3944 (June 5, 1991). The bill was amended to its present form with the representation that damages would not be recoverable. *See, e.g.*, Cong. Rec., H9529 (Nov. 7, 1991).

As enacted, § 107, by its terms, does provide that "the court" "shall not award damages" in a mixed motive case when defendant carries its burden of demonstrating the same decision would have been made anyway. Section 107 amended § 706(g) of Title VII.

Compensatory and punitive damages, however, are made available to Title VII and ADA plaintiffs, not through § 706(g) but through 42 U.S.C. § 1981a. That statutory provision, located outside Title VII, provides for jury trials in cases of intentional discrimination under Title VII and provides that "the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g)." Excluded from compensatory damages is any "type of relief authorized under Section 706(g)." Thus, notwithstanding the wording of § 107 and its legislative history, plaintiffs in Title VII mixed motive cases may be expected to argue that compensatory and punitive damages remain awardable by *juries* under *§ 1981a.*

[187] *But see supra* note 186.

[188] Equal Employment Opportunity Commission, Decision no. 915-002, Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, 1992 WL 189088, at 8 (July 14, 1992).

bility of administering Title VII and, thus, deserve deference from the courts.[189]

It should be noted that prevailing plaintiffs in after-acquired evidence cases also might invoke section 107, arguing that it makes the entire array of Title VII remedies available to them, including full backpay and reinstatement. The provision, after all, limits the availability of these remedies only when the employer can show it would have acted in the same way "in the absence of the motivating factor," and in an after-acquired evidence case, the employer cannot carry this burden because it acquired its nondiscriminatory reason for taking action against the plaintiff only after the action was taken.[190]

While section 107 does not limit the remedies available to prevailing plaintiffs in after-acquired evidence cases, the principles previously discussed provide those limits.[191] An employer who can prove it would have fired the plaintiff upon discovery of her wrongdoing need not reinstate that plaintiff nor pay her backpay beyond the point of the discovery of the evidence .

The EEOC agrees that section 107 should not be read to mandate full backpay and reinstatement in after-acquired evidence cases:

> [I]f the employer produces proof of a justification discovered after-the-fact that would have induced it to take the same action, the employer will be shielded from an order requiring it to reinstate the complainant or to pay the portion of backpay accruing after the date that the legitimate basis for the adverse action was discovered . . . .[192]

The Commission, however, goes on to say that the employer also should be immune from the payment of "the portion of compensatory damages that would cover losses arising after that date."[193] This last statement sweeps too broadly. In easily imaginable circumstances, a plaintiff could sustain compensatory damages after the employer's discovery of discharge-generating evidence, but wholly traceable to the employer's original discriminatory treatment of the plaintiff. Such a plaintiff should not be denied recovery of these damages merely because they arose technically after the discovery of the evidence.

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[189] *See supra* notes 144–46 and accompanying text.
[190] *See supra* notes 80–102 and accompanying text.
[191] *See supra* notes 167–72 and accompanying text.
[192] EEOC Revised Enforcement Guidance, *supra* note 14, at 8.
[193] *Id.*

D. *Declaratory and Injunctive Relief and Attorneys' Fees*

Under all of the major federal statutory regimes prohibiting employment discrimination, a prevailing plaintiff may be entitled to a declaration that the defendant's conduct was unlawful[194] and to injunctive relief to prevent further occurrences.[195] A prevailing plaintiff in an after-acquired evidence case ordinarily should be awarded declaratory relief. On the other hand, no injunctive relief generally should be available to an individual plaintiff in an after-acquired evidence case, because the plaintiff is not entitled to reinstatement and therefore would lack standing to enforce the terms of the injunction.[196]

Prevailing plaintiffs in employment discrimination cases routinely are awarded attorneys' fees.[197] A recent Seventh Circuit decision, *Kristufek v. Hussman Foodservice Co.*,[198] takes the position that a prevailing plaintiff in an after-acquired evidence case is not entitled to any attorney's fees beyond the point at which the employer actually discovers discharge-generating evidence.[199] Such a restriction, like the EEOC's position on compensatory damages, sweeps too broadly. Because after-acquired evidence should have no effect on liability or on most forms of relief in employment discrimination cases, a prevailing plaintiff should be entitled to recover attorney's fees generated to prove liability and that the plaintiff's entitlement to these forms of relief exists, even if the fees are earned after the employer acquires discharge-generating evidence.

