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NOTES

EMPLOYEE MISCONDUCT AND THE AFFIRMATIVE DEFENSE OF "AFTER-ACQUIRED EVIDENCE"

*GIAN BROWN**

INTRODUCTION

The Civil Rights Act of 1991[1] amended and redefined[2] the protections Congress created in Title VII of the Civil Rights Act of 1964 ("Title VII").[3] Title VII specifically targets—and has profoundly changed—the workplace.[4] The 1991 amendment expands the remedies available to promote Title VII's two primary goals: the prohibition of employment discrimination[5] and the restoration of injured employees to their pre-discrimination position.[6] Equitable remedies[7] are no longer the only means of thwarting such discrimination. By providing for compensatory damages, punitive damages, and jury trials, employment discrimination claims now resemble traditional tort claims.[8]

Employers often combat employment discrimination claims with the affirmative defense of "after-acquired evidence,"[9] i.e., evidence of em-

* I thank Professor Manuel del Valle, Chief Administrative Law Judge, New York State Division of Human Rights, for his assistance with this Note.

1. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.).

2. For a discussion of this redefinition, see *infra* notes 84-94 and accompanying text.

3. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified at 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. III 1991)).

4. *See* George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 825-29 (1972); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 431-32 (1966).

5. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 Tex. L. Rev. 17, 97-98 (1991).

6. *See* Firefighters Local No. 1784 v. Stotts, 467 U.S. 561, 579-80 (1984); *Albemarle*, 422 U.S. at 418. *See also* Jennifer M. Follette, Note, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 Wash. L. Rev. 651, 652 (1993) (arguing that Congress's national policy against discrimination "embodies both a deterrent goal of eliminating discrimination in the workplace and a remedial goal of providing relief to discrimination victims").

7. For a discussion of the distinction between Title VII's legal and equitable remedies, see *infra* notes 37-43, 84-94 and accompanying text.

8. *See infra* notes 84-88 and accompanying text.

9. *See* Francis J. Connell, III, *Emerging Defenses to Employment Discrimination Claims: After-Acquired Evidence and Stray Remarks, in* Employment Litigation 1993, at 267, 270 (PLI Litig. & Admin. Practice Course Handbook Series No. 464, 1993); Elizabeth P. Johnson, *After-Acquired Evidence of Employee Misconduct: Affirmative Defense or Limitation on Remedies?*, 67 Fla. B.J. 76, 76 (June 1993). This Note supplements and develops previous Notes that discuss this affirmative defense. *See* Follette, *supra* note 6; William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and*

ployee misconduct uncovered by employers during the suit's discovery phase. While this misconduct would have served as a lawful reason for the employee's discharge,[10] it cannot serve as a "cause" since the employer did not know of it at the time of the discharge.[11] Most courts, however, dismiss the employee's suit on the ground that the misconduct precludes any form of relief, even if the employer actually discriminated.[12] Thus, the employer evades liability despite its discriminatory conduct. In that sense, therefore, the term is inaccurate, because what the employer actually "after-acquires" is an affirmative defense.[13]

Two forms of this affirmative defense exist. In wrongful discharge suits involving post-hiring misconduct, employers claim that they would have fired the employee had they known of the misconduct at the time of the discharge.[14] Alternatively, employers in wrongful refusal to hire suits argue that they would not have hired the employee had they learned of the misconduct.[15] In wrongful discharge suits involving pre-hiring misconduct, employers set forth both of these arguments—that they either would have fired the employee upon learning of such evidence or would never have hired the employee in the first place.[16]

The federal courts disagree over the appropriate response to the em-

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the Challenge Presented by Wallace v. Dunn Construction Co., *968 F.2d 1174 (11th Cir. 1992)*, 72 Neb. L. Rev. 330 (1993); Brian J. King, Survey, *The Use of After-Acquired Resume Fraud as a Defense to Discrimination Claims:* Washington v. Lake County, Illinois, 34 B.C. L. Rev. 406 (1993); Hugh Lawson, III, Casenote, Wallace v. Dunn Construction Co.*: Defining the Role of After-Acquired Evidence in Federal Employment Discrimination Suits*, 44 Mercer L. Rev. 1469 (1993).

10. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1176-77 (11th Cir. 1992); Washington v. Lake County, Ill., 969 F.2d 250, 253 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988); McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 606 (M.D. Tenn. 1992); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 519 (D. Kan. 1991); Punahele v. United Air Lines, 756 F. Supp. 487, 490 (D. Colo. 1991); Grzenia v. Interspec, Inc., No. 91 C 290, 1991 U.S. Dist. LEXIS 15093, at *5 (N.D. Ill. Oct. 18, 1991); Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees' Termination as a Defense in Employment Litigation*, 24 Suffolk U. L. Rev. 1, 1-2 (1990).

11. *See Summers*, 864 F.2d at 708.

12. *See id.*

13. For a discussion of the nature of affirmative defenses, see *infra* notes 100-02 and accompanying text.

14. *See, e.g., Summers*, 864 F.2d at 703 (employee would have been fired for fraud that occurred while plaintiff was employed); Mackey v. Board of Pensions of the United Methodist Church, No. 91 Civ. 5739, 1993 U.S. Dist. LEXIS 424, at *2-3 (N.D. Ill. Jan. 14, 1993) (employee would have been fired for unauthorized removal of files during employment); Smith v. Equitable Life Assurance Soc'y, 60 Fair Empl. Prac. Cas. (BNA) 1225, 1227 (S.D.N.Y. 1993) (employee would have been discharged for falsifying a group insurance application and an insurance claim); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1468 (D. Ariz. 1992) (employee would have been terminated for unauthorized removal of files).

15. *See* Punahele v. United Air Lines, 756 F. Supp. 487, 488-89 (D. Colo. 1991).

16. *See* Washington v. Lake County, Ill., 969 F.2d 250, 251-52 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 516 (D. Kan. 1991).

ployer's affirmative defense of "after-acquired evidence."[17] The majority approach bars an employee from any relief despite the occurrence of discrimination because the misconduct prevents the recognition of any legal injury for which a remedy may be granted.[18] These courts dismiss the employee's suit. But this result actually permits the employer to benefit from its discrimination.[19]

The minority approach recognizes that the employee was indeed injured and refuses to dismiss the cause of action. Once the court finds that the employee suffered a Title VII injury, it then separately considers which remedies should be granted in light of this misconduct.[20] The employer bears the burden of persuasion for showing, by a preponderance of the evidence, whether and in what manner the employee misconduct would have lawfully altered the employment relationship.[21] These courts have proposed two alternative views on the issue of back pay awards—some award back pay up until the date of the court's judgment,[22] while others limit recovery to the date the employer actually learned of the misconduct.[23] The Equal Employment Opportunity Commission espouses the minority approach and the view that back pay should be awarded until the date that the employer actually discovered the employee misconduct.[24]

This Note considers the use of the "after-acquired evidence" defense in wrongful discharge and wrongful refusal to hire actions. Part I examines the changes Title VII brought to the common law regarding employment discrimination, details the impact of amendments to Title VII, and gives an overview of the steps necessary to prove employer liability. Part II presents the issues raised by wrongful discharge suits involving either post-hiring misconduct or pre-hiring misconduct, and wrongful refusal to hire suits involving pre-hiring misconduct. It also discusses the majority and minority approaches employed by the courts, as well as the minority approach's two views on back pay damages. Part III argues that

17. *See* Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 304 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178 (11th Cir. 1992); Moodie v. Federal Reserve Bank, No. 91 CIV. 6629 (MEL), 1993 WL 370582, at *3 (S.D.N.Y. Sept. 20, 1993); Bray v. Forest Pharmaceuticals, Inc., 812 F. Supp. 115, 118 n.2 (S.D. Ohio 1993); Donald R. Livingston, *Revised EEOC General Counsel's Memo on Civil Rights Act of 1991 U.S. Equal Employment Opportunity Commission*, Daily Labor Report, Mar. 4, 1993, *available in* WESTLAW, 41 DLR F-1, 1993 [hereinafter "Revised EEOC Memorandum"].

18. For a discussion of the majority approach, see *infra* notes 109-34 and accompanying text.

19. *See* discussion *infra* part III.A.

20. *See Wallace*, 968 F.2d at 1181-84; *Moodie*, 1993 WL 370582, at *3. The Equal Employment Opportunity Commission espouses this approach. *See infra* notes 158-62 and accompanying text.

21. *See Wallace*, 968 F.2d at 1181 n.11; Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 328 (D.N.J. 1993).

22. *See infra* notes 151, 154-57 and accompanying text.

23. *See infra* notes 154-57.

24. *See infra* notes 158-62 and accompanying text.

the majority approach to wrongful discharge suits involving the affirmative defense of "after-acquired evidence" is fundamentally flawed because it allows an employer to benefit from information that it discovered only as a result of its discrimination. Instead, the minority approach, coupled with a case-by-case evaluation of available remedies, more fully satisfies the purposes of Title VII by properly recognizing that employee misconduct should not shield an employer's discrimination. This Note concludes that only the minority approach avoids giving either the employee or the employer a windfall while satisfying Title VII's goals—eliminating discrimination in the workplace and restoring injured employees to their pre-discrimination positions.

I. AN OVERVIEW OF EMPLOYMENT DISCRIMINATION

Under the common law, an employer could terminate an employee at will[25] " 'for good cause, for no cause or even for a cause morally wrong.' "[26] Courts admitted evidence of an employee's misconduct whether or not the employer knew of such evidence at the time of the discharge.[27] In fact, an employer could rely on one reason as cause at the time of dismissal but later justify such dismissal by relying on an entirely different ground.[28]

A. *Title VII*

Title VII of the Civil Rights Act of 1964[29] changed the common law by expressly prohibiting employers from discharging, refusing to hire, or otherwise discriminating against any individual because of his or her race, color, religion, sex, or national origin.[30] Through this legislation, Congress sought to ensure equal employment opportunities for all persons by eliminating discriminatory barriers in the workplace,[31] and by

25. "At-will" refers to employees who may be fired for any reason or no reason. *See* Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992).

26. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 2-9(a)(2), at 61 (3d ed. 1987) (quoting Payne v. Western & A.R. Co., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915)).

27. *See* Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 412-13 (6th Cir. 1992); Benson v. Quanex Corp., 58 Fair Empl. Prac. Cas. (BNA) 743, 746 (E.D. Mich. 1992); Bradley v. Philip Morris, Inc., 486 N.W.2d 48, 50 (Mich. Ct. App. 1991), *vacated in part*, 486 N.W.2d 737 (Mich. 1992); Muth, *supra* note 11, at 332.