E. *Jury Trials and After-Acquired Evidence*

The pivotal factual issue in the after-acquired evidence defense—whether the employer would have discharged the plaintiff on the basis of the after-acquired evidence—is just the sort of issue one would expect to be resolved by a jury. The question of whether there is a right to a jury trial on the issue under the federal civil rights laws, however,

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[194] This is true under Title VII, 42 U.S.C. § 2000e-5(g); under § 1981, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975) (plaintiff in § 1981 action entitled to legal and equitable relief); and under the ADEA, 29 U.S.C. § 626(b) (1988).

[195] *See supra* note 168 (citing sources).

[196] *See, e.g.*, Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992) (because plaintiff should be denied reinstatement and therefore no longer would be employed, she should be denied injunction against further unlawful practices).

[197] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978).

[198] 985 F.2d 364 (7th Cir. 1993).

[199] *Id.* at 371 (plaintiff not entitled to attorney's fees for period after employer's discovery that plaintiff falsified educational qualifications).

turns out to be somewhat complicated. In a typical employment discrimination case that is tried to a jury, the jury decides liability and whether the plaintiff is entitled to so-called "legal" remedies such as compensatory and punitive damages.[200] The judge, however, rules on the availability of "equitable" remedies such as reinstatement and injunctive relief.[201] In an after-acquired evidence case, the would-have-discharged issue is for the jury if the jury must resolve it in order to determine either liability or the plaintiff's entitlement to "legal" remedies. If, as this Article argues, the after-acquired evidence defense is not a defense to an employer's liability for discrimination, then a jury need not resolve the would-have-discharged issue in order to determine liability. The parties' right to jury resolution of the issue, therefore, exists only if the jury must resolve the issue in determining the plaintiff's entitlement to "legal" remedies.

1. The Would-Have-Discharged Issue and The Backpay Remedy

The after-acquired evidence defense is a defense to full backpay. If the backpay remedy is a "legal" remedy for the jury's resolution, then the would-have-discharged issue also should be for the jury. Unfortunately, there is no single answer in federal law to the question of whether backpay is a "legal" remedy. Under the ADEA, if either party invokes the statutory right to a jury trial, the backpay remedy is treated as a "legal" remedy, so that the backpay issue is for the jury.[202] The jury, therefore, should decide whether the plaintiff's backpay should be cut off because the employer would have discharged the plaintiff on the basis of after-acquired evidence about the plaintiff. Moreover, the jury's determination of the would-have-discharged issue should be binding on the judge with respect to reinstatement and injunctive relief.[203]

There is some authority for the proposition that the jury should decide the backpay issue in section 1981 litigation, at least when the claim for backpay is not coupled with a claim for reinstatement.[204] On

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[200] Belton, *supra* note 149, § 7.5.

[201] *Id.*

[202] In Lorillard v. Pons, the Supreme Court inferred from the statutory language a congressional intent to provide a right to a jury trial under the ADEA on the question of an employer's liability for unpaid wages, 434 U.S. 575, 583 (1978). Soon thereafter, Congress amended the ADEA to make explicit the right to a jury trial on the issue. Belton, *supra* note 149, § 3.28, at 117–18 (discussing 29 U.S.C. § 626(c)(2) (1988)).

[203] *See, e.g.*, Skinner v. Total Petroleum Co., 859 F.2d 1439, 1443 (10th Cir. 1988) (when case involves both jury trial and bench trial, any essential factual issues central to both must be first tried to jury, so litigants' jury trial rights are not foreclosed on common factual issues).

[204] Setser v. Novak Inv. Co., 638 F.2d 1137, 1142 (8th Cir.), *rev'd in part on other grounds*, 657 F.2d 962, *cert. denied*, 454 U.S. 1064 (1981).

the other hand, there is authority for the conflicting view that the backpay issue is equitable in character and therefore is for the judge.[205]

In the period before the enactment of the 1991 Civil Rights Act, the Supreme Court declined repeatedly to rule on the question of whether the parties to Title VII actions were entitled to jury trials at all.[206] Almost without exception,[207] however, the lower federal courts concluded that neither the Seventh Amendment nor Title VII itself conferred a right to a jury trial.[208] Section 102 of the 1991 Civil Rights Act provides that "[i]f a complaining party seeks compensatory or punitive damages"[209] under the new legislation, then "any party may demand a trial by jury . . . ."[210] Section 102 also includes the caveat that "[c]ompensatory damages awarded under this section shall not include backpay . . . ."[211] If backpay is not an element of compensatory damages, then arguably it must be categorized as a species of equitable relief and remains the responsibility of the judge, as it was before 1991.