28. *See Johnson*, 955 F.2d at 412; *Benson*, 58 Fair Empl. Prac. Cas. (BNA) at 746; *Bradley*, 486 N.W.2d at 50; *see also* 53 Am. Jur. 2d *Master & Servant* § 46 (1970) ("If legal grounds for the dismissal of an employee during the term of his employment exist, no importance attaches to the motive which may have actuated the employer in making the dismissal.").

29. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified at 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. III 1991).

30. *See* 42 U.S.C. § 2000e-2(a)(1) (1988).

31. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v.

making employees and job applicants whole for injuries suffered due to an employer's discriminatory employment practices.[32] Consistent with these goals, Title VII expressly provided for causes of action against employers by employees for wrongful discharge or prospective employees for wrongful refusal to hire.[33]

Congress also extended plenary powers to the courts[34] to " 'fashion the most complete relief possible,' "[35] in order for them to render decisions that would, as much as possible, eliminate past discrimination and bar future discrimination.[36] Title VII originally granted courts a discretionary choice of equitable remedies.[37] The statute expressly authorized enjoining an employer from engaging in discriminatory activity[38] and

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Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). Congress intended that the fight against employment discrimination "be a policy 'of the highest priority.' " Kremer v. Chemical Constr. Corp., 456 U.S. 461, 507 (1982) (Blackmun, J., dissenting) (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)); *see also Franks*, 424 U.S. at 763 (same). This policy benefits employers, employees, and consumers because it promotes both efficiency and trustworthy workmanship. *See McDonnell Douglas*, 411 U.S. at 801.

32. *See Ford Motor Co.*, 458 U.S. at 230; *Albemarle*, 422 U.S. at 418.

33. *See, e.g.*, 42 U.S.C. § 2000e-5 (1988 & Supp. III 1991) (providing enforcement provisions).

34. *See Alexander*, 415 U.S. at 45. This extension of power was consistent with Congress's intention that the federal courts have the final responsibility for enforcing Title VII. *See id.* at 44. Broad compliance with the law is also achieved, in part, through private litigation because enforcement of Title VII is so difficult to monitor. *See* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 602-03 & n.21 (1981); *Newman*, 390 U.S. at 401; *see also Alexander*, 415 U.S. at 45 ("[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII."). Thus, attorney's fees assist a plaintiff in her important role as a "private attorney general." *Newman*, 390 U.S. at 402. *See also* 42 U.S.C. § 2000e-5(k) (providing discretionary power to award reasonable attorney's fees).

35. *Albemarle*, 422 U.S. at 421 (quoting 118 Cong. Rec. 7166, 7168 (1972) (statement of Sen. Williams)).

36. *See id.* at 418 (citing Louisiana v. United States, 380 U.S. 145, 154 (1965)). Title VII, then, prohibits "an entire socio-economic structure of conduct." Gudel, *supra* note 5, at 98.

37. Traditionally, courts drew a distinction between legal and equitable remedies. Legal remedies consisted of monetary damages for injuries that had already occurred, while equitable remedies empowered courts to prevent future illegal actions and to craft relief to the peculiar circumstances of each individual case. *See* 1A C.J.S. *Actions* § 124 (1985). In many states today, both legal and equitable remedies are available in one form of action. *See* 27 Am. Jur. 2d *Equity* § 4 (1966). The law has not forgotten, however, this distinction between remedies. While equitable actions were traditionally tried by a court without a jury, only juries generally granted legal relief. *See id.*

Title VII initially only provided the traditional equitable remedies of injunction and reinstatement. *See* Pub. L. No. 88-352, 78 Stat. 253, 261 (1964) (codified at 42 U.S.C. § 2000e-5(g) (Supp. III 1991)). As such, the statute conferred jurisdiction to hear violations of the statute upon "[e]ach United States district court . . . [for] actions brought under [Title VII]," § 706(f) (codified at 42 U.S.C. § 2000e-5(f)(3) (Supp. III 1991)), which Congress later specifically limited the hearing of these cases to judges only, *see* Pub. L. No. 92-261, Sec. 4, § 706(f)(4), 86 Stat. 103, 106 (1972) (codified at 42 U.S.C. § 2000e-5(f)(4) (1988)). The Civil Rights Act of 1991 subsequently changed this. *See infra* notes 84-94 and accompanying text.

38. *See* Pub. L. No. 88-352, 78 Stat. 253, 261 (1964) (codified at 42 U.S.C. § 2000e-5(g) (Supp. III 1991)).

ordering the reinstatement of an employee or the hiring of a prospective employee with or without back pay.[39] Reasonable attorney's fees could also be awarded.[40] The Equal Employment Opportunity Act of 1972[41] amended Title VII and greatly expanded the remedies available by expressly authorizing the use of any appropriate equitable relief.[42] But the 1972 amendment restricted accrual of back pay awards to not more than two years prior to the filing of a charge with the Equal Employment Opportunity Commission.[43]

Title VII's reach, however, is limited. While the statute proscribes employment decisions based on discriminatory factors, it also prohibits preferences for a particular group based upon those same factors.[44] For example, Title VII does not guarantee jobs to persons simply because they are minorities.[45] It also does not compel employers to rehire employees who have engaged in deliberate, unlawful activities against them.[46] Rather, Title VII strikes a balance between the desire to preserve an employer's freedom of choice and the quest to eliminate certain discriminatory bases for distinguishing among employees.[47]

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39. *See id.* Back pay is measured by determining what the employee would have earned had the discrimination not occurred, minus any amounts that the employee actually did earn. *See* Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1119 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

40. *See* Pub. L. No. 88-352, 78 Stat. 253, 261 (1964) (codified at 42 U.S.C. § 2000e-5(k) (1988 & Supp. III 1991)).

41. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (1988 & Supp. III 1991)) [hereinafter the 1972 Act].

42. *See id.* § 4 (codified at 42 U.S.C. § 2000e-5(g)). Congress specifically intended that this expansion of equitable power would aid the court's mission of "fashion[ing] the most complete relief possible." 118 Cong. Rec. 7166, 7168 (1972).

On March 6, 1972, Senator Williams delivered a section-by-section analysis of the 1972 Act that had been agreed to by the Conference Committee of the House and Senate on February 29, 1972 (the "Conference Report"). *See id.* at 7166. The Conference Report explained the major provisions of the 1972 Act. *See id.* The Senate agreed to the Conference Report by a vote of 62 to 10, with 28 not voting. *See id.* at 7170; *see also* Sape & Hart, *supra* note 4, at 880 ("Notwithstanding th[e] . . . limitation [of back pay awards to the two year period prior to the filing of a discrimination charge with the EEOC], the general intention of Congress in adopting the 1972 Amendments was to provide for broad and effective remedies.").

The 1972 Act also provided that the case law that courts had developed through the time of the Act's enactment would continue to govern the applicability and construction of Title VII in those areas that were not addressed by the 1972 Act, or for which Congress had not expressed a contrary intention. *See* 118 Cong. Rec. 7166, 7166 (1972).

43. *See* Pub. L. No. 92-261 § 4, 86 Stat. at 107 (codified as amended at 42 U.S.C. § 2000e-5(g)(1) (1988 & Supp. III)); Albemarle Paper Co. v. Moody, 422 U.S. 405, 420 & n.13 (1975); Sape & Hart, *supra* note 4, at 880.

44. *See* Pub. L. No. 88-352, § 703 (j), 78 Stat. 253, 257 (codified at 42 U.S.C. § 2000e-2(j)); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 581 (1984); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

45. *See Griggs*, 401 U.S. at 430-31.

46. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973).

47. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 242 (1989).

B. *Determining Employer Liability*

An employee may use either direct or indirect evidence to prove that an employer's employment decision resulted from discrimination.[48] The Supreme Court developed two different methods to determine whether evidence asserted by a plaintiff proves an employer's liability. The pretextual analysis evaluates the plaintiff's indirect evidence and considers whether the single "true" motive behind the employment decision was unlawful under Title VII.[49] Alternatively, the mixed motive analysis evaluates either the plaintiff's direct or indirect evidence when the employment decision resulted from more than one reason, one of which was lawful.[50]

1. The Pretextual Analysis

Under the pretextual analysis, the plaintiff must establish a *prima facie* case of discrimination through the use of circumstantial, indirect evidence.[51] The Supreme Court's pretextual analysis involves a three-step process of shifting the burden of production between the employee and the employer.[52] This process enables a court to determine whether a lawful or a discriminatory reason motivated a particular employment practice.[53]

Under this analysis, the employee bears the initial burden of establishing a *prima facie* case of discrimination.[54] She must show "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions" resulted from unlawful employment practices.[55] The Supreme Court, in *McDonnell*

48. *See* Puhy v. Delta Air Lines, No. 1:91-CV-1630-RCF, 1993 WL 405426, at *2 (N.D. Ga. Sept. 30, 1993). A statement by a hiring decisionmaker that "if it were his company he would not hire blacks" exemplifies direct evidence. EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990); *see also Puhy*, 1993 WL 405426, at *2 ("Only the most blatant remarks whose intent could be nothing other than to discriminate constitute direct evidence."); Equal Employment Opportunity Commission Decision No. 915-002, 1992 WL 189088, at *6 (E.E.O.C. July 14, 1992) [hereinafter "EEOC 1992 Decision"]. Plaintiffs rely on indirect evidence more often because blatantly discriminatory policies are unlikely to exist anymore. *Cf.* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

49. *See Price Waterhouse*, 490 U.S. at 260 (White, J., concurring).

50. *See id.* at 260-261.

51. *See Alton Packaging*, 901 F.2d at 923. For a discussion of the distinction between direct and indirect evidence in Title VII cases, see *supra* notes 48-50 and accompanying text.

52. *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993).

53. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (holding that the shifting of burdens is intended "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination"). The pretextual approach therefore enables a plaintiff to prove discrimination by solely relying on circumstantial evidence. *See Price Waterhouse*, 490 U.S. at 270-71 (O'Connor, J., concurring).

54. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

55. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978).

Douglas Corp. v. Green,[56] suggested the following model to establish a *prima facie* case: (i) the plaintiff must belong to a protected class; (ii) the plaintiff must have been qualified for the job; (iii) the plaintiff must have been denied employment despite her qualifications; and (iv) after the employer's rejection of the plaintiff, the position must have remained open and the employer must have continued to seek applications from people equally as qualified for the position as the plaintiff.[57] This four-part *McDonnell Douglas* model, however, was intended to be flexible; the Court has repeatedly recognized that each part is not necessarily applicable to every factual situation.[58]

A *prima facie* case of discrimination creates a presumption of unlawful discrimination,[59] which then shifts the burden of production to the employer to assert any lawful, nondiscriminatory reasons for its employment decision.[60] But the employer need only raise a genuine issue of fact as to whether it discriminated. Because the ultimate burden of persuasion always rests with the employee, the employer does not have to prove that the proffered reasons actually motivated it.[61]

If the employer successfully articulates a lawful, nondiscriminatory reason for its action, the employee may rebut this reason by demonstrating that the reason was pretextual.[62] A reason is a pretext if it serves as a "cover-up" for a decision,[63] and discrimination was the real reason for the employer's action.[64] In order to prove pretext, the employee must show that a proscribed reason, and not the proffered reason, motivated the employment decision.[65]

2. The Mixed Motive Analysis

Direct evidence of discrimination establishes both a *prima facie* case

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56. 411 U.S. 792 (1973).

57. *See id.* at 802.

58. *See id.* at 802 n.13; United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981); *Furnco*, 438 U.S. at 575-76; McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 n.6 (1976). In fact, *McDonnell Douglas* dealt with a discriminatory hiring claim, so some flexibility is necessary in order to embrace claims of wrongful discharge. *See, e.g.*, Smith v. General Scanning, Inc., 876 F.2d 1315, 1318 n.1 (7th Cir. 1989) (arguing that job performance becomes the dominant concern in discharge cases under *McDonnell Douglas*).

59. *See* Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993).

60. *See Burdine*, 450 U.S. at 254-55; *McDonnell Douglas*, 411 U.S. at 802.

61. *See Hicks*, 113 S. Ct. at 2747; *Burdine*, 450 U.S. at 254-55.

62. *See Hicks*, 113 S. Ct. at 2751-52; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); *McDonnell Douglas*, 411 U.S. at 804.

63. *See McDonnell Douglas*, 411 U.S. at 805.

64. *See Hicks*, 113 S. Ct. at 2752. Lower courts have held that pretext may be proven by showing "that the employer, more likely than not, was motivated by a discriminatory reason . . . ." Trujillo v. Grand Junction Regional Ctr., 928 F.2d 973, 977 (10th Cir. 1991); *see* Lee v. National Can Corp., 699 F.2d 932, 937 (7th Cir. 1983), *cert. denied*, 464 U.S. 845 (1983).

65. *See Hicks*, 113 S. Ct. at 2747.

and liability[66] unless the employer impeaches the plaintiff's direct evidence or advances an affirmative defense.[67] Mixed motive suits involve situations where more than one reason led to the employment decision. Unlike pretextual suits, there is no single "true" motive in mixed motive suits. Rather, the employer's decision resulted from at least one lawful, and at least one unlawful, reason.[68] Therefore, the question becomes not whether a single "true" motive was unlawful, but rather whether one of the true motives, standing alone, would have sufficed as a lawful reason for the employment decision.[69]

a. Mount Healthy City School District Board of Education v. Doyle

The Supreme Court's mixed motive analysis developed outside of the context of Title VII. In *Mount Healthy City School District Board of Education v. Doyle*,[70] an employee was discharged in part for a constitutionally prohibited reason and in part for a lawful reason.[71] The discharge would have been justified if the employer's lawful reason had been the sole basis for the discharge.[72] Therefore, once the employee had shown that the constitutionally prohibited reason played a role in the decision to discharge, the Supreme Court shifted the burden to the employer to prove, by a preponderance of the evidence, that the discharge, hypothetically, would still have occurred solely on account of the lawful reason.[73]

According to the Court, any constitutional principle at stake would be "sufficiently vindicated" so long as the employee was not placed in a worse position[74] than he would have been in had he not engaged in the protected conduct.[75] Therefore, courts would not resolve the employment question against a "borderline or marginal candidate" based on his

66. *See* EEOC 1992 Decision, *supra* note 48, at *6.

67. *See id.*

68. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 319 n.5 (D.N.J. 1993).

69. *See Price Waterhouse*, 490 U.S. at 270-71 (O'Connor, J., concurring).

70. 429 U.S. 274 (1977).

71. *See id.* at 281-83. The defendant, a school board, had fired the plaintiff, a school teacher, for a "lack of tact in handling professional matters . . . ." *Id.* at 283 n.1. The board based this decision on two separate incidents: (1) the teacher's use of an obscene gesture to correct students in a cafeteria incident, and (2) the teacher's conveyance of a dress code memorandum to a local radio disk jockey, who broadcasted the memorandum as a news item. *See id.* at 282-83 & n.1. The district court held that the First Amendment protected the conveyance of the memorandum. *See id.* at 283.

72. *See id.* at 285.

73. *See id.* at 287; NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983).

74. For example, if the plaintiff would not have lost his job but for a constitutionally prohibited reason, his discharge places him in a *worse* position than he would have been in had the prohibited reason not arisen. Conversely, if he would have been fired anyway based upon another concurrent and lawful reason, then the employer's reliance on the constitutionally prohibited reason was essentially irrelevant.

75. *See Mt. Healthy*, 429 U.S. at 285-86.

constitutionally protected conduct.[76] At the same time, his employer could still decide not to rehire him on the basis of his performance record even if his protected conduct convinced the employer that its decision was correct.[77]

b. Price Waterhouse v. Hopkins

The Supreme Court applied *Mt. Healthy*'s mixed motive analysis to a Title VII action in *Price Waterhouse v. Hopkins*.[78] The Court held that an employer would not be liable for an employment decision that was based in part on a discriminatory reason if it proved, by a preponderance of the evidence, that it would have reached the same decision solely on account of a lawful reason.[79] A reason would be considered lawful if matters of race, religion, color, gender, or national origin were irrelevant.[80]

The inquiry under the mixed motive analysis became whether the employer considered at least one lawful reason when it made the employment decision.[81] An employer would only prevail if a lawful and sufficient reason in fact motivated its actions at the time of the decision.[82] Evidence that an employer's decision may have been justified was irrelevant. The only relevant inquiry was whether an employer based it's decision either to discharge or to refuse to hire the plaintiff on a discriminatory motive and, if so, whether a lawful reason also motivated the employment decision.[83]

C. *The Civil Rights Act of 1991*

The Civil Rights Act of 1991 ("the 1991 Act")[84] amended Title VII. As its preamble explains, the 1991 Act expands the remedies available to persons injured by intentional discrimination and unlawful harassment in the workplace.[85] It allows for recovery of both compensatory and punitive damages,[86] and it provides jury trials to plaintiffs who seek such damages.[87] The 1991 Act dramatically transforms Title VII by essentially creating a tort that allows for legal remedies.[88]

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76. *See id.*

77. *See id.* The Court therefore remanded the case to the district court to determine whether the lawful reason alone would have caused the discharge. *See id.* at 287.

78. 490 U.S. 228, 248-49 (1989).

79. *See id.* at 242, 244-45, 258.

80. *See id.* at 244.

81. *See id.* at 240-41, 249.

82. *See id.* at 252.

83. *See id.* at 258.

84. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.).

85. *See id.* § 3(1).

86. *See id.* § 102 (codified at 42 U.S.C. § 1981a (Supp. III 1991)). These damages are only available upon proof of "intentional" discrimination. *See id.*

87. *See id.*

88. *See* David A. Cathcart et al., The Civil Rights Act of 1991, at 9 (1993).

The 1991 Act also responded to certain Supreme Court decisions[89] by expanding particular civil rights statutes to provide greater protection to employees injured by discrimination.[90] Through the 1991 Act, Congress modified *Price Waterhouse* by changing the outcome of mixed motive cases involving Title VII.[91] An employer now is *always* liable for discrimination against an employee on the basis of the employee's race, color, religion, sex, or national origin, even though additional lawful factors also motivated the employer's employment decision.[92] The presence of an unlawful motive by itself entitles a plaintiff to some affirmative relief.[93] The 1991 Act, however, expressly limits the types of relief available to mixed motive plaintiffs. Thus, if the plaintiff proves an impermissible classification was a motivating factor and the employer demonstrates that it would have reached the same employment decision in the absence of that factor, courts may then grant declaratory relief, injunctive relief, and attorney's fees, but may not award damages or back pay, or order reinstatement, promotion, or hiring.[94]

II. THE AFFIRMATIVE DEFENSE OF "AFTER-ACQUIRED EVIDENCE"

An employer uncovers "after-acquired evidence" of a complaining employee's misconduct during the discovery phase of an employment-discrimination suit, often long after making the decision either to discharge or to refuse to hire the employee.[95] While this misconduct[96] might have

89. *See* § 3(4), 105 Stat. at 1071. The legislation addressed Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), Patterson v. McLean Credit Union, 491 U.S. 164 (1989), Martin v. Wilks, 490 U.S. 755 (1989), Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). *See* Lex K. Larson, Civil Rights Act of 1991, at 6 (1992).

90. *See id.* § 3(4).

91. *See* David B. Oppenheimer, *Negligent Discrimination*, 141 U. Pa. L. Rev. 899, 924 n.132 (1993); Larson, *supra* note 89, at 6; Cathcart et al., *supra* note 88, at 30; Merrick T. Rossein, Employment Discrimination: Law and Litigation § 2.13, at 2-86 (1993).

92. *See* 42 U.S.C. § 2000e-2(m) (Supp. III 1991); Cathcart, *supra* note 88, at 30-31.

93. *See* Cathcart, *supra* note 88, at 31.

94. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. III 1991); Cathcart, *supra* note 88, at 31; Larson, *supra* note 89, at 31; Rossein, *supra* note 91, § 2.13(7)(e), at 2-118.

95. *See* Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 370 (7th Cir. 1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1176-77 (11th Cir. 1992); Washington v. Lake County, Ill., 969 F.2d 250, 253 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988); Rubinstein, *supra* note 10, at 1-2.