2. The Would-Have-Discharged Issue and Compensatory Damages

If an employer proves that the plaintiff would have been discharged on the basis of after-acquired evidence, then in a jury trial under section 1981, Title VII, or the ADA, the jury should not award the plaintiff all of the compensatory damages to which the plaintiff otherwise might be entitled. For example, a plaintiff who seeks compensatory damages for emotional distress caused by a long period of unemployment after a discriminatory discharge should not be entitled to the full amount of these damages, because the period of unemployment after the employer's actual discovery of the evidence should be attributed to the plaintiff's own discharge-generating conduct and not

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[205] Moore v. Sun Oil Co., 636 F.2d 154, 156 (6th Cir. 1980).

[206] Lytle v. Household Mfg., Inc., 494 U.S. 545, 549 n.1 (1990) (noting Court has not ruled on issue and declining to express view on it); Teamsters v. Terry, 494 U.S. 558, 572 (1990) (assuming without deciding that Title VII plaintiff has no right to jury trial).

[207] In Beesley v. Hartford Fire Ins. Co., Judge Acker concluded that the Seventh Amendment requires a jury trial in Title VII actions, 717 F. Supp. 781, 783–84 (N.D. Ala. 1989). For a discussion of Judge Acker's views, see Charles A. Horowitz, Note, *Judge Acker's Last Stand: The Northern District of Alabama's Lonesome Battle For the Right to Trial By Jury Under Title VII*, 39 WASH. U. J. URB. & CONTEMP. L. 135, 167–71 (1991).

[208] *See* Wilson v. Belmont Homes, Inc., 970 F.2d 53, 55–56 (5th Cir. 1992) (reaffirming Fifth Circuit position that plaintiff is not entitled to jury trial on backpay issue in Title VII action tried before effective date of Civil Rights Act of 1991, and noting unanimous view of other courts of appeals to same effect).

[209] Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. § 1981a(c)).

[210] *Id.* (codified at 42 U.S.C. § 1981a(c)(1)).

[211] *Id.* (codified at 42 U.S.C. § 1981a(b)(2)).

to the employer's discrimination. In a case, then, in which a plaintiff seeks compensatory damages, the jury ordinarily should resolve the would-have-discharged issue as part of the jury's responsibility to fix the amount of the compensatory damages.

Given that the backpay issue is for the jury under the ADEA and that most plaintiffs bringing disparate treatment claims under section 1981, Title VII, or the ADA will seek compensatory damages, jury resolution of the would-have-discharged issue should be the rule rather than the exception in federal employment discrimination litigation. Moreover, even in cases in which there is no statutory or constitutional right to jury resolution of the issue, it only makes sense for the court to use a sitting jury as an advisory jury on the question of what the employer would have done.[212] The issue is not a technical or complex one, and it is one about which a body of ordinary citizens might have useful insight. Judge Acker, in defending his decision to impanel an advisory jury in a pre-1991 Title VII action, quoted G.K. Chesterton:

> Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round.[213]

CONCLUSION

After-acquired evidence has rapidly developed into a powerful defense tactic for employers charged with unlawful discrimination. Courts err, however, in viewing this evidence as liability limiting. For liability purposes, what matters is the employer's motivation at the time the adverse employment decision is made. If the employer took action against an employee because of, for example, her race or sex, statutory causation requirements are satisfied. That an employer would have been justified in acting for nondiscriminatory reasons should not disguise the fact that it did act for discriminatory ones.

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[212] For a discussion of the use of advisory juries in employment discrimination cases, see Belton, *supra* note 149, § 3.31.

[213] Bozeman v. Sloss Indus. Corp., 138 F.R.D. 590, 592–93 (N.D. Ala. 1991) (quoting GILBERT K. CHESTERTON, TREMENDOUS TRIFLES: THE TWELVE MEN 86–87 (1922)).

Moreover, because the discrimination is determinative, it visits a tangible economic detriment on the victim, separate and apart from any intangible harms. An employee who loses her job due to the discriminatory animus of her employer has suffered an injury. She was fired *when* she was fired for unlawful reasons. A compensable injury has occurred.

After-acquired evidence, however, is properly used to limit a prevailing plaintiff's remedy. Although the employer has violated the law in discharging the plaintiff, it does not necessarily follow that she is entitled to full backpay and reinstatement. When the employer can show it would have fired her upon the discovery of her wrongdoing, it is appropriate to end the backpay period as of that time and to deny the plaintiff reinstatement. Because the employer is entitled to act on the basis of nondiscriminatory reasons, a partial backpay award makes the employee whole in an equitable relief sense. Compensatory damages attributable to the employer's unlawful action, as well as punitive damages, however, remain recoverable. That the plaintiff is a wrongdoer makes her no less a victim of her employer's unlawfully motivated acts nor her employer any less a violator of our nation's federal laws prohibiting discrimination.