96. The two forms of employee misconduct are that which had occurred after the employee had been hired ("post-hiring misconduct") and that which had occurred even before the employee was hired ("pre-hiring misconduct"). Examples of post-hiring misconduct include fraud, *see Summers*, 864 F.2d at 703, unauthorized removal of records, *see* Mackey v. Board of Pensions of the United Methodist Church, No. 91 C 5739, 1993 U.S. Dist. LEXIS 424, at *2-3 (N.D. Ill. Jan. 14, 1993); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1468 (D. Ariz. 1992), and falsification of a group insurance application and an insurance claim, *see* Smith v. Equitable Life Assurance Soc'y, 60 Fair Empl. Prac. Cases (BNA) 1225, 1227 (S.D.N.Y. 1993). Examples of pre-hiring misconduct include resume fraud or lying on a job application. *See Kristufek*, 985 F.2d at 369; *Washington*, 969 F.2d at 251-52; *Johnson*, 955 F.2d at 414; Churchman v.

served as a lawful reason for the employment decision,[97] it cannot serve as an actual "cause" because it was unknown at the time the decision was made.[98] Thus, the term "after-acquired evidence" is a misnomer—the defendant actually "after-acquires" an affirmative defense.[99]

The Federal Rules of Civil Procedure require a defendant to set forth any affirmative defenses in her answer to the plaintiff's complaint.[100] But employers do not uncover employee misconduct until the discovery phase, so they fail to include this defense in their initial answer. This failure, however, rarely acts as a waiver because the federal rules allow for liberal amendment of pleadings, provided the opposing party is not unduly prejudiced.[101] Therefore, defendants encounter little difficulty in amending their answer and moving for summary judgment once they uncover evidence of employee misconduct.[102]

The federal courts have developed two different approaches in response to the affirmative defense of "after-acquired evidence."[103] A majority of courts[104] hold that the employee was not legally injured despite

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Pinkerton's Inc., 756 F. Supp. 515, 516 (D. Kan. 1991); Punahele v. United Air Lines, 756 F. Supp. 487, 489 (D. Colo. 1991).

97. *See Wallace*, 968 F.2d at 1176-77; *Washington*, 969 F.2d at 253; *Johnson*, 955 F.2d at 414; *Summers*, 864 F.2d at 708; *O'Day*, 784 F. Supp. at 1468; Grzenia v. Interspec, Inc., No. 91 C 290, 1991 U.S. Dist. LEXIS 15093, at *7-8 (N.D. Ill. Oct. 21, 1991); *Churchman*, 756 F. Supp. at 519; *Punahele*, 756 F. Supp. at 490; Rubinstein, *supra* note 10, at 20.

98. *See Summers*, 864 F.2d at 708.

99. Affirmative defenses stem from the common law plea of "confession and avoidance." *See* Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1270, at 411 (2d ed. 1990). This common law plea resulted in the defendant's admission that plaintiff successfully demonstrated a *prima facie* case but that "additional new material . . . would defeat plaintiff's otherwise valid cause of action." *Id.*

100. *See* Fed. R. Civ. P. 8(c).

101. *See* Fed. R. Civ. P. 15(a) & (b); Bobbitt v. Victorian House, Inc., 532 F. Supp. 734, 736 (N.D. Ill. 1982); Wright & Miller, *supra* note 99, § 1278, at 494-502.

102. Allegations of employee fraud must be stated with particularity as well. *See* Fed. R. Civ. P. 9(b).

103. *See* Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 304 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993); Kravit v. Delta Air Lines, Inc., 60 Fair Empl. Prac. Cases (BNA) 994, 996 (E.D.N.Y. 1992). Some state courts have also addressed this issue. *See, e.g.*, Schuessler v. Benchmark Mktg. & Consulting, Inc., 500 N.W.2d 529, 540 (Neb. 1993) (holding that if post-termination evidence justified termination, the employee may not recover any damages for the period following the actual discharge); Flesner v. Technical Communications Corp., 575 N.E.2d 1107, 1113-14 (Mass. 1991) (denying an employer's summary judgment motion based on an employee's pre-hiring misconduct in a wrongful discharge action because of the presence of disputed issues of material fact); *see also* Lohmann v. Towers, Perrin, Forster, & Crosby, Inc., No. H-91-3586, 1992 WL 473856, at *1 (S.D. Tex. Oct. 28, 1992) (finding that Texas law would apply the minority approach in cases involving the affirmative defense of "after-acquired evidence"). *But see* Mosley v. Truckstops Corp., No. 77916, 1993 WL 191378, at *3 (Okla. June 2, 1993) ("We have never applied the *Summers* rationale to a retaliatory discharge action . . . ."); Muth, *supra* note 9, at 336 n.31 ("No state court to date has strictly enforced the *Summers* doctrine on a state civil rights act claim.").

104. This majority is comprised of the Sixth and Tenth Circuits and their district courts. *See* Johnson v. Honeywell Info. Sys., 955 F.2d 409, 415 (6th Cir. 1992); Summers

the employer's actual discrimination and, therefore, they dismiss the employee's suit.[105] A minority of courts, however, find that the employee was legally injured and therefore entitled to some remedy.[106] The minority courts have, however, developed two views regarding the award of back pay. Some limit accrual of back pay to the time the misconduct was uncovered during the course of the litigation.[107] Others require the employer to show whether, had the employee never brought suit, the misconduct would have been uncovered before the date of the court's judgment.[108]

A. *The Employer's View: The Majority Approach*

Employee misconduct arises in three types of suits: (1) wrongful discharge suits involving post-hiring misconduct,[109] (2) wrongful discharge suits involving pre-hiring misconduct, and (3) wrongful refusal to hire suits involving pre-hiring misconduct.[110] Employers in post-hiring misconduct suits argue that, had they learned of an employee's post-hiring misconduct while she was still employed, they would have lawfully fired that employee.[111] Courts call this the "would have fired" defense.[112] Employers in wrongful discharge suits involving pre-hiring misconduct argue that had they known of the misconduct, they either "would not have hired" or "would have fired" the employee.[113] Employers in wrongful refusal to hire suits only raise the "would not have hired"

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v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988). District courts in the Fifth and Ninth Circuits have used the mixed-motive approach as well. *See* Redd v. Fisher Controls, 814 F. Supp. 547, 551 (W.D. Tex. 1992); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992). *But see* Benitez v. Portland Gen. Elec., 58 Fair Empl. Prac. Cas. (BNA) 1130, 1136 (D. Or. 1992) ("In view of the absence of Ninth Circuit precedent, and the harshness of the result [of applying *Summers* to this case], [the court] decline[s] to dismiss the discrimination claims on the basis of defendant's after-acquired evidence.").

105. For a discussion of the majority approach, see *infra* notes 109-36 and accompanying text.

106. *See* Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369-70 (7th Cir. 1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178-79 (11th Cir. 1992). The Equal Employment Opportunity Commission ("EEOC") supports this minority view. *See infra* notes 158-64 and accompanying text.

107. *See infra* note 154 and accompanying text.

108. See *infra* note 155 and accompanying text.

109. Post-hiring misconduct may be raised only in wrongful discharge actions, because the employer obviously cannot argue that it failed to hire an employee due to misconduct that occurred after employment had already begun.

110. *Compare* Bonger v. American Water Works, 789 F. Supp. 1102, 1105 (D. Colo. 1992) (wrongful discharge suit) *with* Punahele v. United Air Lines, 756 F. Supp. 487, 488 (D. Colo. 1991) (wrongful refusal to hire suit).

111. *See, e.g.*, Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 702-03 (employee would have been fired for fraud that occurred while plaintiff was employed); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1467 (employee would have been fired for unauthorized removal of files).

112. *See* Washington v. Lake County, Ill., 969 F.2d 250, 254 n.3 (7th Cir. 1992); Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1257 (N.D. Ohio 1993).

113. *See Washington*, 969 F.2d at 254 n.3; *Baab*, 811 F. Supp. at 1257.

defense.[114]

Courts following the majority approach grant an employer's motion for summary judgment and dismiss the employee's cause of action in all three types of suits.[115] These courts assert that the employee is not entitled to any relief or remedy, even if discrimination in fact occurred, because the employee simply did not suffer a Title VII injury.[116] Thus, liability ceases to be relevant,[117] and these courts bar recovery because the employee suffered no legally recognizable injury.[118]

1. Post-Hiring Misconduct

The Tenth Circuit first articulated the affirmative defense of "after-acquired evidence" in *Summers v. State Farm Mutual Automobile Insurance Co.*[119] Four years after the employee's discharge, the employer, while preparing for trial, discovered that the employee had falsified company records over one hundred fifty times during his employment.[120] The *Summers* court analogized this situation to a traditional mixed motive case[121] and held that the employee did not suffer a Title VII injury,

114. *See Washington*, 969 F.2d at 253; Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 516 (D. Kan. 1991); Punahele v. United Air Lines, 756 F. Supp. 487, 489 (D. Colo. 1991).

115. *See* Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 304-05 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993); *Washington*, 969 F.2d at 251-52; *Bonger*, 789 F. Supp. at 1107; O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1467, 1469 (D. Az. 1992); *Churchman*, 756 F. Supp. at 519; Grzenia v. Interspec, Inc., No. 91 C 290, 1991 U.S. Dist. LEXIS 15093, at *6-8 (N.D. Ill. Oct. 18, 1991).

116. *See Milligan-Jensen*, 975 F.2d at 305; Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988).

117. *See e.g.*, *Milligan-Jensen*, 975 F.2d at 305 ("[S]ince the trial court found as a fact that falsification of the employment application . . . would have resulted in [the employee's] termination, it becomes irrelevant whether or not [the employee] was discriminated against . . . ."). Indeed, the standard for a motion of summary judgment requires the court to assume that discrimination did in fact occur. *See e.g.*, Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) ("As concerns [the employer's] motion[] for summary judgment, it is *assumed* that [the employer] was motivated, at least in part, if not substantially, because of [the employee's] age and religion.").

118. Therefore, dismissal results not because the employer is not liable, but because the employee was not legally injured. One cannot "sustain a cause of action . . . [unless] he has sustained some injury to his legal personal or property rights . . . ." 1A C.J.S. *Actions* § 32(a) (1985). *See also* Adams v. Bethlehem Steel Corp., 736 F.2d 992, 994 (4th Cir. 1984) ("[T]he existence of a wrong without some identifiable injury does not provide a basis for redress."). Therefore, one may sustain actual damage without the occurrence of an act or omission deemed by the law to be an injury. In such cases, no cause of action arises. *See* 1A C.J.S. *Actions* § 32(b) 394 (1985). Two possible though unstated reasons may also be the old common law and equity's "Clean Hands" maxim. *See infra* notes 184-99 and accompanying text.

119. 864 F.2d 700 (10th Cir. 1988).

120. *See id.* Before discovering the evidence of post-hiring misconduct, the employer claimed that the employee had been discharged due to his poor attitude and inability to get along with coworkers and customers. *See id.* at 702-03. Once it discovered the after-acquired evidence, the employer raised the "would have fired" defense. *See id.*

121. The Tenth Circuit relied strongly on Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). *Summers* was decided in 1988, one year before the

even though discrimination might have occurred, because the employer would have lawfully fired the employee had it known of the post-hiring misconduct.[122] Using this mixed motive analysis, the court reasoned that the employer had a lawful basis for the discharge, thereby rendering the employee ineligible for any Title VII relief.[123] Accordingly, the court granted the defendant's summary judgment motion and dismissed the suit.[124]

Some subsequent cases refined the use of this mixed motive approach in wrongful discharge suits involving post-hiring misconduct.[125] They created a materiality requirement, holding that an employer must show that it would have, rather than could have, discharged the employee had it known of the misconduct either before or at the time of termination.[126] Should the employer fail to prove materiality, a genuine issue of material fact remains and these courts will not dismiss the suit.[127]

2. Pre-Hiring Misconduct

Subsequent cases extended the mixed motive approach to both wrongful discharge suits[128] and wrongful refusal to hire suits[129] involving pre-hiring misconduct. Pre-hiring misconduct usually takes the form of misrepresentations in resumes,[130] job applications,[131] or pre-employment in-

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Supreme Court handed down its opinion in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which considered the mixed-motive approach within the context of Title VII. *See supra* notes 78-83 and accompanying text.

122. *See Summers*, 864 F.2d at 708.

123. *See id.* The lawful excuse alone would have been proper, thereby making the possibility that discrimination may have occurred irrelevant. *See* Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 305 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993).

124. *See Summers*, 864 F.2d at 708. The court equated the employer's defense with that of a hypothetical company that fired its doctor "because of his age, race, religion, and sex," but successfully defended a civil rights action by discovering, after the institution of the suit, "that the discharged employee was not a 'doctor.' " *Id.*

125. *See Milligan-Jensen*, 975 F.2d at 303-05; Redd v. Fisher Controls, 814 F. Supp. 547, 551-53 (W.D. Tex. 1992); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1469 (D. Ariz. 1992).

126. *See* Malone v. Signal Processing Technologies, Inc., 826 F. Supp. 370, 374-75 (D. Colo. 1993); Bonger v. American Water Works, 789 F. Supp. 1102, 1105-06 (D. Colo. 1992); *O'Day*, 784 F. Supp. at 1468-69.

127. *See Malone*, 826 F. Supp. at 375; *Bonger*, 789 F. Supp. at 1107; *O'Day*, 784 F. Supp. at 1468-69; O'Driscoll v. Hercules, Inc., 745 F. Supp. 656, 658 (D. Utah 1990).

128. *See* Johnson v. Honeywell Info. Sys., 955 F.2d 409, 414 (6th Cir. 1992); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 516 (D. Kan. 1991).

129. *See* Punahele v. United Air Lines, 756 F. Supp. 487, 489 (D. Colo. 1991).

130. *See* Washington v. Lake County, Ill., 969 F.2d 250, 251-52 (7th Cir. 1992); Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 (7th Cir. 1989).

131. *See Johnson*, 955 F.2d at 414; Dotson v. United States Postal Serv., 977 F.2d 976, 978 (6th Cir. 1992); Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 303 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *and cert. dismissed*, 114 S. Ct. 22 (1993); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1176-77 (11th Cir. 1992); Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1255-57 (N.D. Ohio 1993); *Churchman*, 756 F. Supp. at 516; *Punahele*, 756 F. Supp. at 489.

terviews.[132] A court will dismiss an employee's cause of action for wrongful discharge if the employer shows either that the employee would not have been hired or that she would have been discharged as soon as the employer had learned of this misconduct.[133] Similarly, a court will reject an applicant's claim of a wrongful refusal to hire if the employer shows that it would not have hired the applicant.[134]

3. The 1991 Act and the Majority Approach

Courts have avoided deciding whether the 1991 Act affects the majority approach. Only two courts have recognized that the 1991 Act might apply, but they declined to address the issue because none of the parties raised the question of the 1991 Act's applicability.[135] They observed in dicta, however, that the use of the mixed motive approach in cases involving employee misconduct was probably inconsistent with the changes implemented by the 1991 Act.[136]

B. *The Employee's View: A* Post Facto *Pretext Approach*

Even courts employing the majority approach sometimes acknowledge that the employer's affirmative defense "may serve as a *post facto* pretext"[137] for its action. The Eleventh Circuit explicitly rejected the mixed motive approach in *Wallace v. Dunn Construction Co.*,[138] a wrongful discharge suit involving pre-hiring misconduct.[139] Crafting a "*post facto*

132. *See* Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 366 (7th Cir. 1993).

133. *See Milligan-Jensen*, 975 F.2d at 305; *Washington*, 969 F.2d at 256-57; *Johnson*, 955 F.2d at 413; Bonger v. American Water Works, 789 F. Supp. 1102, 1105-06 (D. Colo. 1992); DeVoe v. Medi-Dyn, Inc., 782 F. Supp. 546, 552 (D. Kan. 1992); Grzenia v. Interspec, Inc., No. 91 C 290, 1991 U.S. Dist. LEXIS 15093, at *7-8 (N.D. Ill. Oct. 18, 1991); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 994-95 (D. Kan. 1989).

134. *See Punahele*, 756 F. Supp. at 490-91.

135. *See Washington*, 969 F.2d at 255 n.4; Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1184 n.17 (11th Cir. 1992). *See also* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323 (D.N.J. 1993) (noting the 1991 Act only for its persuasive support for the district court's holding).

136. *See Wallace*, 968 F.2d at 1184 n.17; *Washington*, 969 F.2d at 255 n.4. The *Washington* court expressly assumed that the majority approach survived the changes implemented by the 1991 Act. *See Washington*, 969 F.2d at 256 n.6. It refused to address this issue, however, perhaps because it had earlier held that the 1991 Act only applied prospectively. *See* Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 932 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 207 (1992); *see also* Boyd v. Rubbermaid Commercial Prods., Inc., Civil Action No. 91-0083-H, 1992 U.S. Dist. LEXIS 20455, at *14-15 & n.2 (W.D. Va. Dec. 11, 1992) (refusing to "bootstrap a waning area of Title VII case law [the majority view of the after-acquired evidence doctrine]" in a suit involving both pre- and post-hiring misconduct and violations of the Equal Pay Act due to the effect of the Civil Rights Act of 1991 on the majority approach), *dismissed*, 1993 U.S. Dist. LEXIS 7141 (W.D. Va. May 25, 1993). For a discussion of the effects of the 1991 Act, see *supra* text accompanying notes 84-94.

137. DeVoe v. Medi-Dyn, Inc., 782 F. Supp. 546, 552-53 (D. Kan. 1992).

138. 968 F.2d 1174 (11th Cir. 1992).

139. The plaintiff in *Wallace* alleged that her supervisor sexually harassed her before she was fired. *See id.* at 1176. She subsequently admitted in a deposition that she had lied on her job application when she checked "No" in response to a question concerning

pretext" approach, the court held that the employer bore the burden of persuasion for showing, by a preponderance of the evidence, whether and in what manner the employee misconduct would have lawfully altered the employment relationship.[140] The court then determined which remedies should be granted in light of the employee misconduct.[141]

This minority view[142] distinguishes wrongful discharge suits involving pre-hiring misconduct from wrongful refusal to hire suits involving pre-hiring misconduct.[143] An applicant's claim of wrongful refusal to hire will be dismissed if the prospective employer would still have refused to hire the prospective employee even absent any unlawful motives.[144] The employer must, however, prove that it would have uncovered a lawful reason in the next step of the hiring process.[145] The plaintiff does not suffer any Title VII injuries in this type of case because she would not have been hired even in the absence of a discriminatory motive.[146] Alternatively, a Title VII injury occurs in a wrongful discharge case because the employee, absent a discriminatory motive, would have remained employed for a longer period of time, at least until the employer lawfully discovered the misconduct.[147]

Since an employee suffers a legal injury, evidence of misconduct remains relevant only to the determination of what relief to award a prevailing Title VII plaintiff.[148] Because the boundary between the employer's prerogatives and the relief afforded a victim of discrimination varies in accordance with the facts of each action, this approach evaluates the effect of employee misconduct on Title VII's remedies on a case-

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prior criminal convictions—she had previously pled guilty in another state to possession of illegal drugs. *See id.* at 1176-77. The employer raised the "would not have hired" and "would have fired" defenses. *See id.* at 1177. For a discussion on these two defenses, see *supra* notes 111-14 and accompanying text.

140. *See Wallace*, 968 F.2d at 1181 n.11. *See also* Johnson, *supra* note 9, at 77 ("This holding should come as no surprise. The 11th Circuit has rejected several previous attempts to rationalize adverse employment decisions with information unknown to the decision-maker at the time the decision was made.").

141. *See Wallace*, 968 F.2d at 1183-84.

142. In addition to the Seventh Circuit, *see infra* notes 152-53 and accompanying text, two other cases have applied this approach. *See* Moodie v. Federal Reserve Bank, No. 91 CIV. 6629 (MEL), 1993 WL 370582, at *3 (S.D.N.Y. Sept. 20, 1993); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323-24 (D.N.J. 1993); *see also* Boyd v. Rubbermaid Comm'l Prods., Inc., Civil Action No. 91-0083-H, 1992 U.S. Dist. LEXIS 20455, at * 15 (W.D. Va. Dec. 11, 1992) (applying the minority approach in an Equal Pay Act case), *dismissed*, 1993 U.S. Dist. LEXIS 7141 (W.D. Va. May 25, 1993).

143. *See Wallace*, 968 F.2d at 1178-79 n.8.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*; Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323-24 (D.N.J. 1993); Bonger v. American Water Works, 789 F. Supp. 1102, 1106 (D. Colo. 1992); Graf v. Wire Rope Corp., No. WD 45952, 1993 WL 381560, at *1 (Mo. Ct. App. Sept. 30, 1993).

148. *See Wallace*, 968 F.2d at 1181; Moodie v. Federal Reserve Bank, No. 91 CIV. 6629 (MEL), 1993 WL 370582, at *3 (S.D.N.Y. Sept. 20, 1993); *Massey*, 828 F. Supp. at 323-24.

by-case basis.[149] For example, the *Wallace* court decided that declaratory relief, back pay, and attorney's fees were available to the plaintiff, but precluded reinstatement or an injunction as a matter of law.[150] It also held that back pay was "available from the time of discharge to the time of judgment unless the employer c[ould] prove that discovery of the misconduct . . . would have occurred at an earlier date absent the discrimination."[151]

C. *The Seventh Circuit*

The Seventh Circuit also rejects the idea that employee misconduct may be a complete defense and refuses to preclude an employee's cause of action because "[a] discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge."[152] Thus, the court confines its consideration of the lawfulness of a termination to the reasons the employer gives at the time of discharge.[153]

But the Seventh Circuit charts a different course concerning back pay awards—it limits accrual of back pay to the time the misconduct is actually uncovered rather than to the time of judgment.[154] *Wallace* places

149. *See Wallace*, 968 F.2d at 1181.

150. *See id.* at 1181.

151. *Massey*, 828 F. Supp. at 322.

152. Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993). The court noted that "[t]he deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not. The after discovered alternate reason comes too late." *Id.*; *see also* Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 (7th Cir. 1989) ("Whether [defendant] discriminated against [plaintiff] must be decided solely with respect to the reason given for [plaintiff's] discharge . . . . [Plaintiff's] resume fraud is, for this purpose, irrelevant.").

In one case, the Seventh Circuit affirmed a district court's grant of summary judgment to defendant. The circuit court held that plaintiff was not entitled to any relief, even if plaintiff had been fired for a discriminatory reason, because plaintiff had lied on his employment application. *See* Washington v. Lake County, Ill., 969 F.2d 250, 251 (7th Cir. 1992). This case did not, however, adopt the majority rule. The sole issue raised by plaintiff on appeal was whether a genuine issue of material fact existed regarding defendant's claim that it either would not have hired or would have fired plaintiff had it known of the misconduct. *See id.* "Although this Court has never squarely adopted the *Summers* rationale, [plaintiff] does not challenge its validity." *Id.* at 253. The plaintiff, therefore, erred in not challenging the underlying basis of the summary judgment. *See Massey*, 828 F. Supp. at 320-21.

153. *See Kristufek*, 985 F.2d at 369. In fact the *Washington* court explicitly rejected the "would not have hired" argument for two reasons. First, it "unjustified[ly] import[ed] . . . 'property right' concepts into employment discrimination law." *Washington*, 969 F.2d at 256. Title VII does not require this concept, nor is it a defense to a federal discrimination complaint. *See id.* Second, under *Mt. Healthy* and *Price Waterhouse*, "the temporal focus is on the time of the adverse employment decision, and the inquiry is whether the same employment decision would have been made if the protected characteristic or conduct were removed from consideration." *Id.* The court concluded that this same standard applied to employers raising the affirmative defense of after-acquired evidence. *See id. See generally* King, *supra* note 9 (summarizing *Washington*)

154. The National Labor Relations Board agrees with this restriction of recovery. *See Massey*, 828 F. Supp. at 321 n.8.

the burden on the employer to prove when, absent the litigation, it would have uncovered the employee's misconduct.[155] In contrast, the Seventh Circuit allows recovery of back pay only until the time the employer actually discovers the misconduct.[156] This limitation occurs subject to a materiality requirement: the employer must demonstrate that the plaintiff's conduct was both wrongful and that this conduct would, not could, have resulted in termination.[157]

D. *The Equal Employment Opportunity Commission*

The Equal Employment Opportunity Commission ("EEOC") agrees with the minority view and acknowledges that employee misconduct is "relevant only to the issue of appropriate remedy."[158] The EEOC articulated this position in both a 1992 decision[159] and a 1993 memorandum.[160] The EEOC agrees with the Seventh Circuit that back pay awards may be limited to the period between an employee's unlawful termination and the date the employer acquires a non-discriminatory reason for the termination.[161] It also acknowledged that the employee's misconduct may prevent reinstatement or the payment of a portion of compensatory damages covering losses arising after the date when this misconduct would have been discovered.[162] At least one court, however, refused to grant any deference to the EEOC's position because it only articulates a litigation position and is not an actual guideline.[163] This

155. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1184 (11th Cir. 1992). Essentially, this results in a back pay award that accrues up until the date of judgment. *See Massey*, 828 F. Supp. at 323-24; *see also* Johnson, *supra* note 9, at 77 ("Of course, in the case of post-hiring employee misconduct, it will be extremely difficult to prove that such evidence would have been discovered absent the termination, because it is the termination itself (and resulting litigation) which normally brings such matters to light.")

156. *See Kristufek*, 985 F.2d at 371.

157. *See id.* at 369; Reed v. AMAX Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992); Connell, *supra* note 9, at 288-89.

158. Revised EEOC Memorandum, *supra* note 17. *See also* Follette, *supra* note 6, at 663 ("The EEOC . . . support[s] the minority view."); Robert J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 Lab. Law. 43 (1993) (the author, an attorney with the EEOC, criticizes the majority view).

159. *See* EEOC 1992 Decision, *supra* note 48, at *8.

160. *See* Revised EEOC Memorandum, *supra* note 17.

161. *See id.*; EEOC 1992 Decision, *supra* note 48, at *8; *see also* Johnson, *supra* note 9, at 78 n.10 ("The 11th Circuit's creation of an additional evidentiary burden for employers to overcome in order to halt the backpay period goes beyond even the EEOC's position."); Jonathan Groner & Stephen G. Hirsch, *Old News is Bad News*, The Recorder, Mar. 3, 1993, at 1 (" 'Once you can show that the employee would have been fired, there's no liability beyond the date when you have that evidence,' says [Donald] Livingston[, general counsel of the EEOC]."). *But see* Russell v. Microdyne Corp., No. CIV.A. 93-136-A, 1993 WL 343558, at *3 (E.D. Va. July 7, 1993) (arguing, despite the EEOC's recommendation, that "no distinction exists between liability and remedy when no relief is available because of after-acquired evidence of deception during hiring").

162. *See* EEOC 1992 Decision, *supra* note 48, at *8.

163. *See Russell*, 1993 WL 343558, at *3. The court also pointed out that even "guidelines themselves lack the force of administrative rules." *Id.*

reasoning served as the basis for that court's decision to ignore the EEOC's recommendation.[164]

III. THE PROPER ROLE OF EMPLOYEE MISCONDUCT IN EMPLOYMENT DISCRIMINATION LITIGATION

The majority approach to wrongful discharge suits involving the affirmative defense of "after-acquired evidence" is fundamentally flawed because it allows an employer to benefit from information that it discovered only as a result of its discrimination. Although the majority approach is justifiably concerned with employee misconduct, it fails to deter discrimination in the workplace, to punish an employer who has discriminated, or to compensate an employee for injuries resulting from discrimination. Moreover, wrongful discharge suits involving post-termination discovery of employee misconduct have never been analogous to traditional mixed motive cases. Finally, it is inconsistent to bar any relief for plaintiffs in "after-acquired evidence" suits when Title VII now expressly provides relief for plaintiffs even though lawful reasons, in part, motivated the employer.

Only the minority approach furthers Title VII's goals. It is also more likely to induce settlements and prevent these suits from ever reaching the courts in the first place. Finally, requiring an employer to prove that it would have discovered the misconduct at a certain point in time absent its discrimination gives a court the greatest flexibility to make employees whole[165] by "fashion[ing] the most complete relief possible."[166]

A. *The Inadequacies of the Majority Approach in Wrongful Discharge Suits*

Under the majority approach, an employer unfairly benefits from its wrongdoing, because discrimination precipitates discovery of the employee's misconduct. Therefore, courts should require employers to demonstrate when they would have discharged the employee absent the discriminatory motive[167] because only the motives present at the time the employer decided to fire the employee are relevant to the issue of liability.

1. The Inapplicability of Traditional Mixed Motive Cases

Whether the employer would have fired the employee is relevant to the issue of damages,[168] but it remains irrelevant to the issue of liability be-

164. *See id.*

165. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).

166. 118 Cong. Rec. 7168 (1972) (statement of Sen. Williams).

167. The materiality requirement, even if strictly enforced, only requires that an employer demonstrate that it would have fired the employee, but not *when* it would have.

168. The "would not have hired" defense is never relevant because the employee was in fact hired. For a discussion of the Seventh Circuit's rejection of the "would not have hired" defense, see *supra* note 153.

cause the employee's misconduct did not act as a cause of the discharge.[169] Therefore, the majority approach's reliance on *Mount Healthy City School District Board of Education v. Doyle*[170] and *Price Waterhouse v. Hopkins*[171] is misplaced because these suits concerned the liability of employers who based their decisions on two or more factors instead of a single "true" motive.[172] Even before the 1991 Act, a prevailing employer in a mixed motive case had to assert a lawful reason for its employment decision that, standing alone, would have induced the very same decision.[173] An employer could not proffer a reason that did not motivate it at the moment it made the decision.[174]

But when employers raise the affirmative defense of "after-acquired evidence," courts must assume liability even if only for purposes of summary judgment.[175] Evidence of employee misconduct cannot serve as a reason for the employer's decision because the employer learned of it only after commencement of the discrimination suit.[176] Thus, the fact that the employer could have relied on this misconduct in order to discharge the employee is irrelevant—Title VII is concerned only with motives present when the actual discharge decision was made.[177] It is

169. *See* note 98 and accompanying text.

170. 429 U.S. 274 (1977).

171. 490 U.S. 228 (1989).

172. *See Price Waterhouse*, 490 U.S. at 260 (White, J., concurring in judgment). *See also* O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1469 (D. Ariz. 1992) (noting that *Price Waterhouse* only dealt with liability while the majority approach deals with whether the employee was injured); Revised EEOC Memorandum, *supra* note 17 ("After-acquired evidence cases are not mixed-motive cases and should not be analyzed under the standards that apply to mixed-motive cases. Those standards are limited to cases where multiple factors are considered by an employer at the time that it made an employment decision."); Samuel Estreicher, *The Doctrine of After-Acquired Evidence*, N.Y.L.J., Apr. 29, 1993, at 4 ("Properly understood, the after-acquired evidence doctrine has nothing to do with the 'dual motive' problem.").

173. *See Price Waterhouse*, 490 U.S. at 252; Washington v. Lake County, Ill., 969 F.2d 250, 256 (7th Cir. 1992).

174. *See Price Waterhouse*, 490 U.S. at 241, 252; EEOC v. Alton Packaging Corp., 901 F.2d 920, 925 (11th Cir. 1990); *see also* Moodie v. Federal Reserve Bank, No. 91 CIV. 6629 (MEL), 1993 WL 370582, at *2 (S.D.N.Y. Sept. 20, 1993) ("Price Waterhouse is not controlling here because it involved a case of 'mixed motives.' . . . Here, the nondiscriminating reason for dismissal put forth by the [employer] . . . was never a factor in the [employer]'s actual decision to terminate [the employee]."); Mosley v. Truckstops Corp., No. 77,916, 1993 WL 191378, at *7 n.14 (Okla. June 2, 1993) ("Post-termination discovery of employee misconduct has traditionally been no defense in employee's claim of discrimination.").

175. *See, e.g.*, Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) ("As concerns . . . [defendant]'s motion[] for summary judgment, it is *assumed* that [defendant] was motivated, at least in part, if not substantially, because of [plaintiff's] age and religion.").

176. *See id.*

177. *See, e.g.*, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993) ("A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge. . . . [T]he character of [a retaliatory discharge] is not changed by some after discovered alternate reason . . . which might otherwise have been used, but was not. The after discovered alternate reason comes too late.") (citations omitted); *cf. Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring) ("When a[]

inconsistent to hold that employees were neither legally injured nor entitled to any remedy because of misconduct that their employers never considered when Title VII now explicitly entitles employees to relief even when their employers were motivated in part by lawful reasons.[178]

In addition, the majority approach improperly places an employee in a worse position than she would have been in had she not been a member of a protected class. Absent her race, religion, color, gender, or national origin, she would have remained employed for an indeterminate period of time beyond the date of her actual discharge.[179] Some employers may not discharge an employee after discovering pre-hiring misrepresentations, even if the same employers would not have hired the employee had they initially known of the misrepresentations.[180] This employee would indeed suffer a Title VII injury from the discriminatory discharge.[181] This result has compelled some courts employing the majority approach

. . . plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a substantial factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered."); Williams v. Boorstin, 663 F.2d 109, 115 (D.C. Cir. 1980) ("What 'could have been' is never alone a sufficient foundation for a *finding* of what really 'was' . . . ."), *cert. denied*, 451 U.S. 985 (1981); Gudel, *supra* note 5, at 97 n.311 ("If nothing else, [the mixed motive approach] decisions violate the moral principle that two wrongs don't make a right. If Title VII is meant to eradicate discrimination in employment, then the acts of the employers in these cases must be illegal, although the employers might have an argument against reinstatement as a remedy.").

178. *Cf.* Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323 (D.N.J. 1993) ("We note the [1991 Act] only for its persuasive support for our conclusion that an injury does occur when an employment decision is based upon improper motives notwithstanding that other legitimate rationale surfaced after the fact.").

179. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178-80 (11th Cir. 1992); *see also* Puhy v. Delta Air Lines, No. 1:91-CV-1630-RCF, 1993 WL 405426, at *5 (N.D. Ga. Sept. 30, 1993) ("In wrongful discharge cases, if the discrimination had not occurred, then the plaintiff would have still possessed the job. Allowing subsequent evidence to negate the otherwise cognizable injury would establish that the status quo ante was joblessness, not employment, thus placing the plaintiff in a worse position . . . ."). The mixed-motive approach erroneously excuses "all liability based on what *hypothetically* would have occurred absent the alleged discriminatory motive *assuming the employer had knowledge that it would not acquire until sometime during the litigation* . . . ." *Wallace*, 968 F.2d at 1179.

180. *See Wallace*, 968 F.2d at 1178-80; Washington v. Lake County, Ill., 969 F.2d 250, 254 (7th Cir. 1992); *Massey*, 828 F. Supp. at 323; Bonger v. American Water Works, 789 F. Supp. 1102, 1106 (D. Colo. 1992).

181. Injury occurs because the employee would have had a longer tenure absent the discriminatory motive. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178-79 & n.8 (11th Cir. 1992); *see also* Graf v. Wire Rope Corp., No. WD 45952, 1993 WL 381560, at *1 (Mo. Ct. App. Sept. 30, 1993) ("An employer might waive a well-performing employee's false employment application answers."); Morley Witus, *Defense of Wrongful Discharge Suits Based on an Employee's Misrepresentations*, 69 Mich. B.J. 50, 50 (1990) ("While in a given case the factfinder may conclude that an employee's lies did warrant dismissal, the contrary conclusion is possible. Given an employee's exemplary performance, for example, a jury, judge, or arbitrator might find that there was no just cause for termination."); *cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII . . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices.").

to observe that dismissal of the employee's cause of action may be too harsh.[182] Thus, evidence of misconduct discovered after commencement of a suit remains relevant only to the issue of which remedies are available, because this evidence does not change the fact that discrimination may actually have occurred.[183]

2. The Common Law and the Clean Hands Maxim

Under common law, employers relied on evidence of an employee's misconduct whether or not they knew of it at the time of the discharge.[184] This made sense because an employer could terminate an employee for any cause or no cause whatsoever.[185] Title VII changes this, however, because it prohibits discharge based on certain specific reasons.[186] Therefore, courts cannot rely on the old common law rule. The proper focus in a Title VII suit is on what prompted the employment decision at the time it was made; subsequent reasons are irrelevant.[187]

Another possible reason[188] for the majority approach's appeal is the equitable maxim[189] that plaintiffs "who come[] into equity must come with clean hands."[190] This allowed a court of equity to deny relief to a plaintiff even where her complaint was actionable because of her own misconduct.[191] Fraud or misrepresentation by the plaintiff caused courts to invoke the maxim[192] and they denied relief "where it appear[ed] that the right upon which the complainant relie[d] . . . [grew] out of a wrong . . . ."[193]

The maxim's application in suits involving the "after-acquired evidence" defense, however, thwarts Title VII's purposes.[194] Prior to the

182. *See Bonger*, 789 F. Supp. at 1107; Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 995 (D. Kan. 1989); *cf.* Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1260 n.5 (N.D. Ohio 1993) (criticizing aspects of the mixed-motive analysis).

183. *See* Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993); Smith v. Equitable Life Assurance Soc'y, 60 Fair Empl. Prac. Cas. (BNA) 1225, 1228 (S.D.N.Y. 1993).

184. *See supra* note 28 and accompanying text.

185. *See supra* note 26 and accompanying text.

186. *See supra* notes 29-30 and accompanying text.

187. *See supra* note 81-83 and accompanying text.

188. No court has advanced this argument yet. At least two commentators, however, have raised and rejected it. *See* Estreicher, *supra* note 172, at 4; Follette, *supra* note 6, at 665-66.

189. Equity courts created several rules or "maxims" that governed the applicability and scope of equity jurisdiction. *See* 27 Am. Jur. 2d *Equity* § 119 (1966). Among other things, these maxims addressed actions of the court, a party's standing to seek relief, and the mode for "balancing" equities of equal dignity. *See id.*

190. Manufacturers' Fin. Co. v. McKey, 294 U.S. 442, 451 (1935).

191. *See* National Fire Ins. Co. v. Thompson, 281 U.S. 331, 336-38 (1930).

192. *See* 27 Am. Jur. 2d *Equity* § 138 (1966).

193. *Id.*

194. *See, e.g.*, 30A C.J.S. *Equity* § 111 (1992) ("The maxim cannot be applied in any case where the result of the application sustains a relation which is denounced by statute . . . ."); *id.* § 112 ("[T]he maxim cannot be applied in any case where the result of the application sustains a relation which is contrary to public policy."); Follette, *supra* note 6,

enactment of the 1991 Act, Title VII provided only equitable remedies,[195] and therefore some courts might have implicitly relied on this principle.[196] But the addition of legal remedies to the statute[197] makes the maxim inapplicable because it cannot deny legal rights, even if part of the available relief lies in equity.[198] Furthermore, welfare legislation, such as Title VII, "is entitled to a liberal construction to accomplish its beneficent purposes."[199]

B. *The Advantages of the Minority Approach*

The minority's two-step[200] approach more fully satisfies Title VII's two goals of eliminating discrimination in the workplace and giving restitution to an injured employee. The first step inquires whether the employer violated Title VII.[201] Thus, a minority court refuses to dismiss an employee's cause of action for wrongful discharge despite the discovery of either post-hiring or pre-hiring misconduct. If the court finds discrimination, it proceeds to the second step by determining the proper relief.[202] A court may grant remedies that will sufficiently punish the employer and restore the employee to the position that she would have been in absent the discrimination.[203] Yet this approach remains flexible because a court may refuse to grant certain remedies in light of the employee's misconduct in order to avoid placing the employee in a better[204] position

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at 665-66 (arguing that the maxim is inapplicable because the misconduct and the discrimination are not causally related and because Title VII's public policy considerations override it). Courts have also traditionally recognized the more important maxim that "equity will not suffer a wrong to be without a remedy." *See* Independent Wireless Tel. Co. v. Radio Corp., 269 U.S. 459, 468 (1926); *see also* Farmers' Educ. & Coop. Union v. Farmers' Educ. & Coop. Union, Iowa Div., 141 F. Supp. 820, 824 (D. Iowa 1956) (noting that the clean hands maxim is only applied reluctantly), *aff'd* 247 F.2d 809 (8th Cir. 1957).

195. *See supra* notes 37-43 and accompanying text.

196. *See* Estreicher, *supra* note 172, at 4. Indeed, the majority approach reasons that, assuming discrimination occurred, plaintiff was not injured. *See* note 122-23 and accompanying text.

197. *See supra* notes 85-88 and accompanying text.

198. *See* 30A C.J.S. *Equity* § 111, at 324 & n.14 (1992); Estreicher, *supra* note 172, at 4.

199. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790 (1949).

200. *See* Moodie v. Federal Reserve Bank, No. 91 CIV. 6629 (MEL), 1993 WL 370582, at *3 (S.D.N.Y. Sept. 20, 1993).

201. *See id.*

202. *See id.*

203. Although the 1991 Act prohibits back pay awards for plaintiffs in mixed motive suits, *see supra* notes 93-94 and accompanying text, this prohibition does not affect courts employing the minority approach. These courts eschew the mixed-motive analysis, *see supra* text accompanying notes 138-41, so they may still award back pay. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1184 (11th Cir. 1992); Estreicher, *supra* note 172, at 4.

204. For example, an award of back pay that accrues up until the date of judgment places the employee in as good a position as she would have been in had the discrimination not occurred. Reinstatement, however, would go beyond an appropriate remedy and would violate Title VII's protection of an employer's freedom of choice. *See supra* notes 44-47 and accompanying text; *see also* Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369-70 (7th Cir. 1993) (discussing same).

than she would have been in had the discrimination not occurred.

1. Pre-Hiring Misconduct and the *McDonnell Douglas* Model

The first step of the minority approach requires the employee to prove that the employer is liable for discrimination, even though the employee's misconduct might limit the availability of certain remedies.[205] Therefore, an employee is likely to follow the pretextual analysis articulated in *McDonnell Douglas Corp. v. Green*.[206] While employers cannot proffer the employee's misconduct as a lawful reason for the discharge because it was unknown at the time of their employment decision, they often argue that the discrimination prevents an employee from making out a *prima facie* case because the misconduct renders the employee "unqualified."[207] Some courts have held that trustworthiness and honesty are material qualifications for any job.[208] Therefore, lying on a job application prompts two arguments: (1) the employee does not in fact possess the necessary qualification lied about; and (2) the act of lying itself automatically renders the employee materially unqualified.[209]

These arguments do not preclude the establishment of a *prima facie* case. First, courts must assume employers intentionally discriminated when employers do no more than raise the defense of "after-acquired evidence."[210] Second, the Supreme Court has always viewed the *McDonnell Douglas* model as flexible.[211] Third, such discrimination perpetuates itself if the court does not address it.[212] Finally, the court's discretionary

205. *See Moodie*, 1993 WL 370582, at *3.

206. 411 U.S. 792 (1973).

207. *See* Witus, *supra* note 181, at 51-53. For a discussion of establishing a *prima facie* case of discrimination under the *McDonnell Douglas* model, see *supra* notes 54-58 and accompanying text.

208. *See* Williams v. Boorstin, 663 F.2d 109, 117 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981); Grier v. Casey, 643 F. Supp. 298, 309 (W.D.N.C. 1986); Village of Oak Lawn v. Human Rights Comm'n, 478 N.E.2d 1115, 1117 (Ill. App. Ct. 1985); *cf.* Livingston v. Sorg Printing Co., 49 Fair Empl. Prac. Cas. (BNA) 1417, 1418 (S.D.N.Y. 1989) ("[A]lthough [defendant] did not fire [plaintiff] because of the misreprentations on his resume and employment application, [plaintiff]'s admission of those misrepresentations further bars him from meeting his *prima facie* burden and from establishing that he is entitled to damages on his claim."); Robinson v. United States Air Force, 635 F. Supp. 108, 111-12 (D.D.C. 1986) (stating that misrepresentations on a job application raised serious questions concerning plaintiffs truthfulness and basic qualifications).

209. *See* Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1260 (N.D. Ohio 1993).

210. *See* Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988).

211. *See supra* text accompanying note 58; *see also* Williams v. Boorstin, 663 F.2d 109, 119 (D.C. Cir. 1980) (Bazelon, J., concurring) ("[N]either precedent nor reason explains why an employee's qualifications must be a 'critical element' of a discriminatory *dismissal* claim. . . . [T]he Supreme Court in *McDonnell Douglas v. Green* did not intend to define the elements of every employment discrimination claim; that case involved *refusal to hire*.") (footnotes omitted), *cert. denied*, 451 U.S. 985 (1981).

212. Instead, a finding that the employee is "unqualified" under *McDonnell Douglas* actually places the *employer* in a better position than it would have been in absent its discriminatory motive. Ordinarily, and absent any discriminatory motive, the most an employer could do upon learning of pre-hiring misconduct is discharge the employee.

ability to pick and choose among remedies, depending upon the specific facts of the case, negates any potential windfall that the employee might receive due to her misrepresentations.[213] Therefore, arguments that an employee in a wrongful discharge suit is "unqualified" under *McDonnell Douglas* simply lacks merit.[214]

2. Concerns with the Materiality Requirement

If a court determines that an employer discriminated, the second step of the minority approach contemplates how to grant relief properly.[215] To facilitate this, some minority courts adopted the majority approach's materiality requirement[216] for pre-hiring misrepresentations.[217] This materiality requirement supposedly prevents employers from avoiding Title VII liability by using minor or technical infractions that, absent a discriminatory motive, would not have prompted the same employment decision.[218] Unfortunately, employers may easily evade this requirement. Job application forms need only include language that specifically states that *any* falsification would serve as grounds for discharge.[219] Therefore, an objective requirement alone, such as language in an application that any misrepresentation will result in termination, is insufficient. Courts must subjectively determine whether the employer would have fired the employee based on the degree of importance of the misrepresentation or misconduct.

But when an employee is found to be "unqualified," the employer avoids all liability for its discrimination. This finding also encourages employers to refrain from verifying information given by job applicants.

213. *See supra* notes 148-51 and accompanying text.

214. *See* Wallace v. Dunn Constr. Corp., 968 F.2d 1174, 1178-79 n.8 (11th Cir. 1992).

215. *See* Moodie v. Federal Reserve Bank, No. 91 CIV. 6628 (MEL), 1993 WL 370582, at *3 (S.D.N.Y. Sept. 20, 1993).

216. *See supra* note 126-27, 157 and accompanying text.

217. *See, e.g.*, Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993) (" 'May be' [fired] is not 'will be' and is not enough to avoid the proven charge of a retaliatory firing.").

218. *See* Reed v. AMAX Coal Co., 971 F.2d 1295, 1298 (7th Cir. 1992).

219. *See* Witus, *supra* note 181, at 53. The *Wallace* court, for instance, was concerned that the employers would abuse the mixed motive approach by rummaging through a discharged employee's past employment record in order to find a legitimate reason for discharge. *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1180 (11th Cir. 1992). Employers who possessed "a proclivity for unlawful motives" could therefore hire an employee despite the employer's knowledge of a legitimate reason for rejecting the application. *Id.* at 1180-81. Evidence of such knowledge could later be destroyed and the employee discriminatorily discharged. *See id.* Upon commencement of a discrimination suit, the employee could then be "sandbagged" by the employer's "discovery" of the legitimate reason for the discharge. *See id.*

An employer may still "sandbag" an employee by discovering misconduct and subsequently using this discovery to justify a termination it would have made for otherwise discriminatory reasons. But this is a classic mixed motive case. An employee would be able to prove that at least one of the employer's reasons was unlawful, and Title VII now provides some affirmative relief. *See supra* notes 66-94 and accompanying text.

3. Back Pay Awards

The Seventh Circuit's limitation of back pay awards to the date when the misconduct is actually discovered[220] strikes "a comfortable 'middle ground' . . . between the somewhat harsh denial of all relief . . . and the *Wallace* approach."[221] But that "middle ground" guarantees that an employer will unfairly benefit from its discrimination, because the discrimination precipitated the discovery in the first place.[222] Alternatively, the *Wallace* approach ensures the necessary flexibility for the varied range of factual scenarios. By requiring a case-by-case assessment, a court may provide nominal damages for instances of egregious employee misconduct and appropriate punishment and relief for egregious employer discrimination.

Awarding back pay remains consistent with Title VII's purposes.[223] As previously discussed,[224] a court may award back pay where it believes that the facts of the case warrant it. Because this decision is determined at the end of the trial after evaluation of all of the evidence, the threat of back pay awards encourages employers to conform their conduct to the requirements of Title VII.[225] These awards also serve as incentives for injured persons to bring private causes of action under Title VII.[226] Yet courts may always limit back pay awards when an individual case requires it, because the Supreme Court has traditionally recognized that certain relief may be modified or withheld so long as Title VII's purposes are not undermined.[227]

In practical terms, the minority approach is more likely to fulfill Title VII's goals without requiring a court's involvement. The risk of liability and the availability of back pay awards encourage settlements,[228] most likely before the parties ever reach the trial stage.

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220. For a discussion of the Seventh Circuit's view on back pay, see notes 154-57 and accompanying text.

221. Connell, *supra* note 9, at 288.

222. *See, e.g.*, Johnson, *supra* note 9, at 77 ("[I]n the case of post-hiring employee misconduct, it will be extremely difficult to prove that such evidence would have been discovered absent the termination . . . . To that end, the 11th Circuit may have created a virtually insurmountable evidentiary hurdle for employers to overcome in halting the backpay period.").

223. The fact that the 1991 Act fails to make back pay awards available to plaintiffs in mixed motive cases, *see supra* note 93-94 and accompanying text, is irrelevant. Mixed motive cases concern liability, and the 1991 Act does not refer to the affirmative defense of after-acquired evidence.

224. *See supra* note 149-51 and accompanying text.

225. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

226. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

227. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 770-71, 779 (1976).

228. The Supreme Court has repeatedly acknowledged Congress's—and its own—preference for enforcing Title VII through settlements. *See* Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 523-24 n.13 (1986); Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 n.14 (1981); *Alexander*, 415 U.S. at 44; Delta Air Lines v. August, 450 U.S. 346, 363 (1981) (Powell, J., concurring); Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 602 n.20 (1981).

C. *Wrongful Refusal to Hire Suits Involving Pre-Hiring Misconduct*

As discussed earlier,[229] the minority approach precludes wrongful refusal to hire suits where the employer shows that it would have uncovered the pre-hiring misconduct, or the misrepresentation itself, during the course of the hiring process. Unlike a wrongfully discharged employee, an applicant, even if wrongfully refused employment, will not be able to demonstrate an injury under Title VII because she will be unable to prove that she would have been hired even if the discriminatory motive did not exist.[230] Title VII neither guarantees jobs to people simply because they are minorities nor compels employers to hire unqualified employees.[231] Thus, the employer enjoys no windfall, despite its discrimination, because the plaintiff's lack of remedy results from her lack of a statutory injury.

CONCLUSION

Courts addressing the affirmative defense of after-acquired evidence are understandably concerned about allowing an employee to benefit from her post-hiring or pre-hiring misconduct. Yet these courts must be mindful of Congress's purposes in enacting Title VII—the elimination of discrimination in the workplace and the restoration of injured employees to their pre-discrimination position. To facilitate these goals Congress recently added legal remedies to the full array of equitable remedies available.

Only the minority approach avoids giving either the employee or the employer a windfall while satisfying Congress's objectives. It correctly requires the employer to show, by a preponderance of the evidence, whether and in what manner the discovery of employee misconduct would have lawfully altered the employment relationship. This enables the court, in its discretion, to preclude remedies that, on the specific facts of the case, might place the injured employee in a better position than she would have been in had the discrimination not occurred. In so doing, the minority approach returns to the court what the majority approach forecloses—the opportunity to further congressional objectives by both rooting out discrimination in the workplace and compensating the plaintiff for the injuries she has suffered.

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229. *See supra* notes 143-47 and accompanying text.

230. *See id.*; Puhy v. Delta Air Lines, No. 1:91-CV-1630-RCF, 1993 WL 405426, at *5 (N.D. Ga. Sept. 30, 1993). The Supreme Court, in dicta, has supported this proposition. *See* East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 404 n.9 (1977) ("Even assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event."). Lower courts have agreed. *See* Smallwood v. United Air Lines, 728 F.2d 614, 626-27 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984); Murnane v. American Airlines, 667 F.2d 98, 102 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

231. *See supra* notes 45-46 and accompanying text.